STUDY MATERIAL

EXECUTIVE PROGRAMME

SETTING UP OF BUSINESS ENTITIES AND CLOSURE

MODULE 1
PAPER 3

THE INSTITUTE OF
Company Secretaries of India
भारतीय कम्पनी सचिव संस्थान
IN PURSUIT OF PROFESSIONAL EXCELLENCE
Statutory body under an Act of Parliament
(Under the jurisdiction of Ministry of Corporate Affairs)

ICSI House, 22, Institutional Area, Lodi Road, New Delhi 110 003
tel 011-4534 1000 **fax** +91-11-2462 6727
email info@icsi.edu **website** www.icsi.edu

© THE INSTITUTE OF COMPANY SECRETARIES OF INDIA

TIMING OF HEADQUARTERS

Monday to Friday
Office Timings – 9.00 A.M. to 5.30 P.M.

Public Dealing Timings
Without financial transactions – 9.30 A.M. to 5.00 P.M.
With financial transactions – 9.30 A.M. to 4.00 P.M.

Phones
011-45341000

Fax
011-24626727

Website
www.icsi.edu

E-mail
info@icsi.edu

Laser Typesetting by AArushi Graphics, Prashant Vihar, New Delhi, and
Printed at H T Media/February 2020

EXECUTIVE PROGRAMME

SETTING UP OF BUSINESS ENTITIES AND CLOSURE

There are various business structures such as Companies, LLP, Trusts, and Societies etc. which one can choose to start a business. Choosing a form of business entity is crucial to a successful organization. The choice of a business entity will depend on an object, benefits, size of the business of such entity and many other factors. The main types of business entities in India are Sole Proprietorship, Partnership, Hindu Undivided Family (HUF) Business, Limited Liability Partnership (LLP), Co-operative Societies, Branch Office and Company which may be any kind of company including one person company (OPC), private limited company, public limited company, company limited by guarantee, subsidiary company, statutory company, insurance company or unlimited company, company formed under section 8 of the Companies Act, 2013 or under section 25 of the earlier Companies Act, 1956.

Various laws are applicable for proceeding to incorporate a business entity. Initial Registrations like Shops & Establishment, FSSAI, ISO, MSME, copyright, patent etc. and licences from the regulatory authorities like RBI, IRDA, GST, Income Tax, IPR etc. need to be obtained.

In this scenario of various options for the kind of business entity and the plethora of laws applicable to the businesses, it becomes quite crucial to know and understand the laws associated with a particular form of the business in order to initiate successful setting up of the business and prolific closure, whenpreferred to serve the best end of all the stakeholders.

Therefore, with the objective to provide the working knowledge and understanding of the various procedural requirements involved in the setting up of business entities and overview of procedures involved in closure of entities to the students, this study material is published to cover the entire subject into three parts. Part A discusses the Setting up of Business and its various aspects, Part B is devoted to the exhaustive list and detailed procedures related to Registration, Licenses and Compliances applicable for setting up the businesses successfully and Part C deliberates upon Insolvency, Winding up and Closure of Business.

With this, the study material to this subject becomes a One Spot Source of knowledge and understanding for efficaciously setting up business in India while subsuming compliance with all requirements of Registration and Licences, along with overview of the procedures related to Insolvency, Winding Up and Closure.

After going through this study material and the practical training, the student should be able to - Assist in formation of various kinds of Companies (Certification part would be at Professional Programme); Setting of trust, societies, LLP; Setting up of other various entities at small level: Sole Proprietorship, Partnership, HUF etc.; Assist in post formation activities like - PAN; TAN;Open bank account; Assist in post formation registration including MSME registration; GST registration; IPR registration; Registration under shop & establishment law; Compliance under various pollution & environmental laws; Registration under various labour laws; Assist in regular compliances under various labour laws; Assist in closing up of business and alike.

With this objective in mind, a number of procedures have also been included at relevant places.

Besides, as per the Company Secretaries Regulations, 1982, students are expected to conversant with the amendments to the law made up to six months preceding the date of examination.

The legislative changes made upto December, 2019 have been incorporated in the study material. However, on hand, where the subject of Setting up of Business Entities and Closure is inherently fundamental to start any kind of business in India, on the similar end it is subject to the refinement of Legislation, Rules and Regulations.

Henceforth, it becomes necessary for every student to constantly update with legislative changes made as well as judicial pronouncements rendered from time to time by referring to the Institute's monthly journal 'Chartered Secretary', E-Bulletin 'Student Company Secretary' as well as other legal and professional journals along with the aid of reference books related to the subject.

In the event of any doubt, students may contact the Directorate of Academics at **academics@icsi.edu.**

Although due care has been taken in publishing this study material, the possibility of errors, omissions and /or discrepancies cannot be rules out. This publication is released with an understanding that the Institute shall not be responsible for any errors, omissions and /or discrepancies or any action taken in that behalf.

Should there be any discrepancies, errors or omissions noted in the study material, the Institute shall be obliged, if the same is brought to its notice for issue of corrigendum in the e-Bulletin 'Student Company Secretary'.

THE LIST OF LAWS COVERED UNDER THE STUDY

- Air (Prevention and Control of Pollution) Act, 1981
- Banking Regulation Act, 1949
- Beedi Workers Welfare Fund Act, 1976
- Biodiversity Act, 2002
- Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996
- Child and Adolescent Labour (Prohibition and Regulation) Act, 1986
- Chit Funds Act, 1982
- Companies Act, 2013
- Contract Labour (Regulation and Abolition) Act, 1970
- Copyright Act, 1957
- Cine Workers Welfare Fund Act, 1981
- Design Act, 2000
- Drugs and Cosmetics Act, 1940
- Employees' Provident Funds and Miscellaneous Provisions Act, 1952
- Employee's State Insurance Act, 1948
- Environment (Protection) Act, 1986
- Factories Act, 1948
- FEMA, 1999
- Foreign Contribution Regulation Act, 2010
- Geographical Indication of Goods (Regulations and Protection) Act, 1999
- Goods and Services Act, 2017
- Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008
- Income Tax Act, 1961
- Industrial (Development and Regulations) Act 1951
- Industrial Disputes Act, 1947
- Industrial Employment (Standing Orders) Act, 1946
- Information Technology Act, 2000
- Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertakings Act, 1993
- Iron Ore Mines, Manganese Ore Mines & Chrome Ore Mines Labour Welfare Fund Act, 1976
- Insolvency & Bankruptcy Code, 2016
- Insurance Act, 1938
- Insurance Regulatory and Development Authority Act, 1999
- Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979

- Limited Liability Partnership Act, 2008
- Limestone and Dolomite Mines Labour Welfare Fund Act, 1972
- Maternity Benefit (Amendment) Act, 2017
- Mica Mines Labour Welfare Fund Act, 1946
- Micro, Small and Medium Enterprises Development Act, 2006
- Mines Act, 1952
- Minimum Wages Act, 1948
- Motor Transport Workers Act, 1961
- National Green Tribunal Act, 2010
- Partnership Act, 1932
- Patent Act, 1970
- Payment of Bonus Act, 1965
- Payment of Gratuity Act, 1972
- Payment of Wages Act, 1936
- Plantation Labour Act, 1951
- Press Council Act, 1978
- Press & Registration of Books Act 1867
- Prevention of Sexual Harassment of Women at Workplace (Prevention;Prohibition and Redressal) Act, 2013
- Public Liability Insurance Act, 1991
- RBI Act, 1934
- Rights of Persons with Disabilities Act, 2016
- Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act, 2002
- Shop and Establishment Act, 1948
- Societies Registration Act, 1860
- Telecom Regulatory Authority of India Act, 1997
- Trade Marks Act, 1999
- Trade Unions Act, 1926
- The Industrial Disputes Act, 1947
- Water (Prevention and Control of Pollution) Act, 1974
- Water (Prevention and Control of Pollution) Cess Act, 1977

EXECUTIVE PROGRAMME

Module 1

Paper 3
Setting up of Business Entities and Closure
(Max Marks 100)

SYLLABUS

OBJECTIVES

To provide working knowledge and understanding of setting up of Business entities and their closure.

Detailed Contents:

Part A : Setting up of Business (40 Marks)

1. Choice of Business Organization

- Key features of various structures and issues in choosing between business structures including identification of location; tax implications etc.

2. Company

- Private Company;
- Public Company;
- One Person Company;
- Nidhi Company;
- Producer Company;
- Foreign Company- Liaison Offices; Branch Office & Project Office;
- Formation and Registration

3. Part I: Charter documents of Companies

- Memorandum of Association and Articles of Association;
- Doctrine of ultra-vires;
- Doctrine of indoor management; Doctrine of constructive notice;
- Incorporation Contracts;

Part II: Alteration of Charter Documents

- Alteration in MOA & AOA- Change of name;registered office address; objects clause; alteration in share capital and alteration in articles of association.

4. Legal status of Registered Companies

- Small Company;
- Holding Company;
- Subsidiary Company & Associate Company;
- Inactive Company;
- Dormant Company;
- Government Company.

5. Limited Liability Partnership

- Concept of LLP;
- Formation and Registration;
- LLP Agreement;
- Alteration in LLP Agreement;
- Annual and Event Based Compliances.

6. Other forms of business organizations

- Partnership;
- Hindu Undivided Family;
- Sole Proprietorship;
- Multi State Co-operative Society;
- Formation; Partnership Agreement and its registration.

7. Institutions Not For Profit & NGOs

- Section 8 Company; Trust and Society- Formation and Registration.

8. Financial Services Organization

- NBFCs;
- Housing Finance Company;
- Asset Reconstruction Company;
- Micro Finance Institutions (MFIs);
- Nidhi Companies;
- Payment Banks;
- Registration.

9. Start-ups

- Start-up India Policy;
- Registration Process;
- Benefits under the Companies Act and other Government Policies;

- Different types of capital- Seed Capital; Venture Capital; Private Equity; Angel Investor; Mudra Bank.

10. Joint Ventures; Special Purpose Vehicles

- Purpose and Process.

11. Setting up of Business outside India

- Issues in choosing location; Structure and the processes involved.

12. Conversion of existing business entity

- Conversion of private company into public company and vice versa;
- Conversion of Section 8 company into other kind of Company;
- Conversion of Company into LLP and vice versa;
- Conversion of OPC to other type of company and vice versa;
- Company uthorized to be registered under the Act (Part XXI Companies); and other types of conversion.

Part B : Registration; Licenses & Compliances (35 Marks)

13. Various Initial Registrations and Licenses

- Mandatory Registration - PAN; TAN; GST Registration; Shops & Establishments; SSI/MSME;
- Additional Registration/License - ESI/PF; FCRA; Pollution; Other registration as per requirement of sector; IE Code; Drug License; FSSAI; Trademark; Copyright; Patent; Design; RBI; Banking; IRDA; Telecom; I & B; MSME Registration; Udyog Aadhar Memorandum; Industrial License, Industrial Entrepreneurs Memorandum (IEM);
- State Level Approval from the respective State Industrial Department.

14. Maintenance of Registers and Records

- Register and Records required to be maintained by an enterprise.

15. Identifying laws applicable to various Industries and their initial compliances

- Compliance of industry specific laws applicable to an entity at the time of setting up of the enterprise.

16. Intellectual Property laws (Provisions applicable for setting up of business)

- Copyright Act, 1957;
- Patents Act, 1970;
- Trade Mark Act, 1999;
- Geographical Indication of Goods (Registration and Protection) Act, 1999;
- Designs Act, 2000.

17. Compliances under Labour Laws (Provisions applicable for setting up of business)

- Factories Act, 1948;
- Minimum Wages Act, 1948;

- Payment of Wages Act,1936;
- Equal Remuneration Act, 1976;
- Employees' State Insurance Act,1948;
- Employees' Provident Funds and Miscellaneous Provisions Act, 1952;
- Payment of Bonus Act, 1965;
- Payment of Gratuity Act, 1972;
- Employees Compensation Act, 1923;
- Contract Labour (Regulation and Abolition) Act, 1970;
- Industrial Disputes Act, 1947;
- Trade Unions Act, 1926;
- Maternity Relief Act, 196;
- Child and Adolescent Labour (Prohibition and Regulation) Act, 1986;
- [Persons with Disabilities (Equal Opportunities; Protection of Rights and Full Participation) Act,1995]* replaced with Right of Persons with Disabilities Act, 2016
- Prevention of Sexual Harassment of Women at Workplace (Prevention; Prohibition and Redressal) Act, 2013.

18. Compliances relating to Environmental laws (Provisions applicable for setting up of business)

- Water (Prevention and Control of Pollution) Act, 1974;
- Air (Prevention and Control of Pollution) Act, 1981;
- Environment Protection Act, 1986;
- Public Liability Insurance Act, 1991;
- National Green Tribunal Act, 2010.

Part C : Insolvency; Winding up & Closure of Business (25 Marks)

19. Dormant Company

- Obtaining dormant status and dormant to active status.

20. Strike off and restoration of name of the company and LLP

21. Insolvency Resolution process, Liquidation and Winding-up

LESSON WISE SUMMARY

SETTING UP OF BUSINESS ENTITIES AND CLOSURE

Lesson 1 - Choice of Business Organization

The choice of a business organization is driven by a combination of several factors such as nature of activity, capital requirement, degree of independence required, etc. There is no readymade formula for selecting the particular type of business organization. Tax consideration is also an extremely important factor.

Company Secretaries while playing advisory role would help the clients in deciding about the type of organization one may opt for when considering to start a business.

This chapter will cover the factors which are taken into account in choosing a form of business organization. Brief outline of the various forms of business organization is also covered.

Lesson 2: Company: Types of Companies

Companies may be classified on the basis of their incorporation, number of members, size, basis of control and motive. On the basis of incorporation of the companies, it may be classified into Charter Companies, Statutory Companies and Registered Companies. On the basis of liability, it may be Companies limited by shares/guarantee and unlimited liability companies. Further, on the basis of number of members, they may be classified into One Person Company, private company and public company. On the basis of size, they may be divided into small companies and other companies. On the basis of control, they may be classified into holding company, subsidiary company and associate company.

Besides, companies may be nonprofit companies licensed under Section 8, Government companies, foreign companies, holding/subsidiary companies, investment companies, producer companies etc.

This chapter covers the concepts of various types of companies, their legal basis, special provisions and privileges for some classes of companies, distinction between different types of companies etc.

Lesson 3: Part I: Charter Documents of Companies

The memorandum and articles of association of a company are the most important documents for the formation of a company and for its functioning thereafter.

The memorandum of association contains the name, situation of registered office, objects, capital and liability and subscription clauses. The articles are its bye-laws or rules and regulations that govern the management and internal affairs and the conduct of its business. Both the documents are required to be registered with the Registrar of Companies at the stage of incorporation of the company.

Before dealing with a company, it is advisable to read the memorandum and articles of the company to understand aspects, such as powers of Board, scope of company's activities etc. and its relationship with the outside world.

Since Memorandum sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world. Company Secretary in employment should work within the four walls of the MOA and also subject to the provisions of AOA.

This chapter includes the concept of Memorandum of Association and Articles of Association, their purpose, contents and registration. It also covers doctrine of indoor management and Alter Ego.

Lesson 3: Part II: Alteration of Charter Documents

Alterations that can be carried out in the Memorandum and Articles of Association and effect of such alterations. It also explains the legal effect of these documents.

Company Secretary who is holding key position in the company must be aware of the procedural aspects of alteration of various clauses contained in the Memorandum of Association and of various regulations of Articles of Association of the Company which may be permissible under the provisions contained in Section 13 and Section 14 of the Companies Act, 2013 to be read with relevant Rules framed thereunder.

Lesson 4: Legal Status of Registered Companies

This Chapter highlights explains the characteristics of private limited company, public limited company and a One Person Company (OPC).

It also provides an overview of certain other types of companies, such as Small Company, Holding Company, Subsidiary Company and Associate Company, Dormant/Inactive Company. It further explains what is a Government Company and the exemptions available to them.

Company Secretary should be aware of the distinctive features of different entities.

Lesson 5: Limited Liability Partnership

Limited Liability Partnership is governed by the Limited Liability Partnership Act, 2008 and the Rules framed thereunder.

In this Chapter, we shall learn about the Limited Liability Partnership (LLP), its formation and registration; It also covers the features of an LLP agreement and the manner of alterations therein.

LLP is required to make various compliances and file various forms with the Registrar. We shall also study the various annual and event based compliances applicable to the LLP.

Being compliance professional, Company Secretary should be aware of all the compliance requirements of various business entities including Limited Liability Partnership.

Lesson 6: Forms of Business Organisations

This chapter include the various forms of business organisation, such as sole proprietorship, partnership, Hindu Undivided Family and Multi State Co-operative Societies.

The lesson also highlights their respective merits and demerits and the manner in which they can be registered in India.

Lesson 7: Institutions Not For Profit and NGOs

In this Chapter, formation and registration of NGOs, namely, Section 8 Company, Trust and Society is included.

Section 8 Company, its features, exemptions available to them and registration process.

Trust, difference between public trust and private trust, exemptions available to them, more specifically, under the Income Tax Act and formation process.

Society, its advantages and disadvantages, consequences of non-registration, benefits of forming a Society and formation process.

Company Secretary should have clarity with regard to institutions which are not for profit, their features and formation process.

Lesson 8: Financial Services Organisations

Different forms of Financial Services Organisations operating in India such as Non Banking Finance Companies (NBFC'S) and the various categories of such companies, Housing Finance Companies (HFC's), Asset Reconstruction Companies (ARC's), Micro Finance Institutions (MFI's), Nidhi Companies and Payment Banks.

This Chapter also explains the process of registering such entities.

Lesson 9: Start-ups and their Registration

Startups have emerged as a fast-growing business model. This chapter will deal with the evolution of Startups in India, the Startup India Policy, developments initiated in various States to encourage Startups, the exemptions available to them and the registration process.

The Chapter also deals with the different kinds of Debt financing and Equity Financing which can be raised by Startups and the concept of MUDRA Banks.

It also includes the benefits/ exemptions given to start ups, different financing options available and the procedures involved for incorporation and registration as startups.

Lesson 10: Joint Ventures and Special Purpose Vehicles

A Joint Venture (JV) is generally short lived for conducting specific business activities. It is a business agreement in which the parties agree to develop, for a finite time, a new entity and new assets by contributing equity. A Special Purpose Vehicle (SPV) is formed for a specific purpose.

In this chapter, Joint Venture and Special Purpose Vehicle, their advantages and disadvantages, their characteristics and the process for registering these entities are covered.

Lesson 11: Setting up of Business outside India

In this lesson, you will learn about the various forms of business organization, such as sole proprietorship, partnership, Hindu Undivided Family and Multi State Co-operative Societies.

The lesson also highlights their respective merits and demerits and the manner in which they can be registered in India.

Company Secretaries, while playing advisory role, can guide and help in setting up of business outside India.

Lesson 12: Conversion of Existing Business Entity

Companies Act, 2013 provides for conversion of public companies to private companies vice versa, conversion of One Person Company into public/private company, conversion of Section 8 companies (companies for charitable purpose) into any other class of companies. Companies (Incorporation) Rules, 2014 provides details of the procedural aspects.

In addition you will be able to understand the overall legal and procedural aspects relating to various conversions.

Conversion of existing business entity to other form is a strategic decision which needs to be taken to get the benefits of one form of business entity over other form for a particular business at a particular point of time. Company Secretaries can help in taking such strategic decisions and implementation of the same.

Lesson 13: Various Initial Registration and Licenses

A business entity is required to secure various registration and licenses for setting up their businesses in India. In India, there are plethora of laws which requires various registrations and licenses to be obtained for setting up the business unit in India along with ensuring state level compliances. In order to facilitate one spot

understanding, this chapter deals with the list of Mandatory as well as Additional Registration and Licenses along with their detailed process.

Lesson 14: Maintenance of Registers and Records: Register and Records required to be maintained by an enterprise

The Companies Act, 2013 (the Act) and the rules made there under ("the Rules") lays down that every Company incorporated under the Act has to maintain Statutory Registers ("the Registers"). With various provisions incorporated in Company Act, 2013, it is made clear that every company governed under Company Act, 2013 is required to maintain a statutory register at its registered office until the dissolution of the company. Henceforth, this chapter specifies the list of various registers and records required to be maintained by enterprise.

Lesson 15: Identifying laws applicable to various Industries and their initial compliances

Keeping in pace with the contemporary global market and emerging stand of Indian economy, government initiated various flagship programs to boost the entrepreneurship environment in the country. Few of the major flagships including Make in India" coupled with "Ease of Doing Business in India", "Skill India", "Digital India", etc., are starred to build the interest and ease among various domestic and overseas stake holders to set up and advance the entrepreneurship in India. Indeed, when the entrance and advancement to Indian business market would be of ultimate fortune, there are various laws which need to be abided for successfully setting up and taking forward an enterprise in India. In this perspective, this chapter aims at proving a quick understanding laws applicable to various industries, their setting up along with the thorough details of their initial compliances.

Lesson 16: Intellectual Property laws (Provisions applicable for Setting up of Business)

In today's world, the abundant supply of goods and services on the markets has made life very challenging for any business, big or small. In its on-going quest to remain ahead of competitors in this environment, every business strives to create new and improved products (goods and services) that will deliver greater value to users and customers than the products offered by competitors. To differentiate their products - a prerequisite for success in today's markets - businesses rely on innovations that reduce production costs and/or improve product quality. In a crowded marketplace, businesses have to make an on-going effort to communicate the specific value offered by their product through effective marketing that relies on well thought-out branding strategies. In the current knowledge-driven, private sector oriented economic development paradigm, the different types of intangible assets of a business are often more important and valuable than its tangible assets. A key subset of intangible assets is protected by what are labelled collectively as intellectual property rights (IPRs). These include trade secrets protection, copyright, design and trademark rights, and patents, as well as other types of rights. IPRs create tradable assets out of products of human intellect, and provide a large array of IPR tools on which businesses can rely to help drive their success through innovative business models. Under this background, this chapter aims to address various provisions of Intellectual Property Rights applicable for setting up business in India.

Lesson 17: Compliances under Labour Laws (Provisions applicable for Setting up of Business)

Labour laws are one important set of welfare legislation for the employees and labour in India. They ensure that industrial relations are maintained at balance and employees are protected at their social, economic and political welfare. This has made various labour laws being enacted in India to be complied by business entities in India. This chapter deals in briefing the provisions of various labour laws applicable for setting up of business in India.

Lesson 18: Compliances relating to Environmental laws (Provisions applicable for Setting Up of business)

With the recognition of Right to Heathy Environment as a human right under the Universal Declaration of Human Rights and its related covenants, measures are taken at full force to enforce these rights and guard the right to environment at parity. With the endowed protection to environment under the Constitution and Specific Statutes, all the personas be it natural or legal including a Company owes a duty to conduct themselves in such a manner that their act or omission should not pollute the environment. Therefore, a company is necessitated to abide by various laws in order to protect the environment. A brief list of the statutory protection to environment is discussed in this chapter.

Lesson 19: Dormant Company

Companies are generally classified on the basis of their incorporation, number of members, size, basis of control and motive. Additionally, companies can also be classified based on their status. Sometimes, the promoters of a company may feel the need to temporarily close down the company due to various reasons, but they do not want to dissolve it. In such cases, the company may become dormant as against an active company which is carrying on business. Thus, on the basis of its status, companies may be classified into active, dormant, under liquidation, under process of striking off, strike off, dissolved, amalgamated, etc. The 'status' of the company signifies the current state of the company - Whether it is active and operating OR dormant OR it has been struck off and closed.

As a company secretary, one must be aware of the procedure of obtaining status of dormant company, active company, the compliances involved for a dormant company etc.

Lesson 20: Strike Off and Restoration of Name of the Company and LLP

On incorporation, the name of the company and LLP is entered in the Register maintained by the Registrar. On striking off, the name of the company/LLP is temporarily removed from the Register. The name of the company can be restored in the Register on making an application.

Lesson 21: Insolvency Resolution Process, Liquidation and Winding Up: An Overview

The Insolvency & Bankruptcy Code, 2016 consolidate and amend the laws relating to insolvency of companies, partnership firms, limited liability partnership into a single legislation. It aims to provide time bound resolution and empowered the creditors to initiate the insolvency resolution process if default occurs. The Insolvency and Bankruptcy Board of India has notified the Insolvency and Bankruptcy Board of India, Regulations, 2017 on March 31, 2017. The New Regulations provides the process for initiating voluntary liquidation by a corporate person i.e. companies, limited liability partnerships and any other persons incorporated with limited liability for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues.

The provisions of this Code shall apply to –

(a) any company incorporated under the Companies Act, 2013 or under any previous company law;

(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf; and partnership firms and individuals, in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be. But the major focus of this chapter is to include the corporate insolvency process and matters incidental thereto.

LIST OF RECOMMENDED BOOKS

PAPER 3: SETTING UP OF BUSINESS ENTITIES AND CLOSURE

1.	Relevant Bare Acts.		
2.	A.K. Majumdar, Dr. G.K. Kapoor, Sanjay Dhamija	:	Company Law and Practice; Taxmann
3.	Aswani Kumar Bansal	:	Law of Trademarks in India
4.	B L Wadehra	:	Law Relating to Patents, Trademarks, Copyright, Designs and Geographical Indications.
5.	D.K. Jain	:	Company Law Ready Reckoner
6.	D.K. Jain	:	Law & Procedure of Limited Liability Partnership
7.	G.V.G Krishnamurthy	:	The Law of Trademarks, Copyright, Patents and Design.
8.	N.D. Kapoor	:	Handbook of Industrial Law; Sultan Chand & Sons
9.	P M Bakshi	:	Legal Aspects of Technology Transfer: A Conspectus
10.	P. Leelakrishnan	:	Environment Law in India
11.	P.L. Malik	:	Industrial Law; Eastern Book Company
12.	Satyawrat Ponkse	:	The Management of Intellectual Property
13.	S K Roy Chaudhary & H K Saharay		
14.	Taxmann's Guide to Insolvency and Bankruptcy Code, 2016	:	The Law of Trademarks, Copyright, Patents and Design.
15.	Vijaya Kumar Ivaturi, et al	:	The Manual for Indian Start ups

Journals:

1.	e-Bulletin (`Student Company Secretary')	:	The ICSI, New Delhi-110 003.
2.	Chartered Secretary (Monthly)	:	The ICSI, New Delhi-110 003.
3.	All India Reporter	:	All India Reporter Ltd., Congress Nagar, Nagpur.

