December 16, 2013

Shri Sachin Pilot
Minister of State for Corporate Affairs
(Independent Charges)
Room No. 437 "C" wing
4th Floor, Shastri Bhawan
Dr. R. P. Road,
New Delhi

Sir,

CFI Representation: Request to Exempt Applicability of Section 185 of the New Cos. Act on `Loans by the Holding Co. for benefit of SPVs available under 1956 Companies Act'

Construction Federation of India (CFI) is the representative body of leading engineering firms of the country engaged in the construction of critically important infrastructure development projects such as dams, power stations, highways, ports and similar works. They have been integral part of the nation building process over several decades and are today playing a critical role towards achieving the highly ambitious infrastructure creation targets.

The members of the CFI would like to highlight that in the last decade, most of the work in infrastructure development was carried out on a Public Private Partnership (PPP) platform, especially in roads & highway development. Under this mode, the clients which are usually Government Entities (eg. NHAI, MSRDC, PWD, State Governments or Municipalities etc) award project specific contracts to bidders based on certain eligibility requirements, terms and conditions. One of such conditions is to float a Special Purpose Vehicle ('SPV') to domicile and execute such project. Thus in last few years, most of the infrastructure companies had floated many such SPVs. Usually, the Company to which bid is awarded ("the Promoter" or "the Holding Company") floats such SPVs and exercises control & direction over it. Such SPVs can be either subsidiaries or joint ventures of the Promoter/s.

Infrastructure development is highly capital intensive business with a long gestation period to recover the cost of the project. To fund the Project cost, such SPV borrows substantially from Financial Institutions/ Banks. The project funding is available for the period of 15 to 17 years and repayment of project loans are ballooning in nature. There are three aspects of such infrastructure funding:

- Under the Project funding arrangement, larger part of the Project Cost is funded by the Banks/ FI with a reciprocal obligation on the Promoter/s to fund the remaining part of the Project Cost, by way of equity. Such equity infusion can be by way of equity share capital and sub-debt or quasi-debt which is unsecured interest free loan repayable only after complete repayment of Project loans from Lenders i.e. Banks / FI.

….2/-

- The Lenders also seek guarantees for termination payments and in some cases shortfall guarantees, from the Promoter/s.
- The Lenders have a charge on the Project documents and toll rights and the Promoter/s also pledge their holding in the SPVs with the Lenders.

Section 295 of the Companies Act, 1956 :
The erstwhile section 295 of the Companies Act, 1956 prevented Companies from giving loans; guarantees; securities to Directors of lending company and also to certain entities in which such Directors are interested. However such prevention was not applicable to giving of loans by a Bidding Holding Companyto its subsidiaries (ie. SPV) including providing guarantee or security for the subsidiaries. Thus, sec 295 enabled successful bidders to extend the much needed financial support to its own project housed in its subsidiary SPV Company

Section 185 of the Companies Act, 2013 :
Section 185 the Companies Act, 2013 which was notified w.e.f. September 12, 2013, does not provide for such exemption. Additionally, it requires that:

- such loans can be given to the SPVs only if they are in the ordinary course of business of the Promoter/s and it shall be given at a Bank Rate (of RBI);
- such guarantee or securities can only be given on behalf of the SPVs to the Lenders of the SPVs, if they are in the ordinary course of business of the Promoter/s.

Infrastructure Projects, in addition to being highly capital intensive, are also long gestation in nature and returns are largely skewed towards later years of the Project. The SPVs, being newly formed entities, are not in a position to bear the cost of loans given by the Promoter/s at a Bank Rate, over and above the service of project loans given by the Lenders. Also, the Lenders do not allow charging of interest on such loans extended by the Promoter/s to the SPVs.

Further, it is pertinent to note that Companies Act. 2013, has been enacted for furtherance of legitimate needs of evolving business models of Corporate India. The successful Bidder does not float the subsidiary SPV Company for the Project, by choice. It is compelled by bid conditions to float a SPV subsidiary for execution of the Infrastructure Project. Had it not been for such compulsion, the Bidder / Holding Company would have treated the Project as its division and the funds it would infuse by way of loans or guarantees/securities provided for the Project would not have faced the rigour of sec 185 of Companies Act. 2013.

This certainly appears to be an inadvertent consequence of section 185 not enabling the successful bidder to provide the much required financial support for its own Project that is compulsorily housed in its subsidiary**. This difficulty can be overcome by providing concession to the infrastructure sector from the compliance of Section 185 of the Companies Act, 2013 by reinstating in section 185 the exemption provided under the erstwhile Section 295 of the Companies Act, 1956; ie. Loans given by the Holding Company to subsidiaries or securities/guarantees provided for the benefit of the subsidiaries should be exempted from applicability of Section 185.**

…...3/-

Also, such exemption should be granted from the date of notification of Section 185 (ie September 12, 2013) so as to avoid any ambiguity in its application for the interim period.

We sincerely request that due consideration will be given by the Ministry of Corporate Affairs to this serious issue and an appropriate amendment is made as suggested above.

