# Questions raised and conclusions drawn from the Interactive Session with ROC, Karnataka (ROC) on 1st May, 2014

## Chapter I – Definitions

1. The words 'Business decisions under an Agreement' referred to in the explanation to Associate Company u/s 2(6) is not clear. Does it include both verbal and written? What kind of decisions are envisaged?

   **ROC's views :** Both Contract Act and Evidence Act have to be looked into. As per Contract Act both verbal and written agreements are valid contracts. If you are able to prove, verbal contracts are also covered under the expression "Business decisions under an Agreement."

2. Sec 2(91) defines Turnover as aggregate value of the realization of amount made from sales, supply or distribution of goods or on account of services rendered, or both by the Company during the Financial year.

   Should credit sales during the year be excluded for calculating the turnover?Statement of P&L A/c gives revenue from Operations (i.e., Turnover from sale of goods or services). From where do we get Turnover figure as defined above i.e., value of realized amount? Turnover becomes relevant to determine Small Company and constitution of various committees when the prescribed threshold is reached. One of the criteria is ***turnover.***

   **ROC's views : "**Sales" as appearing in the profit and loss account prepared under accrual basis of accounting, to be considered. Credit sales are included.

3. What is the status of Indian subsidiaries covered under Section 4(7) of the Companies Act, 1956? There is no corresponding section under Companies Act, 2013?

   **ROC's views :** Since there is no corresponding section available under Companies Act, 2013, the private limited companies which were hitherto deemed to be subsidiaries of public limited companies, by virtue of the aforesaid Section, now continue to be private limited Companies. Meaning, irrespective of whether the overseas body corporate is a listed or an unlisted entity, the Indian private limited Company, which is a subsidiary of such body corporate, continues to be a private limited Company.

4. As per the new definitions of "holding Company" and "subsidiary Company", it appears that if a Company "A" is a subsidiary of another Company "B", which in turn is a subsidiary of another Company "C", ***"A" will not treated as subsidiary of "C"***. Please confirm.

   **ROC's views :**"A" will be treated as subsidiary of "C". Both direct and indirect subsidiaries included. Only the illustrations given under Section 4 of the old Companies Act have been removed.

5. The definition of “net worth” includes only aggregate of paid-up capital & all ***reserves created out of profits*** and the securities premium account. The definition however excludes “***surplus in the P/L account***”. If a Company does not have a policy of transferring to general reserve, then whether balance appearing in the P/L account to be excluded while calculating net worth?

   This is important as the Act requires the companies to constitute CSR committee and other committees if the prescribed threshold is reached, out of which one of the criteria is ***networth***. It is possible for companies to escape compliance of such provisions, if balance in P/L account is not considered for calculating net worth. Please clarify.

   **ROC’s views :** Though the definition does not expressly include **“**Surplus in the profit and loss account”, the same should be included, as the definition calls for deduction of “accumulated losses”, which implies that positive profits should be included and negative profits should be deducted for calculation of “net worth”.

**<u>Chapter II – Incorporation</u>**

6. In case of shifting of registered office from one state to the other, there is a requirement of filing the order with each of the ROCs. Is it possible to file two forms with a single CIN?

   **ROC’s views :**Two Form INC-28 need to be filed. Second form to be filed after shifting the Registered Office and new CIN is allotted.

7. A Company wants to alter its Article due to some reason. Is it mandatory to alter all provisions in line with Companies Act, 2013?

   **ROC’s views :** A notification from the ministry is expected shortly giving transition period.

8. In Section 4, A Company can now have only “main objects” and “incidental objects” and not the “other objects” in theMoA. How many “main objects” and “incidental objects” will be allowed?

   **ROC’s views :** 5 Main Objects and 50 Incidental objects allowed in general. More than 5 main objects will be allowed in extra ordinary circumstances, like paid-up capital being more than Rs.100 Crore.

   Can a Company have multiple main objects like software development, trading, manufacturing etc under its “main object” clause? Or should a Company be engaged in only one kind of activity like software development?

   **ROC’s views :** Main objects should not be too divergent from each other. Name to be in consonance with the main object. Under a general name (ABC Industries Private Limited or ABC Enterprises Private Limited or ABC Corporation Private Limited) different objects are allowed. If the name reflects specific activity the main objects to be confined to that activity.
   Should all the existing Companies change their MOA and AOA, in lines with Companies Act, 2013? If so, what is the maximum time limit given for making such changes?