Note:

1. Students are advised to read the above journals for updating the knowledge.
2. Students are advised to read/refer the latest editions of the recommended books.
3. Students are also advised to read legal glossary/legal terms given in Appendix.

ARRANGEMENT OF STUDY LESSON

Module-1 Paper-3

SETTING UP OF BUSINESS ENTITIES AND CLOSURE

S.No.	Lesson Tittle
	PART – A: SETTING UP OF BUSINESS (40 MARKS)
1.	Choice of Business Organisation
2.	Types of Companies and their Formation
3.	Part I : Charter Documents
	Part II : Alteration of Charter Documents
4.	Legal Status of Registered Company
5.	Formation of Limited Liability Partnerships
6.	Different Forms of Business Organisation and its Registration
7.	Formation and Registration of NGOs- Section 8 Company, Trust and Society
8.	Financial Services Organisation and its Registration Process
9.	Start-ups and its registration
10.	Joint Ventures Collaboration and Special Purpose Vehicles
11.	Setting up of Business outside India and issues relating thereto
12.	Procedure of conversion of business entities
	PART B: REGISTRATION; LICENSES & COMPLIANCES (35 MARKS)
13.	Various Initial Registrations and Licenses
14.	Maintenance of Registers and Records
15.	Identifying laws applicable to various Industries and their initial compliances
16.	Intellectual Property laws (Provisions applicable for setting up of business)
17.	Compliances under Labour Laws (Provisions applicable for setting up of business)
18.	Compliances relating to Environmental laws (Provisions applicable for setting up of business)
	PART C: INSOLVENCY; WINDING UP & CLOSURE OF BUSINESS (25 MARKS)
19.	Dormant Company: Obtaining dormant status and dormant to active status.
20.	Strike off and restoration of name of the company and LLP.
21.	Insolvency Resolution process; Liquidation and Winding-up: An overview.

CONTENTS

LESSON 1

CHOICE OF BUSINESS ORGANISATION

Types of Business Organisations 2

Sole Proprietorship 2

Partnership Firm 2

Hindu Undivided Family (HUF) 3

Limited Liability Partnership (LLP) 3

Co-operative Society 3

Section 8 Company 3

One Person Company 3

Private Company 3

Public Company 3

Choice of a Business Organisation 4

Factors Governing the Decisions for Suitable Form of Organisation 4

1. Nature of Business Activity 4

2. Scale of Operations 5

3. Capital Requirements 6

4. Managerial Ability 6

5. Degree of Control and Management 6

6. Degree of Risk and Liability 7

7. Stability of Business 7

8. Flexibility of Administration 7

9. Division of Profit 8

10. Costs, Procedure and Government Regulation 8

11. Tax Implication 8

12. Geographical Mobility 9

13. Transferability of Ownership 9

14. Managerial Needs 9

15. Secrecy 9

16. Independence 9

Conclusion 9

Company as a Choice of Business Organisation for Start-Ups 10
Features of Private Limited Company 10
Limited Liability Partnership 10
Features of Limited Liability Partnership 10
Partnership Firm 11
Features of General Partnership 11
Sole Proprietorship 11
Features of Sole Proprietorship 11
One Person Company 12
Features of One Person Company 12
LESSON ROUND-UP 12
SELF-TEST QUESTIONS 13

LESSON 2

TYPES OF COMPANIES

Introduction 16
Private Company 20
Characteristics of Private Limited Company 21
Incorporation of a Private Company 21
Process of Incorporation of a Private Company 22
STEP – I: Apply for Name Approval in RUN 22
STEP – II: Preparation of Documents for Incorporation of Company 23
STEP – III: Fill the Information in Form 23
STEP – IV: Preparation of MOA & AOA (Electronic or Physical) 25
STEP – V: Fill details of PAN & TAN 25
STEP – VI: Fill details of GST, IEC in AGILE 25
STEP – VII: Submission of INC-32, 33, 34, AGILE on MCA 25
STEP – VIII: Certificate of Incorporation 25
Recent Initiatives by MCA in line with is on doing business 25
Pre-caution to be taken by Professionals 26
Privileges and Exemptions of Private Company 26
Public Company 31
Characteristics of Public Company 31
Incorporation of a Public Company 32

Steps for Incorporation of Public Company 33
One Person Company (OPC) 33
Background of OPC 33
Status of OPC in other countries 33
Incorporation of OPC 34
Difference between a Sole Proprietorship and an OPC 34
Position of OPC in India under the Companies Act, 2013 34
Rule 3 of Companies (Incorporation) Rules, 2014 - One Person Company 34
Contract by One Person Company 35
Privileges of One Person Company 35
Benefits of One Person Company 37
Certain characteristics of an OPC are summarized below 38
Nidhi Companies 38
Origin of the Concept in India 39
Prevailing Regulatory Aspects of Nidhi 39
Declaration of Nidhis (Rule 3A of Nidhi Rules) 40
Compliance with rule 3A by certain Nidhis 40
Companies declared as Nidhis under previous company law to file Form NDH-4 40
Incorporation of Nidhi 41
Requirements for minimum number of members and net owned funds 41
Return of statutory compliances by Nidhi Companies 41
General restrictions or prohibitions 41
Share capital and allotment 42
Membership of Nidhi 42
Branches of Nidhi 43
Acceptance of Deposits 43
Un-encumbered term deposits by Nidhi 44
Loans by Nidhi 44
Rate of interest on any loan given by a Nidhi 44
Directors in a Nidhi Company 45
Dividend 45
Appointment of Auditor 46
Auditor’s certificate 46
Filing of half yearly return 46

Power of Registrar to enforce compliance 46
Certain provisions of RBI Act not applied to Notified NBFCs 46
Exceptions, modification and adaptations to Nidhi Companies 47
Producer Companies 50
Objects of Producer Companies 50
Foreign Companies 51
Branch Office 52
Master Direction - Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities 53
Annexure 55
LESSON ROUND UP 55
SELF-TEST QUESTIONS 57

LESSON 3 – PART I

CHARTER DOCUMENTS OF COMPANIES

Memorandum of Association 60
Case Law 60
Form of Memorandum of Association 60
Contents of Memorandum 60
Name Clause 62
Case Law 63
Situation Clause 64
Publication of Name and Address of the Company 65
Object Clause 65
Liability Clause 66
Capital Clause 67
Declaration for Subscription 67
Articles of Association 67
Nature of Articles 67
Articles Subordinate To Memorandum 68
Registration of Articles 69
Entrenchment Provisions 69
Statutory Requirements 70
Contents of Articles 70

Consistency of Articles of Association with Companies Act, 2013 71
Doctrine of Ultra Vires 72
Case Law 72
Loans, Borrowings, Guarantees and Ultra Vires Rule 73
Implied Powers 74
Powers which are not Implied 74
Shareholder's Right in Respect of Ultra Vires Acts 74
Effects of ultra vires Transactions 74
Doctrine of Indoor Management 75
Case Laws under Erstwhile Companies Act 75
Relation of company with members and outsiders 76
Forgery and incompetent acts 76
Directors not aware of their disqualification 76
Exceptions to the Doctrine of Indoor Management 76
Constructive Notice of Memorandum And Articles 78
Monies Payable by Members is a Debt [Sub-section (2) of Section 10] 79
Interpretation of Memorandum And Articles 79
Doctrine of Alter Ego 79
Distinction between Memorandum and Articles 79
Legal Effect of the Memorandum and Articles 80
Members Bound to the Company 80
CASE LAW 80
Company Bound to the Members 81
Member Bound to Member 81
Company not Bound to Outsiders 81
LESSON ROUND-UP 82
SELF-TEST QUESTIONS 83

LESSON 3 – PART II

ALTERATION OF CHARTER DOCUMENTS

Introduction 86
Alteration of Memorandum of Association (MOA) 86
Applicable section for Alteration of MOA 87
Alteration of MOA Due to Change in Name Clause [section 13(2) and (3)] 87

Methods of changing the name 88

Procedure for Alteration in Name Clause of Memorandum 88

Name change requirement under regulation 45 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 91

Effect of Change 92

Alteration of Situation of Registered Office Clause in the MOA [Section 13 (4) (5) And (7)] 92

Change of Registered office from one State to another 94

Rule 30-31 of Companies (Incorporation) Rules 2014 94

Steps after obtaining new certificate from ROC 100

Employees' right to object in case of shifting of registered office from one state to another – Some legal cases 100

Alteration of MOA due to Change in Object Clause [Section 13(8) And (9)] 101

Registration of Alteration 103

Alteration of Liability Clause 104

Alteration of Capital Clause in MOA [Section 61 read with Section 64] 104

Alteration of Articles of Association of a Company 106

Manner of Altering AOA 108

Procedure for alteration of AOA under Section 14 109

Effect of Altered Articles 110

Section 8 Company cannot alter Articles except with the prior approval of Central Government 110

Alterations of Memorandum or Articles to be Noted in Every Copy 110

Sample Board Resolution for Change in the Name of the Company 110

Sample Shareholder's Resolution to be Passed in the General Meetings for Change in the Name Clause of Moa 111

Sample Shareholder's Resolution to be Passed in the General Meeting for Shifting of Registered Office of the Company from One State to Another 111

Explanatory Statement Pursuant to Section 102 of the Companies Act 2013 112

Sample Board Resolution for Alteration of Object Clause in MOA 112

Sample Shareholder's Resolution to be Passed in the General Meeting for Alteration of Object Clause in MOA 113

Explanatory Statement Pursuant to Section 102 of the Companies Act, 2013 113

Sample Board Resolution for Alteration of Capital Clause in MoA 114

Sample Shareholders' Resolution to be Passed in the General Meeting 114

Special Business 114

Sample Board Resolution for Alteration of Articles of Association of the Company 115

Sample Shareholders Resolution for Alteration of Articles 115

Explanatory Statement Pursuant to Section 102 of the Companies Act, 2013 115

Specimen of Notice for the Board Meeting for Convening General Meeting for Alteration of Articles to Convert a Public Company into a Private Company 116

LESSON ROUND-UP 117

SELF-TEST QUESTIONS 117

LESSON 4

LEGAL STATUS OF REGISTERED COMPANY

Corporate Personality 121

Limited Liability 121

Perpetual Succession 121

Separate Property 121

Transferability of Shares 121

Capacity to Sue or be Sued 122

Provisions Relating to Certain Types of Companies 122

Small Company 122

Advantages of a Small Company 122

Holding Company 123

Provisions in the Companies Act, 2013 relating to holding company 124

Financial Statements of Holding Company 125

If Holding Company has more than one subsidiary 125

Separate financial statement of Holding Company 125

Disclosure in balance Sheet of Holding Company 125

Disclosure in Profit and Loss account of Holding Company 125

Subsidiary Company 125

Associate Company 127

Additional compliances if a company has an Associate Company Sub section (76) of section 2 127

Inactive Company / Dormant Company 128

Procedural aspects relating to dormant company / inactive company 128

Consent of shareholders is mandatory 129

Listed companies are ineligible to apply for status of dormant companies 129

Government Company 130

Annual General Meeting [Section 96(2)] 130

Appointment of Director (sub section 5 of section 152) 131

Right of persons other than retiring directors to stand for directorship (Section 160) 132
Disqualification of directors {sub-section (2) of section 164} 132
Loan to Director (Section 185) 132
Loan and Investment by Company (Section 186) 132
Related Party Transaction (Section 188) 133
Appointment of Managerial Personnel (Section 196) 133
Appointment of Key Managerial Personnel (Section 203) 133
Provisions relating to Auditor 133
Auditor Report in a Government Company [sub-section (5) of section 143] 134
Supplementary Audit Ordered by C & AG [sub section (6) of section 143] 134
Annual Report of Government Company (Section 394) 134
SELF-TEST QUESTIONS 135

LESSON 5

FORMATION OF LLP

Concept of LLP 138
Definition of LLP 138
Nature and Characteristics of LLP 138
Advantages of LLP 138
Disadvantages of LLP 139
Procedure for Incorporation of LLP 140
LLP Agreement 141
How to draft LLP agreement 141
How to prepare LLP agreement 141
Essential Clauses to be included in the LLP agreement 142
Alteration to the LLP Agreement 144
Change in Partner /Designated Partner 144
Change of name 145
Procedure for Changing the Name of the LLP 145
Shifting of Registered office 145
Checklist for Shifting of Registered Office 146
Annual Compliances of LLP 146
Filing of Annual Return 147
Filing of Statement of the Accounts or Financial Statements 147

Filing of Income Tax Returns 147
Event Based Compliances for LLP 147
Draft LLP Agreement 148
Admission of New Partner 151
Rights of Partner 151
Duties of Partners 151
Duties of Designated Partner 152
Cessation of Existing Partners 153
LESSON ROUND-UP 153
SELF-TEST QUESTIONS 153

LESSON 6

DIFFERENT FORMS OF BUSINESS ORGANISATIONS & ITS REGISTRATION

Introduction 156
Sole Proprietorship 156
Merits of Sole Proprietorship 156
Limitations of Sole Proprietorship 157
Procedure for Formation Sole Proprietorship Firm 157
Partnership 157
Features of Partnership 158
Types of Partnership 159
Types of Partners 160
Minor admitted into the benefits of partnership 160
Merits of Partnership 160
Limitations of Partnership 161
Partnership Deed 161
Partnership 162
Registration under Income Tax 163
Hindu Undivided Family (HUF) 163
Meaning of Joint Hindu Family Business 163
Characteristics of a Joint Hindu Family Business 163
Benefits of HUF 164
Hindu Undivided Family (HUF) 165
Multi State Co-Operative Society 166

Benefits of Multi State Co-Operative Society 167
Formation of Multi State Co-Operative Society 168
LESSON ROUND-UP 170
SELF-TEST QUESTIONS 170

LESSON 7

FORMATION AND REGISTRATION OF NGO'S

Section 8 Company 172
Features of a Section 8 Company 173
Exemptions available to Section 8 Company 174
Procedure for Registration of NGO'S 175
Section 8 Company 175
Application for Incorporation 177
Certificate of Incorporation 178
Trust 178
Persons who can create a Trust 179
Persons who can be a Trustee 179
Difference between Public Trust and Private Trust 179
Exemptions available to Trusts 180
Formation of Trust 181
Society 182
Definition 182
Advantages of Society 183
Disadvantages of Society 183
Consequences of Registration / Non-Registration of a Society 183
Accounts and Audits 184
Litigation 184
Benefits of forming a Society 184
Formation of a Society 184
Steps for Registering a society In India 185
Selection of a Name 186
Memorandum of Association 186
LESSON ROUND-UP 187
SELF-TEST QUESTIONS 187

LESSON 8

FINANCIAL SERVICES ORGANISATION AND ITS REGISTRATION PROCESS

Introduction 190

Non Banking Financial Company 191

Types/Categories of NBFCS 191

Benefits of Incorporating An NBFC 194

Incorporation of NBFCs 194

Registration Process with Reserve Bank of India 195

Procedure for filing application with Reserve Bank of India 195

Documents required for registration as Type I - NBFC-ND 196

Housing Finance Companies 197

Benefits of incorporating a Housing Finance Company 197

Housing Finance Company: Registration Process 198

Net Owned fund 198

Asset Reconstruction Company (ARC) 199

Benefits of incorporating an Asset Reconstruction Company (ARC) 200

Asset Reconstruction Company – the Registration Process 200

Micro Finance Institutions (MFI) 201

Characteristics of a Micro Finance Institution 201

Incorporation of MFI 202

NIDHI COMPANIES 203

Characteristics of a Nidhi Company 203

General restrictions or prohibitions on Nidhis (Rule 6) 204

Benefits of incorporating a Nidhi Company 204

Incorporation of a Nidhi Company 205

Payment Banks 205

Regulations 205

LESSON ROUND-UP 206

SELF-TEST QUESTIONS 207

LESSON 9

STARTUPS AND ITS REGISTRATION

Startups 210

Evolution 210

Startup India Policy 210
Eligibility for becoming a Startup Company 214
Recognition as Startups 214
Certification of the Inter-Ministerial Board for availing the Tax Benefit under Section 80-IAC 214
Tax Exemption under Section 56 of the Income Tax Act (Angel Tax) 215
Indian States with Startup policies 216
State Startup Ranking 217
Exemptions for Startups 218
Tax Exemptions for the Startups, Effective from 2017-18 219
Benefits / Exemptions to Start-ups under Companies Act, 2013 219
Registration Steps 220
Financing Options Available for Startup Companies 224
Seed Capital 225
A. Equity Financing 225
Sources of capital 227
Structure 227
B. Debt Financing 229
C. Once the startups achieve stable operations and revenue flows, it may consider an Initial Public Offering (IPO) to raise the funds or increase the magnitude of the business operations 229
D. Unconventional modes of financing options which are now becoming popular in India 230
Mudra Banks 230
Procedure for loan 231
Mudra Card 233
LESSON ROUND-UP 233
SELF-TEST QUESTIONS 234

LESSON 10

BUSINESS COLLABORATIONS

Business Collaboration 236
Types of Business Collaboration 236
Joint Venture 236
Definition 236
MNC's in different forms including Joint Ventures 237
Advantages of forming Joint Venture 237

Model Foreign Joint Venture Collaboration 239
Disadvantages of Joint Venture 239
Strategies of Entering in to a Joint Venture 239
Formation of Joint Ventures 240
Restrictions under FDI Policy of the Government of India 243
LLP Firm as a Special Purpose Vehicle 244
Documents for Joint Ventures 244
Essential Features of a Shareholders' Agreement (SHA) /Joint Venture Agreement / LLP Partnership Agreement (PA) 245
Essential components of a Joint Venture Agreement 245
Special Purpose Vehicle (SPV) 246
Meaning of Special Purpose Vehicle (SPV) 246
Benefits of Special Purpose Vehicle 247
Purpose of Special Purpose Vehicle 247
Difference between a special purpose vehicle and a company 248
How is an SPV established 248
SPV as preferred vehicle for funds raising by Infrastructure Sector 248
LESSON ROUND-UP 249
SELF-TEST QUESTIONS 249

LESSON 11

SETTING UP OF BUSINESS OUTSIDE INDIA AND ISSUES RELATING THERETO

Introduction 252
Laws /Authority governing Setting up of Business out side India 253
Foreign Exchange Management Act, 1999 253
Eligibility (Entities are Referred to as "Indian Party") 254
Prohibitions 254
Automatic Route 255
Method of Funding 256
Investments not Under Automatic Route and that Require Approval of the Reserve Bank 257
Foreign Direct Investment Policy 258
Reporting requirement under Master Direction – Reporting under Foreign Exchange Management Act, 1999 258
Issues in Choosing Location Outside India 259
Setting up of a Business in New Zealand 260

Setting up of Business in Singapore 262
Recent Initiatives in Singapore for Setting up of Business 263
Setting up of a Business in Hong Kong SAR, China 264
Recent Initiatives of Hong Kong SAR, China 265
Setting up of Business in New York City 267
Recent initiatives in New York City 269
Setting up of a Business in United Kingdom 269
Recent Initiatives in United Kingdom 271
LESSON ROUND-UP 272
SELF-TEST QUESTIONS 273

LESSON 12

CONVERSION OF BUSINESS ENTITIES

Introduction 276
Conversion of a Private Company into a Public Company 276
Procedure for Conversion of a Private Company into a Public Company 277
Scrutiny of documents by ROC 278
Conversion of a Public Company into a Private Limited 278
Procedure for Conversion of a Public Limited Company into a Private Limited 279
Holding of General Meeting 279
Filing of MGT-14 with ROC 279
Application under section 14 for conversion of public company into private company. 279
Conversion of one Person Company to Private Company 282
When Conversion OPC is necessary in to a Private Company or Public Company 282
Conversion of Private Company into One Person Company 284
Procedure/Steps for Conversion of Private Company into One Person Company 285
Conversion of Section 8 Company Into Any Other Kind 287
Rule 21 of Companies (Incorporation) Rules, 2014 287
Rule 22 of Companies (Incorporation) Rules, 2014 288
Conversion of Company Into Llp 289
Conversion of a Company Limited by Guarantee into a Company Limited By Shares 291
Conversion of Unlimited Liability Company into a Limited Liability Company by Shares Or Guarantee 291
Companies Authorised to Register under the Companies Act, 2013 293
Conversion of LLP Into Company 294

Process for Conversion 295
Registration of society as a company limited by guarantee under section 8 296
Registration of trust as a company limited by guarantee under section 8 297
Memorandum of Association & Articles of Association 298
LESSON ROUND-UP 299
SELF-TEST QUESTIONS 300

LESSON 13

VARIOUS INITIAL REGISTRATIONS AND LICENSES

Introduction 302
Mandatory Registration 302
PAN 302
Significance of PAN for Setting up of Business 302
Application and Registration of PAN 303
TAN 304
Types of TAN Applications 304
Procedure to Apply 304
Where to get the Physical Application Forms 304
Communication 304
Status track 304
Fee 304
GST 304
Compulsory Registration 305
Persons not liable to register 306
Procedure for Registration 306
Cancellation of Registration 306
Registration under Shops & Establishments 307
Purpose of Shop and Establishment Act 307
Meaning of an Establishment for the Purpose of the Act 307
Meaning of a Shop for the Purpose of the Act 307
License under Shop and Establishment Act, 1948 307
Registration of Shops & Establishments 308
Communication of Change to the Inspector 308
Closing of Establishment to be communicated to Inspector 308

SSI/MSME 308
Micro, Small and Medium Enterprises 308
Eligibility apply for Udyog Aadhar/MSME registration 309
Criteria for applying for Udyog Aadhar/MSME Registration 309
Stage to apply for MSME registration 310
UDYOG AADHAR MEMORANDUM 310
Benefits of SSI/MSME Registration 310
Micro and Small Enterprises 310
Registration Process 311
Validity Period of G. P. Registration 312
Documents to be submitted by the Micro & Small Enterprises at the Time of Fresh Registration 312
Documentary Proof of the Status of the firm 313
Documents Required for Renewal of the Registration 314
NSIC Registration 314
Benefits of NSIC Registration 315
Eligibility 315
Application 315
Registration Fee 315
Other Compliances 315
ESI Registration with Procedure & Benefits 316
Benefits of ESI Registration for both Employer & Employee 316
ESI Registration Procedure for both Employer & Employee 316
Registration of Employee: 316
PF Registration Process 317
Documents required to be submitted 317
FCRA Registration 318
Eligibility for obtaining FCRA Registration 318
Criteria for grant of FCRA Registration 318
Applying for FCRA Registration 319
Pollution 320
Other Registration as per requirement of sector 320
Drug License 321
List of State Drugs Control Organization 321
Requirement for obtaining Drug License 322

Documents required for obtaining Drug License 322
FSSAI 322
FSSAI Registration 323
FSSAI License 323
Trademark 333
Steps of Registration 334
Form and Fees 334
Copyright 334
Copyright Registration Procedure 335
Time for Processing Application 336
Scope and Extent of Copyright Registration 336
Fees 337
Patent 337
Filing Patent Application 337
Design 338
Design Registration 338
Documents Required for Design Registration 338
General Guidelines 339
RBI 339
Requirement of NBFC License with RBI 339
Financial Companies exempt NBFC License 339
Requirement for Obtaining NBFC License 340
Calculating Net Owned Funds as per RBI Definition 340
Types of NBFC License 340
Applying for NBFC License 341
Banking 342
IRDA (Insurance Regulatory and Development Authority) 343
Introduction 343
Functions and Duties of IRDAI 343
Procedure of Granting of License to Companies to Start Insurance Business (Read with Amendments of 2015) 344
IRDAI (Registration of Indian Insurance Companies) (Seventh Amendment) Regulations 2016 (Registration Amendment Regulations) 345
Refusal of Registration 347
Suspension of Registration 347

Cancellation of Certificate of Registration 347
Revival of Registration 348
Telecom 348
TRAI Scope and Functions 349
OSP Registration in India 349
Overview 349
OSP Registration Applicability 350
OSP Registration Requirement 350
OSP Registration Compliance 350
I & B 350
Mandate of I & B 351
Regulatory Regime of I & B 351
Regulating and Certification Head under I & B 351
Films 352
Industrial License 352
Compulsory Licensing 353
Small Scale Sector 353
Policy Relating to Small Scale Undertakings 353
Recent amendment to Industrial Licensing Rule 354
Locational Restrictions 354
Industrial Entrepreneurs Memorandum (IEM) 354
Meaning of IEM 354
Cases requiring IEM/ LOI 355
Procedure for filling of IEM 355
Steps Post-Filling IEM 355
Role of Directorate of Industries 355
State Level Approval from the respective State Industrial Department 355
Green category of polluting industries 356
Orange category of polluting industries 356
Ordinary Red category of polluting industries 356
Special Red category of polluting industries 356
LESSON ROUND-UP 356
SELF-TEST QUESTIONS 359

