IMPACT

Of

On

PRIVATE COMPANIES

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COMPANIES ACT, 2013

What's in store for

PRIVATE COMPANIES?

Companies Act, 2013 has brought massive changes for private companies as barring a very few, all the exemptions which were available to private companies under the Companies Act, 1956 have been withdrawn in the Companies Act, 2013. So far, 99 Sections of the Companies Act, 2013 have been notified which include Sections like 135, 180 & 185 etc. which have major impact on the functioning of Private Companies. Till the time the other Sections are notified, Private Companies can continue to enjoy the exemptions available to them under the Companies Act, 1956 but nevertheless they should prepare themselves for the challenges ahead.

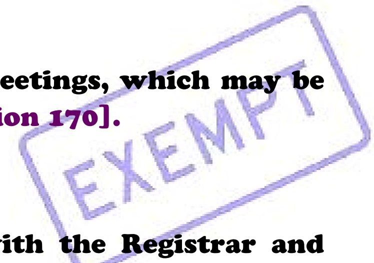
In this article, we attempt to throw light on the impact on private companies by means of comparison of the significant provisions relating to Private Companies under the Companies Act, 1956 and Companies Act, 2013.

IMPACT ON PRIVATE COMPANIES

EXEMPTIONS AND PRIVILEGES WHICH WERE/ARE AVAILABLE TO PRIVATE COMPANIES UNDER COMPANIES ACT, 1956

- **Exemptions Available To All Private Companies**
  - **A private company may be formed with only two persons at the time of incorporation of the company [section 12].**
  - **A statement in lieu of prospectus need not be delivered to the Registrar before allotment of any shares in the company [section 70].**
  - **The provisions of sub-sections (1), (1A), and (2), of section 81 prescribing the manner of further issue of share capital, are not applicable to a private company [section 81 (3) (a)].**
  - **A private company can commence its business operations immediately on obtaining the Certificate of Incorporation from the Registrar of Companies [Section 149 (7)] .**

- A private company need not comply with the formalities stipulated in subsection (2A) of section 149 for commencing a new business activity at any time [section 149(7)].
- A private company need not hold a statutory meeting [section 165].
- A private company can make in its articles provisions relating to meetings, which may be different from those contained in sections 171 to 186 of the Act [section 170].

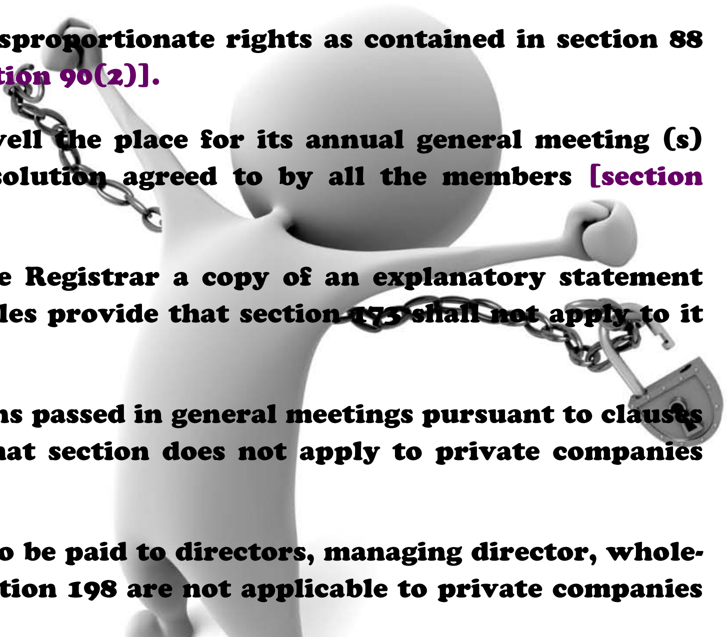


- A private company can have only two directors [section 252(2)].
- The provisions regarding consent to act as director to be filed with the Registrar and qualification shares are not applicable to a private company [section 266(5)].

- **Exemptions Available to only those Private Companies which are not subsidiary of public companies**

  - A private company is not prohibited from giving financial assistance for purchasing its own shares or shares of its holding company [section 77].
  - The definitions of "preference share capital" and "equity share capital" as given in section 85 of the Act are not applicable to a private company [section 90(2)].
  - A private company is free from the restriction contained in section 86 that a company limited by shares shall have only two kinds of shares (equity and preference) [section 90(2)].

  - The voting rights of members of a private company need not be in conformity with the provisions of section 87 [section 90(2)].
  - The prohibition of issue of shares with disproportionate rights as contained in section 88 does not applies to a private company [section 90(2)].