   Should the existing Companies now remove the “other objects” clause?

**ROC's views :** Existing other objects need not be discontinued. Include them in main objects and change the name. Change of name not insisted where the turnover from other objects is insignificant like less than 25%.

A notification from the ministry is expected shortly giving transition period.

9. Chapter 2 Rule 13 "Signing of memorandum and articles" – Sub Rule (5) states the procedure for subscription where subscriber to the memorandum is a **foreign national residing outside India**.

   Would the same be applicable to Indian nationals residing outside India ?

   **ROC's views :** For execution of documents, the procedure laid down by international conventions like Hague convention to be followed. The basic test is the place of execution of the documents. If the documents (MOA and AOA) are executed outside India by Indian nationals residing outside India procedure prescribed under Rule (5) should be followed.

10. Chapter 2 Rule 8 "Undesirable names" – Sub Rule 1 states (1) In determining whether a proposed name is identical with another, the differences on account of the following shall be disregarded:

    If the proposed name is the Hindi or English translation or transliteration of the name of an existing Company or limited liability partnership in English or Hindi, as the case may be.

    What about any other Scheduled Indian language?

    **ROC's views :** Only English or Hindi translation or transliteration of the name of an existing Company or limited liability partnership in English or Hindi shall be disregarded**.** Other Scheduled Indian languages will be allowed.

11. If a name (in e-form 1A) is made available prior to April 01, 2014, will it still be valid under the new Act? Since the name is valid only for a period of 60 days and the new forms for incorporation are yet to be made available, will the validity of the name be extended? Or should a fresh application in e-form INC-1 be made?

    **ROC's views :** If the system accepts the names made available prior to 1st April, 2014 same will be accepted. . Further, MCA has issued a Department Circular to all ROCs and RDs on April 04, 2014, to accept all forms without additional fee upto May 30, 2014, which were due for filing between April 01, 2014 and April 30, 2014.

12. As per (12) of the e-form INC-1, it should be mentioned whether the proposed name resembles with any class of Trade Mark Rules, 2002. Does it mean that if a name is registered under one class of trademark, the same word will not be allowed for use under a different class?

    **ROC's views :** Generally if a name is registered under one class of trademark, the same word will be allowed for use under a different class. However, well known Trademarks will not be allowed (For Eg. Cadbury, Hindustan Liver, Reliance).

13. Until the rules for exemptions to be granted to Section 8 Companies are notified, can it enjoy the exemption that was granted for Section 25 companies under the Companies Act, 1956 ?

**ROC's views :** Yes. Until the rules for exemptions to be granted to Section 8 Companies are notified, existing Section 25 Companies continue to enjoy the exemptions that were granted to them under the Companies Act, 1956.

14. Chapter 2 Rule 21 on Conversion of Sec 8 Company into any other Company: Sub Rule 3 states that to application to RD, the Company shall also attach the proof of serving of the notice served to all the authorities mentioned in Rule 22(2); Rule 22(1) states that within 7 days of submission as stated above, the Company has to release newspaper advertisements etc. Rule 22(2) states that simultaneous to 22(1), the Company shall serve certain notice to CCIT etc..

    Was it the intention to state that the petition should be filed with RD within 7 days of newspaper advt + serving of other notices under Rule 22(3).

    **ROC's views :** RD's domain. Not answered.

15. Chapter 2 Rule 23 on Revocation of License u/s 8 to be notified to ROC in Form INC 20 along with the fees. Is there any time limit for filing this form ?

    **ROC's views :** RD's domain. Not answered.

16. Chapter 2 Rule 3(2) states "No person shall be eligible to incorporate more than a One Person Company ***or*** become nominee in more than one such Company." This implies that a person can be ***either*** incorporate one OPC only ***OR*** be a nominee of one OPC only.

    Is it ok if Mr. "X" having incorporated OPC1, acquires by transfer of shares, the ownership of OPC2 (incorporated by Mr. "Y"), OPC3 (incorporated by Mr. "Z") etc.

    Was there an intention to say that a person may be a "member" of one OPC only ?