LESSON 14

MAINTENANCE OF REGISTERS AND RECORDS

Maintenance of Registers and Records 362

Register and Records required to be maintained by an enterprise 362

Introduction 362

List of Register and Records required to be maintained by an enterprise 362

Place of Keeping the Records and Registers 365

Inspection of Statutory Registers 365

Suggested Method of Keeping Statutory Registers 365

LESSON ROUND-UP 366

SELF-TEST QUESTIONS 366

LESSON 15

IDENTIFYING LAWS APPLICABLE TO VARIOUS INDUSTRIES AND THEIR INITIAL COMPLIANCES

Compliance of industry specific laws applicable to an entity at the time of setting up of the enterprise 368

Introduction 368

Formalizing and Deciding the Business Structure 368

Here is a quick look into the legal implications for the major business types in India 368

Procedure for Setting up a Company 370

Incorporation 370

Form of a Company 370

Applying for Business Licenses 372

Understanding Taxation and Accounting Laws 372

Adhering to Labour Laws 372

Adherence to Laws relating to Intellectual Property 373

Ensuring Effective Contract Management 373

Procedure for Voluntary Winding Up 375

Laws relating to Industries and Industries in Specific 375

The Factories Act, 1948 376

The Plantation Labour Act, 1951 376

The Mines Act, 1952 377

The Shops and Establishments Act, 1953 377

The Motor Transport Workers Act, 1961 377

The Contract Labour (Regulation & Abolition) Act, 1970 377
Labour Welfare Funds for Social Assistance to Workers 378
The Building & Other Construction Workers (Regulation of Employment & Conditions of Service) Act, 1996 378
LESSON ROUND-UP 379
SELF-TEST QUESTIONS 380

LESSON 16

INTELLECTUAL PROPERTY LAWS (PROVISIONS APPLICABLE FOR SETTING UP OF BUSINESS)

Introduction 382
Intellectual Property vis-a-vis Business: A Rationale of Relativity 382
Intellectual Property Regime in India 382
IP Protection for Businesses: A Snapshot 383
Trademarks 383
Points To Consider While Adopting A Trademark 384
Enforcement of Trademark Rights 385
Geographical indication of Goods (Registration and Protection) Act; 1999 385
Designs Act, 2000 386
Copyrights 387
Rights of the Registrar of Copyrights 391
Infringement of Copyright 391
Patents 392
Use of Technology or Invention 392
Enforcement of Patent Rights 392
LESSON ROUND-UP 393
SELF-TEST QUESTIONS 394

LESSON 17

COMPLIANCES UNDER LABOUR LAWS (PROVISIONS APPLICABLE FOR SETTING UP OF BUSINESS)

Factories Act, 1948 397
Applicability of the Act 397
Registration & Renewal of Factories (Section 6) 397
Minimum Wages Act, 1948 400

Object of the Act 400
Payment of Wages Act, 1936 403
Object of the Act 403
Employees' State Insurance Act, 1948 406
Applicability of the Act 406
Coverage of factory/establishment 408
Employees' Provident Funds and Miscellaneous Provisions Act, 1952 415
Applicability 415
Payment of Bonus Act, 1965 419
Applicability 419
Payment of Gratuity Act, 1972 (Payment of Gratuity in Consonance with State Rules) 421
Applicability 421
Employees Compensation Act, 1923 424
Applicability (Section 1) 424
Contract Labour (Regulation and Abolition) Act, 1970 425
Applicability 425
Registers of Contractors 426
Industrial Disputes Act, 1947 430
Objective of the Act 430
Procedure of Strikes 436
Procedure of Lockouts 436
Trade Unions Act, 1926 445
Object of the Act 445
Maternity Relief Act, 1961 along with Maternity Benefit (Amendment) Act, 2017 446
Object of the Act 446
Maternity Benefit (Amendment) Act, 2017 447
Key highlights of the Amendment 447
Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 448
Part I- Preliminary 448
Part II- Prohibition of Employment of Children in Certain occupations And Processes 449
Part III- Regulation of Conditions of Work of Children 450
Part IV- Miscellaneous 452
Rights of Persons with Disabilities Act, 2016 (Replacing Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995) 453
Prevention of Sexual Harassment of Women at Workplace (Prevention; Prohibition and Redressal) Act, 2013 459

Objectives of the Act 459
LESSON ROUND-UP 460
SELF-TEST QUESTIONS 461

LESSON 18

COMPLIANCES RELATING TO ENVIRONMENTAL LAWS (PROVISIONS APPLICABLE FOR SETTING UP OF BUSINESS)

Introduction 464
Environmental Regulations in India: A Bird's Eye View 464
Water (Prevention and Control of Pollution) Act, 1974 465
Air (Prevention and Control of Pollution) Act, 1981 467
Environment Protection Act, 1986 469
Public Liability Insurance Act 1991 471
National Green Tribunal Act, 2010 471
Objectives of National Green Tribunal 472
LESSON ROUND-UP 475
SELF-TEST QUESTIONS 475

LESSON 19

DORMANT COMPANY

Introduction 478
Obtaining Dormant Status 478
Legal framework for Dormant Companies 479
Procedure to obtain the status of a Dormant Company 479
Benefits / Exemptions Provided to a Dormant Company 480
Compliance Requirements by Dormant Company 481
Legal Framework Dealing with the Provision of Seeking the Status of Active Company from Dormant Company 482
Procedure to obtain the status of an Active Company from Dormant Company 482
LESSON ROUND-UP 483
SELF-TEST QUESTIONS 484

LESSON 20

STRIKE OFF AND RESTORATION OF NAME OF THE COMPANY AND LLP

Introduction 486

Ways of Striking off of Companies 486
Strike Off by RoC Suo Motu 486
Case Law 487
Strike Off by Way of Filing an Application by the Company 489
Procedure of striking off of the name of the company by way of an application to ROC 490
No objection certificate from appropriate Regulatory Authority 492
Status of Strike Off Company 492
Fraudulent Application for Removal of Name 492
Liabilities of directors, managers, officers and members to be continue 493
List of STK forms 493
Restoration of the company 494
Appeal to NCLT for restoration of the name of the company 494
Application to NCLT by ROC for restoration of the name of the company 494
Striking of the Name of the Limited Liability Partnership (LLP) from the Register of Limited Liability Partnerships 495
Legal Framework dealing with the provision of Striking off 495
Strike Off by Roc Suo Motu 495
Strike Off by Way of Filing an Application by the Llp 496
Liabilities of Partners to be continued after Striking Off 498
Restoration of the LLP 498
LESSON ROUND-UP 499
SELF-TEST QUESTIONS 499

LESSON 21

CORPORATE INSOLVENCY RESOLUTION PROCESS, LIQUIDATION AND WINDING UP: AN OVERVIEW

Introduction 502
The Insolvency and Bankruptcy Code, 2016 502
Some Salient Features of the Insolvency and Bankruptcy Code, 2016 503
Applicability 503
Important Definitions 504
Important Rules and Regulations 505
Persons who May Initiate Corporate Insolvency Resolution Process (CIRP) 506
Resolution Process 506
Time Limit of Corporate Insolvency Resolution Process 507

Withdrawal of Application 507
Moratorium 507
Interim Resolution Professional (IRP) 507
Resolution Professional 508
Committee Of Creditors 508
Resolution Plan 508
Liquidation Process 508
Liquidator 509
Liquidation Estate 510
Voluntarily Liquidation 510
Waterfall Arrangement 511
Dissolution Of Corporate Debtor 512
Winding Up 512
Object and Scope of the law 512
Meaning of Winding-up 512
Difference Between 'Winding Up' and 'Dissolution' 513
Winding Up by Tribunal 513
LESSON ROUND-UP 515
SELF-TEST QUESTIONS 516

Test Paper 518
Bibliography & References 520

Lesson 1

Choice of Business Organisation

LESSON OUTLINE

- Types of Business Organisation
- Choice of a Business Organisation
- Factors governing the decisions for suitable form of organisation
  - Nature of business activity
  - Scale of operations
  - Capital requirements
  - Managerial Ability
  - Degree of control and management
  - Degree of risk and liability
  - Stability of business
  - Flexibility of administration
  - Division of profit
  - Costs, Procedure, and Government Regulation
  - Tax Implication
  - Geographical mobility
  - Transferability of ownership
  - Managerial Needs
  - Secrecy
  - Independence
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

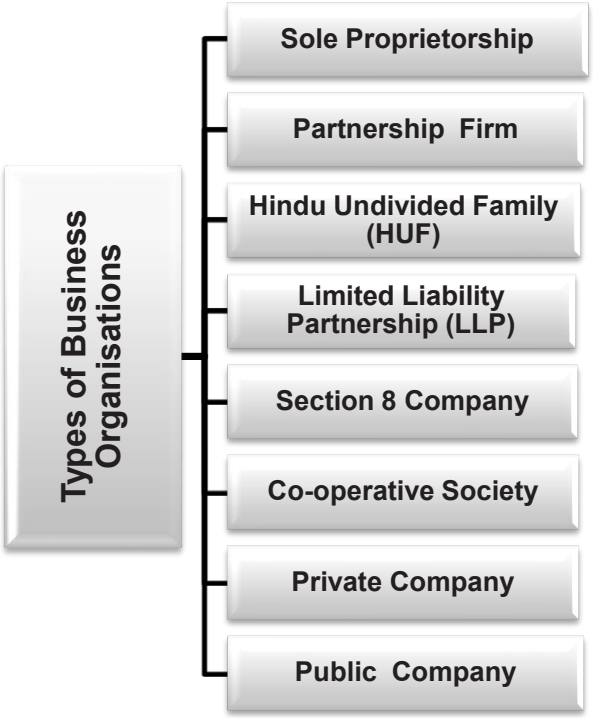
The choice of a business organisation is driven by a combination of several factors such as nature of activity, capital requirement, degree of independence required, etc. There is no readymade formula for selecting the particular type of business organisation. Tax consideration is also an extremely important factor.

Company Secretaries while playing advisory role would help the clients in deciding about the type of organisation one may opt for when considering to start a business.

In this lesson, we shall examine the factors which are taken into account in choosing a form of business organisation. Brief outline of the various forms of business organisation is also covered.

TYPES OF BUSINESS ORGANISATIONS

Business organisation refers to all necessary arrangements required to conduct a business in an optimized manner. It refers to all those steps that need to be undertaken for establishing and maintaining relationship between men, material, and machinery to carry on the business efficiently for earning profits. This may be called the process of planning and organising which are the integral part of the business management. The arrangement which follows this process of organising the factors required for commencing and carrying on the business is called a business undertaking or organisation.



Choosing a form of business entity is crucial to a successful organization. The choice of a business entity will depend on an object, nature and size of the business of such entity which will be varied from case-to-case basis and will also depend upon the will of the owners of the business entity which they want to accomplish. The main types of business entities in India are Sole Proprietorship, Partnership, Hindu Undivided Family (HUF) Business, Limited Liability Partnership (LLP), Co-operative Societies, Branch Office and Company which may be any kind of company including One Person Company (OPC), private company, public company, Guarantee Company, subsidiary company, statutory company, insurance company or unlimited company. Further, Company formed under section 8 of the Companies Act, 2013 or under section 25 of the earlier Companies Act of 1956 is a non-profit business entity. There can also be Association of Persons (AOP) and Body of Individuals (BOI), Corporation, Co-operative Society, Trust etc.

Sole Proprietorship

Sole proprietorship is a form of business, wherein one person owns all the assets of the business, No legal formalities are required to create a sole proprietorship other than an appropriate licensing to conduct a business and registration of business name if it differs from that sole proprietorship. The owner reports income/loss from this business along with is personal income tax return.

Partnership Firm

Partnership firms are created by drafting a partnership deed among the partners. The partnership deed is

registered to make a firm. Partnership firms in India are, governed by the Indian Partnership Act, 1932 Maximum no. of partners in a partnership firm can be 20 partners, and The Profit & loss are shared in manner as agreed in the partnership deed.

Hindu Undivided Family (HUF)

A Hindu family can come together and form a HUF. HUF is taxed separately from its members. One can save taxes by creating a family unit and pooling in assets to form a HUF. HUF has its own PAN and files tax returns independent of its members.

Limited Liability Partnership (LLP)

Limited Liability Partnership is an alternate corporate business entity that provides the benefits of limited liability of a company but allows its members the flexibility of organising their internal management on the basis of a mutually-arrived agreement, as is the case in a partnership firm, introduced in India by way of limited Liability Partnership Act, 2008

Co-operative Society

A cooperative organisation is an association of persons, usually of limited means, who have voluntarily joined together to achieve a common economic end through the formation of a democratically controlled organisation, making equitable distributions to the capital required, and accepting a fair share of risk and benefits of the undertaking.

Section 8 Company

Section 8 company is a company established for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object', provided the profits, if any, or other income is applied for promoting only the objects of the company and no dividend is paid to its members Section 8 Companies are registered under the Companies Act, 2013.

One Person Company

An OPC means a company with only 1 person as a member Share holder can make only 1 nominee, he shall become a shareholder in case of death / incapacity of original stakeholder.

Private Company

Private company is a company which has the following characteristics:

- Shareholders right to transfer shares is restricted
- Minimum number of 2 members in company
- Number of shareholder is limited to 200
- An invitation to the public to subscribe to any shares or debentures or any type of security is **prohibited.**

Public Company

A public company is a company which has the following characteristics

- Shareholders right to transfer share; is not restricted
- Minimum 7 members
- An invitation to the public to subscribe to any shares or debentures or any type of security is **permitted**.

CHOICE OF A BUSINESS ORGANISATION

Essentially, companies could be either private or public company. Public company could be unlisted or listed. A person must sit down and carefully consider all the advantages and disadvantages of each type of entity before choosing one of the form of business entity which suited best to the nature and size of the business which the entrepreneur / business owner desires to undertake.

A business enterprise can be owned and organized in several forms. Each form of organization has its own merits and demerits. The ultimate choice of the form of business depends upon the balancing of the advantages and disadvantages of the various forms of business. The right choice of the form of the business is very crucial because it determines the power, control, risk and responsibility of the entrepreneur as well as the division of profits and losses. Being a long-term commitment, the choice of the form of business should be made after considerable thought and deliberation. The selection of a suitable form of business organisation is an important entrepreneurial decision because it influences the success and growth of a business – e.g., it determines the division or distribution of profits, the risk associated with business, and so on.

Once a form of business organisation is chosen, it is very difficult to switch over to another form because it needs the winding up, dissolution of the existing organisation which may be treated as a case which is raised by oneself to face with the complex issues and procedures which ultimately results into the waste of time, effort and money. Further, closure of business will entail loss of business opportunity, capital and employment. The volume of risks and liabilities as well as the willingness of the owners to bear it, is also an important consideration in choosing the right business entity.

Therefore, the form of business organisation must be chosen after giving the due thought and consideration in respect of all the sides of the glorious coin of each form of business entity and its suitability to the business ideas of an entrepreneur. There are several factors to be considered while selecting an appropriate form of business organisation.

As discussed earlier, the different forms of business organisation differ from each other in respect of division of profit, control, risk, legal formalities, flexibility, etc.

Therefore, a thoughtful consideration should be given to this aspect of planning and only that form of organisation which most suited to the style of business should be chosen. Since the need for the selection of business organisation arises both initially i.e. while starting a business, and at a later stage for meeting the needs of its growth and expansion, it is desirable to address this issue at both these levels.

FACTORS GOVERNING THE DECISIONS FOR SUITABLE FORM OF ORGANISATION

For a new or proposed business, the selection of a suitable form of a business organisation is generally governed by the following factors:

1. Nature of Business Activity

This is an important factor having a direct bearing on the choice of a form of ownership. In small trading businesses, professions, and rendering of personal services, sole-proprietorship is predominant.

Examples are Laundromats, beauty parlours, repair shops, consulting agencies, small retail stores, medicine stores, dentist, accounting concerns, boarding-house, restaurants, specialty ships, jobbing builders, painters, decorators, bakers, confectioners, tailoring shops, small scale shoe repairers and manufacturers, etc.

The partnership is suitable in all those cases where sole proprietorship is suitable, provided the business is to be carried on a slightly bigger scale with help of one or more partner (owner).

Besides, partnership is also advantageous in case of manufacturing activities on a modest scale. The finance, trading and real estate industries (on a smaller scale) seem to be suited to partnership form of organisation.

Some of the financial businesses that find this form advantageous are tax, accounting, stockbrokerage firms, and consulting agencies etc.

Service enterprises like hotels and lodging places; trading enterprises, such as wholesale trade, retail houses; small scale manufacturing enterprises, small drug manufacturers, etc. can be undertaken in the form of partnership. Similarly, the business lines such as carrying on large chain stores, multiple shops, super-bazaars, engineering industrial activities with high capital and working capital requirements and software industrial activities are generally in the form of companies.

Where the persons intending to start a business wish to launch a business organisation clothed with a legal entity and in corporate form with a feature of having their sole ownership and control thereon, they may decide to form a One-Person Company (OPC). OPC is a new concept in India and hybrid of Sole-Proprietor and Company form of business. The concept opens spectacular possibilities for sole proprietors and entrepreneurs as, such companies retain the character of a Sole Proprietorship, provides limited liability feature to the sole proprietor and is clothed with a legal entity distinct from its owner.

An alternative form of organisation where two or more persons are involved in starting the business organisation is the Limited Liability Partnership ('LLP') under the Limited Liability Partnership Act, 2008. Such entities have also gained popularity nowadays. A major advantage of such an entity is that the liabilities (if any), of the LLP lies with the entity and does not fall on the individual partners unlike the partnership form of business organisation under the Indian Partnership Act, 1932, where the joint and several liabilities of the partner(s) is one of the features.

In an LLP form, the liability of the Partner is limited to the extent of his contribution towards the LLP, except in case of intentional fraud or wrongful act of omission or commission by the partner himself. What is at stake for the partner is what he has put into the business along with any personal guarantees he would have furnished. However, such forms of business organisation are suitable generally in the service industry and where there is no dependence on large amounts of financing from outside sources.

A One-Person Company (OPC), LLP and limited company exist as a separate business entity in the eyes of law and this creates a wall between the personal assets of the investor and that of the business. Thus, in these form of business organisations the personal property of the owner(s) is protected and this gives the owner(s) the ability to build the business credit, get loans and raise capital.

2. Scale of Operations

In accordance with the provision of Micro, Small & Medium Enterprises Development (MSMED) Act, 2006 the Micro, Small and Medium Enterprises (MSME) are classified as below:

Manufacturing Sector	
Enterprise Category	**Investment in plant & machinery**
Micro Enterprises	Does not exceed twenty five lakh rupees
Small Enterprises	More than twenty five lakh rupees but does not exceed five crore rupees
Medium Enterprises	More than five crore rupees but does not exceed ten crore rupees

Service Sector	
Enterprise Category	**Investment in equipment**
Micro Enterprises	Does not exceed ten lakh rupees

Small Enterprises	More than ten lakh rupees but does not exceed two crore rupees
Medium Enterprises	More than two crore rupees but does not exceed five crore rupees

The second factor that affects the form of business organisation is the scale of operations. If the scale of operations of business activities is small, sole proprietorship or a One Person Company (OPC) is suitable; If the scale of operations is modest - neither too small nor too large - partnership or limited liability partnership (LLP) is preferable; whereas, In case of large scale of operations, the company form is advantageous.

The scale of business operations depends upon the size of the market area served, which, in turn, depends upon the size of demand for goods and services. If the market area is small, local - sole-proprietorship, OPC or partnership is opted. If the demand originates from a large area- partnership including LLP or Company may be adopted.

3. Capital Requirements

Capital is one of the most crucial factors affecting the choice of a particular form of ownership organisation. Requirement of capital is closely related to the type of business and scale of operations. Enterprises requiring heavy investment (like iron and steel plants, large scale infrastructure projects etc.) should be organised as companies. Depending on the capital required, they can be set up as public companies and in some cases, may be in the form of listed companies by raising money from the public and being listed on the stock exchanges.

Enterprises requiring small investment (like retail business stores, personal service enterprises, etc.) can be best organised as sole proprietorships or even as Partnerships. Apart from the initial capital required to start a business, the future capital requirements - to meet modernisation, expansion, and diversification plans - also affect the choice of form of organisation.

In sole proprietorship, the owner may raise additional capital by borrowing, by purchasing on credit, and by investing additional amounts himself. Banks and suppliers, however, will look closely at the proprietor's individual financial resources before sanctioning any loans or advances.

Partnerships can often raise funds with greater ease, since the resources and credit of all partners are combined in a single enterprise. Companies are usually best able to attract capital because investors are assured that their liability will be limited, their operations are in public domain in the transparent manner, easily accessible and the ownership can be transferred to other investors.

4. Managerial Ability

It is difficult for a sole proprietor to have expertise in all functional areas of business. Further, the size of the business may not permit engagement of professional management.

In other forms of organizations like partnership and company, there is division of work among the partners which allows the partners to specialize in specific areas, leading to better outputs and decision making. However, this may sometimes lead to conflicts due to differences of opinion. Company form of organization is a better alternative if the operations are far flung, complex in nature and require professional management at various levels.

5. Degree of Control and Management

The degree of control and management that an entrepreneur desires to have over business affects the choice of form of organisation.

In sole proprietorship and OPC: ownership, management, and control are completely fused, and therefore, an entrepreneur has complete control over his business.

In partnership: management and control of business is jointly shared by the partners and their specific rights, duties and responsibilities would be documented through incorporating various clauses in this regard in the partnership deed. They have equal voice in the management of partnership business except where they agree to divide among themselves the business responsibilities in a different manner. Even then, they are legally accountable to each other.

In a company, however, there is divergence between ownership and management, the management and control of the company business is entrusted to the Board, who are generally the elected representatives of shareholders. Thus, a person wishing to have complete and direct control of business prefers proprietary organisation rather than partnership or company. If he is prepared to share it with others, he will choose partnership. But, if the activities are large, professional managers are required to handle the day to day affairs and there is need for corporate structure and management, he will prefer the company form of organisation.

6. Degree of Risk and Liability

The size of risk and the willingness of owners to bear it, is an important consideration in the selection of a form of business organisation. The amount of risk involved in a business depends, among other factors like, on the nature and size of business. Smaller the size of business, smaller the amount of risk.

Thus, a sole proprietary business carries small amount of risk with it as compared to partnership or company. However, the sole proprietor is personally liable for all the debts of the business to the extent of his entire property. Likewise, in partnership, partners are individually and jointly responsible for the liabilities of the partnership firm.

Companies and LLPs have a real advantage, as far as the risk is concerned, over the other forms of business organisation. Creditors can force payment of their claims only to the limit of the company's and LLPs assets. Thus, while a shareholder/member/partner may lose the entire money he puts into or agreed to put into the company and LLP, he cannot be forced to contribute additional funds out of his own pocket to satisfy the business debts of the company and LLP.

7. Stability of Business

Stability of business is another factor that governs the choice of an ownership organisation. A stable business is preferred by the owners in so far as it helps him in attracting suppliers of capital who look for safety of investment and regular return, and also helps in getting competent workers and managers who look for security of service and opportunities of advancement. From this point of view, sole proprietorships are not stable, although no time limit is placed on them by law.

The illness of owner may derange the business and his death can lead to permanent closing off the business operations. Partnerships are also unstable, since they are terminated by the death, insolvency, insanity, retirement, admission, expulsion or withdrawal of/ by one of the partners. Companies and LLPs have the most business stability due to its feature or perpetuity being an artificial or legal person. The life of the company and LLP is not dependent upon the life of its members/partners. Members/partners may come, members/partners may go, but the company/LLP goes on forever unless and until it being wound up.

8. Flexibility of Administration

As far as possible, the form of organisation chosen should allow flexibility of administration. The flexibility of administration is closely related to the internal organisation of a business, i.e., the manner in which organisational activities are structured into departments, sections, and units with a clear definition of authority and responsibility.

The internal functioning of a sole proprietary business, for instance, is very simple, and therefore, any change in its administration can be effected with least inconvenience and loss. To the large extent, the case is the same in a partnership business also.

While, in case of company, administration is not that flexible because its activities are conducted on a large scale and they are quite rigidly structured. Thus in this form of structures any substantial change in the existing line of business activity - say from cotton textiles to sugar manufacturing may not be permitted by law if such a provision is not made in the 'objects clause' of the Memorandum of Association of the company.

Thus, from flexibility point of view, sole proprietorship has a distinct edge over other forms.

9. Division of Profit

Profit is the guiding force of private business and it has a tremendous influence on the selection of a particular form of business organisation. An entrepreneur desiring to pocket all the profits of business will naturally prefer sole proprietorship of course, in sole proprietorship, the personal liability is also unlimited.

But, if he is willing to share the profits, partnership form of organisation would be preferred. In company form of organisation, however, the profits (whenever the Board of Directors decides) are distributed among shareholders in proportion to their shareholding, but the liability of the shareholders is limited. The rate at which dividend is to be distributed is decided by the Board, though approved by the shareholders. Companies may also reward shareholders by issue of bonus shares. In case of listed companies, the equity shares are tradable on the stock exchanges, enabling the shareholders to exit the company at any time as per their own discretion.

10. Costs, Procedure and Government Regulation

This is also an important factor that should be taken into account while choosing a particular form of organisation. Different forms of organisation involve different procedure for establishment and are governed by different laws which affect the immediate and long-term functioning of a business enterprise. From this point of view, sole proprietorships are the easiest and cheapest to get started. There is no one specific government regulation. but is guided by various state and central laws to give a valid proof of existence e.g – Shops and Establishment Act. What is necessary is the technical competence and the business acumen of the owner and the requirement of meeting tax liabilities.

