

Deposit [Sec 2(31), Rule 2(1)(c)]

In this edition, we look at the definition of the term ‘deposit’.

1. Meaning of the term ‘Deposit’

The term "deposit" is defined in clause (31) of section 2 which states that ‘deposit includes any receipt of money by way of deposit or loan or in any other form by a company, but does not include such categories of amount as may be prescribed in consultation with the Reserve Bank of India’. The rule 2 (1) (c) prescribes categories of amounts which shall not be termed as ‘deposits’ subject to meeting the prescribed conditions. It should be noted that receipt of money under a different nomenclature is also covered under the term ‘Deposit’ which amounts to creation of a legal fiction.

Loan and deposit: Quite often, these two terms are used synonymously and interchangeably. It was held in Mohd. Akbar Khan v. Attar Singh [AIR 1936 PC 171] that, ‘the two terms ('deposit' and 'loan') are not mutually exclusive.’ Both loans and deposits are temporary in nature, both are refundable at one point of time. The difference between a ‘loan’ and ‘deposit’ is very technical in terms of conditions of repayment, cessation of interest and the limitation period for claiming the money back. In Abdul Hamid Sahib and Ors. V. Rahmat Bi [AIR 1965 Mad 427], the Madras High Court has brought out the clear distinction: “Both are debts repayable. But, the question as to when the repayment is to be made furnishes the real point of distinction between the two concepts. A loan is repayable the minute it is incurred. But this is not so with a deposit. Either the repayment will depend upon the maturity date fixed therefor or the terms of the agreement relating to the demand, on making of which the deposit will become repayable. In other words, unlike a loan there is no immediate obligation to repay in the case of a deposit. That is the essence of the distinction between a loan and a deposit.” In case of a deposit, the accrual of interest ceases upon maturity, whereas in loan, interest is payable up to the date of repayment of the loan itself. The onus of repayment of loan vests with the person taking the loan and even the limitation period starts on the date on which the amount was repayable as per the agreement. In case of deposit, the depositor has to claim the deposit amount. Consequently in this case, the limitation period starts from the date when the depositor claimed repayment of money.

However, for the purpose of this Act, the definition of the term ‘Deposit’ clearly states that it includes ‘any receipt of money by way of deposit or loan or in any other form by a company’. Hence, the statutory inclusion obliterates the difference between ‘loan’ and ‘deposit’ as propounded in the above judgment. Any loan has to fall within the exclusion from the definition of ‘deposit’ if it were to qualify as loan simpliciter.

2. Certain receipts not included in deposits

In terms of rule 2(1)(c), the following receipts of money shall not be treated as deposit:

Clause (i): Amount received from Government

Any amount received from Central Government, State Government, local authority or statutory authority constituted under Central or State legislation is not a deposit. Further, amount received from any other source where repayment is guaranteed by Central or State Government is not a deposit. This provides flexibility in operation of companies such as Government Companies and other special purpose entities established for execution of projects. Commonly, such money is received in form of seed capital, capital grant etc. There are no qualifications or conditions placed on this exemption, hence once the source is ascertained, this exemption will be availed without complying with any other condition.

Clause (ii): Amount received foreign government, etc. subject to compliance of FEMA, 1999

List of transactions covered under this clause as follows:

Any amount received from

- (i) Foreign Governments
- (ii) Lateral Foreign Banks
- (iii) International Banks
- (iv) Multilateral financial institutions (such as, International Financial Finance Corporate, Asian Development Bank, Commonwealth Development Corporation, International Monetary Fund, World Bank, International Bank for Industrial and Financial Reconstruction etc.)
- (v) Foreign Government owned development Financial Institutions
- (vi) Foreign Export credit agencies
- (vii) Foreign collaborators (It can be equity participation or technology collaboration)
- (viii) Foreign Bodies corporate
- (ix) Foreign citizen
- (x) Foreign Authorities
- (xi) Persons resident outside India

Clause (iii): Loan or facilities from Banks

Any amount provided as loan or facility by any banking Company, State Bank of India or its subsidiaries, banking institutions notified under Section 51 of the Banking Regulation Act, 1949, corresponding new bank as defined in clause (d) of Section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and clause (b) of Section 2 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 or

cooperative banks as defined in clause (b-ii) of section 2 of the Reserve bank of India Act, 1934.