    **ROC's views :** Yes. A person can be a member of one OPC only ***OR*** be a nominee of one OPC only. If he acquires membership in another OPC by way of transfer of shares or by virtue of his being a nominee, he has to elect the one in which he desires to continue as a member, within 180 days. .

17. Further, Sub-rule (3) states that - Where a natural person, being member in One Person Company in accordance with this rule becomes a member in another such Company by virtue of his being a nominee in that One Person Company, such person shall meet the eligibility criteria specified in sub rule (2) within a period of one hundred and eighty days.

    When read along with Sub Rule (2), this adds more confusion here.

    **ROC's views :** If a person becomes a member in another OPC by virtue of his being a nominee in that OPC, such person shall meet the eligibility criteria specified in sub rule (2) within a period of one hundred and eighty days

18. Chapter 2 Rule 3(6) states that an OPC cannot carry out **'Non-Banking Financial Investment activities'** including investment in securities of any body corporates.

    Since this Rules is expressing only Non-Banking Financial Investment activities, is an OPC entitled to carry Leasing or Hire Purchase or Bill discounting or any residuary services which may be carried out by NBFCs ?

**ROC's views :** ROC has no problem in allowing OPCs with activities like Leasing or Hire Purchase or Bill discounting or any residuary services. It is for the other regulators to restrict. NOC from RBI to be obtained before the name is made available.

As per Rule 3 of the Companies (Incorporation) Rules, 2014, only a natural person who is an Indian citizen and resident in India shall be eligible to ***incorporate*** a One Person Company ("OPC"). What happens to the OPC if the natural person ceases to an Indian citizen/resident in India, after incorporation of the OPC?

**ROC's views :** If a natural person ceases to be an India Citizen/resident in India after incorporation of OPC, the said OPC needs to be either wound up or get converted to a Company as envisaged in Sec .18 of the Companies Act, 2013 within a reasonable period of say 90 days.

**Chapter III - Public Offer and Private Placement:**

19. As per Section 42 relating to private placement, if the Company fails to allot share within 60 days, it shall repay the application money to the subscribers within 15 days from the date of completion of 60 days and if the Company fails to repay the application money within the aforesaid period, it shall be liable to repay that money with interest at the rate of 12%.p a. from the expiry of the 60th day. That means to say, if the Company pays interest from the expiry of 60th day, there is no violation.

    However, under Companies (Acceptance of Deposits) Rules, 2014, if the Company fails to refund the share application money, it will fall under the deposits and there is a violation. There seems to be an anomaly..!

    **ROC's views :** Even if the Company pays interest from the expiry of 60thday there is a violation. Penal action will follow for not refunding the money within 15 days from the date of completion of 60 days. There is no anomaly.

20. Share application from members which was exempted deposit under old act - whether need to refund within one year of commencement of new act?

    **ROC's views :** As of today, it is a grey area. MCA may take a call on this before 30th June, 2014.

21. If share application money is pending as on 31.03.2014 whether allotment should be done within 60 days from the commencement of the Act?

    **ROC's views** : The share application money outstanding as on 31.3.14 should be squared up either by refund or by allotment of shares within 60 days, from 1.4.14. However, MCA is likely to come out with a clarification.

22. Allotment size under private placement should not be less than Rs. 20000/- per person- Rule 14 (2) (c). What is the intention of this monetary limit? What happens if a Company want to issue shares for less than Rs. 20,000/- ?

    **ROC's views :** In a private placement minimum investment size should not be less than Rs.20,000 face value of securities. There is no exception. No Company can issue shares per person for less than Rs. 20,000/- face value of securities under private placement. Intention of this limit is not relevant. .

23. Time limit for receiving the share application money u/s 42 (Private Placement) is not prescribed. Does this mean that the Company making the offer can decide the time period within which share application money is to be received.

**ROC's views :** Under new Companies Act, there is no difference between private placement and preferential allotment**.** The Company making the offer can decide the time period within which share application money is to be received. There is scope for planning.

24. If allotment of shares is completed as per the provisions of CA 1956, before 31st March, 2014, the Company could not have complied with private placement provisions and rules. Then how does it file Return of Allotment in PAS-3 ? This is a practical issue since no forms could be filed since 1st April, 2014.

