

Introduction

The words 'capital' and 'share capital' are synonymous. Although requirement of share capital is not compulsory for the purposes of incorporation but companies prefer to get incorporated with share capital because of their objectives of running business requiring capital. S. 13(4)(a) of the Companies Act, 1956 (CA, 1956) provided that the last clause i.e the capital clause of the memorandum of association must state the amount of nominal capital of the company and the number and value of shares into which it is divided. S. 4 (e) of the Companies Act, 2013 (CA, 2013) provides that in case of a company having a share capital, the amount of share capital with which the company is being registered should be stated. Division of the share capital into shares of a fixed amount and the number of shares which each subscriber to memorandum has agreed to subscribe should also be stated. In no case a subscriber should agree to have less than one share.

It is also necessary to know here that the company law also prescribes the minimum capital requirement for incorporating a company as a public or a private company. The Companies Act, 2013 provided that a public company must have a minimum paid-up share capital of a five lakh rupees or such higher paid-up share capital as may be prescribed [s. 2(71), CA, 2013]. Similarly, a private company was also defined as a company having a minimum paid-up share capital of one lakh rupees or such higher paid-up share capital as would be prescribed [s. 2(68), CA, 2013)]. However, such requirements of minimum paid-up capital has been removed by the amendment in view of facilitating ease of incorporating companies to encourage business and startup companies. Only a public company can raise funds from the public through public offerings and increase its share capital. Private companies can raise finance through private placement of securities. Even a public company can raise capital through private placement of securities. A company may meet its fund requirements either through raising share capital or through borrowings. Such a decision depends upon the business of the company and its requirement of capital, existing interest rates, and availability of assets with the company to give as security for borrowing, profitability of the company and the number of shareholders etc. The company does a proper financial analysis before making such a decision. Similarly, the company also has to make a choice between issue of equity shares and preference shares in case it decides to raise capital through share capital.

a. Share Capital:

As we discussed earlier, for a company to have share capital, it is necessary that its memorandum should state the amount and its division. The amount that is stated in the memorandum is known as the 'authorized capital' of the company. 'Authorised capital' or 'nominal capital' means such capital as is authorized by the memorandum of a company to be the maximum amount of share capital of the company [s. 2(8), CA, 2013]. Whole of the authorized share capital or any part of it can be issued by the company depending upon fund requirement of the company. Part of the share capital which is issued to the public is called 'issued capital' of the company. 'Issued capital' means such capital as the company issues from time to time for subscription [s. 2(50), CA,2013]. Whole of the issued capital may be subscribed by the public. That part of the issued capital which is subscribed by the public or allotted to the public is known as 'subscribed capital' of the company. As per s. 2(86), CA, 2013, 'subscribed capital' means such part of the capital which is for the time being subscribed by the members of a company. Minimum subscription requirement presently is ninety percent of the issued capital. The company has the flexibility of calling the subscribed capital wholly or partially. The actual amount received by the company from the subscribed capital is called the 'paid-up capital' of the company. The un-called capital of the company can be converted into reserve capital by passing a special resolution.

b. Shareholders and Members:

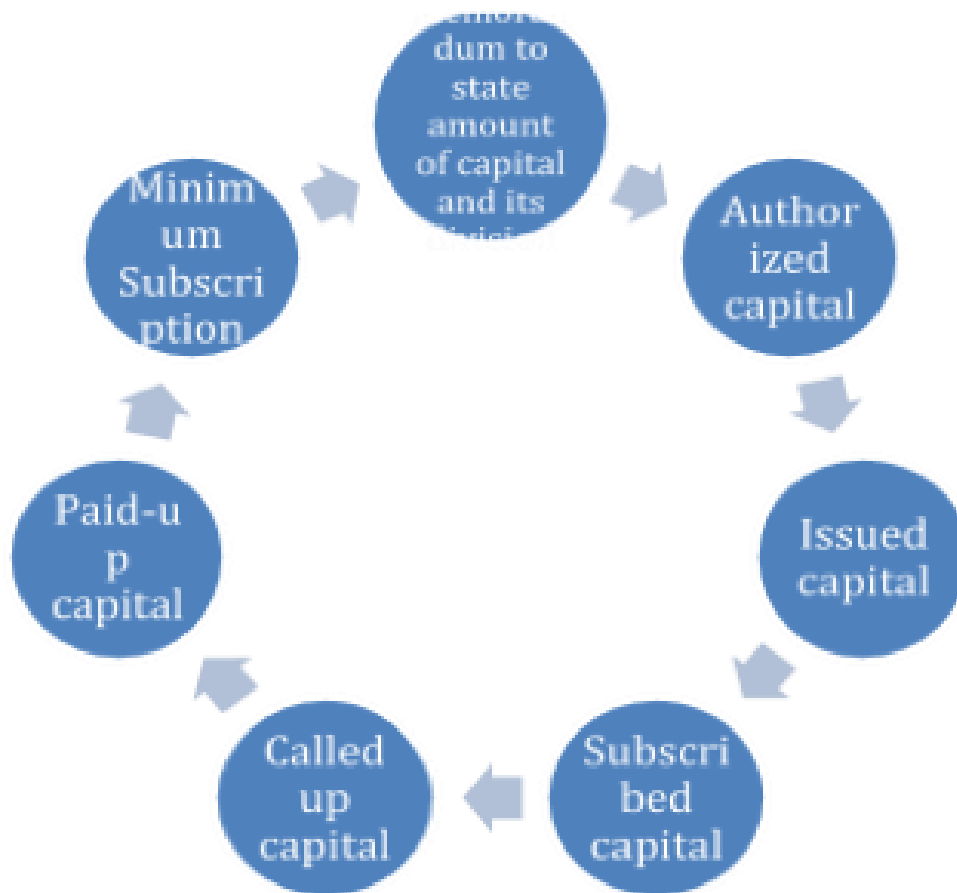
In relation to a company, a 'member' under s. 2(55), CA, 2013 means:

- i. the subscribers to the memorandum of the company. They are deemed to have agreed to become members of the company and after registration of the company; their name is entered in register of members.
- ii. every other person who agrees to become a member of a company in writing and whose name is entered on the register of members.
- iii. every person holding shares of the company and whose name is entered as beneficial owner in the records of a depository.

Therefore, a shareholder is also a member of the company. Although the terms 'shareholder' and 'member' are used interchangeably, member is a broader term. Companies limited by

guarantee and unlimited companies may not have shareholders as such companies may not have share capital. However, they have members.

A person may become member of a company by subscribing to memorandum, by allotment of shares or by agreeing in writing to become a member and whose name is entered on register of members, beneficial owners in depository records, by transfer or transmission of shares.



Nominal, Authorised or Registered Capital: 2(8)

Such capital as is authorised by the memorandum of a company to be the maximum amount of share capital of the company.

• Issued Capital 2(50)

Such capital as the company issues from time to time for subscription. It is that part of the authorised or nominal capital which the company issues for the time being for public subscription and allotment. This is computed at the face or nominal value.

- **Subscribed Capital 2(86)**

Such part of the capital which is for the time being subscribed by the members of a company. It is that portion of the issued capital at face value which has been subscribed for or taken up by the subscribers of shares in the company. It is clear that the entire issued capital may or may not be subscribed.

- **Paid-up Share Capital 2(64)**

Such aggregate amount of money credited as paid-up as is equivalent to the amount received as paid-up in respect of shares issued and also includes any amount credited as paid-up in respect of shares of the company, but does not include any other amount received in respect of such shares, by whatever name called.

c. Kinds of share capital:

Share capital must be divided into shares of a fixed amount. The CA, 1956 permitted only two kinds of share to be issued, namely, 'equity share capital' (ordinary shares) and "preference share capital" (preference shares). S. 86 of the CA, 1956 provided that equity share capital shall be issued with voting rights or with differential rights as to dividend, voting or otherwise. Two other categories of shares namely, 'derivative' and 'hybrid' were also introduced by the Companies (Amendment) Act, 2000. 'Derivative' was given the same meaning as in s. 2 of the Securities Contracts (Regulation) Act, 1956. 'Hybrid' meant any security which has the characteristics of more than one type of security, including their derivatives.

