

APPENDIX - III

4-4 WHAT CONSTITUTE A PUBLIC COMPANY :-

At present a public limited company is defined simply as one which is not a private limited company. In order to constitute a private company, it is only necessary to provide certain restrictions and prohibitions in the articles of association, namely, restriction on the total number of members, restriction on transferability of shares and prohibition of invitation to the public for subscribing to share and debentures. The committee felt that while basic criteria for classification of companies into public and private limited need not to be disturbed, it is certainly difficult to ignore the larger consideration of what really lends public character to a company and go simply by the declaratory statement of a few simple set of restrictions and prohibitions. It was felt that there are a few fundamental considerations of public interest which cannot overlooked in regulating the working of public and private companies. The Committee, for example, considered, among others, the question as to how far it is justifiable to allow private companies to invite or accept deposits from the public when, on probably on similar considerations these companies are already prohibited from inviting the

public to subscribe to debentures, public deposits being hardly any different from the unsecured debentures; and also as to whether the size and consequent extent of operation of a company, necessarily affecting a segment of the economy and the consuming public, should not automatically make a private company inillegible to continue as such and rather make it emenable to the discipline of a public limited company. In this context, the committee was also considered the concept of a deemed public company appearing in the present section 43A of the Act and was of the view that the three essential ingredients of a deemed public company, namely, a certain size of turn over, a certain proportion of investment by a public company in the subscribed capital of a private company, can as well form part of the larger consideration in making certain private limited companies amenable, so long as these ingredients are present, to the overall discipline of public limited companies, thus doing away with the need for the deeming provisions of Section 43-A in the Act.

4.5 Several suggestions were considered by the Committee on the question as to which companies should (or should not) be classified as public or private companies. Views were expressed that authorised or paid capital, as indicator of size, and value of turn over or sales, as indicator of the

extent of operations could also form the basis for such classification. We feel that authorised or paid up capital may not constitute a true test of the size of the company and as such any monetary ceiling in terms of authorised or paid up capital for the purpose of classification may not be desirable. However, we subscribed to the view that 'private companies which are less capital intensive but have considerable consumer and employee interest because of its high turn over' should be subject to the discipline of specified provisions of the Act which are at present required to be complied with by public companies. Similarly, private companies in which there is significant financial interest of public companies or which themselves have a substantial stake in public companies should be subjected to certain specified regulatory provisions which are applicable to public companies. Further, we feel that private companies should confine their activities to a limited sphere and should essentially be formed for running small business as for instance, ancillary industry. Such private companies should, therefore, be prohibited from placing any reliance on finances from the public in any form or on long-term borrowings. We have reviewed the concept of a private company in the light of these considerations and we recommend as follows :-

- (1) 'Private Company' will remain as defined in Section 3(1)(iii) of the Companies Act.
- (2) Private companies will be prohibited from
 - (a) accepting deposits or borrowing money from members of the public, except from their own directors, shareholders and their relatives; and

(b) borrowing long-term loans or more than three years from public financial institutions in excess of ten lakhs of rupees.

It is clarified that this will not prevent private companies from raising short-term loans from public financial institutions including licensed money-lenders.

(3) Whenever any of the conditions mentioned in clause (4) are filled in respect of a private company, then notwithstanding anything contained in the Act, all the provisions of the Act applicable to public companies-except the (present) sections 70,81,171-186 235-257, 259, 264-266,270,300 and 400 - shall apply to such a private company.

(4) The conditions mentioned in clause (3) which would attract the provisions applicable to public limited companies would be -

(a) whenever the turn over of a private company exceeds in any financial year one crore rupees the provisions mentioned in clause (3) above would apply on and from the expiry of the period of three months from the last date of the financial year during which the private company had the said annual turn-over; or

- (b) whenever in any financial year twenty five percent or more of the paid-up share capital of the private company is held by one or more public limited companies; or
- (c) whenever in any financial year twenty-five percent or more of the paid-up share capital of a public company is held by the private company; the provisions mentioned in clause (3) above would apply only from the date in which either of the aforesaid events (in (b) or (c) above) has taken place.
- (5) The provisions applicable to public limited companies would continue to apply to such private companies once the conditions ~~at~~ (a), (b) or (c) mentioned in clause (4) have been attracted.
- (6) It shall be the duty of every private company to intimate the Registrar of companies, along with ~~its~~ balance-sheet and profit and loss account whether the provis one in Clause (4) above become applicable during the year in question and whether the company has complied with the provisions applicable to such private companies as a consequences thereof.
- (7) Default in compliance will be visited with penalties.

4-0 Consistent with this, we would recommend that the
provision to sub-section (1) of section 31 be deleted
and it be made clear that it will not be permissible
for a public company to convert it self into a
private company.