    In another scenario if the Company has received the share application money before 31st March, 2014 and not yet allotted shares, how can it comply with the provisions of CA 2013 and Rules? Any relief for such transition transactions ?

    **ROC's views :** PAS-3 can be filed under new Act, for allotments made prior to April 01, 2014. However, an explanatory note can be attached to the e-form, duly signed by the authorized signatory of the Company and not by a practising professional.

25. The explanation to the terms "private placement" and "preferential allotment" appears to be similar. Moreover, if a Company wants to make preferential allotment of securities u/s 62 (1)(c), it will be required to comply with the provisions of Section 42 relating to private placement. Therefore, what is the difference between the two?

    **ROC's views :** Under new Companies Act, there is no difference between private placement and preferential allotment**.**

26. As per Section 56 (4), a Company will be required to deliver ***share certificates*** to the subscribers, ***within two months*** from the date of incorporation. Does it mean that the subscribers should bring the subscription money within two months of incorporation?

    Further, as per Section 248 (1), if the subscribers have not paid the subscription amount within ***180 days from the date of incorporation***, the ROC can remove the name of the Company from the Register of Companies. Does that mean that the subscribers have time upto 180 days from the date of incorporation to bring in the subscription money? If yes, will the Company still be required to issue share certificates within two months of incorporation?

    **ROC's views :** The Company should deliver share certificates to the subscribers, within two months from the date of incorporation. It means that the subscribers should bring the subscription money within two months of incorporation. Under section 248(1) the subscribers are given opportunity to make good the offence committed under Section 56 by bringing in share subscription amount within 180 days. Else, the name may be struck off by the ROC after expiry of 180 days. However, penal provision under Section 56 applies for not issuing share certificates within 2 months.

27. There is no clarity in Section 62 as to whether the return of allotment should be filed for shares issued on rights basis. Please clarify under which Section this is covered.

    **ROC's views :** Should be filed.

28. As per the provisions relating to "private placement" and "preferential allotment" the shares should be allotted ***within 60 days*** from the date of receipt of subscription money. However, there is no such provision for amount received under rights offer as per Section 62.

However, as per Rule 2(c)(vii) of the Companies (Acceptance of Deposits) Rules, 2014, if shares are not allotted within 60 days of receipt of share subscription money received pursuant to any offer made in accordance with the Act, it shall be treated as deposit. Please confirm whether this applies even to rights issue?

**ROC's views :** 60 days time period is applicable to rights issue also.

29. Is Shelf Prospectus referred to u/s 31 meant only for Debt, ICDR, Debentures or does it include Equity also ? As of now Shelf Prospectus is not possible for Equity Issue.

    **ROC's views :** It includes equity shares also. However, the same is not allowed by SEBI currently.

**Chapter V – Acceptance of Deposits by Companies**

30. What is the status of exempted deposits accepted under Companies Act, 1956 and now covered under the definition of "deposits"? Should it be repaid as per Section 74?

    **ROC's views :** As of today, it is a grey area. MCA may take a call on this before 30th June, 2014.

31. What is the meaning of expression "any non-interest bearing amount received or held in trust" used under Companies (Acceptance of Deposits) Rules, 2014?

    **ROC's views :** It is a printing error. It should have been "any non-interest bearing amount received and held in trust."

32. Whether gold deposits schemes exceeding 12 months will be exempted under Rule 2(c) (xii) (b) Companies (Acceptance of Deposits) Rules, 2014 ?

    **ROC's views :** Not exempted.

33. What should be the coverage of deposit insurance policy ? Is it the whole amount of deposits accepted or is it restricted to Rs. 20,000 per depositor ?

    **ROC's views :** It is restricted to Rs.20,000 per depositor. Akin to deposit policy of any nationalized bank.

34. As per the provisions of the Section 62 there is no time period for allotment of shares from the date of receipt of share application money under "Right Issue" route. Whether Rule 2(c) (xii) (b) Companies (Acceptance of Deposits) Rules, 2014 is applicable for share application money received for Rights issue also ?

    **ROC's views :** 60 days time period is applicable to share application money received under rights issue also.

35. Under Companies (Acceptance of Deposits) Rules, 2014, if the Company choses to secure fully its deposits by creation of charge, is it mandatory to take Deposit Insurance ?