Chapter IV of the CA, 2013 deals with share capital. S. 43 deals with kinds of share capital and it provides that the share capital of a company limited by shares can be of two types, namely, equity share capital and preference share capital.

- **"equity share capital"**, with reference to any company limited by shares, means all share capital which is not preference share capital;
- **Preference share**, which receive dividends before ordinary shares but which have no voting rights, it must satisfy the following conditions:

- As regards dividends, it must carry a preferential right to fixed amount or amount calculated at a fixed rate and
- As regards the capital, in the event of a winding up or other arrangement to repayment of capital, there must be a preferential right to be repaid the amount of the capital paid up on such share. A Preference share capital may or may not carry such other rights as specified. All share capital, not falling within the above description of preference capital, is equity share capital, which has no guaranteed amount of dividend but carries voting rights.

Equity capital is also known as “Common Stock” or common share capital that represents ownership in a company. Common share capital is generally divided into units known shares. These unit holders are called equity shareholders. They are the real owners of the company and policy makers of the company. However, they do not have access to the day to day affairs of the company. They appoint their representatives called board of directors to look after the affairs of the company. Equity shareholders are entitled to vote on resolutions of the company, get a return by way of dividend if declared and take part in surplus in assets of the company at time of winding- up.

d. Preference share capital:

It means that part of the issued share capital of the company which either carries or would carry a preferential right with respect to payment of dividend and a preferential right of repayment in case of winding up or repayment of capital. Dividend may be paid as a fixed amount or amount calculated at a fixed rate. Right of repayment would be irrespective of preferential right to the payment of any fixed premium or premium on a fixed scale specified in memorandum or articles

of the company. Apart from these two preferential rights, preference shares can be of participating or non-participating type depending upon their right to participate in dividend payment with capital not entitled to the preferential right. That means that if shareholders are participating type they will have the right to extra dividend apart from their preferential dividend in case the company decides to distribute more profits as dividend. Similarly, preferences shareholders may have also the right to participate in any surplus capital which may remain after the entire capital has been repaid.

S. 55 of the CA, 2013 provides for issue and redemption of preference shares. It prohibits issue of irredeemable preference shares by any company limited by shares. A company may, if it is authorised by its articles, issue preference shares liable to be redeemed within a period not exceeding twenty years. Only for infrastructure projects, a company may issue such shares for a period of more than twenty years but not exceeding thirty years. This is subject to redemption of minimum of 10% of such shares per year from twenty first year onwards or earlier at the option of preference shareholders. This redemption will be on proportionate basis. Redemption will be subject to the conditions that only fully paid shares can be redeemed. Redemption can be made only from company's profits available for dividend or out of the proceeds of a fresh issue made for this purpose. A sum equal to nominal value of shares to be redeemed should be transferred to a reserve known as Capital Redemption Reserve Account from the profits out of which redemption will take place. Capital Redemption Reserve is to be preserved with same sanctity as share capital. Redemption of preference shares is not treated as reduction of share capital. Premium on redemption can be paid from profits of the company or securities premium account. If a company is not in a position to redeem preference shares or to pay dividend, it may with the consent of holders of three-fourths in value of such preference shares and with the approval of the Tribunal further issue redeemable preference shares of the same value including dividend. This will be deemed redemption of unredeemed preference shares. A company has to notify the Registrar about the redemption of preference shares within a period of thirty days of redemption.

e. Bonus shares:

A bonus share is an accretion. A bonus share is issued when a company capitalizes its profits by transferring an amount equal to the face value of the share from its reserves to the nominal capital. If the articles of accompany authorize, it may convert its accumulated undivided profits into bonus shares. This is a mechanism to provide capital to the company by utilizing its own accumulated profits instead of public offering or borrowing by the company. S. 63, CA, 2013 provides that a company may issue bonus shares to its members in any manner whatsoever, out of its free reserves or amount lying in the securities premium account or capital redemption reserve. Reserves created from revaluation of assets cannot be utilized or capitalized for the purpose of issuing bonus shares. Bonus shares cannot be issued in lieu of dividend.

f. Sweat Equity Shares:

Sweat equity shares are equity shares issued by the company at a discount or for consideration other than cash. They are issued only to directors or employees of the company for providing technical know-how to the company or making available intellectual property rights to the company or for any value addition to company.

g. ‘Employee Stock Option’ (ESOP)

has been defined under sub-section (37) of Section 2 of the Companies Act, 2013, according to which “employees’ stock option” means the option given to the directors, officers or employees of a company or of its holding company or subsidiary company or companies, if any, which gives such directors, officers or employees, the benefit or right to purchase, or to subscribe for, the shares of the company at a future date at a pre-determined price. As discussed earlier, Section 62(1)(b) provides that a company may issue further shares to its employees under a scheme of employees’ stock option, subject to special resolution passed by company and subject to such conditions as may be prescribed. In case of private company special resolution has been substituted by ordinary resolution.

Rights of shareholders:

Important rights of shareholders or members of a company are as under:

1. Voting Rights: Section 47, CA, 2013 provides that every equity shareholder of a company has the right to vote on every resolution placed before the company. Equity shareholder’s voting right on a poll will be in proportion to his share in the paid-up equity share capital of a company.

Every preference shareholder of a company will have a right to vote only on resolutions placed before the company directly affecting his rights attached to the preference shares and any resolution for winding up of the company or for repayment or reduction of its equity or preference share capital. Voting rights of every preference shareholder on a poll shall be in proportion to his share in the paid-up preference share capital of the company. Proportion of the voting rights of the equity shareholders to preference shareholders will be in the proportion of the paid-up equity share capital and paid-up preference share capital held by them. If dividend in respect of a class of preference shares is not paid for a period of two years or more,

such class of preference shareholders will have the right to vote on all the resolutions placed before the company.

Voting rights under s. 47 are subject to provisions of s. 43 (kinds of share capital), s. 50 (2) (company to accept unpaid share capital, although not called up) and s. 188(1) (related party transactions).

Where the company accepts unpaid share capital which is not yet called up by the company, such shareholders will not be entitled to any voting rights in respect of such share capital paid by them.

2. Dividend: Every equity shareholder has the right to receive dividend declared by directors of the company yearly as well as interim dividend if declared by the directors in accordance with s. 143 of the CA, 2013. Every preference shareholder has the right to receive preferred dividend as per the terms of issue of preference shares. Participating preference shareholders have also the

right to receive extra dividend from surplus profits. A company may pay dividends in proportion to the amount paid-up on each share if its articles authorize it to do so.

3. Right to uniform calls on shares: Where any calls are made by the company for a class of shares from uncalled capital of the company, such calls should be made uniformly for all shares of that class.

4. Right to be paid at winding up of the company: Every preference shareholder has the preferred right of payment at the winding up of the company or repayment of capital. They may also have the right to participate in surplus capital if they are participating type. Equity shareholders also have the right of payment from the capital of the company left after repaying creditors and preference shareholders of the company at the winding up of the company.

5. Variation of shareholder' rights: S. 48, CA, 2013 restricts the variation of shareholders' rights except with the consent in writing of the holders of not less than three-fourths of the issued shares of the class of shares whose rights are being modified. Such a variation may also be made by means of a special resolution passed at a separate meeting of shareholders of that class if provision in respect of such variation is contained in memorandum or articles of the

company or in its absence such variation is not prohibited by terms of issue of shares of that class.