This exemption is very significant as otherwise loan is included in the definition of 'Deposit'. A point worth noting is that only financial assistance through formal banking channels is exempted. Other informal and unregulated sources are not covered here. Such loans from unregulated sources will amount to deposits.

Clause (iv): Loans or financial assistance from Public Financial Institutions, Insurance Companies, Scheduled Banks etc.

Any loan or financial assistance received from notified Public Financial Institutions or any regional financial institutions or Insurance Companies or Scheduled Banks as defined in the Reserve Bank of India Act, 1934 is not a deposit.

It is pertinent to analyse of the word "financial assistance". This word is defined in clause (k) of Section 2 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 as "any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any Bank or financial institution," Although, the same may not be *pari materia* in this context, it is sufficient to establish that the word 'financial assistance' is wider than 'facility'. The term financial assistance may also include the receipt of grant, donations, etc. Such financial assistance is not exempted when availed from Banks other than Scheduled Banks. As these are wider services, only Scheduled Banks (having higher resources as per conditions prescribed in Banking Regulation Act) and other financial intermediaries having expertise are recognised.

Clause (v): Amount raised by issue of certain instruments

Any amount received against the issue of commercial paper (issued in pursuance with Master Circular - Guidelines for Issue of Commercial Paper) or other instruments issued in conformity with the guidelines or notifications issued by Reserve Bank of India.

Clause (vi): Amount received from other company

Any amount received by a company from any other company is not a deposit. The 'Company' means a 'company' as defined in clause (20) of section 2. The Act this exemption has huge ramifications. One such ramification of conflict with other clauses is discussed in detail below. Non-compliance of section 185 by the company giving the amount will not change the characteristic of amount received under this clause.

This clause may be read as a blanket clause but when a purpose is specified (like money received for subscription of securities), resort should not be taken to this clause. Other school of thought is reading this clause as a blanket clause. Till any particular clarification or court decision is given, this point cannot be crystallised.

Clause (vii): Amount received towards allotment

Any amount which is received and held towards subscription of securities including share application money and money due on allotment is not a deposit subject to following conditions:

- a. The amount is appropriated only against amount due on allotment of securities.
- b. Such allotment shall be made within a period of 60 days. If not made, the amount shall be refunded within a period of 15 days from the end of such 60 days. (such refund cannot be made by way of adjusting the amount for any other purpose).

Here, the apparent intention of legislature is that any share application amount received without offer will be treated as deposit. Additionally, for refund, the period of 15 days will not be available as well. The word used is 'towards subscription to any securities'. Hence, all securities will come under the purview of this clause. Although the next term is 'share application money' which is confined towards shares, the term 'advance towards allotment of securities' is wider in coverage. The money received towards allotment of securities, retained beyond 60 days will be a deposit. It appears that the call money retained by the company beyond 60 days may not be a deposit.

A proviso to this rule inserted on 31.03.2015 [Vide Rule 2 (1) (a) of the Companies (acceptance of Deposits) Amendments Rules, 2015 published vide notification no. G.S.R 241 (E) dated 31 March 2015] which provides that where the company has received any amount by way of subscription to shares, stock, bonds or debentures before 01.04.2014 and the same is disclosed in the balance sheet for the year ending on or before 31.03.2014 for which allotment is pending on 31.03.2015, the company shall perform either of the following three actions by 01.06.2015:

- a. Refund the amount;
- b. Allot shares, stock, bonds or debentures;
- c. Treat the amount pending for allotment as deposit by complying with the provisions of the Act and Rules.

Clause (viii): Amount received from Director

Any amount received from a person who was a Director of the company at the time of receipt. As per Notification dated 15.09.2015, which amended the rule, any amount received from a director of a company or in case of a private company, from the relative of the director, shall also be exempt, provided that such person furnishes a written declaration that the amount is not given out of any borrowing or accepting loans or deposits from others and the same is disclosed in the Board's Report. The reporting in Board's report is a condition imposed by the Amendment Rules which are effective from 15.09.2015. Hence, all Board's reports signed after this date need to give this disclosure. In this regard, it is pertinent to note here that a Hindu Undivided Family shall not be regraded as a relative of director. Rule 16(A) mandates every company, other than a private company, shall disclose in its financial statement, by way of notes, about the money received from the director.