    **ROC's views :** Charge and Deposit insurance both are different**.** Charge will not guarantee money for depositors whereas Deposit insurance will. Hence both are mandatory.

36. Section 73 (2) stipulates conditions in case Deposits are to be issued to Members of the Company. One of the conditions states that – (d)-

"Providing such deposit Insurance in such manner and to such extent as may be prescribed."

The above wordings seem to be mandatory requirement, whereas Explanation – I to Rule 6 of Chapter V on Deposit (Creation of Security) suggest that Security can be created out of Deposit Insurance or creating Charge on Assets or by both. Please clarify.

**ROC's views :** Both are mutually exclusive. Charge and Deposit insurance both are different**.** Charge will not guarantee money for depositors whereas Deposit insurance will. Hence both are mandatory. All companies covered under Section 73 and 76 are required to have deposit insurance.

37. If the private Company accepts deposits from the public other than its members, will that private Company cease to be a private Company as was the case earlier under the provisions of the Companies Act, 1956?

    **ROC's views :** A private limited Company prohibited from any invitation to the public to subscribe for any securities of the Company. Deposits are not securities. Accordingly, private limited Company accepting deposits from public will not cease to be a private limited Company.

38. As per Section 74, if "**any deposit**" is accepted before commencement of the Act, a statement relating to the same needs to be filed with ROC within 3 months and such amount should be repaid within one year. Does this provision apply to "***share application money pending allotment***", "***amount received from members and relatives of directors***" as on March 31, 2014, as the same ***were not*** treated as "***deposits***" under the Companies Act, 1956?

    Also, will companies be required to allot shares within 60 days of commencement of the Act, for the balance in the share application money pending allotment account as on March 31, 2014?

    **ROC's views :** Already clarified. As of today, it is a grey area. MCA may take a call on this before 30th June, 2014.

**<u>Chapter VII – Management and Administration</u>**

39. As per first proviso to Section 96, a Company shall be required to hold its first AGM within 9 months from the closure of the first financial year. If a Company is incorporated on January 01, 2013 and the first financial year ends on December 31, 2013, should the AGM be held before June 30, 2014 (*18 months from the date of incorporation as per Companies Act, 1956*) or September 30, 2014 as per the new provisions?

    **ROC's views :** Under the given example, due date of AGM is 30.09.2014, i.e. 9 months from the closure of financial year. Due date may go beyond 18 months.

**<u>Chapter VIII – Dividends</u>**

40. Under Chapter VIII – Dividends – Section 123(6) – States that " A Company which fails to comply with the provisions of section 73 and 74 shall not, so long as such failure continues, declare any dividend on its Equity Shares."

Seems Section 76 is not covered which is far more important than Section 73, since Section 73 is inviting deposits from Members, whereas Section 76 is inviting Deposits from "Public".

**ROC's views :** Section 73(1) covers deposits from public and Section 73 (2) covers deposits from members. Hence both are covered under Section 73.

## Chapter IX – Accounts of Companies

41. For the year 2014-2015 - whether we need to file Compliance certificate u/s 383A of the Companies Act, 1956 and annual Return as per Schedule V u/s 159 of the Companies Act, 1956 or annual return as per New Act ?.

    Directors report, balance sheet, audit report - MCA has already clarified.

    **ROC's views :** Compliance Certificate, Annual return are enclosures to the Annual report.

    Both Compliance Certificate and annual return to be as prepared as per CA, 1956.

42. Any Director of a Company which has not filed either balance sheet or annual return for a continuous period of 3 years is disqualified to be re-appointed as a director of that Company or any other Company for period of 5 years.

    (Need clarification whether the period starts from 2014-2015 balance sheet onwards or 2013-2014, 2012- 2013 and 2011-2012 onwards).

    **ROC's views :** The period starts from 2014-2015 balance sheets onwards. *Section 274(1)(g) of CA, 1956 did not apply for FYs before 1999-2000. On the same analogy, the new Section will have only prospective effective.*

43. If there is any offence under CA 2013, would it mean that it is a contravention of Directors Responsibility Statement ?Would it amount to misstatement?