If variation by one class of shareholders affects the rights of any other class of shareholders, consent of three-fourths of such other class of shareholders shall also be obtained.

Dissenting shareholders by not less than ten percent of the issued shares of that class whose shares are under variation may apply to Tribunal for cancellation of variation.

6. Right of participation in Annual General Meeting: Shareholders have the right to receive notice for attending the AGM of the company. Each shareholder has the right to receive financial statements, including auditors' report and other documents annexed to financial statements, along with directors' report presented by Board of directors at AGM.

7. Right to transfer shares/securities or other interest in company: Securities or other interest of any member in a public company are freely transferable under s. 44, CA, 2013. Shareholders of a public company have freely transferable shares/ securities without any restriction on transferability of shares. In case of private companies, approval of the Board of directors may be necessary before any transfer of shares. Members also have the right of transmission of shares/securities or other interest in the company. The company has the power to register on receipt of intimation of transmission of any right to securities by operation of law from any person to whom such right has been transmitted under s. 56, CA, 2013. Every holder of securities has also been given the power to nominate any person to whom his securities will vest in the event of his death. In case the nominee is a minor, holder has to appoint a person who will be entitled to securities of the company in the event of death of nominee during his minority [s. 72, CA, 2013].

Duties and Liabilities of shareholders/ members: All rights and liabilities of shareholders are subject to terms and conditions contained in the articles of the company. The provisions of the CA, 2013 are also applicable. The members are under a duty to participate in the meetings of the companies and vote on resolutions of the companies. They should not merely be 'functionless rentiers' of capital. They should not only be bothered about their dividend but also take active interest in the decision-making. Appointment of directors, auditors, alteration of memorandum and articles of company are few of the important resolutions where their participation is necessary.

Minority shareholders should also be vigilant for their rights in the company. Shareholders of companies are under a liability to pay the full amount of their shareholding.

The Companies (Amendment) Act, 2017 added s. 3-A about members' several liabilities after section 3 relating to formation of companies in case the number of members is reduced below the statutory requirement but the company continues with its business. Public companies and private companies are required to have minimum seven and two members respectively. S. 3-A provides that if any time the number of members of a company is reduced below statutorily required in case of a public or private company and the company carries on business for than six months while the number of members is so reduced, every person who is a member of the company during the time that it so carries on business after those six months and is cognizant of the fact that it is carrying on business with less than seven or two members, shall be severally liable for the whole debts of the company contracted during that time, and may be severally sued therefor.

Shareholders, if required, may also pledge or mortgage their shares since shares are a movable property. Where share certificate is in physical form, it can be pledged for raising a loan. Where it is given as security, pledge retains possession of it till the loan amount is repaid. In case some right or interest in shares is transferred to the creditor, then it amounts to mortgage of shares. Where shares are in dematerialized form and with the depositories, pledge or mortgage of shares has to be registered with the depository.

Dividend

Every Company requires funds to operate its business successfully. Shareholders are an integral part of every company where they raise funds and in the process of same become its stakeholders. They have a control over the share of profits in proportion to the money they invest. This share of profit by shareholders is termed as dividend.

The word "Dividend" has origin from the Latin word "Dividendum" Dividend refers to that portion of profit that is paid to the shareholders of the company. It is often paid in one financial year to the shareholders after the final accounts of profit are ready and the same has to be distributed. Section 2 of the Act defines that 'includes any interim dividend'.

The rights of shareholders on profits as dividends only arise after the declaration of dividends by the company done generally on the approval of board of directors. The amount paid of the dividend

is in proportion to the amount paid on the share by the shareholder as provided in section 51 of the Act. There are two types of dividends: Interim dividends and Final dividends.

Interim dividend

The Act defines Dividend in terms of interim dividends which refer to the dividend declared by company's board during any time of the year before official closing of financial year and calling of Annual General Meeting. According to the Act the company can declare interim dividend out of profits accumulated of current or previous financial years. The provisions of the Act which are generally for final dividend are applicable to interim dividends also.