  - A private company may fix the time as well the place for its annual general meeting (s) either by its articles or by passing a resolution agreed to by all the members [section 166(2)].
  - A private company need not file with the Registrar a copy of an explanatory statement along with a special resolution, if its articles provide that section 175 shall not apply to it [section 192(1) with section 170(1(ii)].
  - A private company need not file resolutions passed in general meetings pursuant to clauses (a), (d) and (e) of section 293(1) since that section does not apply to private companies [section 192(4) (ee)].
  - Restrictions and ceiling on remuneration to be paid to directors, managing director, whole-time director and manager imposed by section 198 are not applicable to private companies [see respective section 198(1)].
  - The requirement that at least two-thirds of the total number of directors being liable to retirement by rotation at annual general meetings is not applicable to private companies [section 255(1)].
  - Approval of the Central Government is not required for a private company to increase the number of its directors beyond 12 [section 259].
  - Two or more directors of a private company may be appointed by a single resolution [section 263(1)].

- **A director of a private company need not file with the company and the Registrar consent to act as director [section 264(3)].**
- **A private company need not comply with the provisions of Schedule XIII.**
- **In calculating the number of companies of which a person may be a director at a time (i.e. fifteen) the directorships in private companies are to be excluded (directorships in a private company which is not a holding company of a public company are also to be excluded) [section 278(1)].**
- **Consent of shareholders by way of an ordinary resolution need not be obtained by the Board for exercising the powers specified in clauses (a) to (e) of sub-section (1) of section 293 [section 293(1)].**
- **No approval of the Central Government is required for giving a loan, guarantee or security to a director of the company [section 295(2)].**
- **Directors of private companies are not debarred from taking part in discussion and voting and from being excluded for the purpose of quorum in respect of resolutions in which they are interested [section 300(2)].**
- **A private company can appoint a person as its managing director or manager for a period of more than five years [section 317, 388].**
- **A private company can make loans, give guarantees or provide securities or acquire by way of subscription , purchase or otherwise securities, in any other body corporate without any limit and without complying with the formalities prescribed in section 372A [section 372A].**
- **The provisions of the Companies (Acceptance of Deposits) Rules, 1975, are not applicable to the deposits accepted by a private company from its shareholders [Rule 2(b) (ix) of the said Rules].**

COMPARISON OF PROVISIONS RELATING TO PRIVATE COMPANIES UNDER COMPANIES ACT, 1956 AND COMPANIES ACT, 2013

DEFINITION OF PRIVATE COMPANY

Companies Act, 1956	Companies Act, 2013
• Maximum number of members restricted to 50 • Express clause in the definition *"prohibits any invitation or acceptance of deposits from persons other than its members, directors or their Relatives"* [Section 3(1)(iii)]	• Maximum number of members restricted to 200 • No specific clause on prohibition of acceptance of deposits is there in the definition. [Section 2(68)]

COMMENCEMENT OF BUSINESS

Companies Act, 1956

- Under Companies Act, 1956, a Private company can commence its operations immediately after incorporation. Only public companies have to seek certificate of commencement of business. (Section 149)

Companies Act, 2013

- Under Companies Act, 2013, even a Private Company cannot commence its business or make any borrowings unless it files with ROC a statement that the subscription money and minimum paid up capital has been brought in. (Section 11)

FURTHER ISSUE OF SHARES

Companies Act, 1956

- Provisions relating to rights issue and Preferential allotment are not applicable to a private company. [Section 81 and 81(1A)]

Companies Act, 2013

- A private company can make further allotment only by means of Rights Issue, ESOP or Private placement/preferential allotment and needs to comply with the all the provisions relating to these types of allotment. [Section 62]

ACCEPTANCE OF DEPOSITS FROM RELATIVES OF DIRECTORS

Companies Act, 1956

- A Private Company can accept deposits/loans from relatives of directors by virtue of exemption available in the definition of private company. [Section 3(1)(iii)]

Companies Act, 2013

- A private company is prohibited to accept unsecured loans/deposits from relatives of directors. [Section 73 read with draft rules issued thereunder]

SHARES HAVING DIFFERENTIAL VOTING RIGHTS

COMPANIES ACT, 1956	COMPANIES ACT, 2013
Provisions relating to issue of shares with differential voting rights are not applicable to a private company [Section 86]	A private company has to comply with the provisions contained in Section 43 read with the rules issued there under to issue shares with differential voting rights. [Section 43]

APPOINTMENT OF KEY MANAGERIAL PERSONNEL

Companies Act, 1956	Companies Act, 2013
• Irrespective of the capital, Private Companies are not mandated to appoint MD/WTD/Manager etc. except Whole Time Company Secretary in case of companies having paid up capital of Rs. 5 Crores or more. [383A]	• All companies, including private companies, having paid up capital of Rs. 5 Crores or more are required to have the following whole time KMP: • MD/CEO/Manager/WTD; • Company Secretary; and • CFO [Section 203]