With kind regards,

Yours sincerely,

(Siddharth Singh)
Secretary General

December 16, 2013

Shri Naved Masood
Secretary
Ministry of Corporate Affairs
A Wing, Shastri Bhawan
Dr. R P Road
New Delhi-110 001

Sir,

CFI Representation: Request to Exempt Applicability of Section 185 of the New Cos. Act on `Loans by the Holding Co. for benefit of SPVs available under 1956 Companies Act'

Construction Federation of India (CFI) is the representative body of leading engineering firms of the country engaged in the construction of critically important infrastructure development projects such as dams, power stations, highways, ports and similar works. They have been integral part of the nation building process over several decades and are today playing a critical role towards achieving the highly ambitious infrastructure creation targets.

The members of the CFI would like to highlight that in the last decade, most of the work in infrastructure development was carried out on a Public Private Partnership (PPP) platform, especially in roads & highway development. Under this mode, the clients which are usually Government Entities (eg. NHAI, MSRDC, PWD, State Governments or Municipalities etc) award project specific contracts to bidders based on certain eligibility requirements, terms and conditions. One of such conditions is to float a Special Purpose Vehicle ('SPV') to domicile and execute such project. Thus in last few years, most of the infrastructure companies had floated many such SPVs. Usually, the Company to which bid is awarded ("the Promoter" or "the Holding Company") floats such SPVs and exercises control & direction over it. Such SPVs can be either subsidiaries or joint ventures of the Promoter/s.

Infrastructure development is highly capital intensive business with a long gestation period to recover the cost of the project. To fund the Project cost, such SPV borrows substantially from Financial Institutions/ Banks. The project funding is available for the period of 15 to 17 years and repayment of project loans are ballooning in nature. There are three aspects of such infrastructure funding:

- Under the Project funding arrangement, larger part of the Project Cost is funded by the Banks/ FI with a reciprocal obligation on the Promoter/s to fund the remaining part of the Project Cost, by way of equity. Such equity infusion can be by way of equity share capital and sub-debt or quasi-debt which is unsecured interest free loan repayable only after complete repayment of Project loans from Lenders i.e. Banks / FI.

….2/-

- The Lenders also seek guarantees for termination payments and in some cases shortfall guarantees, from the Promoter/s.
- The Lenders have a charge on the Project documents and toll rights and the Promoter/s also pledge their holding in the SPVs with the Lenders.

Section 295 of the Companies Act, 1956 :
The erstwhile section 295 of the Companies Act, 1956 prevented Companies from giving loans; guarantees; securities to Directors of lending company and also to certain entities in which such Directors are interested. However such prevention was not applicable to giving of loans by a Bidding Holding Companyto its subsidiaries (ie. SPV) including providing guarantee or security for the subsidiaries. Thus, sec 295 enabled successful bidders to extend the much needed financial support to its own project housed in its subsidiary SPV Company

Section 185 of the Companies Act, 2013 :
Section 185 the Companies Act, 2013 which was notified w.e.f. September 12, 2013, does not provide for such exemption. Additionally, it requires that:

- such loans can be given to the SPVs only if they are in the ordinary course of business of the Promoter/s and it shall be given at a Bank Rate (of RBI);
- such guarantee or securities can only be given on behalf of the SPVs to the Lenders of the SPVs, if they are in the ordinary course of business of the Promoter/s.

Infrastructure Projects, in addition to being highly capital intensive, are also long gestation in nature and returns are largely skewed towards later years of the Project. The SPVs, being newly formed entities, are not in a position to bear the cost of loans given by the Promoter/s at a Bank Rate, over and above the service of project loans given by the Lenders. Also, the Lenders do not allow charging of interest on such loans extended by the Promoter/s to the SPVs.

Further, it is pertinent to note that Companies Act. 2013, has been enacted for furtherance of legitimate needs of evolving business models of Corporate India. The successful Bidder does not float the subsidiary SPV Company for the Project, by choice. It is compelled by bid conditions to float a SPV subsidiary for execution of the Infrastructure Project. Had it not been for such compulsion, the Bidder / Holding Company would have treated the Project as its division and the funds it would infuse by way of loans or guarantees/securities provided for the Project would not have faced the rigour of sec 185 of Companies Act. 2013.

This certainly appears to be an inadvertent consequence of section 185 not enabling the successful bidder to provide the much required financial support for its own Project that is compulsorily housed in its subsidiary**. This difficulty can be overcome by providing concession to the infrastructure sector from the compliance of Section 185 of the Companies Act, 2013 by reinstating in section 185 the exemption provided under the erstwhile Section 295 of the Companies Act, 1956; ie. Loans given by the Holding Company to subsidiaries or securities/guarantees provided for the benefit of the subsidiaries should be exempted from applicability of Section 185.**

…...3/-

Also, such exemption should be granted from the date of notification of Section 185 (ie September 12, 2013) so as to avoid any ambiguity in its application for the interim period.

We sincerely request that due consideration will be given by the Ministry of Corporate Affairs to this serious issue and an appropriate amendment is made as suggested above.

With kind regards,

Yours sincerely,

(Siddharth Singh)
Secretary General