Features of interim dividend

- It is declared by board of directors in one financial year out of surplus generated in profit and loss accounts and out of profits in which interim dividend is bound to be declared. It has been held in Judgments that mere declaration by the directors in a general meeting does not obligate them to pay dividends as the decision can be rescinded.
- If the company registers loss before the stipulated declaration of dividends, it has to be declared at an average rate calculated on the basis of dividends declared in previous 3 financial years.
- It is deposited in a scheduled bank account within five days of the declaration. The same is irrespective of intervening holidays.

Final dividends

The dividends declared by the company after closing of the financial year and approval of Board of Directors in AGM. The term Dividend used except in the definition in Companies Act, 2013 refers to final dividends only. Majority of the provisions for both Interim and Final are same but there are some differentiated provisions for the Interim dividends in the Act. The liability on default arises only in case of declaration of Final Dividend and not Interim dividend.

Private Placement

PRIVATE PLACEMENT OF SHARES As per Explanation I to Section 42(3), "private placement" means any offer or invitation to subscribe or issue of securities to a select group of persons by a company (other than by way of public offer) through private placement offer-cum- application, which satisfies the conditions specified in this section.

Private Placement Offer – cum Application Section 42(1) provides that a company may, subject to the provisions of this section, make a private placement of securities. Section 42(3) reads, a company making private placement shall issue private placement offer and application in such form and manner as may be prescribed to identified persons, whose names and addresses are recorded by the company in such manner as may be prescribed. The private placement offer and application shall not carry any right of renunciation.

Maximum number of persons to whom offer can be made and other incidental matters As per section 42(2), a private placement shall be made only to a select group of persons who have been identified by the Board (herein referred to as "identified persons"), whose number shall not exceed fifty or such higher number as may be prescribed [excluding the qualified institutional buyers and employees of the company being offered securities under a scheme of employees stock option in terms of provisions of clause (b) of sub-section (1) of section 62], in a financial year subject to such conditions as may be prescribed. "qualified institutional buyer" has been defined under the section to mean that the qualified institutional buyer as defined in the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2009, as amended from time to time. Accordingly any offer or invitation made to qualified institutional buyers, or to employees of the company under a scheme of employees stock option as per provisions of clause (b) of sub-section (1) of section 62 shall not be considered while calculating the number of identified persons. Where a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, whether the payment for the securities has been received or not or whether the company intends to list its securities or not on any recognised stock exchange in or outside India, the same shall be deemed to be the public offer and shall be accordingly dealt.

Applying to private placement As per section 42(4) states that every identified person willing to subscribe to the private placement issue shall apply in the private placement and application

issued to such person along with subscription money paid either by cheque or demand draft or other banking channel and not by cash: Hence all the payments have to be made either by cheque or demand draft or other banking channel and not by cash. However, a company shall not utilise monies raised through private placement unless allotment is made and the return of allotment is filed with the Registrar. According to subsection (5) the company shall make any fresh offer or invitation with respect to private placement unless the allotments with respect to any offer or invitation made earlier have been completed or that offer or invitation has been withdrawn or abandoned by the company. A company may, at any time, make more than one issue of securities to such class of identified persons as may be prescribed subject to the maximum number of identified persons as stated above.

Prospectus

In general parlance prospectus refers to an information booklet or offer document on the basis of which an investor invests in the securities of an issuer company. It has been defined under section 2(70) so as to mean any document described or issued as a prospectus and includes a red herring prospectus referred to in section 32 or shelf prospectus referred to in section 31 or any notice,

circular, advertisement or other document inviting offers from the public for the subscription or purchase of any securities of a body corporate. Red herring Prospectus under Explanation to section 32 has been referred to mean a prospectus which does not include complete particulars of the quantum or price of the securities included therein. Shelf Prospectus under Explanation to section 31 has been referred to mean a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. The definition clarifies that any notice, circular, advertisement or any other document inviting offers from public for the subscription or purchase of securities shall be included in the definition of Prospectus

Matters to be stated in the prospectus: Every Prospectus shall state such information and set out such reports on financial information as may be specified by the Securities and Exchange Board in consultation with the Central Government: Provided that until the Securities and Exchange Board specifies the information and reports on financial information under this subsection, the regulations made by the Securities and Exchange Board under the Securities and

Exchange Board of India Act, 1992, in respect of such financial information or reports on financial information shall apply.