LOANS TO DIRECTORS

Companies Act, 1956

- Restrictions relating to giving of loans, advances or providing securities , guarantees to directors and other interested entities are not applicable to a private company. [Section 295]

Companies Act, 2013

- All companies, including private companies, are restricted from giving loans, advances or providing securities , guarantees to directors and other interested entities barring few exceptions. [Section 185]

RESIDENT DIRECTOR

Companies Act, 1956	• No requirement to have any director resident in India.
Companies Act, 2013	• All companies, including private companies, must have atleast one director who has stayed in India for a minimum period of 182 days during the previous calendar year. [Section 149]

CONSENT TO ACT AS DIRECTOR

Companies Act, 1956

In case of private companies, consent to act as director is not mandatory to be filed with ROC. [Section 264]

Companies Act, 2013

A person appointed as a director shall not act as a director unless he gives his consent to hold the office as director and such consent has been filed with the Registrar within thirty days of his appointment [Section 152]

APPOINTMENT OF 2 OR MORE DIRECTORS BY SINGLE RESOLUTION

Companies Act, 1956

Provision relating to appointment of directors to be voted on individually is not applicable to a private company which is not a subsidiary of a public company. [Section 263]

Companies Act, 2013

At a general meeting of a company, a motion for the appointment of two or more persons as directors of the company by a single resolution shall not be moved unless a proposal to move such a motion has first been agreed to at the meeting without any vote being cast against it. [Section 162]

LIMIT ON NUMBER OF DIRECTORSHIP

Companies Act, 1956

Private Companies are not counted for the purpose of determining the limit of 15 companies in which a person can act as a director at any given time. [Section 275]

Companies Act, 2013

A person can act as director in a maximum of 20 companies at any given point of time out of which not more than 10 should be public companies. [Section 165]

CORPORATE SOCIAL RESPONSIBILITY

Companies Act, 1956	Companies Act, 2013
• No requirement to spend on CSR activities.	• All companies, including private companies, meeting the eligibility criteria, are required to constitute a CSR committee and spend at least 2% of average net profits on CSR activities. [Section 135]

CONTENTS OF FINANCIAL STATEMENTS

Companies Act, 1956	Companies Act, 2013
• Balance Sheet • Statement of Profit & Loss • Cash flow Statement (applicable only to listed companies and companies having TO in excess of 50 crores or borrowings in excess of 10 crores) AS 3 and listing agreement	• Balance Sheet • Statement of Profit & Loss • Cash Flow Statement (Except for OPC and Small Company) • Statement of Changes in Equity • Notes to accounts [Section 2(40)]

CONSOLIDATION OF ACCOUNTS

Companies Act, 1956

- Consolidation is not mandated under the Companies Act, 1956 for any company.
- Listing agreement requires consolidation for listed companies having subsidiaries (Clause 32 of Listing agreement and AS 21)

Companies Act, 2013

- All companies having subsidiary (s) need to prepare consolidated accounts.
- Subsidiary includes associate and joint ventures. [Section 129]

MAXIMUM TENURE OF AUDITOR

Companies Act, 1956	Companies Act, 2013
• Appointment of auditor happens on yearly basis at AGM. • No limit on maximum number of years. (Section 224)	• Appointment of auditor will be for 5 years term in each appointment subject to ratification every year in AGM. • Individual auditor can serve maximum 5 years and Firm for maximum 10 years followed cooling off period of 5 years. (Section 139)

LIMIT ON NUMBER OF COMPANIES TO BE AUDITED BY AN AUDITOR

Companies Act, 1956	Companies Act, 2013
• For Private Companies, no limit is there as Section 224(1B) is not applicable to private companies.	• 20 Companies in total. • Private companies cannot appoint a person as auditor if he is already auditor for 20 other companies. (Section 141)

SIGNING OF ANNUAL RETURN

Companies Act, 1956	Companies Act, 2013
• Director + CS/Manager • If no CS/Manager, then MD + Director • If no MD, then 2 directors (Section 161)	• Private Company being a Small Company –CS, • If no CS, then 1 Director • Private Company, other than Small Company – CS + Director • If no CS, then PCS + Director (Section 92)

PROVISIONS REGARDING GENERAL MEETINGS

Companies Act, 1956	Companies Act, 2013
• Private companies can exempt themselves from the applicability of Sections 171 to 186 by mentioning so in its AOA. These sections deal with length of notice for GMs, explanatory statement etc.	• All requirements regarding general meetings as specified in the Act are applicable to Private Companies. No exemption can be sought basis AOA.