Partnerships are also quite simple to be initiated. Even a written document is not always necessarily a prerequisite since an oral agreement can be equally effective. However, in actual practice, written partnership deed is usually entered into, as it is needed for registration of the firm and for tax authorities. The procedure for dissolution of partnership is also, relatively simple.

Company form of business organisation is more complicated to form. It can be created by law, dissolved by law, and operate under the express provisions of the law. In the formation of a company, a number of legal formalities have to be gone through which entails, at times, quite a substantial amount of expenditure. Further, various formalities have to be complied with for closure of companies. Non - payment of dues may land the company into insolvency or liquidation.

For example, the cost incurred on the drafting of the Memorandum of Association, the Articles of Association, the Prospectus, issuing of share capital, etc. can be quite high. This cost is however, small in case of private companies. Besides, companies are subjected to a large number of anti-monopoly and other economic laws so that they do not hamper the public interest.

11. Tax Implication

In the choice of the form of business organisation, tax implication plays an important factor. In smaller entities, such as sole proprietorship or partnership, tax liability is dependent on the extent of profits. However, the liability of the owner(s) is unlimited. In case of companies or LLPs the liability of shareholders is limited to the value of shares they have purchased. In case of companies or LLPs, tax liability could be higher.

12. Geographical Mobility

The extent to which the product or service is proposed to be manufactured or made available also plays a vital role in choosing the type of business organisation. If a concern deals with local market, a seasonal product or perishable goods, or is meant to cater to a specific city or locality, then sole proprietorship or partnership form of business may be suitable. If it is proposed to market the product or service all over India (which may also entail providing customer support services), a company form of organisation may be preferred.

13. Transferability of Ownership

Sole proprietorship, being a one-person entity does not lend itself to transferability of ownership as the owner himself enjoys the profits and suffers the losses in his business. Partnership form of organisation is one where two or more partners share the profits and/or losses in the agreed proportion. If a partner exits, the partnership, may decide to induct a new partner with benefits of ownership and share of profits or losses. In the company form of organisation, transfer of ownership is possible by transfer of shareholding by any person or group of persons in favour of another person or group of persons.

14. Managerial Needs

Managerial and administrative requirements also affect the decision about the form of organisation. When the concern is small and it caters to local needs only then one person will be enough to manage the business. Sole – proprietorship form of organisation will be suitable for such a business. If business caters to more areas, then more persons will be needed to look after various business functions in various areas. When a business is run on a large – scale basis, it will require the services of specialists to manage various departments. The company form of organisation will be suitable for such concerns.

15. Secrecy

Secrecy is of supreme importance, particularly in small business concerns. Accordingly, the entrepreneur would select the sole proprietorship for that reason. In case, he has partners, he will have to carefully weigh whether other partners will be able to maintain the secrecy. He will have to exercise great care in taking partners. In case of a company, secrecy may be restricted to the manufacturing process or the manner in which business is conducted. However, certain aspects of their business such as their board of directors, shareholding, financial statements and other information which are statutorily required to be placed in public domain are accessible to any person.

16. Independence

The company is subject to strict government regulations. So, if the entrepreneur wants to have a freedom in business with little governmental interference, he has to go for either sole proprietorship or partnership.

CONCLUSION

The consideration of the various factors listed above clearly shows that:

(a) These factors do not exist in isolation, but are interdependent, and all these factors are important in their own right. Nevertheless, the factors of nature of business and scale of operations are the most basic ones in the selection of a form of ownership for setting up of a business organisation.

All other factors are dependent on these basic considerations. For instance, the financial requirements of a business will depend on the nature of business and the scale of operations planned. To take an example, if a business wants to set up a trading enterprise (say, a retail store) on a small scale, his financial requirements will be small.

(b) The various factors listed above are only major factors, and in no case they constitute an exhaustive list. Depending upon the requirements of the business, the demands of the situation and sometimes even the personal preference of the owner, the choice of a form of ownership is made.

(c) The problem in choosing the best form of business organisation is one of the analysing and weighing relative advantages and disadvantages to find the one that will yield the highest net advantage. And for that, weights may be assigned to different factors depending upon their importance in each form of organisation, and the type of organisation that obtains the maximum weights may be ultimately selected.

COMPANY AS A CHOICE OF BUSINESS ORGANISATION FOR START-UPs

Start-ups prefer company as a business structure because it allows outside funding to be raised easily, limits the liabilities of its shareholders and enables them to offer employee stock options to attract top talent. As these entities must hold board meetings and file annual returns with the Ministry of Corporate Affairs (MCA), they tend to be viewed with more credibility than an LLP or General Partnership.

Features of Private Limited Company

For Businesses Raising Funding: Fast-growing businesses that will require funding from venture capitalists (VCs) need to register as private limited companies. This is because only private limited companies can make them shareholders and offer them a seat on the board of directors. LLPs would require investors to be partners and OPCs cannot accommodate additional shareholders.

Limited Liability: Businesses often need to borrow money. In structures such as General Partnership, partners are personally liable for all the debt raised. If it cannot be repaid by the business, the partners would have to sell their personal possessions to do so. In a private limited company, only the amount invested in starting the business would be lost; the directors' personal property would be safe.

Start-up Cost: Fee for filing SPICe, MoA and AoA has been reduced to Zero for proposed companies where the authorized capital is upto Rs.10 Lakhs in case of company having share capital or where the number of members are upto 20 in case of company not having share capital.

Requires Greater Compliance: In exchange for the convenience of easily accommodating funding, the private company set-up needs to meet the compliances under the Companies Act, 2013. These range from a statutory audit, annual filings with the Registrar of Companies (RoC), annual submission of IT returns, as well as quarterly board meetings, the filing of minutes of these meetings, and more.

Few Tax Advantages: The private company is assumed to have many tax advantages, but this is not actually the case. There are some segment specific and industry-specific advantages, but taxes are to be paid at a flat rate on profits.

Limited Liability Partnership

A relatively cheaper approach to incorporate as compared to a Private Limited Company and requires fewer compliances; its main improvement over General Partnership is that it limits the liabilities of its partners to their contributions to the business and offers each partner protection from negligence, misdeeds or incompetence of the other partners.

Features of Limited Liability Partnership

Start-up Cost: Cheaper than starting a private company, with government fees of Rs. 5000 approx, no paid-up capital and low compliance costs.

For Non-Scalable Businesses: If you're running a business that's unlikely to require equity funding, you may

want to register an LLP as it combines several benefits of the private limited company and general partnership. It has limited liability, like a private limited company, and has a simpler structure, like a general partnership.

Fewer Compliances: The MCA has made given some concessions to the LLP. For example, an audit needs to be performed only if your turnover is greater than Rs. 40 lakhs or paid-up capital is more than Rs. 25 lakhs. Furthermore, whereas all structural changes need to be communicated to the RoC in the case of private limited companies, the requirement is minimal for LLPs.

Tax Advantages: Particularly if your business is earning over Rs. 1 crore in profits, the LLP offers tax benefits. The tax surcharge that applies on companies with profits over Rs 1 crore doesn't apply to LLPs, nor does Dividend Distribution Tax. Loans to partners are also not taxable as income.

Number of Partners: There is no limit to the number of partners there may be in an LLP. If you're building a large advertising agency, for example, you need not worry about any cap on the number of partners.

Partnership Firm

A General Partnership is a business structure in which two or more individuals manage and operate a business in accordance with the terms and objectives set out in the Partnership Deed. This structure is thought to have lost its relevance since the introduction of the LLP because its partners have unlimited liability, which means they are personally liable for the debts of the business. However, low costs, ease of setting up and minimal compliance requirement make it a viable option for some, such as home businesses that are unlikely to take on any debt. Registration is optional in the case of General Partnerships.

Features of General Partnership

Unlimited Liability: On account of unlimited liability, the partners in the business are liable for all of its debts. This means that if, for whatever reason, a partner is unable to repay a bank loan or is liable to pay a fine, this can be recovered from his or her personal possessions. So the bank, institution or supplier would have right to their jewellery, house or car. Furthermore, aside from ease of set-up and minimal compliance, the partnership offers no benefits over the LLP. If one opts to register it, which is optional, it may not even be cheaper. Therefore, unless one is running a very tiny business (let's say you offer a lunch pack service in your area and would like to set a profit ratio with your partner), you should not opt for a partnership.

Easy to Start: If you choose not to register your partnership firm, all you need to get started is a partnership deed which you can have ready in just two to four working days. Even registration, for that matter, can be completed in a day once you have the appointment with the registrar. As compared with a private limited company or LLP, the procedure for starting-up is much simpler.

Relatively Inexpensive: A General Partnership is cheaper to start than an LLP and even over the long-term, thanks to the minimal compliance requirements, is inexpensive. You would not need to hire an auditor. This is why, despite its shortcomings, home businesses may opt for it.

Sole Proprietorship

A sole proprietorship is a business that is owned and managed by a single person. You could have one up and running within 10 days, which makes it very popular among the unorganised sector, particularly small traders and merchants. There is no such thing as registration; proprietorships are recognised by other registrations, such as a service or sales tax registration.

Features of Sole Proprietorship

Unlimited Liability: Just as a partnership, a sole proprietorship has no separate existence. Therefore, all debts can only be recovered from the sole proprietor. Therefore, the owner has unlimited liability with regard to all the debts. This should heavily discourage any risk-taking, which means that it's suited to only small businesses. If

you plan on running a business that requires a loan or may end up paying penalties, fines or compensation, it's best you look into registering an OPC.

Easy to Start: There is no separate registration procedure for proprietorships. All you need is a government registration relevant to your business. If you're selling goods online, a proprietor would only need a sales tax registration. Therefore, starting up as a sole proprietor is relatively easy.

One Person Company

The constitution of a One Person Company (OPC) was recently introduced as a strong improvement over sole proprietorship. It gives a single promoter full control over the company while limiting his/her liability to contributions to the business. This person will be the only director and shareholder (there is a nominee director, but with no power until the original director is incapable of entering into contract). Hence, there is no scope of raising equity funding or offering employee stock options.

Features of One Person Company

For Solo Entrepreneurs: A big improvement over the sole proprietorship firm, given that your liability is limited, the OPC is meant for solo entrepreneurs. However, do note that if it has revenues of over Rs. 2 crore and paid-up capital of over Rs. 50 lakh, it needs to be converted into a private limited company. Furthermore, given that there must be a nominee director (to enable perpetual existence of the OPC), you may as well consider starting a private limited company, which will also have flexibility of raising funding.

High Compliance Requirements: While there are no board meetings, you will be required to conduct a statutory audit, submit annual returns and comply with the various requirements of the Companies Act, 2013.

Minimal Tax Advantages: The OPC, like the private limited company, has some industry-specific advantages. But taxes are to be paid at a flat rate on profits, the DDT applies, as does MAT. If you're looking for a structure with the lowest tax burden, the LLP does offer some better benefits.

Start-up Costs: Fee for filing SPICe, MoA and AoA has been reduced to Zero for proposed companies where the authorized capital is upto Rs.10 Lakhs in case of company having share capital or where the number of members are upto 20 in case of company not having share capital.

LESSON ROUND-UP

- The main types of business entities in India are Sole Proprietorship, Partnership, Hindu Undivided Family (HUF) Business, Limited Liability Partnership (LLP), Co-operative Societies, Branch Office and Company which may be any kind of company including one person company (OPC), private limited company, public limited company, Guarantee Company, subsidiary company, statutory company, insurance company or unlimited company. Further, Company formed under section 8 of the Companies Act, 2013 or under section 25 of the earlier Companies Act of 1956 is a non-profit business entity.
- There can also be Association of Persons (AOP) and Body of Individuals (BOI), Corporation, Co-operative Society, Trust etc.
- Choosing a form of business entity is crucial to a successful organization.
- Various factors involved are Nature of business activity, Scale of operations, Capital requirements, Managerial Ability, Degree of control and management, Degree of risk and liability, Stability of business, Flexibility of administration, Division of profit, Costs, procedure, and government regulation, Tax implication, Geographical mobility, Transferability of ownership, Managerial Needs, Secrecy, Independence.

- These factors do not exist in isolation, but are interdependent, and all these factors are important in their own right. Nevertheless, the factors of nature of business and scale of operations are the most basic ones in the selection of a form of ownership for setting up of a business organisation. All other factors are dependent on these basic considerations.
- The various factors listed above are only major factors, and in no case they constitute an exhaustive list. Depending upon the requirements of the business, the demands of the situation and sometimes even the personal preference of the owner, the choice of a form of ownership is made.
- There is a need to analyse and weigh the relative advantages and disadvantages to find the one that will yield the highest net advantage. And for that, weights may be assigned to different factors depending upon their importance in each form of organisation, and the type of organisation that obtains the maximum weights may be ultimately selected.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What are the factors which govern the choice of a business organisation?
2. Why would you prefer a Limited Liability Partnership compared to a Private Limited Company?
3. Distinguish between a sole proprietorship and partnership.
4. In which form of business organisation the owner is personally liable for all the debts of the business?
5. What are the advantages of partnership compared to a private limited company?
6. Why would you prefer One Person Company (OPC) compared to a Sole Proprietorship?

Lesson 2

Types of Companies

LESSON OUTLINE

- Introduction
- Types of Companies
- Classification of Companies
- Private Company
- Characteristics of Private Company
- Incorporation of a Private Company
- Privileges and exemptions of Private Companies
- Public Company
- Characteristics of Public Company
- Incorporation of Public Company
- One Person Company
- Incorporation of One Person Company
- Difference between Sole Proprietorship and One Person Company
- Privileges of One Person Company
- Nidhi Companies
- Exemptions, modification and adaptations to Nidhi Companies
- Producer Companies
- Objects of Producer Companies
- Foreign Companies
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Companies may be classified on the basis of their incorporation, number of members, size, basis of control and motive. On the basis of incorporation of the companies, it may be classified into Charter Companies, Statutory Companies and Registered Companies. On the basis of liability, it may be Companies limited by shares/guarantee and unlimited liability companies. Further, on the basis of number of members, they may be classified into One Person Company, private company and public company. On the basis of size, they may be divided into small companies and other companies. On the basis of control, they may be classified into holding company, subsidiary company and associate company.

Besides, companies may be nonprofit companies licensed under Section 8, Government companies, foreign companies, holding/subsidiary companies, investment companies, producer companies etc.

After reading this lesson you would be able to understand the concepts of various types of companies, their legal basis, special provisions and privileges for some classes of companies, distinction between different types of companies etc.

INTRODUCTION

The Companies Act, 2013 provides for the kinds of companies that can be promoted and registered under the Act. The three basic types of companies which may be registered under the Act are:

(a) Private Companies;

(b) Public Companies; and

(c) One Person Company (to be formed as Private Limited Company)

Section 3 of the Companies Act 2013 read with the Companies (Incorporation) Rules, 2014 , states that:

(1) A company may be formed for any lawful purpose by–

(a) seven or more persons, where the company to be formed is a public company;

(b) two or more persons, where the company to be formed is a private company; or

(c) one person, where the company to be formed is a One Person Company that is to say, a private company,

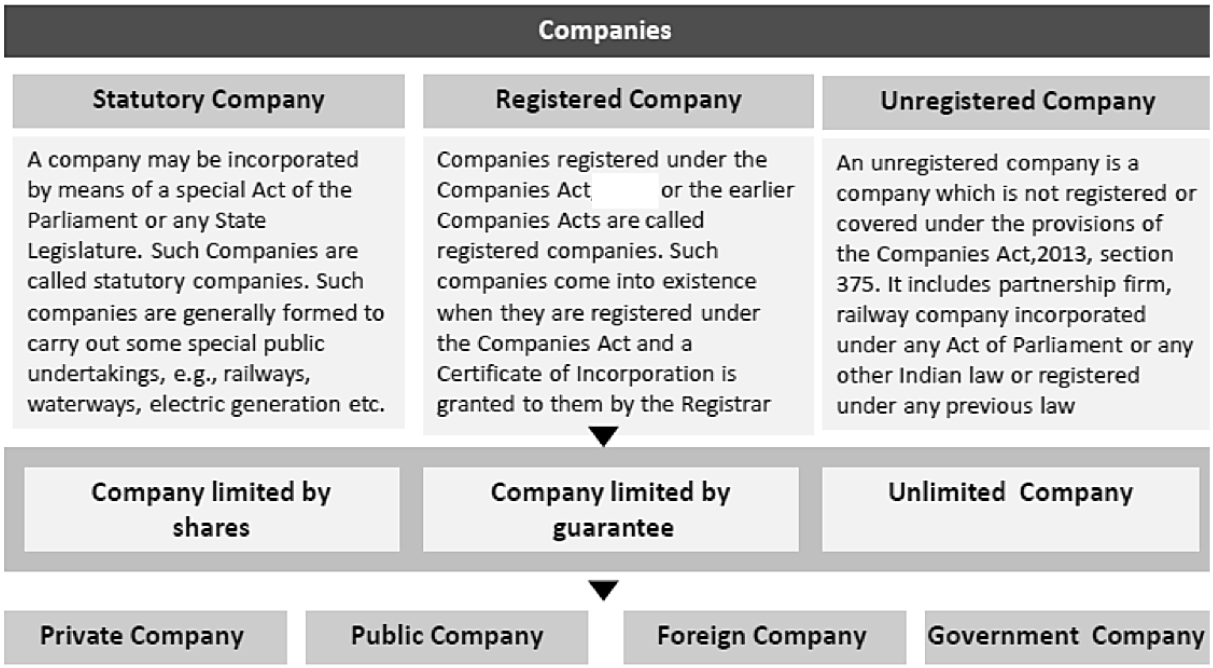
by subscribing their names or his name to a memorandum and complying with the requirements of the act in respect of registration.

(2) A company formed under sub-section (1) may be either–

(a) a company limited by shares; or

(b) a company limited by guarantee; or

(c) an unlimited company.



Classification of Companies

(i) **Classification on the basis of Incorporation**: Companies may be Incorporated under the following categories:

(a) **Statutory Companies**: These are constituted by a special Act of Parliament or State Legislature. The provisions of the Companies Act, 2013 do not apply to them. Examples of these types of companies are Reserve Bank of India, Life Insurance Corporation of India, etc.

(b) **Registered Companies:** The companies which are incorporated under the Companies Act, 2013 or under any previous company law and registered with the Registrar of Companies, fall under this category.

(ii) Classification on the basis of Liability: Under this category there are three types of companies: -

(a) **Unlimited Companies**: In this type of company, the liability of members of the company is unlimited, Section 2(92) of the Companies Act, 2013 provides that unlimited company means a company not having any limit on the liability of its members, Such companies may or may not have share capital. They may be either a public company or a private company. . The members is liable to the company and to any other person.

(b) **Companies limited by guarantee**: Section 2(21) of the Companies Act, 2013 provides that a company that has the liability of its members limited to such amount as the members may respectively undertake, by the memorandum, to contribute to the assets of the company in the event of its being wound-up, is known as a company limited by guarantee. The members of a guarantee company are, in effect, placed in the position of guarantors of the company's debts up to the agreed amount. the members is liable to the company and to any other person.

(c) **Companies limited by shares**: A company that has the liability of its members limited by the liability clause in the memorandum to the amount, if any, unpaid on the shares respectively held by them is termed as a company limited by shares. Section 2(22) of the Companies Act, 2013 provides that "company limited by shares" means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them. For example, a shareholder who has paid Rs. 75 on a share of face value Rupees 100 can be called upon to pay the balance of Rupees.25 only'. Companies limited by shares are by far the most common and it may be either public or private.

(iii) Other Forms of Companies

(a) **Section 8 Companies**: a person or an association of persons proposed to be registered under this Act as a limited company and proved to the satisfaction of the Central Government that he company –

i. has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;

ii. intends to apply its profits, if any, or other income in promoting its objects; and

iii. intends to prohibit the payment of any dividend to its members,

such person or association of person may be allowed to be registered as a limited company without addition to its name of the word "limited" or private limited by the Central government by issuing a license and by prescribing specified condition.

The association proposed to be registered under section 8 shall not be proposed to be an unlimited company. However the same may be company limited by guarantee or a Company limited by shares.

(b) **Government Companies:** As per section 2(45) of the Companies Act, 2013 the Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or

partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company;

(c) **Foreign Companies:** As per section 2(42) of the Companies Act, 2013 the "foreign company" means any company or body corporate incorporated outside India which,-

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

(d) **Holding and Subsidiary Companies**; As per section 2(46) of the Companies Act, 2013 46) the "holding company", in relation to one or more other companies, means a company of which such companies are subsidiary companies and the expression "company" includes any body corporate.

As per section 2(87) of the Companies Act, 2013 "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company –

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the 19[total voting power] either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation.- For the purposes of this clause, –

(*a*) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (*i*) or sub-clause (*ii*) is of another subsidiary company of the holding company;

(*b*) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(*c*) the expression "company" includes any body corporate;

(*d*) "layer" in relation to a holding company means its subsidiary or subsidiaries;

As per section 2(11) of the Companies Act, 2013, the "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.

(e) **Associate Companies/ Joint Venture Company**: As per section 2(6) of the Companies Act, 2013 the "associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation.- For the purpose of this clause, –

(a) the expression "significant influence" means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;

(f) **Investment Companies**: the term investment company" includes a company whose principal business is the acquisition of shares, debentures or other securities 13[and a company will be deemed to be principally engaged in the business of acquisition of shares, debentures or other securities, if its assets in the form of investment in shares, debentures or other securities constitute not less than fifty per cent. of its total assets, or if its income derived from investment business constitutes not less than fifty per cent. as a proportion of its gross income.

(g) **Producer Companies**: Producer Company means a body corporate having objects or activities specified in section 581B of the Companies Act, 1956 and registered as Producer Company under the Companies Act.

The objects of the Producer Company shall relate to all or any of the following matters, namely:

i. production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the Members or import of goods or services for their benefit: Provided that the Producer Company may carry on any of the activities specified in this clause either by itself or through other institution ;

ii. processing including preserving, drying, distilling, brewing, vinting, canning and packaging of produce of its Members ;

iii. manufacture, sale or supply of machinery, equipment or consumables mainly to its Members ;

iv. providing education on the mutual assistance principles to its Members and others ;

v. rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its Members ;

vi. generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce ;

vii. insurance of producers or their primary produce ;

viii. promoting techniques of mutuality and mutual assistance ;

ix. welfare measures or facilities for the benefit of Members as may be decided by the Board ;

x. any other activity, ancillary or incidental to any of the activities referred above or other activities which may promote the principles of mutuality and mutual assistance amongst the Members in any other manner ;

xi. financing of procurement, processing, marketing or other activities specified above which include extending of credit facilities or any other financial services to its Members.

(h) **Nidhi Companies**: A nidhi company is a type of company in the Indian non-banking finance sector, recognized under section 406 of the Companies Act, 2013 their core business is borrowing and lending money between their members. They are also known as Permanent Fund, Benefit Funds, Mutual Benefit Funds and Mutual Benefit Company. These companies are regulated under the Nidhi Rules, 2014 issued by the Ministry of Corporate affairs.

(i) **Dormant Companies** covered under Section 455 of the Companies Act. 2013 and includes a company which is formed and registered under the Act for a future project or to hold an asset or intellectual property and which has not been carrying on any business or operation, or has not

made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

(j) **Non-banking Financial Companies**: A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, 1956 / 2013 engaged in the business of loans and advances, acquisition of shares/stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property. A non-banking institution which is a company and has principal business of receiving deposits under any scheme or arrangement in one lump sum or in installments by way of contributions or in any other manner, is also a non-banking financial company.

(k) **Listed Company**: "listed company" means a company which has any of its securities listed on any recognised stock exchange;

PRIVATE COMPANY

As per Section 2(68) of the Companies Act, 2013, "private company" means a company having a minimum paid-up share capital as may be prescribed, and which by its articles,–

(i) restricts the right to transfer its shares;

(ii) except in case of One Person Company, limits the number of its members to two hundred:

Provided that where two or more persons hold one or more shares in a company jointly, they shall, for the purposes of this clause, be treated as a single member:

Provided further that –

(A) persons who are in the employment of the company; and

(B) persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continued to be members after the employment ceased,

shall not be included in the number of members; and

(iii) prohibits any invitation to the public to subscribe for any securities of the company;

It must be noted that it is only the number of members that is limited to two hundred. A private company may issue debentures to any number of persons, the only condition being that an invitation to the public to subscribe for debentures is prohibited.

The aforesaid definition of private limited company specifies the restrictions, limitations and prohibitions, which must be expressly provided in the articles of association of a private limited company.

As per proviso to Section 14 (1) of the Act, if a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, such company shall, as from the date of such alteration, cease to be a private company.

The words 'Private Limited' must be added at the end of its name by a private limited company.

As per section 3(1), a private company may be formed for any lawful purpose by two or more persons, by subscribing their names to a memorandum and complying with the requirements of this Act in respect of registration. Section 149(1) further lays down that a private company shall have a minimum number of two directors. The only two members may also be the two directors of the private company.

Characteristics of Private Limited Company

Members – To start a company, minimum number of 2 members is required and a maximum number of 200 members as per the provisions of the Companies Act, 2013.

Limited Liability – The liability of each member or shareholders is limited. It means that if a company faces loss under any circumstances then its shareholders are not liable to sell their own assets for payment. Thus, the personal, individual assets of the shareholders are not at risk.

Perpetual succession – The Company keeps on existing in the eyes of law even in the case of death, insolvency, the bankruptcy of any of its members. This leads to perpetual succession of the company. The life of the company keeps on existing forever.

Index of members – An index of the names entered in the respective registers of members and the index shall, in respect of each folio, contain sufficient indication to enable the entries relating to that folio in the register to be readily found. The maintenance of index of members is not necessary in case the number of members of the company is less than fifty. Which is a privilege to a private company wherein number of members is less than fifty.