SHELF PROSPECTUS: Shelf Prospectus means a prospectus in respect of which the securities or class of securities included therein are issued for subscription in one or more issues over a certain period without the issue of a further prospectus. In simple terms Shelf Prospectus is a single prospectus for multiple public. Issuer is permitted to offer and sell securities to the public without a separate prospectus for each act of offering for a certain period. Under the Act any class or classes of companies, as the Securities and Exchange Board (SEBI) may provide by regulations in this behalf, may file a shelf prospectus with the Registrar. Such prospectus is to be submitted at the stage of the first offer of securities which shall indicate a period not exceeding one year as the period of validity of such prospectus. The validity period shall commence from the date of opening of the first offer of securities under that prospectus, and in respect of a second or subsequent offer of such securities issued during the period of validity of that prospectus, no further prospectus is required. An information memorandum is required to be filed by a company filing a shelf prospectus which shall contain all material facts relating to • new charges created, • changes in the financial position of the company as have occurred between the first offer of securities or the

previous offer of securities and the succeeding offer of securities and • such other changes as may be prescribed, with the Registrar within the prescribed time, prior to the issue of a second or subsequent offer of securities under the shelf prospectus. According to the rules the information memorandum shall be prepared in Form PAS-2 and filed with the Registrar along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within one month prior to the issue of a second or subsequent offer of securities under the shelf prospectus. The section also provides a benefitting provision for the investors, the proviso provides that where a company or any other person has received applications for the allotment of securities along with advance payments of subscription before the making of any such change, the company or other person shall intimate the changes to such applicants and if they express a desire to withdraw their application, the company or other person shall refund all the monies received as subscription within fifteen days thereof.

RED HERRING PROSPECTUS Red herring Prospectus means a prospectus which does not include complete particulars of the quantum or price of the securities included therein. In simple terms a red herring prospectus contains most of the information pertaining to the

company's operations and prospects, but does not include key details of the issue such as its price and the number of shares offered. According to section 32 a company proposing to make an offer of securities may issue a red herring prospectus prior to the issue of a prospectus. Such company proposing to issue a red herring prospectus shall file it with the Registrar at least three days prior to the opening of the subscription list and the offer. A red herring prospectus shall carry the same obligations as are applicable to prospectus and any variation between the red herring prospectus and a prospectus shall be highlighted as variations in the prospectus. Upon the closing of the offer of securities under this section, the 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 are not included in the red herring prospectus shall be filed with the Registrar and the Securities and Exchange Board.

ABRIDGED PROSPECTUS According to section 2(1) of the Act "abridged prospectus" means a memorandum containing such salient features of a prospectus as may be specified by the Securities and Exchange Board by making regulations in this behalf. Section 33 of the Act provides that no form of application for the purchase of any of the securities of a company shall be issued unless such form is accompanied by an abridged prospectus. A copy of the prospectus shall, on a request being made by any person before the closing of the subscription list and the offer, be furnished to him. Nothing aforesaid shall apply if it is shown that the form of application was issued— (a) in connection with a bona fide invitation to a person to enter into an underwriting agreement with respect to such securities; or (b) in relation to securities which were not offered to the public. The penal provisions provide that a company which makes any default in complying with the provisions shall be liable to a penalty of fifty thousand rupees for each default

Debentures

BORROWING In order to run a business effectively/successfully, adequate amount of capital is necessary. In some cases capital arranged through internal resources i.e. by way of issuing equity share capital or using accumulated profit is not adequate and the organisation is resorted to external resources of arranging capital i.e. External Commercial borrowing (ECB), Debentures, Bank Loan, Public Fixed Deposits etc. Thus, borrowing is a mechanism used whereby the money is arranged through external resources with an implied or expressed intention of returning money.