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AUTHENTICATION OF FINANCIAL STATEMENTS

Companies Act, 1956

- **By two directors including Managing Director , if there is one and Company Secretary , if there is one (Section 215)**

Companies Act, 2013

- **Chairperson, if he is authorized by board or 2 Directors out of which one shall be Managing Director**
- **The Chief Executive officer, if he is a Director of the company, The chief financial officer and the company secretary of the company, wherever they are appointed. (Section 134)**

INTER CORPORATE INVESTMENT/LOANS/GUARANTEE

Companies Act, 1956

- **Provisions of Section 372A regarding Inter Corporate Investments/Loans/Guarantee are not applicable.**

Companies Act, 2013

- **Except subsection (1) of Section 186, other provisions on Inter Corporate Investments/loans/Gurantees are applicable.**

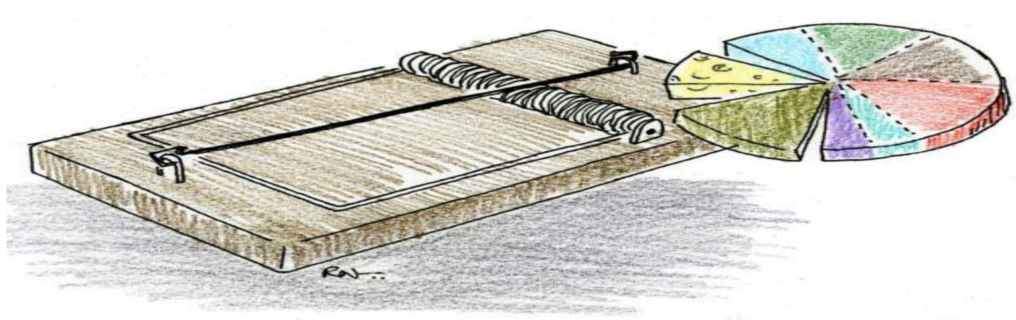
SIGNING OF DIRECTORS' REPORT

Companies Act, 1956

- **By Chariman of the Board if he is authorized by board or by such number of directors of the board as are required to sign the balance sheet and the profit and loss account of the company by virtue of sub- sections (1) and (2) of section 215 (Section 217)**

Companies Act, 2013

- **Chairperson, if he is authorized by board or 2 Directors out of which one shall be Managing Director or by the Director where there is one Director (Section 134)**



SIMPLIFICATIONS INTRODUCED FOR PRIVATE COMPANIES UNDER COMPANIES ACT, 2013

CONCEPT OF ONE PERSON COMPANY

Private Companies can now be formed with a single member and single director

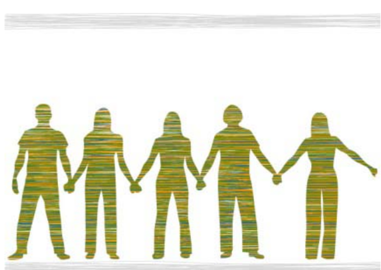
Many exemptions and privileges are available to these companies.

CONCEPT OF SMALL COMPANY

Based on capital or turnover, private companies can take advantage of being a small company

Many exemptions and privileges are available to small companies like holding only 2 Board Meetings in a year, non applicability of cash flow statement, perpetual term of auditor etc.

RELATED PARTY TRANSACTIONS



Requirement of obtaining prior approval of Central Government for entering into related party transactions by Private Companies having paid up capital of Rs. 1 Crore or more has been done away with.

Special resolution is sufficient now.

OFFICE OR PLACE OF PROFIT

Requirement of obtaining central government approval for appointment of relative of director to an office or place of profit carrying monthly remuneration of Rs. 2,50,000/- or more has been removed.

BOARD MEETINGS THROUGH VIDEO CONFERENCING

Directors can participate in meetings of Board via video conferencing subject to presence in physical form in atleast 1 meeting every year.

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COMPLIANCE CERTIFICATE FROM PRACTISING COMPANY SECRETARY

The Requirement for private companies having paid up capital in excess of Rs. 10 Lakhs to obtain Compliance Certificate from a Practising Company Secretary is done away with.

Private Companies having paid up capital in excess of 50 Lakhs AND turnover in excess of 2 crores are required to get the annual return signed by a PCS, if the company does not have a whole CS.

MAINTENANCE OF ACCOUNTS IN ELECTRONIC MODE

Companies can maintain its books of accounts in electronic format by complying with the conditions prescribed under the Act.

Wrap up

Private Companies have been hit hard by the hammer of Companies Act, 2013. Almost all the privileges and exemptions which were available to these companies under the Companies Act, 1956 have been withdrawn in the Companies Act, 2013. The Companies Act, 2013 treats private companies on par with public company except for those private companies which satisfy the criteria of being a small company. Private Companies need to gear up to meet the challenges before them to be able to survive the impositions of the Companies Act, 2013.

Post your reflections to

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