A number of directors – When it comes to directors, a private company needs to have minimum two directors. With the existence of 2 directors, a private company can come into existence and can start with its operations.

Paid up capital – There is no minimum capital requirement.

Prospectus – Prospectus is a detailed statement of the company affairs which is issued by a company for its public. However, in the case of private limited company, the act prohibits any invitation to the public to subscribe for any securities of the company;, there is no such need to issue a prospectus because in this type of companies, public is not invited to subscribe for the shares of the company

Commencement of Business – A company incorporated after the commencement of the Companies (Amendment) Act, 2019 and having a share capital cannot commence any business or exercise any borrowing powers unless –

(a) A declaration is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and

(b) The company has filed with the Registrar a verification of its registered office.

Name – It is mandatory for all the private companies to use the word “private limited” after its name.

INCORPORATION OF A PRIVATE COMPANY

E Form SPICe (INC-32) deals with the single application for reservation of name, incorporation of a new company and/or application for allotment of DIN and/or application for PAN and TAN and/or issuance of Section 8 License Certificate. This eForm is accompanied by supporting documents including details of Directors & subscribers, MoA and AoA etc. Once the eForm is processed and found complete, company would be registered and CIN would be allocated. License Certificate shall also be issued in case of incorporation of a Section 8 company. Also DINs gets issued to the proposed Directors who do not have a valid DIN. Maximum three Directors are allowed for using this integrated form for filing application of allotment of DIN while incorporating a company. Also PAN and TAN would get issued to the Company.

However, the MCA provide web service for reserving a name for a new company or for change of name for any existing company which is known as RUN (Reserve Unique Name) web service.

For the incorporation of a Company, it is advisable to refer to the Companies (Incorporation) Rules, 2014 with

the applicable Forms as specified under the Companies Act, 2013. However, herein below we have tried to reproduce the steps as mentioned in the Rules vis-à-vis the Act, which are:

PROCESS OF INCORPORATION OF A PRIVATE COMPANY

Approval of Name through "RUN" is an optional way to get the name of the Company. A person can directly apply for the Incorporation of Company without approval of the Name in SPICE form. The detailed procedures is provided in STEP -2 onwards.

STEP – I: Apply for Name Approval in RUN

A. Login on MCA Website

Applicant have to login into their account on MCA Website. (Pro-existing users can use earlier account or new users have to create a new account.)

After Login use have to click on the icon "RUN" in MCA Service. An online form shall be open. Applicants have to fill the information online. (This form cannot be downloaded)

Note* since 26th January, 2018 e-form INC-1 has been omitted from the Companies Act, 2013.

B. Details required to be mentioned in online form:

(i) Entity type (i.e. Part I, OPC, Section 8 etc.) (below table taken from MCA link: http://www.mca.gov.in/MinistryV2/runServicerFAQ.html)

Entity Type	Suffix allowed	Example
New Company (Others)/ Part I company	Limited/ Private Limited	ABC Limited DEF Private Limited
Producer Company	Producer company limited	GHI Producer Company Limited
Unlimited Company	Unlimited	JKL Unlimited
Private (OPC)	(OPC) Private Limited	MNO (OPC) Private Limited
IFSC Company	(IFSC) Limited/ (IFSC) Private Limited/ IFSC Limited /IFSC Private Limited	PQR IFSC Limited/ PQR (IFSC) Limited STU IFSC Private Limited/ STU (IFSC) Private Limited
Section 8 company	Other than 'Limited/ Private Limited/ (OPC) Private Limited'	VWX Electoral Trust
Nidhi Company	Nidhi Limited	MNO Nidhi Limited

(ii) CIN (Corporate Identification Number and it has to be entered only when an existing company wishes to change its name and is using RUN to reserve a new name)

(iii) Proposed name (Auto Check Facility)

(iv) Comment (Mention Objects of the proposed Company and any other relevant information Like Trade Mark etc.)

(v) Choose File (Any attachment)

C. Choose File:

This option is available to upload the PDF documents. If applicant want to attach any file, can be upload at this option.

D. Submission of Form on MCA Website:

After completion of above steps user shall submit the Form with MCA website.

E. Payment of Fees:

There is no option of pay later challan in RUN. Applicant has to pay fees immediately after submission of form. After payment challan shall be generated.

F. Validity of Reserved Name:

Reserved name shall be valid for 20 days from the date of approval of Name.

Point to Remember

- DSC & DIN is not required for filing of RUN form for reservation of Name. Only account of MCA portal is mandatory.
- Only One Resubmission option is provided in RUN Form.
- Reserved name shall be valid for 20 days in case of allotment of name for New Company. However in case of allotment of name for existing Company name will be reserved and valid for 60 days in case of (Change of Name).
- Only one Name can be mentioned in RUN form. Earlier INC-1 allowed 6 names according to the preference.
- As per Register office Fees Rules, Fees shall be Rs. 1,000/-
- It is mandatory to attach relevant documents and No Objection Certificates(NOCs) only when a name which requires the approval of a Sectoral Regulator or NoC etc. if applicable, as per the Companies(Incorporation) Rules, 2014, is being applied for.
- one file is allowed to be uploaded as an attachment and the size of the file should not exceed 6MB. In case of multiple attachments, please scan all documents into a single file not exceeding 6MB in size, and then upload the same.
- No, there is no need to mention the name or number of proposed Directors in RUN.

STEP – II: Preparation of Documents for Incorporation of Company

After approval of name or for Incorporation of Company applicant have to prepare the following below mentioned Documents;

- INC-9 – Declaration by first Subscriber(s) and Director(s)
- DIR-2- Declaration from first Directors along with Copy of Proof of Identity and residential address.
- NOC from the owner of the property
- Proof of Office address (Conveyance/ Lease deed/ Rent Agreement etc. along with rent receipts);
- Copy of the utility bills which should not be older than two months
- In case of subscribers/ Director does not have a DIN, it is mandatory to attach: Proof of identity and residential address of the subscribers
- All the Subscribers should have Digital Signature.

STEP – III: Fill the Information in Form

Once all the above mentioned documents/ information are available. Applicant has to fill the information in the e-form “Spice” INC-32.

Features of SPICe (Inc-32) form:

- Maximum details of subscribers are SEVEN (7). In case of more subscribers, physically signed MOA & AOA shall be attaching in the Form.
- Maximum details of directors are TWENTY (20).
- Maximum THREE (3) directors are allowed for filing application of allotment of DIN while incorporating a Company.
- Person can apply the Name also in this form.
- By affixation of DSC of the subscriber on the INC-33 (e-moa) date of signing will be appear automatically by the form.
- Applying for PAN / TAN will be compulsory for all fresh incorporation applications filed in the new version of the SPICe form.
- Company can apply for GST, IEC also through AGILE form.
- In case of companies incorporated, with effect from the 26th day of January, 2018, with a nominal capital of less than or equal to rupees ten lakhs or in respect of companies not having a share capital whose number of members as stated in the articles of association does not exceed twenty, fee on INC-32 (SPICe) shall not be applicable

SPICe (INC-32) a Single Window Form for Incorporation of Company

Earlier if a Person wants to incorporate Company then it has to apply for the DIN, Approval of the Name Availability, and Separate form for first Director, Registered office address, PAN, TAN etc. But this form is a single window for Incorporation of Company.

This form can be used for the following purposes:

- Application of DIN (upto 3 Directors)
- Application for Availability of Name
- No need to file separate form for first Director (DIR-12)
- No need to file separate form for address of registered office (INC-22)
- No need to file separate form for PAN & TAN
- No need to file separately for GST, IEC.

Points to Remember

- In case of incorporation of a company having more than 7 subscribers, MOA & AOA shall be filled with INC 32 in the respective format as specified in Table A to J in Schedule I without filing form INC 33 and INC 34 as Physical attachment of MOA & AOA in e-form INC 32)
- In case of incorporation of a company where any of the subscribers of the MOA/AOA is signing at place outside India, MOA & AOA shall be filled with INC 32 in the respective format as specified in Table A to J in Schedule I without filing form INC 33 and INC 34 as Physical attachment of MOA & AOA in e-form INC 32.
- Company has to pay the Stamp Duty in case of incorporation of Company with authorized Capital of Rs. 10 Lakh or below. Because Stamp Duty is state matter. Companies Act, has given exemptions for the ROC fees not for the stamp duty.

- Maximum 3 (Three) DIN can be apply through SPICE form. If applicant want to incorporation Company with more than 3 Directors and more than 3 persons doesn't have DIN. In such situation applicant have to incorporate Company with 3 Directors and have to appoint new directors later on after incorporation.
- Only one (1) Name can be apply through SPICE form. In case after filing of e-form, due to non-availability of name form came for resubmission. In such case applicant have to propose new name and have to alter the name on all the attachment of the Form.

STEP – IV: Preparation of MOA & AOA (Electronic or Physical)

- After proper filing of SPICE form applicant has to download the e-form INC-33 (MOA) and INC-34 (AOA) form the MCA site. After downloading of form fill all the information in the forms as per requirement of Table A to J of Schedule I.
- After completely filing of the form affix DSC of all the subscribers and professional on subscriber sheet of the MOA & AOA.
- (Make Sure Professional and Subscriber sign the form on same date)

STEP – V: Fill details of PAN & TAN

It is mandatory to mention the details of PAN & TAN in the Incorporation Form INC-32. Link to find out of Area Code to file PAN & TAN are given in Help Kit of SPICE Form.

STEP – VI: Fill details of GST, IEC in AGILE

If Company wants to apply for GST or IEC it has to select YES in the form and fill the information in the form.

If Company doesn't want to apply for GST and IEC then it have to select no.

STEP – VII: Submission of INC-32, 33, 34, AGILE on MCA

Once all the 4 forms ready with the applicant, upload all four document as Linked form on MCA website and make the payment of the same.

STEP – VIII: Certificate of Incorporation

Incorporation certificate shall be generating with CIN, PAN & TAN.

Commencement of Business

It is to be noted that every company incorporated having a share capital shall not commence any business or exercise any borrowing powers unless

(a) a declaration in form INC-20A is filed by a director within a period of one hundred and eighty days of the date of incorporation of the company in such form and verified by a company Secretary or a chartered Accountant or a cost Accountant. in practice:, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him on the date of making of such declaration; and

(b) The company has filed with the Registrar a verification of its registered office in form INC-22 as provided in sub-section (2) of section 12.

Recent Initiatives by MCA in line with is on doing business

Form Spice Plus

SPICe plus is a integrated form and expansion and subsumed version of Spice form and AGILE form which enable the promoters of Company to apply for following Services while incorporation of Company:

a) Name Reservation of Company

b) PAN (Mandatory)

c) TAN (Mandatory)

d) EPFO (Optional)

e) ESIC (Optional)

f) GST (Optional)

Pre-caution to be taken by Professionals

1. Obtain engagement letter from subscriber: – As per certification in e-form DIR-12 & INC-22, a professional declares that he has been engaged for the purpose of certification, Therefore the professional should take engagement letter from the promoters.
2. Verification of original records pertaining to registered office: – As per certification in e-form INC-22, a professional declares that he has verified all the particulars(including attachments) from original records.
3. Ensure all attachments are clear enough to read: – As per certification in e-form DIR-12 & INC-22, a professional declares that all attachments are completely and legibly attached.
4. Ensure registered office of the company is functioning for the business purposes of the company: – As per certification in e-form INC-22, a professional declares that he has personally visited the registered office.
5. Take a declaration to the effect that all the original documents have been handed over after incorporation. Since as per section 7(4) copies all documents/information as originally filed should be preserved at the registered office of the company, therefore a professional should take a declaration while handing over the incorporation documents.
6. MCA Circular 10/2014: – According to this circular ROC/RD in case of omission of material fact or submission of false/incomplete/ misleading information can after giving opportunity to explain refer the matter toe-governance division of MCA, which in turn may initiate proceedings under section 447 and/ or ask the respective professional institute to take requisite disciplinary action.

Privileges and Exemptions of Private Company

The Companies Act, 2013, confers certain privileges on private companies which are not subsidiaries of public companies. Such companies are also exempted from complying with quite a few provisions of the Act. The basic rationale behind this is that since private limited companies are restrained from inviting capital and deposits from the public, not much public interest is involved in their affairs as compared to public limited companies. Private limited companies lose the privileges and exemptions the moment they cease to be private companies.

Private companies enjoy various privileges and exemptions. The Central Government has been empowered under section 462 (1), to issue in public interest, by notification, directing that any of the provisions of Companies Act, 2013 shall not apply to such class or classes of companies or shall apply to the class or classes of companies with such exceptions, modifications and adaptations as may be specified in the notification. In this context the Central Government vide notification no. 464(E) and 583(E) dated 5th June, 2015 and 13th June, 2017 respectively directed that respective sections of the Companies Act, 2013 shall not apply or shall apply with certain exceptions, modification and adaptations to private companies. A brief information on such exemptions is given hereunder.

Consolidated Table of exceptions, modifications and adaptations for Private Companies vide notification dated 5th June, 2015 and 13th June, 2017

S. No.	Notification date	Chapter/ Section number/ Sub-section(s) in the Companies Act, 2013	Exceptions/ Modifications/Adaptations
1	13th June, 2017	Chapter I, clause (40) of section 2.	For the proviso, the following shall be substituted, namely:- Provided that the financial statement, with respect to one person company, small company, dormant company and private company (if such private company is a start-up) may not include the cash flow statement; Explanation. - For the purposes of this Act, the term „start-up" or "start-up company" means a private company incorporated under the Companies Act, 2013 (18 of 2013) or the Companies Act, 1956 (1 of 1956) and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry."
2	5th June, 2015	Chapter I, sub-clause (viii) of clause (76) of section 2.	Shall not apply with respect to section 188.
3	5th June, 2015	Chapter IV, section 43 and section 47.	Shall not apply where memorandum or articles of association of the private company so provides.
4	5th June, 2015	Chapter IV, sub-clause (i) of clause (a) of sub-section (1) and sub-section (2) of section 62.	Shall apply with following modifications: – In clause (a), in sub-clause (i), the following proviso shall be inserted, namely: – Provided that notwithstanding anything contained in this sub- clause and sub-section (2) of this section, in case ninety per cent. of the members of a private company have given their consent in writing or in electronic mode, the periods lesser than those specified in the said sub-clause or sub-section shall apply.
5	5th June, 2015	Chapter IV, clause (b) of sub- section (1) of section 62.	In clause (b), for the words "special resolution", the words "ordinary resolution" shall be substituted.

6	5th June, 2015	Chapter IV, section 67.	Shall not apply to private companies - in whose share capital no other body corporate has invested any money; (b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice its paid up share capital or fifty crore rupees, whichever is lower; and such a company is not in default in repayment of such borrowings subsisting at the time of making transactions under this section.
7	5th June, 2015	Chapter V, clauses (a) to (e) of sub-section (2) of section 73.	Shall not apply to a private company which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital and free reserves, and such company shall file the details of monies so accepted to the Registrar in such manner as may be specified.
8	13th June, 2017	Chapter V, clauses (a) to (e) of sub-section (2) of section 73	Shall not apply to a private company – A. which accepts from its members monies not exceeding one hundred per cent. of aggregate of the paid up share capital, free reserves and securities premium account; or B. which is a start-up, for five years from the date of its incorporation; or C. which fulfils all of the following conditions, namely:- a. which is not an associate or a subsidiary company of any other company; b. if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and c. such a company has not defaulted in the repayment of such borrowings subsisting at the time of accepting deposits under this section: Provided that the company referred to in clauses (A), (B) or (C) shall file the details of monies accepted to the Registrar in such manner as may be specified.

9	13th June, 2017	Chapter VII, clause (g) of sub-section (1) of section 92	Shall apply to private companies which are small companies, namely:- "(g) aggregate amount of remuneration drawn by directors;".
10	13th June, 2017	Chapter VII, proviso to sub-section (1) of section 92	For the proviso, the following proviso shall be substituted, namely:- Provided that in relation to One Person Company, small company and private company (if such private company is a start-up), the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.".
11	5th June, 2015	Chapter VII, sections 101 to 107 and section 109.	Shall apply unless otherwise specified in respective sections or the articles of the company provide otherwise.
12	5th June, 2015	Chapter VII, clause (g) of sub-section (3) of section 117.	Shall not apply.
13	5th June, 2015	Chapter X, Clause (g) of sub-section (3) of section 141.	Shall apply with the modification that the words "other than one person companies, dormant companies, small companies and private companies having paid-up share capital less than one hundred crore rupees" shall be inserted after the words "twenty companies".
14	13th June, 2017	Chapter X, clause (i) of sub-section (3) of section 143	Shall not apply to a private company:- (i) which is a one person company or a small company; or (ii) which has turnover less than rupees fifty crores as per latest audited financial statement or which has aggregate borrowings from banks or financial institutions or any body corporate at any point of time during the financial year less than rupees twenty five crore."
15	5th June, 2015	Chapter XI, section 160.	Shall not apply.
16	5th June, 2015	Chapter XI, section 162.	Shall not apply.

17	13th June, 2017	Chapter XII, sub-section (5) of section 173.	For sub-section (5), the following sub-section shall be substituted, namely:- (5) A One Person Company, small company, dormant company and a private company (if such private company is a start-up) shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days: Provided that nothing contained in this sub-section and in section 174 shall apply to One Person Company in which there is only one director on its Board of Directors.
18	13th June, 2017	Chapter XII, sub-section (3) of section 174.	Shall apply with the exception that the interested director may also be counted towards quorum in such meeting after disclosure of his interest pursuant to section 184.
19	5th June, 2015	Chapter XII, section 180.	Shall not apply.
20	5th June, 2015	Chapter XII, sub-section (2) of section 184.	Shall apply with the exception that the interested director may participate in such meeting after disclosure of his interest.
21	5th June, 2015	Chapter XII, section 185.	Shall not apply to a private company - (a) in whose share capital no other body corporate has invested any money; (b) if the borrowings of such a company from banks or financial institutions or any body corporate is less than twice of its paid up share capital or fifty crore rupees, whichever is lower; and (c) such a company has no default in repayment of such borrowings subsisting at the time of making transactions under this section.
22	5th June, 2015	Chapter XII, second proviso to sub-section (1) of section 188.	Shall not apply.
23	5th June, 2015	Chapter XIII, sub-sections (4) and (5) of section 196.	Shall not apply.

It is to be noted that the exceptions, modifications and adaptations provided in column (3) of the above Table shall be applicable to a private company which has not committed a default in filing its financial statements under section 137 of the said Act or annual return under section 92 of the said Act with the Registrar.

(**Students are advised to refer relevant sections under the Companies Act, 2013 and rules made thereunder for reading in detail or Refer the E-book on Companies Act, 2013 from Institute's Website.)**

PUBLIC COMPANY

By virtue of Section 2(71), a public company means a company which:

(a) is not a private company; and

(b) has a minimum paid-up share capital, as may be prescribed

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

As per section 3(1)(a), a public company may be formed for any lawful purpose by seven or more persons, by subscribing their names or his name to a memorandum and complying with the requirements of this act in respect of registration.

A public company may be said to be an association consisting of not less than 7 members, which is registered under the Act. In principle, any member of the public who is willing to pay the price may acquire shares in or debentures of it. The securities of a public company may be quoted on a Stock Exchange. The number of members is not limited to two hundred.

As per section 58(2), the securities or other interest of any member in a public company shall be freely transferable. However, any contract or arrangement between two or more persons in respect of transfer of securities shall be enforceable as a contract.

The concept of free transferability of shares in public and private companies is very succinctly discussed in the case of Western *Maharashtra Development Corpn. Ltd.* v. *Bajaj Auto Ltd*. [2010] 154 Com Cases 593 (Bom). It was held that the Companies Act, makes a clear distinction in regard to the transferability of shares relating to private and public companies. By definition, a "private company" is a company which restricts the right to transfer its shares. In the case of a public company, the Act provides that the shares or debentures and any interest therein, of a company, shall be freely transferable.

The provision contained in the law for the free transferability of shares in a public company is founded on the principle that members of the public must have the freedom to purchase and, every shareholder should have the freedom to transfer. The incorporation of a company in the public, as distinguished from the private, realm leads to specific consequences and the imposition of obligations envisaged in law. Those who promote and manage public companies assume those obligations. Corresponding to those obligations there are some rights, which the law recognizes as inherent in the members of the public who subscribe to shares of the company.

CHARACTERISTICS OF PUBLIC COMPANY

Board of Directors

The board of the Public company comprises of a minimum number of three members and a maximum of 15. The company may appoint more than 15 directors after passing a special resolution. These are elected by the shareholders during the annual general meeting. They act as the representatives of the shareholders in the management of the company. Public limited companies are headed by a board of directors and Key Managerial Personnel of the Company. Composition of the board of directors is set out in the company's articles of association and the applicable rules and regulations.

Limited Liability

Shareholder liability for the losses of the company is limited to their share contribution only. This is what makes it a separate legal entity from its shareholders. The business can be sued on its own and not involve its shareholders. The company does not belong to any person since one person can own only a part of it.

Number of Members

A public limited company has a minimum number of seven shareholders or members and a limitless number of members. It can have as many shareholders as its share capital can accommodate.

Transferable shares

Shares of a public limited company are bought and sold by the shareholders, However in case of listed company the shares were traded on a stock exchange where the shares of the company are listed. They are freely transferable between its members and people trading in the stock exchange.

Life Span

A public limited company is not affected by death of one of its shareholders, but the shares are transferred to the next kin or legal heir of such deceased shareholder and the company continues to run its business as usual. In the case of a director's death, the Board is empowered to fill the resulting casual vacancy may be filled by Board of Directors at Board meeting which shall be subsequently approved by members in the immediate next general meeting.

Financial Privacy

Public limited companies are strictly regulated and are required by law to publish their complete financial statements annually. This ensures that they reveal their true financial position to their owners and to potential investors so that they can determine the true worth of its shares.

Capital

Public limited companies enjoy an increased ability to raise capital since they can issue shares to the public through the stock market. They can also raise additional capital by issuing debentures and bonds through the same market from the public. Debentures and bonds are in the form of secured or unsecured debts issued to a company on the strength of its integrity and financial performance by the general public or its members etc.

Incorporation of a Public Company

Requirement of minimum number of directors and shareholders:

There is a minimum requirement of directors and shareholders, as mentioned below:

(A) Public Company

- Minimum Shareholders: 7 (Seven)
- Minimum Directors: 3 (Three)

Statutory compliances

A public or private will have to comply with all the laws, rules and regulations as applicable, including but not limited to the Companies Act, 2013, Foreign Exchange Management Act, 1999, Shops and Establishment Act, Income Tax Act, etc., failing to which may result in heavy penalties.

- There must be at least seven members to start a public company.

- There is no ceiling on the maximum number of members in a public company.
- A public company should have at least three directors.
- In a Public Ltd. Company, there must be at least five members, personally present at the General Meeting for constituting the requisite quorum.
- The shareholders of a public company can freely transfer their shares.
- A public company can invite the general public for subscribing shares of the company.
- The shares of a public company can be listed on a recognised stock exchange and traded publicly.

STEPS FOR INCORPORATION OF PUBLIC COMPANY

The Incorporation procedure for a public company is similar to the private company. However it is to ensure that the proposed company in compliance with the minimum requirement of the members and Directors in a public company and the Articles and Memorandum of Association are drafted as per the requirement of the Act. The name shall be suffix by the word "Limited". If the article of the company is entrenched then such entrench shall in compliance with the Act.

ONE PERSON COMPANY (OPC)

Background of OPC

The Companies Act, 2013 provides for a new type of entity in the form of One Person Company (OPC), the introduction of OPC in the legal system is a move that would encourage corporatization of micro businesses and entrepreneurships.

In India, in the year 2005, the JJ Irani Expert Committee recommended the formation of OPC. It had suggested that such an entity may be provided with a simpler legal regime through exemptions so that the small entrepreneur is not compelled to devote considerable time, energy and resources on complex legal compliances.

OPC is a one shareholder corporate entity, where legal and financial liability is limited to the company only.

Status of OPC in other countries

Even in other countries like UK, Australia, Singapore, Pakistan, etc; a single person can form a company.

Various countries permit this kind of a corporate entity (China introduced it in October 2005) in which the promoting individual is both the director and the shareholder.

The amended company law of Pakistan permits one person to form a single-member company by filing with the registrar, at the time of incorporation, a nomination in the prescribed form indicating at least two individuals to act as nominee director and alternate nominee director.

In US, several states permit the formation and operation of a single-member Limited Liability Company (LLC).

In China, one person is allowed to apply for opening a limited company with a minimum capital of 1, 00,000 Yuan. The amended law of China prescribes that the owner should pay the investment capital at one time and bars him from opening a second company of the same kind.

In most countries, the law governing companies enables a single-member company to have more than one director and grants exemptions to such companies from holding AGMs, though records and documents are to be maintained.

Incorporation of OPC

Section 2(62) of the Companies Act, 2013 define "One Person Company" as a company which has only one person as member. OPC is a type of Private Company as per Section 2(68) and Section 3(1)(c) of the Act.

Rule 3 of the Companies (Incorporation) Rules 2014 say, only a natural person who is an Indian citizen and resident in India:-

(a) shall be eligible to incorporate a One Person Company;

(b) shall be a nominee for the sole member of a One Person Company.

"Resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty two days during the immediately preceding one calendar year.

A natural person can be member of only one "One Person Company", at any point of time and the said person shall not be a nominee of more than a One Person Company. The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber's death or his incapacity to contract, become the member of that One Person Company. The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in Form INC-32 (SPICe), Single Application for Incorporation of Company, along with consent of such nominee obtained in Form INC-3 and fee as provided in the Companies (Registration offices and fees) Rules, 2014 shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles. Form INC-32 is form for incorporation of one Person Company.