    **ROC's views :** DRS can be in negative. No need to reproduce the statements given under Section 134 of the Act.

    *Applicable only to violations like non-filing of Balance Sheet, which can be found out without any enquiry. If offence can be found out only after enquiry/issue of show cause notice, it does not amount to misstatement.*

44. Sec 134(5) states that: The Directors' Responsibility Statement ("DRS") referred to in clause (c) of sub-section (3) ***shall state*** that—

    a)
    b)
    c) ………………..

    The words 'shall state' seems to suggest that this DRS has to be affirmative only. Please clarify if this DRS be in negative?

    **ROC's views :** DRS can be in negative. No need to reproduce the statements given under Section 134 of the Act.

45. According to 134(6), The Board's report and any annexures thereto under sub-section (3) shall be signed by its chairperson of the Company if he is authorised by the Board and where he is not so authorised, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director.

Where a Company has not appointed a Chairperson, can the Chairperson of that BOD meeting (approving the BOD Report) sign it singly?

**ROC's views :** It is the Chairman of the Company who is authorized by the Board to sign the Board's report. Does not matter whether the Chairman of the Company has attended the meeting or not, where the report was considered. Chairman of the meeting cannot sign. If for any reason, the chairman of the Company authorized by the Board is unable to sign the report, authority should flow again from the Board.

46. Section 2(11) defines Body Corporate as:

2(11) "body corporate" or "corporation" includes a Company incorporated outside India, but does not include—

(i) a co-operative society registered under any law relating to co-operative societies; and

(ii) any other body corporate (not being a Company as defined in this Act), which the Central Government may, by notification, specify in this behalf;

This definition does not expressly include or exclude LLPs. In the context of CA 2013, how do we treat LLPs now? Further, the definition of "Subsidiary" includes an entity which could be a Body Corporate for the limited purpose of establishing Holding-Subsidiary relationship. Acc. to Sec 129(3) we need to consolidate the accounts of Subsidiary Companies with those of Holding Company. Do we need to consolidate the accounts of LLPs also with the Holding Company? {*Formats are different*}

**ROC's views :** LLP is a body corporate as per LLP Act. Consolidation required.

47. Chapter 9 Rule 3(6) reads as under:

The Company shall intimate to the Registrar on an annual basis at the time of filing of financial statement-
(a) the name of the service provider;
(b) the internet protocol address of service provider;
(c) the location of the service provider (wherever applicable);
(d) where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.

We feel, it should be read as under:

The Company shall intimate to the Registrar on an annual basis at the time of filing of financial statement-
(a) the name of the service provider;
(b) the internet protocol address of service provider;
(c) the location of the service provider (wherever applicable);

where the books of account and other books and papers are maintained on cloud, such address as provided by the service provider.

**ROC's views :** Need to be checked in AOC-4 form. Attachment to the form can be done as an alternate.

48. Is 2% CSR contribution is tax deductible or not?

    **ROC's views :** IT department has to answer.

49. Can any professional fee paid for drafting of CSR Policy or engaging the services of an outside consultant for implementation of CSR Projects be included in the 5% CSR Expenditure ?

    **ROC's views :** Professional fees paid for drafting of CSR Policy or engaging the services of an outside consultant for implementation of CSR Projects are not forming part of CSR expenditure.

50. The requirement of constitution of the CSR committee as per Section 135(1) of the Act, arises only if the prescribed threshold of turnover/net worth/net profit is reached ***during the financial year 2014-2015*** and not on the basis of previous years' figures. Please confirm.

    Also, if the net worth of the Company is not more than the prescribed limit as on April 01, 2014, but if the net profit as on March 31, 2015 exceeds the prescribed limit, the Company ***need not spend*** any amount towards CSR activity during 2014-2015, as required under Section 135(3). Please confirm.

    **ROC's views :**The requirement of constitution of the CSR committee as per Section 135(1) of the Act, arises only if the prescribed threshold of turnover/net worth/net profit is reached during the financial year 2014-2015 and not on the basis of previous years' figures. Also, if the net worth of the Company is not more than the prescribed limit as on April 01, 2014, but if the net profit as on March 31, 2015 exceeds the prescribed limit, the Company need not spend any amount towards CSR activity during 2014-2015, as required under Section 135(3).

***Disclaimer: Above are the ROC's views concluded from the Interactive session with the members of ICSI, Bangalore chapter, held on 1st May, 2014. They shall not be construed as official clarification by the Ministry of Corporate Affairs.***