Clause (ix): Secured or convertible debentures or bonds

Other exempted deposits include fully secured bonds or debentures having a first charge or pari-passu first charge on the assets of the Company (not of its holding or subsidiary company) which shall not exceed the market value of the assets of the company as assessed by a registered valuer, excluding intangible assets. This can be contradicted with the last proviso to Rule 18(1) of the Companies (Share Capital and Debentures) Rules, 2014 which allows for creation of charge or mortgage on the properties or assets of the holding company in case of loan taken by subsidiary from any bank or financial institution. Further, unsecured bonds or debentures which are compulsorily convertible into shares of the company within ten years of issue are not included in deposits. This implies that such unsecured bonds or debentures, which are not convertible into shares or which are convertible beyond five years, shall be treated as deposits. It is clear that any conversion, whether into equity or preference shares is permissible to get this exemption.

The condition of amount of bonds or debentures not exceeding market value of assets is a peculiar one. Hence, the security cover shall always be on a higher side to cover the repayment of bonds or debentures.

ECB- rupee Denominated Bonds

Similar RBI issued A.P. (DIR Series) Circular No.17-RBI/2015-16/193 External Commercial Borrowings (ECB) Policy - Issuance of Rupee denominated bonds overseas, wherein these bonds can be issued by the company to recognized investors with a minimum maturity period of 5 years. In order to avail exclusions, it seems that the conditions like creation of charge or compulsorily convertibility mentioned in clause IX of this rule are not required to be complied for advance received in accordance with FEMA.

[Inserted vide the Companies (Acceptance of deposits) Amendments Rule, 2016, notification no. G.S.R. 639(E) dated 29th June, 2016]

Clause (ixa): Any amount raised by issue of non-convertible debenture not constituting a charge on the assets of the company and listed a recognised stock exchange as per applicable regulations made by Securities and Exchange Board of India.

Clause (x): Security deposit from an employee

Any non-interest bearing security deposit received from an employee of the company limited to his annual salary is not a deposit. It is pertinent to note that this amount needs to be received under a contract of employment i.e. such term should form a part of the contract. Further, there is no definition of the word 'annual salary' and what components should form part of it. Hence, the definition provided in contract of employment may be taken into account.

Clause (xi): Any non-interest bearing amount received and held in trust.

Any non-interest bearing amount received or held in trust is exempt from the definition of deposit

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The criteria to decide is whether the non-interest bearing amount received is in trust or not. If amount received or held is not in trust, then it is a deposit. "In trust" means, the company receiving and holding the amount is acting as trustee or custodian and not appropriating the money for its use. When a company receives money in trust, there is no obligation on the company to pay interest on the same. An example of the amount received in trust as given in the Act is deposit of one lakh rupees received under section 160 with the notice signifying the candidature as director.

Clause (xii): Amount received in the course of, or for the purpose of, the business of the company

This clause is sub-divided into four sub-clauses.

Clause (a): Any amount received in the course of business of the company, as a trade advance, which is adjusted within a period of 365 days is exempt from the definition of deposit. This limit of 365 days does not apply in case of amount which is a subject matter of legal proceedings before any court of law.

Clause (b): Further, any amount received as an advance for consideration of an immovable property which is adjusted in accordance with the terms of agreement or arrangement under which it is received will not amount to a deposit. The word 'immovable property' was inserted with effect from 31.03.2015 [Vide Rule 2 (1) (a) of the Companies (Acceptance of Deposits) Amendments Rules, 2015 published vide notification no. G.S.R.241 (E) dated 31 March 2015] The word 'arrangement' has wider connotation than an 'agreement'.

Clause (c): Any amount received as security deposit for performance of supply of goods or provision of services is not a deposit. This will cover earnest money deposits which are given at the time of entering into a contract.

Clause (d): Any amount received as advance for supply of capital goods under long term projects except monies covered under clause (b) relating to exemption given to immovable property are exempt from deposits. Supply of capital goods and connection with long term projects are two cumulative conditions. Long term projects and capital goods are not defined under the Rules.