Difference between a Sole Proprietorship and an OPC

An one-person company is different from a sole proprietorship because it is a separate legal entity that distinguishes between the promoter and the company.

The promoter's liability is limited in an OPC in the event of a default or legal issues. On the other hand, in sole proprietorships, the liability is not restricted and extends to the individual and his or her entire assets would be liable to repay the debts due by the sole proprietorship business unlike OPC.

Position of OPC in India under the Companies Act, 2013

The Companies Act, 2013 classifies companies on the basis of their number of members into One Person Company, Private Company and Public Company. As stated above, a private company requires a minimum of 2 members. In other words, a One Person Company is a kind of private company having only one member.

As per section 2(62) of the Companies Act, 2013, "One Person Company" means a company which has only one person as a member.

Section 3(1)(c) lays down that a company may be formed for any lawful purpose by one person, where the company to be formed is to be One Person Company that is to say, a private company. In other words, one person company is a kind of private company.

An One person company shall have a minimum of one director. Therefore, a One Person Company will be registered as a private company with one member and one director.

By virtue of section 3(2) of the Act, an OPC may be formed either as a company limited by shares or a company limited by guarantee; or an unlimited liability company.

Rule 3 of Companies (Incorporation) Rules, 2014 - One Person Company

(1) Only a natural person who is an Indian citizen and resident in India -

(a) shall be eligible to incorporate a One Person Company;

(b) shall be a nominee for the sole member of a One Person Company.

Explanation-For the purposes of this rule, the term "resident in India" means a person who has stayed in India for a period of not less than one hundred and eighty two days during the immediately preceding one calendar year.

(2) A natural person shall not be a member of more than a One Person Company at any point of time and the said person shall not be a nominee of more than a One Person Company.

(3) 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.

(4) No minor shall become member or nominee of the One Person Company or can hold share with beneficial interest.

(5) Such Company cannot be incorporated or converted into a company under section 8 of the Act.

(6) Such Company cannot carry out Non-Banking Financial Investment activities including investment in securities of any body corporates.

(7) No such company can convert voluntarily into any kind of company unless two years have expired from the date of incorporation of One Person Company, except threshold limit (paid up share capital) is increased beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees.

Contract by One Person Company

Section 193 (1) provides that where One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are recorded in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract.

However, above said provision shall not apply to contracts entered into by the one person company in the ordinary course of its business.

As per section 193 (2), the company shall inform the Registrar about every contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors under sub-section (1) within a period of fifteen days of the date of approval by the Board of Directors.

As per section 152 (1), in case of a One Person Company an individual being its member shall be deemed to be its first director until a director or directors are duly appointed by the member in accordance with the provisions of that section.

Privileges of One Person Company

The privileges enjoyed by an OPC over other companies are as follows:

Section		Nature of Privileges
2(40)	Definition(Financial Statement)	The financial statement, with respect to One Person Company, may not include the cash flow statement;

67(2)	Restriction on purchase by company or giving of loans by its for purchase of its shares	Financial assistance can be taken by the member from the OPC for purchase of or subscribing to its own shares
92(1)	Annual Return	The annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company. In other words, it need not be signed by a company secretary in practice.
96(1)	Annual General Meeting	Need not hold annual general meeting
121(1)	Report on Annual General Meeting	Need not prepare a report on Annual General Meeting
122(1)	Applicability of this chapter to One Person Company	The provisions of section 98 and sections 100 to 111 (both inclusive) of Chapter VII shall not apply to a One Person Company
122(3)	Applicability of this chapter to One Person Company	For any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.
122(4)	Applicability of this chapter to One Person Company	Where there is only one director on the Board of Director of a One Person Company and any business is required to be transacted at the meeting of the Board of Directors of the company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes-book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all purposes under this Act.
134(1)	Financial statement, Board's Report, etc.	Financial statement and Board's report can be signed only by one director.
134(3)(p)	Financial statement, Board's Report, etc.	Need not prepare a statement indicating the manner in which formal annual evaluation has been made by the Board of its own performance and that of its committees and individual directors;
134(4)	Financial statement, Board's Report, etc.	In case of a One Person Company, Board's report shall mean only a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

137(1) (Third proviso)	Copy of financial statement to be filed with Registrar	File a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within 180 days from the closure of the financial year.
149(1)	Company to have Board of Directors	One person company need not to have more than one director on its Board.
149(4)	Company to have Board of Directors	Need not to appoint Independent directors on its Board.
152(6)	Appointment of Directors	Retirement by rotation is not applicable to these companies.
164(3)	Disqualifications for Appointment of Director	Additional grounds for disqualification for appointment as a director may be specified by way of articles being a private company.
165(1)	Number of Directorships	Restrictive provisions regarding total number of directorships which a person may hold in a public company do not include directorships held in One Person company which are neither holding nor subsidiary company of a public company.
167(4)	Vacation of office of Director	Additional grounds for vacation of office of a director may be provided in the Articles being a private company.
173 (5)	Meetings of Board	It is required to hold at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings should not be less than ninety days. For an OPC having only 1 director, the provisions of section 173 (Meetings of board) and section 174 (Quorum for meetings of Board) will not apply.
190(4)	Contract of Employment with Managing or Whole-Time Directors	The provisions relating to contract of employment with managing or whole-time directors does not apply to a One Person Company being a private company.
197(1)	Overall Maximum Mnagerial Remuneration and Managerial Remuneration in case of absence or inadequacy of profits	Total managerial remuneration payable by a one person company, to its directors, including managing director and whole-time director, and its manager in respect of any financial year may exceed eleven per cent. of the net profits since the restrictive provision is not applicable to OPC being a private company.

Benefits of One Person Company

The concept of One Person Company is quite revolutionary. It gives the individual entrepreneurs all the benefits of a company, which means they will get credit, bank loans, and access to market, limited liability, and legal protection available to companies by virtue of acquiring the legal status and perpetuity.

Prior to the Companies Act, 2013 coming into effect, at least two shareholders were required to start a company. But, now the concept of One Person Company would provide tremendous opportunities for small businessmen and traders, including those working in areas like handloom, handicrafts and pottery. Earlier they were working as artisans and weavers on their own, so they did not have a legal entity of a company. But now an OPC form

of organization would help them do business as an enterprise and give them an opportunity to start their own ventures with a formal business structure.

Further, the amount of compliance by a one person company is much lesser in terms of filing returns, balance sheets, audit etc. Also, rather than the middlemen usurping profits, the one person company will have direct access to the market and the wholesale retailers. The new concept would also boost the confidence of small entrepreneurs.

Certain characteristics of an OPC are summarized below

1. The financial statement, with respect to One Person Company, may not include the cash flow statement;
2. The Memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber's death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles.
3. The words "One Person Company" shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.
4. In relation to One Person Company, the annual return shall be signed by the company secretary, or where there is no company secretary, by the director of the company.
5. For the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.
6. Notwithstanding anything in this Act, where there is only one director on the Board of Director of a One Person Company, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such One Person Company, the resolution by such director is entered in the minutes-book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act. {sub section (4) of section 122}
7. The financial statement, including consolidated financial statement, if any, shall be approved by the Board of Directors before they are signed on behalf of the Board only by one director, for submission to the auditor for his report thereon.
8. A One Person Company shall file a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within one hundred eighty days from the closure of the financial year.
9. A One Person Company, small company and dormant company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days:

   Provided that nothing contained in this sub-section and in section 174 shall apply to One Person Company in which there is only one director on its Board of Directors. (Section 173(5))

NIDHI COMPANIES

The primary object of Nidhis is to carry on the business of accepting deposits and lending money to member-

borrowers only against jewels, etc., and mortgage of property. For over a century Nidhis, with the objective of cultivating the habit of thrift, generally promoted by public spirited men drawn from affluent local persons, lawyers and professionals like auditors, educationists, etc., including retired persons. The area of operation was local – within municipalities and panchayats. Some Nidhis on account of their financial and administrative strength opened branches within the respective revenue district and even outside. The principle of mutual benefit has been incorporated to pool the savings from members and lend only to members and never have dealing with non-members. Nidhis were not expected to engage themselves in the business of Chit Fund, hire purchase, insurance or in any other business including investments in shares or debentures. As stated these Nidhis do their business only with Members. Such Members are only individuals. Bodies Corporate or Trusts are never to be admitted as Members in these companies.

Origin of the Concept in India

The history of the Nidhis, their special features, their manner of functioning, their regulations, etc., have been described by the:

(i) Viswanatha Shastri Committee in 1965;

(ii) Banking Commission in 1972;

(iii) James Raj Committee in 1975;

(iv) Chakravarthy Report in 1987 ;

(v) Dr. A. C. Shah Committee in 1992.

Further the Central Government vide Notification No.5/7/2000-CL.V dated 23rd March 2000 constituted a Committee known as Sabanayagam Committee to examine the various aspects of the functioning of Nidhi Companies and suggested an appropriate policy framework for overall improvement of the Nidhi Companies and alternative mechanism to regulate and facilitate Nidhi Companies to play key role in mobilizing and gainfully investing small savings and improving their viability, resilience and performance.

In 2005, the Expert Committee on Company Law headed by Dr. Jamshed J. Irani suggested in its report on Nidhi companies as given hereunder:

NIDHI companies are effectively non-banking financial companies and are engaged in the business of accepting deposits and making loans to their members. The recent failures in the NBFC sector also extended to the NIDHI companies compelling the Government to introduce strict prudential norms for such companies. The deposit taking activities of NIDHIs are governed by the RBI Act and guidelines made thereunder. The power to give exemptions to the NIDHI companies in the administration of NIDHI i.e. with the Ministry of Company Affairs. This dual control leads to confusion in the administration of the provisions of the RBI Act and the Companies Act, 1956. Since, RBI is the regulator of all the NBFC incorporated under the Companies Act, the Committee felt that NIDHI companies should also be controlled by RBI through close supervision.

Prevailing Regulatory Aspects of Nidhi

As per section 406 of the Companies Act, 2013, “Nidhi” or “Mutual Benefit Society” means a company, which the Central Government may by notification in the Official Gazette, declare to be a Nidhi or Mutual Benefit Society, as the case may be.

Nidhi” means a company which has been incorporated as a Nidhi with the object of cultivating the habit of thrift and saving amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with the rules made by the central Government for regulation of such class of companies.

In exercise of powers conferred under section 406 read with section 469 of the Companies Act, 2013, Central

Government issued the Nidhi Rules, 2014 which came into force on the 1st day of April, 2014. Nidhi Rules, 2014 applicable to:

- every company which had been declared as a Nidhi or Mutual Benefit Society under sub-section (1) of Section 620A of the Companies Act, 1956;
- every company functioning on the lines of a Nidhi company or Mutual Benefit Society but has either not applied for or has applied for and is awaiting notification to be a Nidhi or Mutual Benefit Society under sub- Section (1) of Section 620A of the Companies Act, 1956; and
- every company incorporated as a Nidhi pursuant to the provisions of Section 406 of the Companies Act, 2013.
- every company declared as Nidhi or Mutual Benefit Society under sub-section (1) of section 406 of the Companies Act, 2013.

Declaration of Nidhis (Rule 3A of Nidhi Rules)

The Central Government, on receipt of application (in.Form NDH-4 along with fee thereon) of a public company for declaring it as Nidhi and on being satisfied that the company meets the requirements under these rules, shall notify the company as a Nidhi in the official Gazette:

Provided that a Nidhi incorporated under the Act on or after the commencement of the Nidhi (Amendment) Rules, 2019 shall file Form NDH-4 within sixty days from the date of expiry of :-

(a) one year from the date of its incorporation or

(b) the period up to which extension of time has been granted by the Regional Director under sub-rule (3) of rule 5:

Provided further that nothing in the first proviso shall prevent a Nidhi from filing Form NDH-4 before the period referred therein:

Provided also that in case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotment).

Compliance with rule 3A by certain Nidhis

Every company referred to in clause (b) of rule 2 and every Nidhi incorporated under the Act, before the commencement of Nidhi (Amendment) Rules, 2019, shall also get itself declared as such in accordance with rule 3, 4 within a period of one year from the date of its incorporation or within a period of nine months from the date of commencement of Nidhi (Amendment) Rules, 2019, whichever is later:

Provided that in case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotment).

Companies declared as Nidhis under previous company law to file Form NDH-4

Every company referred in clause (a) of rule 2 shall file Form NDH-4 alongwith fees as per the Companies (Registration Offices and Fees) Rules, 2014 for updating its status:

Provided that no fees shall be charged under this rule for filing Form NDH-4, in case it is filed within six month of the commencement of Nidhi (Amendment) Rules, 2019:

Provided further that, in case a company does not comply with the requirements of this rule, it shall not be allowed to file Form No. SH-7 (Notice to Registrar of any alteration of share capital) and Form PAS-3 (Return of Allotement)

Incorporation of Nidhi

(1) A Nidhi shall be a public company and shall have a minimum paid up equity share capital of five lakh rupees.

(2) Nidhi company shall not issue preference shares.

(3) If preference shares had been issued by a Nidhi before the commencement of the Companies Act, 2013, such preference shares shall be redeemed in accordance with the terms of issue of such shares.

(4) No Nidhi shall have any object in its Memorandum of Association other than the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit.

(5) Every "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

Requirements for minimum number of members and net owned funds

Sub-Rule (1) of Rule 5 of the Nidhi Rules, 2014 deals with requirements for minimum number of members, net owned fund etc. It provides that:

(1) Every Nidhi shall, within a period of one year from the date of its incorporation, ensure that it has–

(a) not less than two hundred members;

(b) Net Owned Funds of ten lakh rupees or more;

(c) unencumbered term deposits of not less than ten per cent of the outstanding deposits as specified in rule 14; and

(d) ratio of Net Owned Funds to deposits of not more than 1:20.

It may be noted that "Net Owned Funds" means the aggregate of paid up equity share capital and free reserves as reduced by accumulated losses and intangible assets appearing in the last audited balance sheet. Further, the amount representing the proceeds of issue of preference shares shall not be included for calculating Net Owned Funds.

If a Nidhi is not complying with clauses (a) or (d) of sub-rule (1) above mentioned, it shall within thirty days from the close of the first financial year, apply to the Regional Director in Form NDH-2 along with fee specified in Companies (Registration Offices and Fees) Rules, 2014 for extension of time and the Regional Director may consider the application and pass orders within thirty days of receipt of the application.

Provided that the Regional Director may extend the period upto one year from the date of receipt of application.

Where the failure to comply with sub-rule (1) above mentioned extends beyond the second financial year, Nidhi shall not accept any further deposits from the commencement of the second financial year till it complies with the provisions contained in sub-rule (1), and gets itself declared under sub-section (1) of section 406 besides being liable for penal consequences as provided in the Act.

Return of statutory compliances by Nidhi Companies

Within ninety days from the close of the first financial year after its incorporation and where applicable, the second financial year, Nidhi shall file a return of statutory compliances in Form NDH-1 along with such fee as provided in Companies (Registration Offices and Fees) Rules, 2014 with the Registrar duly certified by a company secretary in practice or a chartered accountant in practice or a cost accountant in practice.

General restrictions or prohibitions

In terms of Rule 6, Nidhi shall not –

(a) carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any body corporate;

(b) issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;

(c) open any current account with its members;

(d) acquire another company by purchase of securities or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management, unless it has passed a special resolution in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over such Nidhi;

(e) carry on any business other than the business of borrowing or lending in its own name.

Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.

(f) accept deposits from or lend to any person, other than its members;

(g) pledge any of the assets lodged by its members as security;

(h) take deposits from or lend money to any body corporate;

(i) enter into any partnership arrangement in its borrowing or lending activities;

(j) issue or cause to be issued any advertisement in any form for soliciting deposit.

It may be noted that private circulation of the details of fixed deposit Schemes among the members of the Nidhi carrying the words “for private circulation to members only” shall not be considered to be an advertisement for soliciting deposits.

(k) pay any brokerage or incentive for mobilizing deposits from members or for deployment of funds or for granting loans.

Share capital and allotment

(1) Every Nidhi shall issue fully paid up equity shares of the nominal value of not less than ten rupees each.

(2) No service charge shall be levied for issue of shares.

(3) Every Nidhi shall allot to each deposit holder at least a minimum of ten equity shares or shares equivalent to one hundred rupees:

It may be noted that a savings account holder and a recurring deposit account holder shall hold at least one equity share of rupees ten.

Membership of Nidhi

(1) A Nidhi shall not admit a body corporate or trust as a member.

(2) Every Nidhi shall ensure that its membership is not reduced to less than two hundred members at any time.

(3) A minor shall not be admitted as a member of Nidhi.

It may be noted that deposits may be accepted in the name of a minor, if they are made by the natural or legal guardian who is a member of Nidhi.

Branches of Nidhi

(1) A Nidhi may open branches, only if it has earned net profits after tax continuously during the preceding three financial years. A Nidhi may open up to three branches within the district.

(2) If a Nidhi proposes to open more than three branches within the district or any branch outside the district, it shall obtain the prior permission of the Regional Director and an intimation is to be given to the Registrar about opening of every branch within thirty days of such opening.

(3) Nidhi shall not open branches or collection centres or offices or deposit centres, or by whatever name called outside the State where its registered office is situated.

(4) Nidhi shall not open branches or collection centres or offices or deposit centres, or by whatever name called unless financial statement and annual return (up to date) are filed with the Registrar.

(5) A Nidhi shall not close any branch unless it –

   (a) publishes an advertisement in a newspaper in vernacular language in the place where it carries on business at least thirty days prior to such closure, informing the public about such closure;

   (b) fixes a copy of such advertisement or a notice informing such closure of the branch on the notice board of Nidhi for a period of at least thirty days from the date on which advertisement was published under clause (a) ; and

   (c) gives an intimation to the Registrar within thirty days of such closure.

Acceptance of Deposits

Rule 13 of the Nidhi Rules, 2014 provides that any of the fixed deposits accepted by a Nidhi company shall be for a minimum period of six months and a maximum period of sixty months.

Recurring deposits shall be accepted for a minimum period of twelve months and a maximum period of sixty months. In case of recurring deposits relating to mortgage loans, the maximum period of recurring deposits shall correspond to the repayment period of such loans granted by Nidhi.

The maximum balance in a savings deposit account at any given time qualifying for interest shall not exceed one lakh rupees at any point of time and the rate of interest shall not exceed two per cent above the rate of interest payable on savings bank account by nationalised banks.

A Nidhi may offer interest on fixed and recurring deposits at a rate not exceeding the maximum rate of interest prescribed by the Reserve Bank of India which the Non-Banking Financial Companies can pay on their public deposits.

A fixed deposit account or a recurring deposit account shall be foreclosed by the depositor subject to the following conditions, namely:–

(a) Nidhi shall not repay any deposit within a period of three months from the date of its acceptance;

(b) where at the request of the depositor, a Nidhi repays any deposit after a period of three months, the depositor shall not be entitled to any interest up to six months from the date of deposit;

(c) where at the request of the depositor, a Nidhi makes repayment of a deposit before the expiry of the period for which such deposit was accepted by Nidhi, the rate of interest payable by Nidhi on such deposit shall be reduced by two per cent from the rate which Nidhi would have ordinarily paid, had the deposit been accepted for the period for which such deposit had run. It may be noted that in the event of death of a depositor, the deposit may be repaid prematurely to the surviving depositor or depositors in the case of joint holding with survivor clause, or to the nominee or to legal heir with interest up to the date of repayment at the rate which the company would have ordinarily paid, had such deposit been accepted for the period for which such deposit had run.

Un-encumbered term deposits by Nidhi

Under Rule 14 of the Nidhi Rules, 2014, every Nidhi shall invest and continue to keep invested, in unencumbered term deposits with a Scheduled commercial bank (other than a co-operative bank or a regional rural bank), or post office deposits in its own name an amount which shall not be less than ten per cent of the deposits outstanding at the close of business on the last working day of the second preceding month.

In cases of unforeseen commitments, temporary withdrawal may be permitted with the prior approval of the Regional Director for the purpose of repayment to depositors, subject to such conditions and time limit which may be specified by the Regional Director to ensure restoration of the prescribed limit of ten per cent.

Loans by Nidhi

According to Rule 15 A Nidhi shall provide loans only to its members. The loans given by a Nidhi to a member

shall be subject to the following limits, namely:–

(a) two lakh rupees, where the total amount of deposits of such Nidhi from its members is less than two crore rupees;

(b) seven lakh fifty thousand rupees, where the total amount of deposits of such Nidhi from its members is more than two crore rupees but less than twenty crore rupees;

(c) twelve lakh rupees, where the total amount of deposits of such Nidhi from its members is more than twenty crore rupees but less than fifty crore rupees; and

(d) fifteen lakh rupees, where the total amount of deposits of such Nidhi from its members is more than fifty crore rupees:

Where a Nidhi has not made profits continuously in the three preceding financial years, it shall not make any fresh loans exceeding fifty per cent of the maximum amounts of loans specified in clauses (a), (b), (c) or (d).

A member shall not be eligible for any further loan if he has borrowed any earlier loan from the Nidhi and has defaulted in repayment of such loan.

The amount of deposits shall be calculated on the basis of the last audited annual financial statements. A Nidhi shall give loans to its members only against the following securities, namely:–

(a) gold, silver and jewellery, and the re-payment period of such loan shall not exceed one year.

(b) immovable property and, the total loans against immovable property [excluding mortgage loans granted on the security of property by registered mortgage, being a registered mortgage under section 69 of the Transfer of Property Act, 1882 (IV of 1882)] shall not exceed fifty per cent of the overall loan outstanding on the date of approval by the board, the individual loan shall not exceed fifty per cent of the value of property offered as security and the period of repayment of such loan shall not exceed seven years.

(c) fixed deposit receipts, National Savings Certificates, other Government Securities and insurance policies.

It may be noted that such securities duly discharged shall be pledged with Nidhi and the maturity date of such securities shall not fall beyond the loan period or one year whichever is earlier and in the case of loan against fixed deposits, the period of loan shall not exceed the unexpired period of the fixed deposits.

Rate of interest on any loan given by a Nidhi

The rate of interest to be charged on any loan given by a Nidhi shall not exceed seven and half per cent above the highest rate of interest offered on deposits by Nidhi and shall be calculated on reducing balance method.

Nidhi shall charge the same rate of interest on the borrowers in respect of the same class of loans and the rates

of interest of all classes of loans shall be prominently displayed on the notice board at the registered office and each branch office of Nidhi.

Directors in a Nidhi Company

The Director shall be a member of Nidhi. The Director of a Nidhi shall hold office for a term up to ten consecutive years on the Board of Nidhi. The Director shall be eligible for re-appointment only after the expiration of two years of ceasing to be a Director.

Where the tenure of any Director in any case had already been extended by the Central Government, it shall terminate on expiry of such extended tenure.

The person to be appointed as a Director shall comply with the requirements of Director Identification Number.

A person shall not be eligible for appointment as a director of a Nidhi, if –

(a) he is of unsound mind and stands so declared by a competent court;

(b) he is an undischarged insolvent;

(c) he has applied to be adjudicated as an insolvent and his application is pending;

(d) he has been convicted by a court of any offence, whether involving moral turpitude or otherwise, and sentenced in respect thereof to imprisonment for not less than six months and a period of five years has not elapsed from the date of expiry of the sentence.

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

(e) an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

(f) he has not paid any calls in respect of any shares of the company held by him, whether alone or jointly with others, and six months have elapsed from the last day fixed for the payment of the call;

(g) he has been convicted of the offence dealing with related party transactions under section 188 at any time during the last preceding five years; or

(h) he has been allotted a Director Identification Number under section 154 of the Act.

No person who is or has been a director of a Nidhi or any other company which

(a) has not filed financial statements or annual returns for any continuous period of three financial years; or

(b) has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more,

shall be eligible to be re-appointed as a director of that company or appointed in other company for a period of five years from the date on which the said company fails to do so.

Dividend

Under Rule 18 of the Nidhi Rules, 2014 a Nidhi shall not declare dividend exceeding twenty five per cent or such higher amount as may be specifically approved by the Regional Director for reasons to be recorded in writing and further subject to the following conditions, namely:–

(a) an equal amount is transferred to General Reserve;

(b) there has been no default in repayment of matured deposits and interest; and

(c) it has complied with all the rules as applicable to Nidhis.

Appointment of Auditor

Nidhi shall not appoint or re-appoint an individual as auditor for more than one term of five consecutive years and Nidhi shall not appoint or re-appoint an audit firm as auditor for more than two terms of five consecutive years.

It may be noted that an auditor (whether an individual or an audit firm) shall be eligible for subsequent appointment after the expiration of two years from the completion of his or its term. Further, in case of an auditor (whether an individual or audit firm), the period for which he or it has been holding office as auditor prior to the commencement of these rules shall be taken into account in calculating the period of five consecutive years or ten consecutive years, as the case may be.

Auditor's certificate

The Auditor of the company shall furnish a certificate every year to the effect that the company has complied with all the provisions contained in the rules and such certificate shall be annexed to the audit report and in case of non-compliance, he shall specifically state the rules which have not been complied with.

Filing of half yearly return

As per Rule 21 of the Nidhi Rules, 2014, every Nidhi company required file half yearly return with the Registrar in Form NDH-3 along with such fee as provided in Companies (Registration Offices and Fees) Rules, 2014 within thirty days from the conclusion of each half year duly certified by a company secretary in practice or chartered accountant in practice or cost accountant in practice.