Power of Company to Borrow The power of the company to borrow is exercised by its directors, who cannot borrow more than the sum authorized. The powers to borrow money and to issue debentures whether in or outside India can only be exercised by the Directors at a duly convened meeting. Pursuant to Section 179(3) (c) & (d) directors have to pass resolution at a duly convened

Board Meeting to borrow money. The power to issue debentures cannot be delegated by the Board of directors. However, the power to borrow monies can, be delegated by a resolution passed at a duly convened meeting of the directors to a committee of directors, managing director, manager or any other principal officer of the company. The resolution must specify the total amount up to which the moneys may be borrowed by the delegates. Often the power of the company to borrow is unrestricted, but the authority of the directors acting as its agents is limited to a certain extent. For example, Section 180(1)(c) of the Act prohibits the Board of directors of a company from borrowing a sum which together with the monies already borrowed exceeds the aggregate of the paid-up share capital of the company and its free reserves apart from temporary loans obtained from the company's bankers in the ordinary course of business unless they have received the prior sanction of the company by a special resolution in general meeting. Explanation to section 180(1)(c) provides that the expression "temporary loans" means loans repayable on demand or within six months from the date of the loan such as short-term, cash credit arrangements, the discounting of bills and the issue of other short-term loans of a seasonal character, but does not include loans raised for the purpose of financial expenditure of a capital nature. It is further provided in proviso to Section 180(1)(c) that the acceptance by a banking company, in the ordinary course of its business, of deposits of money from the public, repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise, shall not be deemed to be borrowing of monies by the banking company within the meaning of clause (c) of Sub-section (1) of Section 180. It is important at this stage to distinguish between, borrowing which is ultra vires the company and borrowing which is intra vires the company but outside the scope of the director's authority. The provisions of Sub-section (5) of Section 180 clearly lay down that debts incurred in excess of the limit fixed by clause (c) of Sub-section (1) shall not be valid unless the lender proves that he lent his money in good faith and without knowledge of the limit imposed by Sub-section (1) being exceeded. With recent exemption notification no 464(E) private companies have been exempted to comply the entire provisions of Section 180 of the Companies Act 2013,

resultantly special resolution is not required to exercise powers under section 180 for private companies.

The behaviour of the directors, as the company's agents, can have no effect whatsoever on the validity of the loan for no agent can have more capacity than his principal. No agent can have a power which is not with the principal. If, therefore, the borrowing is ultra vires the company so that the company has no capacity to undertake it, the lender can have no rights at common law. No

| | Debenture | Share |
|----|---|---|
| 1. | Debentures constitute a loan. | Shares are part of the capital of a company. |
| 2. | Debenture holders are creditors. | Shareholders are members/owners of the company. |
| 3. | Debenture holder gets fixed interest which carries a priority over dividend | Shareholder gets dividends with a varying rate. |
| 4. | Debentures generally have a charge on the assets of the company. | Shares do not carry any such charge. |
| 5. | Debentures can be issued at a discount without restrictions. | Shares cannot be issued at a discount |
| 6. | The rate of interest is fixed in the case of debentures. | Whereas on equity shares the dividend varies from year to year depending upon the profit of the company and |

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| | | the Board of directors decides to declare dividends or not. |
| 7. | Debenture holders do not have any voting rights | Shareholders enjoy voting rights. |
| 8. | Interest on debenture is payable even if there are no profits i.e. even out of capital. | Dividend can be paid to shareholders only out of the profits of the company and not otherwise. |
| 9. | Interest paid on debenture is a business expenditure and allowable deduction from profits | Dividend is not allowable deduction as business expenditure. |