If the money received under clause (a), (b) and (d) above, becomes due for refund for the reason that the company does not have necessary permission or approval to deal with in the products for which the amount is received, the same is deemed to become a deposit after the expiry of 15 days from the day in which it became due for refund. Further the amount referred in clause (a), (b) and (d) above shall become deposit only if conditions specified in the proviso is violated and not otherwise, ie. If refund is made on the request of party or on account of some subsequent changes in legislation leading to inability to conclude the contract.

While capital goods are not expressly defined in the Act, reference may be made to the definition given under other legislations like Rule 2 (a) of CENVAT Credit Rules, 2004.

Advance for export of goods / service

For instance, advance for export of goods / service is regulated through Master Circular on Export of Goods and Services No.14/2015-16, which is detailed code dealing with advance received in course of foreign trade. Relevant portion of said master circular is reproduced for cross reference.

“Part 2 –para B.8 of Master Circular of on Export of Goods and Services

(2) AD Category- I banks can also allow exporters having a minimum of three years’ satisfactory track record to receive long term export advance up to a maximum tenor of 10 years to be utilized for execution of long term supply contracts for export of goods subject to the conditions as under:

- (i) Firm irrevocable supply orders and contracts should be in place. Product pricing should be in consonance with prevailing international prices.
- (ii) Company should have capacity, systems and processes in place to ensure that the orders over the duration of the said tenure can actually be executed.
- (iii) The facility is to be provided only to those entities, which have not come under the adverse notice of Enforcement Directorate or any such regulatory agency or have not been caution listed.
- (iv) Such advances should be adjusted through future exports.
- (v) The rate of interest payable, if any, should not exceed LIBOR plus 200 basis points.
The documents should be routed through one Authorized Dealer bank only.
- (vi) Authorised Dealer bank should ensure compliance with AML / KYC guidelines
- (vii) Such export advances shall not be permitted to be used to liquidate Rupee loans classified as NPA.
- (viii) Double financing for working capital for execution of export orders should be avoided.
- (ix) Receipt of such advance of USD 100 million or more should be immediately reported to the Trade Division, Foreign Exchange Department, Reserve Bank of India, Central Office, Mumbai.
- (xi) In case Authorized Dealer banks are required to issue bank guarantee (BG) / Stand by Letter of Credit (SBLC) for export performance, then the issuance should be rigorously evaluated as any other credit proposal keeping in view, among others, prudential requirements based on board approved policy.”

From about it appears that RBI has made sufficient provisions to safeguard the interest of person giving the advance for exports and to ensure the company receiving it, uses the same properly. In order to avail exclusions, it seems that the conditions like 365 days mentioned in the sub- clause (a) of clause XII of this rule may not be required to be complied with for advance received in accordance with FEMA.

As an advance towards consideration for providing future services in the form of a warranty or maintenance contract as per written agreement or arrangement, if the period for

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providing such services does not exceed the period prevalent as per common business practice or five years, from the date of acceptance of such service whichever is less;

As an advance received and as allowed by any sectoral regulator or in accordance with directions of Central or State Government;

As an advance for subscription towards publication, whether in print or in electronic to be adjusted against receipt of such publications:

Clause (xiii): Amount brought in by promoters

Unsecured loans received from the promoters (as defined in clause (69) of section 2) or their relatives (as defined in clause (77) of section 2) or both as per the stipulation of any lending financial institution or a bank shall not be treated as deposits. Hence, when the loan is brought in without any stipulation imposed by the lending institution or the loan brought in beyond the amount stipulated by lending institutions, the same will amount to 'Deposit'. This exemption is available only till the loan from the lending institution is subsisting and not after the same is repaid. As the exemption is available only till subsistence of loan, the amount brought in by promoters needs to be repaid along with the loans from lending institutions.

Clause (xiv): Amount accepted by Nidhi Company

Any amount accepted by a Nidhi company in accordance with the provisions applicable to them and subject to the rules made under section 406 of the Act.