Power of Registrar to enforce compliance

As per Rule 23 of the Nidhi Rules, 2014, the Registrar of companies may call for such information or returns from Nidhi as he deems necessary and may engage the services of chartered accountants, company secretaries in practice, cost accountants, or any firm thereof from time to time for assisting him in the discharge of his duties.

Further, in respect of any Nidhi which has violated these rules or has failed to function in terms of the Memorandum and Articles of Association, the concerned central government may appoint a Special Officer to take over the management of Nidhi and such Special Officer shall function as per the guidelines given by Central government:

It should also be noted that an opportunity of being heard shall be given to the concerned Nidhi by the Central Government before appointing any Special Officer.

Certain provisions of RBI Act not applied to Notified NBFCs

Reserve Bank of India issued Master Circular dated 1st July, 2014, pertaining to exemptions from the provisions of RBI Act, 1934 provides that the provisions of Sections 45-IA [Requirement of Registration and net owned fund], 45-IB [Maintenance of Liquid Assets] and 45-IC [Creation of Reserve Fund] of the Reserve Bank of India Act, 1934 shall not apply to any non-banking financial company Notified under Section 620A of the Companies Act, 1956, or under section 406 of the Companies Act, 2013 known as Nidhi Companies; and the provisions contained in Non-Banking Financial Companies Acceptance of Public Deposits (Reserve Bank) Directions, 1998 shall not apply to a Mutual Benefit Financial Company or a Mutual Benefit company provided that the application of Mutual Benefit Company is not rejected by Government of India under the provisions of the Companies Act, 1956.

The Central Government has been empowered under section 462 (1), to issue in public interest, by notification, directing that any of the provisions of Companies Act, 2013 shall not apply to such class or classes of companies

or shall apply to the class or classes of companies with such exceptions, modifications and adaptations as may be specified in the notification. In this context the Central Government vide notification no. 465(E) dated 5th June, 2015 directed that respective sections of the Companies Act, 2013 shall not apply or shall apply with certain exceptions, modification and adaptations to Nidhi companies. A brief analysis of these exemptions is given hereunder.

Exceptions, modification and adaptations to Nidhi Companies

Sr. No.	Chapter/ Section Number/ Sub-section(s) in the Companies Act, 2013	Exceptions/Modifications/Adaptations
1	Chapter II Section 20(2)	Incorporation of Company Shall apply subject to the modification that in the case of a Nidhi, the document may be served only on members who hold shares of more than one thousand rupees in face value or more than one per cent of the total paid-up share capital of the Nidhi's whichever is less. For other shareholders, document may be served by a public notice in newspaper circulated in the district where the Registered Office of the Nidhi is situated; and publication of the same on the notice board of the Nidhi. Note: Section 20 deals with service of documents.
2	Chapter III Section 42 except sub-section (1), explanation (II) to sub-section (2), sub-sections (4), (6), (8) (9) and (10)	Prospectus and Allotment of Securities Shall not apply. Note: Provisions of Section 42(2) except for explanation II, Section 42(3), Section 42(5), Section 42(7) shall not apply to Nidhi companies. Accordingly, provision such as recording of names of proposed allottees prior to invitation to subscribe, restrictions on fresh offer, restrictions on payment of subscription money through cash etc. shall not apply to Nidhi companies.
3	Chapter IV Section 47(1)(b)	Share Capital & Debentures Shall apply, subject to the modification that no member shall exercise voting rights on poll in excess of five per cent of total voting rights of equity shareholders. Note: Section 47(1)(b) deals with voting right on a poll to be in proportion with the paid-up share capital held. In Nidhi companies it shall apply, subject to the modification that no member shall exercise voting rights on poll in excess of five per cent of total voting rights of equity shareholders.
4	Chapter IV Section 62	Share Capital & Debentures Shall not apply. Note: Section 62 relates to further issue of share capital. Section 62 is not applicable to Nidhi companies.

5	Chapter IV Section 67(1)	Share Capital & Debentures Shall not apply, when shares are purchased by the company from a member on his ceasing to be a depositor or borrower and it shall not be considered as reduction of capital under section 66 of the Companies Act, 2013. Note: Section 67(1) states that no company limited by shares or by guarantee and having a share capital shall have power to buy its own shares unless the consequent reduction of share capital is effected under the provisions of the Act. It shall not apply to Nidhi companies when shares are purchased by the company from a member on his ceasing to be a depositor or borrower and it shall not be considered as reduction of capital under section 66 of the Companies Act, 2013.
6	Chapter VIII Section 123(5)	Declaration and payment of dividend Shall apply, subject to the modification that any dividend payable in cash may be paid by crediting the same to the account of the member, if the dividend is not claimed within 30 days from the date of declaration of the dividend. Note: Section 123(5) states that no dividend shall be paid by a company in respect of any shares therein except to the registered shareholder of such share or his order or to his banker and shall not be payable except in cash. These provisions shall apply subject to the modification that any dividend payable in cash may be paid by crediting the same to the account of the member, if the dividend is not claimed within 30 days from the date of declaration of the dividend.
7	Chapter VIII Section 127	Declaration and payment of dividend Shall apply, subject to the modification that where the dividend payable to a member is one hundred rupees or less, it shall be sufficient compliance of the provisions of the section, if the declaration of dividend is announced in the local language in one local news paper of wide circulation and announcement of the said declaration is also displayed on the notice board of the Nidhis for at least three months. Descriptive note: Section 127 deals with punishment for failure to distribute dividend. However, for Nidhi companies, where the dividend payable to a member is one hundred rupees or less, it shall be sufficient compliance of the provisions of the section, if the declaration of dividend is announced in the local language in one local news paper of wide circulation and announcement of the said declaration is also displayed on the notice board of the Nidhis for at least three months.
8	Chapter IX Section 136(1)	Accounts of Companies Shall apply, subject to the modification that, in the case of members who do not individually or jointly hold shares of more than one thousand rupees in face value or more than one per cent of the total paid-up share capital whichever is less, it shall be sufficient compliance with the provisions of the section if an intimation is sent by Public notice in newspaper circulated in the district in which the Registered Office of the Nidhi is situated stating the date, time and venue of

		Annual General Meeting and the financial statement with its enclosures can be inspected at the registered office of the company, and the financial statement with enclosures are affixed in the Notice Board of the company and a member is entitled to vote either in person or through proxy. Note: Section 136(1) deals with the right of the members to copies of audited financial statement. In case of Nidhi companies, for members not holding individually or jointly shares of more than one thousand rupees in face value or more than one per cent of the total paid-up share capital whichever is less, it shall be sufficient compliance with the provisions of the section if an intimation is sent by Public notice as prescribed above.
9	Chapter XI Section 160	Appointment and Qualification of Director In sub-section (1), for the words "one lakh rupees", the words "ten thousand rupees" shall be substituted. Note: Section 160(1) requires a deposit of Rs. 1 lakh for nomination of a director who is the person other than the retiring director. For Nidhi companies such deposit is Rs. 10,000/-
10	Chapter XII Section 185	Meetings of Board and its Powers Shall not apply, provided the loan is given to a director or his relative in their capacity as members and such transaction is disclosed in the annual accounts by a note. Note: Section 185 prohibits loans to directors with some exceptions. However, it shall not apply to Nidhi companies, provided the loan is given to a director or his relative in their capacity as members and such transaction is disclosed in the annual accounts by a note.
11	Chapter XIII Second proviso to sub- section (1) of section 197	Appointment and remuneration of Managerial Personnel Shall apply with the modification that the remuneration of a director who is neither managing director nor whole time director or manager for performing special services to the Nidhis specified in the articles of association may be paid by way of monthly payment subject to the approval of the company in general meeting and also to the provisions of section 197: Provided that no approval of the company in general meeting shall be required where, - (a) a Nidhi does not have a managing director or a whole-time director or a manager; (b) the remuneration payable during a financial year to all the directors of the Nidhi does not exceed ten per cent of the net profits of such Nidhi or fifteen lakh rupees, whichever is less; and (c) a remuneration payable under clause (b) is approved by a special resolution passed in this behalf by the Nidhi. Note: Section 197 deals with overall maximum managerial remuneration and managerial remuneration in case absence or inadequacy of profits. Second proviso to Section 197(1) limits the remuneration payable to directors who are neither managing directors nor whole-time directors to one percent of the net profits of the

		company, if there is a managing or whole-time director or manager; three percent of the net profits in any other case. However, Nidhi companies are allowed to pay remuneration to directors who are neither managing directors nor whole-time directors, for performing special services subject to conditions as laid down.
12	Chapter XXIV Section 403	Registration offices and Fees Shall apply, with the modification that the filing fees in respect of every return of allotment under sub-section (9) of section 42 shall be calculated at the rate of one rupee for every one hundred rupees or parts thereof on the face value of the shares included in the return but shall not exceed the amount of normal filing fee payable. Note: Section 403 deals with filing fee. For Nidhi companies it shall apply with the modification that the filing fees in respect of every return of allotment under sub-section (9) of section 42 shall be calculated at the rate of one rupee for every one hundred rupees or parts thereof on the face value of the shares included in the return but shall not exceed the amount of normal filing fee payable.

PRODUCER COMPANIES

Section 465(1) of the Companies Act, 2013 provides that the Companies Act, 1956 and the Registration of Companies (Sikkim) Act, 1961 (hereafter in this section referred to as the repealed enactments) shall stand repealed.

However, proviso to section 465(1) provides that the provisions of Part IX A of the Companies Act, 1956 shall be applicable mutatis mutandis to a Producer Company in a manner as if the Companies Act, 1956 has not been repealed until a special Act is enacted for Producer Companies.

In view of the above provision, Producer Companies are still governed by the Companies Act, 1956.

Companies (Amendment) Act, 2002 had added a new Part IXA to the main Companies Act, 1956 consisting of 46 new Sections from 581A to 581ZT.

According to the provisions as prescribed under Section 581A(I) of the Companies Act, 1956, a producer company is a body corporate having objects or activities specified in Section 581B and which is registered as such under the provisions of the Act. The membership of producer companies is open to such people who themselves are the primary producers, which is an activity by which some agricultural produce is produced by such primary producers.

Objects of Producer Companies

In terms of Section 581B (1) of the Companies Act, 1956, the objects of a producer company registered under this Act may be all or any of the following matters:

(a) production, harvesting, procurement, grading, pooling, handling, marketing, selling, export of primary produce of the members or import of goods or services for their benefit.

(b) processing including preserving, drying, distilling, brewing, vinting, canning and packaging of the produce of its members.

(c) manufacturing, sale or supply of machinery, equipment or consumables mainly to its members.

(d) providing education on the mutual assistance principles to its members and others.

(e) rendering technical services, consultancy services, training, research and development and all other activities for the promotion of the interests of its members.

(f) generation, transmission and distribution of power, revitalisation of land and water resources, their use, conservation and communications relatable to primary produce.

(g) insurance of producers or their primary produce.

(h) promoting techniques of mutuality and mutual assistance.

(i) welfare measures or facilities for the benefit of the members as may be decided by the Board.

(j) any other activity, ancillary or incidental to any of the activities referred to in clauses (a) to (i) above or other activities which may promote the principles of mutuality and mutual assistance amongst the members in any other manner.

(k) financing of procurement, processing, marketing or other activities specified in clauses (a) to (j) above, which include extending of credit facilities or any other financial services to its members.

Further, under Section 581B(2) it has also been clarified that every producer company shall deal primarily with the produce of its active members for carrying out any of its objects specified above.

FOREIGN COMPANIES

As per section 2(42), "foreign company" means any company or body corporate incorporated outside India which –

(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and

(b) conducts any business activity in India in any other manner.

Sections 379 to 393 under Chapter XXII of the Act deal with such companies.

Section 380 of the Act lays down that every foreign company which establishes a place of business in India must, within 30 days of the establishment of such place of business, file with the Registrar of Companies for registration:

(a) a certified copy of the charter, statutes or memorandum and articles, of the company or other instrument constituting or defining the constitution of the company and, if the instrument is not in the English language, a certified translation thereof in the English language;

(b) the full address of the registered or principal office of the company;

(c) a list of the directors and secretary of the company containing such particulars as may be prescribed;

(d) the name and address or the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;

(e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

(f) particulars of opening and closing of a place of business in India on earlier occasion or occasions;

(g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and

(h) any other information as may be prescribed.

Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified places or documents as required under Section 382.

Section 381 requires a Foreign Company to maintain books of Account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of place of business established by the foreign company in India.

Section 376 of the Companies Act, 2013 provides further that when a foreign company, which has been carrying on business in India, ceases to carry on such business in India, it may be wound up as an unregistered company under Sections 375 to 378 of the Act, even though the company has been dissolved or ceased to exist under the laws of the country in which it was incorporated.

Section 379 provides that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference of a foreign company is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whether singly or in the aggregate, such company shall comply with such of the provisions of this Act, as may be prescribed by the Central Government with regard to the business carried on by it in India, as if it were a company incorporated in India.

As regards the applicability of the provisions of the Companies Act, 2013 to foreign companies the following provisions of section 384 are to be noted:

(i) The provisions of section 71 relating to Debentures shall apply mutatis mutandis to a foreign company.

(ii) The provisions of Section 92 regarding (filing of annual returns) and Section 135 (Corporate Social Responsibility) shall, subject to such exceptions, modifications or adaptations as may be made therein by the rules made under the Act, apply to a foreign company as they apply to a company incorporated in India.

(iii) The provisions of Section 128 relating to the (to the extent of requiring it to maintain at its principal place of business in India books of account with respect to moneys received and spent, sales and purchase made and assets and liabilities, in the course of or in relation to its business in India), Section 209A (inspection of accounts), Section 233A (Special audit), Section 233B (audit of cost accounts), Section 234-246 (investigations), so far as may be, apply only to the Indian business of a foreign company having an established place of business in India as they apply to a company incorporated in India.

(iv) The provisions of Chapter VI (Registration of Charges) shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.

(v) The provisions of Chapter XIV (Inspection, Inquiry and Investigation) shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

As per Section 386(c), having a share transfer office or registration office will constitute a place of business. In Tovarishestvo Manufacture Liudvig Rabenek, Re [1944] 2 All ER 556 it was held that where representatives of a company incorporated outside the country frequently stayed in a hotel in England for looking after matter of business, it was held that the company had a place of business in England.

In a certain case, it was held that mere holding of property cannot amount to having a place of business.

BRANCH OFFICE

Foreign companies, as they grow, seek to expand their business over the globe. The establishment of branch offices, herein referred to as BOs, achieves this strategic growth. This article explains the route to be taken by these foreign companies in establishing their branches and the compliance to be met in the process, focusing solely on the establishment of Branch Offices and not Liaison or Project Offices. Branch Offices help companies with an easier management of their businesses in the particular areas. A BO is an extension of the Parent Company.

Section 2(42) of the Companies Act, 2013, defines a foreign company as a company or a body corporate incorporated outside India and which has a place of business whether by itself or through an agent, in this country. This definition includes a Branch Office; all the provisions of the Act applying to the company will also apply to the BO. India sets up several rules under the RBI (Reserve Bank of India) and FEMA, 1999. The establishment of a BO is regulated as per Section 6(6) of FEMA, 1999 read along with notification no FEMA 22/2000-RB dated May 3, 2000. Under Section 11 of the afore-mentioned Act, RBI issues directions to the authorized persons regarding the regulations to be followed when conducting foreign exchange business with the customers or constituents. The BOs that were established in the pre-FEMA period are now required to regularize their offices under FEMA through the RBI, as per the recent regulations.

Master Direction - Establishment of Branch Office (BO) / Liaison Office (LO) / Project Office (PO) in India by foreign entities

A BO can be established by a body incorporated outside India, including a firm or association of persons, involved in manufacturing or trading activities. The process of setting up is an easy one with minimal compliance requirements. The permission to set-up a BO has to be obtained by the RBI under the FEMA, 1999 provisions. RBI provides guidelines to be followed for establishing a BO; the former also reserves the right to reject an application on the non-fulfilment of the same. The Applications are to be made in form FNC and are considered by the RBI under two routes determined by the degree of Foreign Direct Investment (FDI):

- The Reserve Bank Route: taken when the principal business of the foreign company falls under sectors where 100% FDI is permissible and the prior approval of Reserve Bank of India is not required if the Government approval or license/permission by the concerned Ministry/Regulator has already been granted.
- The Government Route: when the sectors do not permit 100% FDI investment.

The RBI has a few other considerations:

- Track Record: For a BO a company will require a profit making track record in the in the immediately preceding five financial years in the home country.
- Net Worth: “a total of paid-up capital and free reserves, less intangible assets as per the latest Audited Balance Sheet or Account Statement Certified by a Certified Public Accountant or any Registered Accounts Practitioner”. The net worth has to be equal to or more than USD 100,000.

An application from a foreign for opening of a BO/LO/PO in India shall require prior approval of Reserve Bank of India and shall be forwarded by the AD Category-I bank to the General Manager, Reserve Bank of India, Central Office Cell, Foreign Exchange Department, 6, Sansad Marg, New Delhi - 110 001 who shall process the applications in consultation with the Government of India, in the following cases:

- The applicant is a citizen of or is registered/incorporated in Pakistan;
- The applicant is a citizen of or is registered/incorporated in Bangladesh, Sri Lanka, Afghanistan, Iran, China, Hong Kong or Macau and the application is for opening a BO/LO/PO in Jammu and Kashmir, North East region and Andaman and Nicobar Islands;
- The principal business of the applicant falls in the four sectors namely Defence, Telecom, Private Security and Information and Broadcasting. However, Further, in the case of proposal for opening a PO relating to defence sector, no separate reference or approval of Government of India shall be required if the said non-resident applicant has been awarded a contract by/ entered into an agreement with Ministry of Defence or Service Headquarters or Defence Public Sector Undertakings. The term “permission” used in the Government of India Notification dated January 21, 2019 does not include general permission, if any, available under Foreign Direct Investment in the automatic route, in respect of the above four sectors.

- The applicant is a Non-Government Organisation (NGO), Non-Profit Organisation, Body/ Agency/ Department of a foreign government. However, if such entity is engaged, partly or wholly, in any of the activities covered under Foreign Contribution (Regulation) Act, 2010 (FCRA), they shall obtain a certificate of registration under the said Act and shall not seek permission under FEMA 22(R).

The application by the foreign company has to be made through a designated AD Category-I bank to the General Manager of the Foreign Exchange Department of RBI. Some prescribed documents have to be attached with the application. The RBI Master Circular of 2016 provides two of the documents that have to be attached:

"1. English version of the Certificate of Incorporation / Registration or Memorandum & Articles of Association attested by Indian Embassy / Notary Public in the Country of Registration.

2. Latest Audited Balance Sheet of the applicant entity."

Even if applications do not satisfy the criteria if an agent files them on behalf of a parent company, that parent company ought to satisfy the criteria. The AD-I Category bank involved in the process will conduct due diligence on the Applicant in the following areas- "background, antecedents of the promoter, nature and location of activity, sources of funds, etc.", along with compliance of the Know Your Customer (KYC) norms.

The BO hence, once approved by the RBI, will be allotted a Unique Identification Number (UIN). Once the offices have been set up, the BO must also obtain a Permanent Account Number (PAN) from the Income Tax Authorities. This should be reported in the Annual Activity Certificate (AAC) that the BO is required to present at the end of each ear to show that the activities are undertaking in the permitted categories only.

Section 382 of the Companies Act, 2013, states that the company has to 'conspicuously' exhibit outside the office, the company's name and the specify country it was incorporated in. The name must be in English Language and in the local language of the area where the office is set-up. If the members of the company have limited liability, then the same has to be specified with the name of the company outside the office and also mentioned in all the broachers, prospectus and any other circulars generated by the company. The Act also provides for the registration of the prospectus of the company with the registrar before it circulates and spreads any information about the issuance of securities by the company.

Funding of the BO by the Foreign Company

Equity Share Capital: in the usual way Indian companies are financed.

Preferred Share Capital: such convertible preference shares, compulsorily convertible into equity shares are regarded as Foreign Direct Investment (FDI).

Debentures and Borrowings: there can be redeemable, convertible or non-convertible. Companies can issue debentures, bonds and other debt securities. These also, when convertible into equity shares, are treated as FDI.

Activities

These BOs represent the parent company and usually undertake the same activities as the latter. The profits from these are easily remittable from India, subject to the taxes applicable. They are permitted by the RBI to undertake the following activities, as listed in the Master Circular:

1. Export / Import of goods.
2. Rendering professional or consultancy services.
3. Carrying out research work, in areas in which the parent company is engaged.
4. Promoting technical or financial collaborations between Indian companies and parent or Overseas group company.
5. Representing the parent company in India and acting as buying / selling agent in India.

6. Rendering services in information technology and development of software in India.
7. Rendering technical support to the products supplied by parent/group companies.
8. Foreign airline / shipping company.

A branch office is not allowed to undertake any Retail Trading Activities. Manufacturing or Processing activities, undertaken directly or indirectly, are also barred.

The RBI has given general permission to foreign companies to set up branch offices in Special Economic Zones (SEZs) subject to the following conditions:

1. such BOs are functioning in those sectors where 100 per cent FDI is permitted;
2. Such BOs comply with Chapter XXII of the Companies Act, 2013
3. such BOs function on a stand-alone basis..

Every Branch Office within thirty days of its establishment has to deliver certain documents to the Registrar as specified in Section 380 of the Companies Act, 2013.

ANNEXURE

SPECIMEN OF BOARD RESOLUTION FOR ADOPTION OF PRE–INCORPORATION CONTRACTS

RESOLVED that the preliminary expenses for ₹ …… incurred by the promoters of the company for the purpose of its incorporation as per the statement placed before the meeting be and are hereby approved.

RESOLVED FURTHER that the preliminary contracts entered into by the promoters in connection with the incorporation of the company as per the statement before the meeting be and are hereby approved.

MODEL GENERAL POWER OF ATTORNEY

(On non-judicial Stamp Paper of Requisite Value) The Registrar of Companies

.....

.....

I/We, the undersigned, subscribers to the Memorandum and Articles of Association, ... do hereby authorise Shri ..... son of..... resident of..... ..... to make any alteration, addition, correction, deletion, amendment, and such other work as may be necessary on our behalf in the Memorandum and Articles of Association and all other documents filed with you relating to the registration of the above-mentioned company and attest the same on my/our behalf and to receive/collect the Certificate of Incorporation on our behalf and to do such other things as may be necessary in connection with the incorporation of the above named company.

Accepted.

Place: Subscriber(s) to the Memorandum and Articles of Association

Date:

LESSON ROUND UP

– From the point of view of incorporation, companies can be classified as chartered companies, statutory companies and registered companies. Companies can be categorized as unlimited companies, companies limited by guarantee and companies limited by shares. Companies can also be classified as public companies, private companies, one person companies, small companies, associations not for profit having license under Section 8 of the Act, Government companies, foreign companies,

holding companies, subsidiary companies, associate companies, investment companies and Producer Companies.

- A Digital Signature establishes the identity of the sender or signee electronically while filing documents through the Internet. The Ministry of Corporate Affairs (MCA) mandates that the Directors sign some of the application documents using their Digital Signature. Hence, a Digital Signature is required for all Directors of a proposed Company.
- A private company has been defined under Section 2(68) of the Companies Act, 2013 as a company which has a minimum paid-up capital as prescribed, and by its articles restricts the right to transfer its shares, limits the number of its members to two hundred, and prohibits any invitation to the public to subscribe for any securities of the company.
- Where a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included therein under section 2(68), the company shall, as from the date of such alteration, cease to be a private company.
- A private company can be further classified into a One Person Company and Small Company.
- "One Person Company" means a company which has only one person as a member.
- "Small company" means a company, other than a public company, (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than five crore rupees; and (ii) turnover of which as per its last profit and loss account does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than twenty crore rupees.
- Above definition of small company is not applicable to a holding company or a subsidiary company; or a company registered under section 8; or a company or body corporate governed by any special Act.
- A public company is a company which (a) is not a private company (b) has a minimum paid-up share capital as may be prescribed.
- A limited company is a company limited by shares or by guarantee. An unlimited company is a company not having any limit on the liability of its members.
- Associations not for profit with limited liability are permitted to be registered under a license granted by the Central Government without using the word(s) 'Limited' or 'Private Limited'.
- Section 2(45) defines a Government company as a company in which not less than fifty-one per cent of the paid-up share capital is held by Central or State Government or governments or partly by one and partly by others.
- Auditor of a government company shall be appointed or reappointed by the Comptroller and Auditor General of India (C&AG).
- Foreign Company means any company or body corporate incorporated outside India which (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner.
- Investment Company means a company whose principal business is the acquisition of shares, debentures or other securities.
- A Producer Company is a body corporate having objects or activities specified in Section 581B and which is registered as such under the provisions of the Act. Section 581B(1) of the Companies Act, 1956 provides the objects for which a producer company may be registered under the Act.
- The primary object of Nidhis is to carry on the business of accepting deposits and lending money to member-borrowers only against jewels, etc., and mortgage of property. According to section 406 of Companies Act, 2013 "Nidhi" means a company which has been incorporated as a Nidhi with the object

of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit, and which complies with such rules as are prescribed by the Central Government for regulation of such class of companies.

– A company formed under an Act of Parliament or State Legislature is called a Statutory Company/ Corporation.

– Principal characteristics of Statutory Corporation are State ownership, creation by special law, immunity from Parliamentary scrutiny, freedom in regard to personnel, body corporate features, distinct relation with the Government, independent finances, commercial audit and operation on business principles.