The explanation at the end of rule 2(1)(c) provides that any amount received by a company in pursuant to any promise by a Company to give returns either in cash or kind and additional contributions made by the company in such amount shall both be treated as a deposit.

[Sub-clause xv-xviii inserted vide the Companies (Acceptance of deposits) Amendment Rule, 2016, notification no. G.S.R. 639(E) dated 29th June, 2016]

Clause (xv): Any amount received by way of subscription in respect of a chit under the Chit Fund Act, 1982 (40 of 1982);

Clause (xvi): Any amount received by the company under any collective investment scheme in compliance with regulations framed by the Securities and Exchange Board of India;

Clause (xvii): An amount of twenty five lakh rupees or more received by a start-up company, by way of a convertible note (convertible into equity shares or repayable within a period not exceeding five years from the date of issue) in a single tranche, from a person.

Explanation - For the purposes of this sub-clause,

- I. "start-up company" means a private company incorporated under the Companies Act, 2013 or Companies Act, 1956 and recognised as such in accordance with notification number G.S.R. 180(E) dated 17.02.2016 issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry;

- II. “convertible note” means an instrument evidencing receipt of money initially as a debt, which is repayable at the option of the holder, or which is convertible into such number of equity shares of the start-up company upon occurrence of specified events and as per the other terms and conditions agreed to and indicated in the instrument.

Clause (xviii): Any amount received by a company from Alternate Investment Funds, Domestic Venture Capital Funds and Mutual Funds registered with the Securities and Exchange Board of India in accordance with regulations made by it”.

Rule 2(1)(c) contains an explanation which clarifies the wide scope of the section. This explanation is applicable to the entire clause (c). It provides that following types of amount will be treated as ‘deposit’

- a. Amount received by the company from a person with promise or offer to give returns on completion of the period specified in the promise or offer, or earlier. Such amount maybe received either in the form of instalments or otherwise. The returns may be given in cash or in kind. The manner of accounting is immaterial.
- b. Further, any additional contributions made by the company as part of such promise or offer over and above the amount so deposited shall be treated as a deposit.

This explanation may result into inclusion of various deposit schemes run by the companies into the definition of ‘deposits’ if they satisfy the above conditions.

3. Deemed Deposits

Rule 2(1)(c) of the Companies (Acceptance of Deposit) Rules, 2014 provides for certain situations in which the receipt of money shall become deposit. Few of such situations are as discussed herein below:

- a) Any amount received towards the subscription of any security for which allotment not made within 60 days of the receipt of money, if not refunded within fifteen days from expiry of said 60 days, shall become deposit.
- b) Any amount received in the course of business of the company, as a trade advance, which remain unadjusted after expiry of 365 days or which becomes due for refund for the reason that the company does not have necessary permission or approval to deal with in the products, will become deposit after the expiry of 15 days from the day in which it became due for refund. shall except in cases where the said amount is subject matter of legal proceeding before any court of law.
- c) Any amount received as an advance for consideration of an immovable property which remain unadjusted in accordance with the terms of agreement or arrangement or which becomes due for refund for the reason that the company does not have necessary permission or approval to deal with in the products will become deposit after the expiry of 15 days from the day in which it became due for refund.

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d) Any amount received as advance for supply of capital goods under long term projects which becomes due for refund for the reason that the company does not have necessary permission or approval to deal with in the products will become deposit after the expiry of 15 days from the day in which it became due for refund.

e) Any unsecured loans received from the promoters or their relatives or both as per the stipulation of any lending financial institution or a bank which continues beyond the subsistence of such loan from lending financial institution or a bank, shall become deposit.

f) Any amount received by the company towards debentures/bonds secured by way of the first charge on assets specified in schedule – I, shall become deposit if it becomes unsecured or charge is reduced below paripassu first charge or market value of the security is reduced below the value of debentures/bonds.

g) Any amount received by the company towards debentures compulsorily convertible within 10 years of the allotment, if conversion does not take place within the said period of 10 years.

In this regard Department of company affairs Circular No. 4/12/81-CL-X, dated 30-3-1984 also affirm the above preposition.

In all the above situations the amount received becomes a deposit on expiry of above mentioned period, however date of receipt of such amount shall be considered as the date of receipt of deposit.