– Central Government has exempted applicability of various provisions of the Act, to Private Company, Nidhi Company, Section 8 Company and Government Company.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. State in brief the various kinds of companies which can be registered under the Companies Act, 2013.
2. Define a private company and state the exemptions which it enjoys under the Companies Act, 2013.
3. Discuss in brief disadvantages and obligations of a private company.
4. Define a public company and distinguish it from a private company.
5. State the consequences in each of the following cases giving reasons for your answers:
   (a) A Private Company has 210 members in total of which 10 are the employees of the company. 5 of these employees leave the employment of the company.
   (b) A private firm has 20 partners, including a private company which is having 30 shareholders.
6. What is a Government Company? Summarize the special provisions of the Companies Act relating to Government Companies.
7. Write short notes on:
   (a) Holding and Subsidiary companies.
   (b) Associate Companies
   (c) Investment Companies
   (d) Non-Banking Financial Companies.
   (e) Unlimited Companies.
   (f) Small Companies
   (g) One Person Companies
   (h) Nidhi Companies
   (i) Producer Companies
   (j) Public Financial Institution
   (k) Dormant Companies
8. Discuss in brief the law relating to statutory corporations.
9. What is a foreign company? Summarize the provisions of the Companies Act, 2013 relating to foreign companies.

Lesson 3 – Part I

Charter Documents of Companies

LESSON OUTLINE

- Memorandum of Association
- Forms of Memorandum of Association
- Contents of Memorandum of Association
- Articles of Association
- Contents of Articles of Association
- Doctrine of Ultra Vires
- Doctrine of Indoor Management
- Exceptions to Doctrine of Indoor Management
- Constructive Notice of Memorandum and Articles
- Doctrine of Alter Ego
- Distinction between Memorandum and Articles
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

The memorandum and articles of association of a company are the most important documents for the formation of a company and for its functioning thereafter.

The memorandum of association contains the name, situation of registered office, objects, capital and liability and subscription clauses. The articles are its bye-laws or rules and regulations that govern the management and internal affairs and the conduct of its business. Both the documents are required to be registered with the Registrar of Companies at the stage of incorporation of the company.

Before dealing with a company, it is advisable to read the memorandum and articles of the company to understand aspects, such as powers of Board, scope of company's activities etc. and its relationship with the outside world.

After reading this lesson, you would be able to understand the concept of Memorandum of Association and Articles of Association, their purpose, contents and registration. It also discusses the alterations that can be carried out in the Memorandum and Articles of Association and effect of such alterations. It also explains the legal effect of these documents. It also covers doctrine of indoor management and Alter Ego.

MEMORANDUM OF ASSOCIATION

The Memorandum of Association is a document which sets out the constitution of a company and is therefore the foundation on which the structure of the company is built. It defines the scope of the company's activities and its relations with the outside world.

The first step in the formation of a company is to prepare a document called the memorandum of association. In fact, memorandum is one of the most essential pre-requisites for incorporating any form of company under the Companies Act, 2013 (hereinafter referred to as 'Act'). This is evidenced in Section 3 of the Act, which provides the mode of incorporation of a company and states that a company may be formed for any lawful purpose by seven or more persons, where the company to be formed is a public company; two or more persons, where the company to be formed is a private company; or one person, where the company to be formed is a One Person Company by subscribing their names or his name to a memorandum and complying with the requirements of this Act in respect of its registration.

To subscribe means to append one's signature or mark a document as an approval or attestation of its contents.

According to Section 2(56) of the Act "memorandum" means the memorandum of association of a company as originally framed and altered, from time to time, in pursuance of any previous company law or this Act.

Section 4 of the Act specifies in clear terms the contents of this important document which is the charter of the company. The memorandum of association of a company contains the objects of the company which it shall pursue. It not only shows the objects of formation of the company but also determines the scope of its operations beyond which its actions cannot go. "THE MEMORANDUM OF ASSOCIATION", as observed by Palmer, "is a document of great importance in relation to the proposed company".

CASE LAW

In the celebrated case of Ashbury Railway Carriage & Iron Co. Ltd. v. Riche, (1875) L.R. 7 H.L. 653, Lord Cairn observed: "The memorandum of association of a company is its charter and defines the limitations of the powers of the company. It contains the both which is affirmative and that which is negative. It states affirmatively the ambit and extent of vitality and powers which by law are given to the corporation, and it states negatively, if it is necessary to state, that nothing shall be done beyond that ambit." [Egyptian Salt and Soda Co. Ltd. v. Port Said Salt Association Ltd. (1931) A.C. 677]

FORM OF MEMORANDUM OF ASSOCIATION

Section 4(6) of the Act provides that the memorandum of association should be in any one of the Forms specified in Tables A, B, C, D or E of Schedule I to the Act, as may be applicable in relation to the type of company proposed to be incorporated or in a Form as near thereto as the circumstances admit.

(i) the Form in Table A is applicable in the case of companies limited by shares;

(ii) the Form in Table B is applicable to companies limited by guarantee not having a share capital;

(iii) the Form in Table C is applicable to the companies limited by guarantee having a share capital;

(iv) the Form in Table D is applicable to unlimited companies not having a share capital;

(v) the Form in Table E is applicable to unlimited companies having a share capital.

A company shall adopt any of the model Forms of the memorandum of association mentioned above, as may be applicable to it.

CONTENTS OF MEMORANDUM

As per Section 4(1), the memorandum of a limited company must state the following:

(a) the name of the company with "Limited" as its last word in the case of a public company; and "Private Limited" as its last words in the case of a private company;(Name Clause)

This shall not apply in case of companies registered under section 8.

Similarly, in case of government companies the name of the company need not be ended with the words "Limited" or "Private Limited". This is as per the exemptions to Government Companies under Section 462 of Companies Act, 2013 vide notification dated June 5, 2015.

(b) the State in which the registered office of the company is to be situated;(Situation Clause)

(c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;(objects clause);

(d) the liability of members of the company, whether limited or unlimited, and also state,—(Liability Clause)

(i) in the case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them; and

(ii) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute –

(A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and

(B) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

(e) in the case of a company having a share capital, — (Capital Clause) the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount;

(f) Subscription Clause:

(i) the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share; and

(ii) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

(g) in the case of a One Person Company, the name of the person who, in the event of the death of the subscriber, shall become the member of the company.

According to section 4(7), any provision in the memorandum or articles, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void.

The above clauses are compulsory and are designated as "conditions" prescribed by the Act, on the basis of which a company is incorporated.

It is to be noted that the Companies Act, 2013 shall override the provisions in the memorandum and Articles of a company, if the latter contains anything contrary to the provisions in the Act (Section 6).

MEMORANDUM OF ASSOCIATION [SECTION 4 READ WITH SCHEDULE I]

NAME CLAUSE

Name of the company should indicate whether the company is private or public
No undesirable name as specified in Rule 8 of Companies (Incorporation) Rules, 2014
No identical name that resembles the name of an existing company.

SITUATION CLAUSE

This specifies the state in which the registered office is situated.
Companies are required to have registered office within 15 days of its incorporation.
Registrar to be intimated about the details of registered office within 30 days of incorporation or 15 days of change if any as the case may be in Form INC-22

OBJECT CLAUSE

Memorandum to state the object of the company to be pursued on the incorporation of the company and the matters which are necessary for the furtherance of the objects as stated above.
The bifurcation of main, ancillary and other objects as required under Companies Act, 1956 has been dispensed with in Companies Act, 2013.

LIABILITY CLAUSE

This states that liability of the members is limited or unlimited.
In case of a company limited by shares, that liability of its members is limited to the amount unpaid, if any, on the shares held by them (including premium if any) as against Companies Act, 1956 where in it was limited to the amount unpaid on the face value of the share.

CAPITAL CLAUSE

This states the amount of the capital with which the company is registered
The shares into which the capital is divided must be of fixed amount and the no. of shares which the subscribers to the memorandum agree to subscribe to subscribers to which shall not be less than one share
The capital is variously described as "Nominal", "Authorised"

SUBSCRIPTION CLAUSE (STATED IN SCHEDULE I)

Subscribers agree to subscribe the prescribed no. of shares stated against their name in the memorandum .
The statutory requirements regarding subscription of memorandum are that:
~Each subscriber must take at least 1 share
~Each subscriber must write opposite his name the no. of shares which he agrees to take

NAME CLAUSE

A company being a legal entity must have a name of its own to establish its separate identity. The name of the company is a symbol of its independent corporate existence. The first clause in the memorandum of association of the company states the name by which a company is to be known. The company may adopt any suitable name provided it is not undesirable.

According to section 4(*2*), the name stated in the memorandum shall not –

(a) be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law; or

(b) be such that its use by the company –

  (i) will constitute an offence under any law for the time being in force; or

  (ii) is undesirable in the opinion of the Central Government.

Section 4(*3*) of the Act provides that without prejudice to the provisions of section 4(*2*), a company shall not be registered with a name which contains –

(a) any word or expression which is likely to give the impression that the company is in any way connected with, or having the patronage of, the Central Government, any State Government, or any local authority, corporation or body constituted by the Central Government or any State Government under any law for the time being in force; or

(b) such word or expression, as may be prescribed in rule 8 of the Companies(Incorporation) Rules, 2014, unless the previous approval of the Central Government has been obtained for the use of any such word or expression.

As per section 4(*4*) a person may make an application, in web-based form RUN (Reserve Unique Name) in prescribed manner and accompanied by prescribed fee to the Registrar for the reservation of a name set out in the application as –

(a) the name of the proposed company; or

(b) the name to which the company proposes to change its name.

Section 4(*5*)(i) lays down that upon receipt of an application under sub-section (*4*), the Registrar may, on the basis of information and documents furnished along with the application, reserve the name for a period of twenty days from the date of the application.

Provided that in case of an application for reservation of name or for change of its name by an existing company, the Registrar may reserve the name for a period of sixty days from the date of approval. As stated above, section 4(2) provides that the name stated in the memorandum shall not be such that its use by the company, in the opinion of the Central Government, is undesirable. A name which is identical to or too nearly resembles, the name by which a company in existence has been previously registered or the use of the names which will constitute any offence under any law for the time being in force, will be deemed to be undesirable.

The Registrar must make preliminary enquiries to ensure that the name allowed by him is not misleading or intended to deceive with reference to the Objects Clause of the memorandum [*Methodist Church* v. *Union of India*, (1985) 57 Com Cases 443 (Bombay)]. The Registrar is not, however, required to carry out any elaborate investigation at the time of registration of the company. Unless the purpose of the company appears to be unlawful *ex-facie* or is transparently illegal or prohibited by any statute, it cannot be regarded as an unlawful association [*T.V. Krishna* v. *Andhra Prabha (P) Ltd.*, (1960) 30 Com Cases 437 (AP)].

The object is to prevent the use of a name likely to mislead the public. For example, a company is not allowed to use a name which is prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950, or suggestive of any connection with Government or of State patronage where there is none.

CASE LAW

Thus, in *Ewing* v. *Buttercup Margarine Co. Ltd.* (1917) 2 Ch. 1, the plaintiff, who carried on business under the name of the Buttercup Dairy Co., obtained an injunction against the defendant (Buttercup Margarine Co. Ltd.), on the grounds that the public might think that the two businesses were connected, the word “Buttercup” being a fancy one.

The rule will apply also to foreign companies or traders, whose goods are imported into the country, as it was applied in the case of *La Societe Anonyme Panchard at Levessor* v. *Panchard Levessor Motor Co. Ltd.*, (1901) 2 Ch. 513. The plaintiffs were a French company carrying on business in Paris as motor car manufacturers and were using the name “Panchard” in connection with motors of their manufacture. They objected to the use of the word “Panchard” in the name of the defendant company on the ground that the principal object of the defendants was to injure wrongfully and fraudulently the plaintiffs’ business by passing off their goods as those of the plaintiffs’ manufacture and succeed even though they had no agencies in England but had a market for their goods there.

The Central Government under Section 16 is empowered to direct a company, at any point of time to rectify its name if by inadvertence it has been registered with a name which is identical to or too nearly resembles the name of an existing company whether registered under this Act or the previous company law. The company shall change its name within a period of 3 months from the issue of the above direction after passing an ordinary resolution for the purpose.

However, any application rejected by Regional Director under Section 22(1)(ii)(b) of the Companies Act, 1956 on the ground that such applications were made after the requisite period of twelve months specified therein, cannot apply afresh under Section 16(1) (a) Companies Act, 2013 as the extinguished limitation cannot be considered to be revived even if no limitation period has been prescribed/ laid down in the said section.

This section also gives enhanced power to the Central Government to order rectification of name where such name in its opinion constitutes an infringement of a registered trademark. The proprietor of the registered trademark may make an application to the Central Government for an order for rectification of name of the company because it is identical to or too nearly resembles the applicant's registered trademarks. Such application must be made within three years from the date of incorporation or the registration or change of name whether under this Act or previous company law. In such a case the Central Government may direct the company to change its name and the company shall change its name, within a period of six months from the issue of such direction, after passing an ordinary resolution for the purpose.

Where a company changes its name or obtains a new name, it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum.

CASE LAW

In the case of *Atlas Cycles (Haryana) Ltd.* v. *Atlas Products Pvt. Ltd* [146 (2008) DLT 274 (DB)], use of the brand name as corporate name was settled. Both the plaintiff and the defendant companies belong to the same family. The Appellant-plaintiff was the proprietor of the trade mark in the name "Atlas". The Respondent-defendant company containing the name "Atlas" in its corporate name started dealing in bicycles. The plaintiff objected to the use of the name "Atlas" by the defendant company. The Defendants were restrained from using the word 'Atlas' in their corporate/trade name in respect of bicycles and bicycle parts.

Where a company is directed to change the name, the court cannot directly tell the Registrar to effect the change in the name of the company. The Court can only direct the company to do so. The company cannot simply file the Court order regarding the change, but it will have to follow the prescribed procedure. [*Halifax Plc* v. *Halifax Repossessions Ltd.* (2004) 2 BCLC 455 (CA)].

But mere similarity of name is not in itself enough to give a right to an injunction. As held in *D.W. Boulay* v. *D.W. Boulay,* (1868) LR 2 (PC), the law does not give a person a right to prevent the use of a name by another person. In the case of companies, however, registration will be refused only if there is likelihood of deception or confusion.

A person cannot be permitted to name a company even after his personal name if that name resembles the name of an existing company. [*K.G. Khosla Compressors Ltd.* v. *Khosla Extractions Ltd.,* (1986) 1 Comp LJ 211: AIR 1986 Del 181]

In the case of incorporation of an Asset Management Company (AMC), the Memorandum and Articles of Association are required to be vetted and approved by the Securities and Exchange Board of India (SEBI) before these documents are registered by the Registrar of Companies.

SITUATION CLAUSE

The name of the State in which the registered office of the company is to be situated must be given in the

memorandum. But the exact address of the registered office is not required to be stated therein. According to section 12 of the Act within thirty (30) days of company's incorporation, and at all times thereafter, the company must have a registered office to which all communications and notices may be sent. The company must also furnish to the Registrar verification of its registered office within a period of thirty days of its incorporation in such manner as may be prescribed. (e-form INC-22)

Publication of Name and Address of the Company

According to Section 12(3) of the Act, every company is required to display its name and address in legible letters in conspicuous position and in all its business letters, bill heads, letter papers. Accordingly, the company shall –

(a) paint or affix its name, and the address of its registered office, and keep the same painted or affixed, on the outside of every office or place in which its business is carried on, in a conspicuous position, in legible letters, and if the characters employed therefor are not those of the language or of one of the languages in general use in that locality, also in the characters of that language or of one of those languages;

(b) have its name engraved in legible characters on its seal, if any;

(c) get its name, address of its registered office and the Corporate Identity Number along with telephone number, fax number, if any, e-mail and website addresses, if any, printed in all its business letters, billheads, letter papers and in all its notices and other official publications; and

(d) have its name printed on negotiable instruments such as hundies, promissory notes, bills of exchange and such other document as may be prescribed.

However, where a company has changed its name or names during the last two years, it shall paint or affix or print, as the case may be, along with its name, the former name or names so changed during the last two years.

Further, in case of One Person Company, the words ''One Person Company'' shall be mentioned in brackets below the name of such company, wherever its name is printed, affixed or engraved.

Department, presently known as Ministry of Corporate Affairs (MCA) has clarified that display of its name in English in addition to the display in the local language will be a sufficient compliance with the requirements of the section.

The MCA has also clarified that a share certificate is not an official publication of a company within the meaning of Section 147(1)(c) of the Companies Act, 1956 [This corresponds to Section 12 of the Companies Act, 2013] [Circular No. 3/73/8/10(147)/ 72-CC-V dated 3.2.1973].

The words 'outside of every office' do not mean outside the premises in which the office is situated [*Dr. H.L. Batliwalla Sons & Company Ltd.* v. *Emperor* (1941) 11 Com Cases 154 : AIR 1941 (Bom.) 97]. Where office is situated within a compound, the display outside the office room, though inside the building, is sufficient.

Do you know?

The company shall furnish to the Registrar of Companies, the verification of its registered office within 30 days of incorporation in Form INC 22.

OBJECT CLAUSE

The third compulsory clause in the memorandum sets out the objects for which the company has been formed. Under section 4(1)(c) of the Act, all companies must state in their memorandum the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof.

The objects clause is of great importance because it determines the purpose and the capacity of the company.

It indicates the purpose for which the company has been set up and its actual capability, besides its sphere of activities. It states affirmatively the ambit and extent of powers of the company and, stated negatively, that nothing should be done beyond that ambit and that no attempt shall be made to use the company for any other purpose than that which is specified. The purpose of the objects clause is to enable the persons dealing with the company to know its permitted range of activities. The acts beyond this ambit are *ultra vires* and hence void. Even the entire body of shareholders cannot ratify such acts.

Although express powers are necessary, a company may do anything which is incidental to and consequential upon the powers specified, and the act will not be *ultra vires* [*Attorney General* v. *G.E. Rly. Co.*, (1880) 5 A.C. 473]. Thus, a trading company has an implied power to borrow money, draw and accept bills of exchange in the ordinary form, but a railway company cannot issue bills although it may borrow money.

The subscribers to the memorandum of association enjoy almost unrestricted freedom to choose the objects. The only restriction is that objects should not be illegal and against the provisions of the Companies Act, 2013.

The memorandum of association of a company is its charter defining the objects of its existence and operations. As pointed out in *Cotman* v. *Brougham* 1918 AC 514, its purpose is 'to enable the shareholders, creditors and those dealing with the company to know what is the permitted range of the enterprise. The objects clause or clauses in the memorandum are to be so construed as to confer on the company all powers reasonably required to the attainment of the objects.' "A memorandum of association like any other document must be read fairly and its importance derived from a reasonable interpretation of the language which it employs" [*Egyptian Salt and Soda Co. Ltd.* v. *Port Said Salt Association Ltd.* AC 677: (1931) 1 Com Cases 285: AIR 1931 PC 182; 62 MLJ 163; *Deuchar* v. *Gas, Light and Coke Co.,* (1925) AC 691)]. The natural and ordinary meaning of the language used in several clauses should be taken into consideration for determining whether a particular transaction does or does not fall within the objects stated in the memorandum [*Bell Houses Ltd.* v. *City Wall Properties Ltd.* (1966) 36 Com Cases 779: (1966) 2 All ER 674 (CA)].

It is *ultra vires* for a company to act beyond the limits of its memorandum. Any attempted departure will be invalid and cannot be validated even if assented to by all the shareholders of the company. *Ultra vires* means an act or transaction of a company, which though it may not be illegal, is beyond the company's powers by reason of not being within the objects of the memorandum of association. The memorandum is, so to speak, the limit beyond which a company cannot travel. [*Ashbury Railway Carriage and Iron Company* v. *Riche,* (1875) LR 7 HL 653]. An act beyond the objects mentioned in the memorandum is *ultra vires* and void and cannot be ratified [*Dr. Lakshmanaswami Mudaliar A.* v. *LIC* (1963) Comp LJ 248: 1963 33 Com Cases 420: AIR 1963 SC 1185]. Where no connection or nexus exists between the exercise of a power and the attainment of an object, exercise of power will be *ultra vires* [*Radha Cinema & Co.* v. *Chitralipi Films,* 1974 Tax LR 2180 (Cal)].

LIABILITY CLAUSE

Section 4 sub-section 1(d) of the Act, states that the liability of members of the company is to be specifically mentioned in the MoA. It is provided that the liability of member may either be limited or unlimited, further it shall also state that, –

(i) in the case of a company limited by shares, the liability of its members is limited to the amount unpaid, if any, on the shares held by them; and

(ii) in the case of a company limited by guarantee, the amount up to which each member undertakes to contribute –

(A) to the assets of the company in the event of its being wound-up while he is a member or within one year after he ceases to be a member, for payment of the debts and liabilities of the company

or of such debts and liabilities as may have been contracted before he ceases to be a member, as the case may be; and

(B) to the costs, charges and expenses of winding-up and for adjustment of the rights of the contributories among themselves;

CAPITAL CLAUSE

This clause shall state the amount of the capital with which the company is registered. The shares into which the capital is divided must be of fixed value, which is commonly known as the nominal value of the share. The capital is variously described as "nominal", "authorized" or "registered".

The amount of nominal capital is determined having regard to the present as well as future requirements of the company with reference to its objects. The usual way to state the capital in the memorandum is: "The capital of the company is 10,00,000 rupees divided into 1,00,000 equity shares of 10 rupees each". This amount lays down the maximum limit beyond which the company cannot issue shares without altering the memorandum as provided by Section 61 of the Companies Act, 2013.

If there are both equity and preference shares, then the division of the capital is to be shown under these two heads. A company is not authorized to issue capital beyond its authorized/nominal/registered capital. If it receives applications for shares beyond the shares covered by the authorized capital, the amount received on excess number of shares should be returned.

Out of the issued capital, the total amount actually subscribed or agreed to be subscribed is known as subscribed capital, and this subscribed capital again may be wholly paid or partly paid, in which latter case the balance would be payable on future calls when made. The amount actually paid by the shareholders is called the paid-up capital.

According to Section 60 of the Act, if the amount of the authorized capital (nominal capital), of the company is stated in any notice, advertisement, official publication, business letter, bill head or letter paper, it shall also contain a statement in an equally prominent position and in equally conspicuous terms the amount of capital which has been subscribed and the amount paid-up.

DECLARATION FOR SUBSCRIPTION

The subscribers to the memorandum declare: "We, the several persons whose names and addresses are subscribed below, are desirous of being formed into a company in pursuance of this memorandum of association, and we respectively agree to take the number of shares in the capital of the company set opposite our respective names". Then follow the names, addresses, description, occupations of the subscribers, and the number of shares each subscriber has agreed to take and their signatures attested by a witness.

The statutory requirements regarding subscription of memorandum are that:

- each subscriber must take at least one share;
- each subscriber must write opposite his name the number of shares which he agrees to take. [Section 4(1)(e))]

ARTICLES OF ASSOCIATION

Nature of Articles

According to Section 2(5) of the Companies Act, 2013, 'articles' means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act. It also includes the regulations contained in Table A in Schedule I of the Act, in so far as they apply to the company.

In terms of section 5(1), the articles of a company shall contain the regulations for management of the company. The articles of association of a company are its bye-laws or rules and regulations that govern the management of its internal affairs and the conduct of its business. The articles play a very important role in the affairs of a company. It deals with the rights of the members of the company inter se. They are subordinate to and are controlled by the memorandum of association. The general functions of the articles have been aptly summed up by Lord Cairns, L.C. in *Ashbury Railway Carriage and Iron Co. Ltd.* v. *Riche,* (1875) L.R. 7 H.L. 653 as follows:

"The articles play a part that is subsidiary to the memorandum of association. They accept the memorandum of association as the charter of incorporation of the company, and so accepting it, the articles proceed to define the duties, rights and powers of the governing body as between themselves and the company at large, and the mode and form in which business of the company is to be carried on, and the mode and form in which changes in the internal regulations of the company may from time to time be made... The memorandum, is as it were... the area beyond which the action of the company cannot go; inside that area shareholders may make such regulations for the governance of the company as they think fit".

Thus, the memorandum lays down the scope and powers of the company, and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members. But they must keep within the limits marked out by the memorandum and the Companies Act.

The articles regulate the internal management of the affairs of the company by way of defining the powers of its officers and establishing a contract between the company and the members and between the members *inter se*. This contract governs the ordinary rights and obligations incidental to membership in the company [*Naresh Chandra Sanyal* v. *The Calcutta Stock Exchange Association Ltd.,* AIR 1971 SC 422, (1971) 41 Com Cases 51]. But the Articles of Association of a company are not 'law' and do not have the force of law. In *Kinetic Engineering Ltd.* v. *Sadhana Gadia,* (1992) 74 Com Cases 82 : (1992) 1 Comp LJ 62 (CLB), the Hon'ble CLB held that if any provision of the articles or the memorandum is contrary to any provisions of any law, it will be invalid in toto.

Articles Subordinate to Memorandum

The articles of a company are subordinate to and subject to the memorandum of association and the Act. Any clause in the Articles going beyond the memorandum will be *ultra vires*. But the articles are only internal regulations, over which the members of the company have full control and may alter them according to what they think fit. Only care has to be taken to see that regulations provided for in the articles do not exceed the powers of the company as laid down by its memorandum [*Ashbury* v. *Watson, (1885) 30 Ch. D 376 (CA)*]. Articles that go beyond the company's sphere of action are inoperative, and anything done under the authority of such article is *void* and incapable of ratification.

But, neither the articles nor the memorandum can authorize the company to do anything so as to contravene any of the provisions of the Act. [See *Re Peveril Gold Mines,* (1989) 1 Ch 122 (CA)].

The functions of the Articles in relation to the Memorandum have already been summed up in the *Ashbury Railway Carriage case* and even though the articles are subordinate to the memorandum yet if there be any ambiguity in the memorandum, the articles may be used to explain it but not so as to extend the objects. [Re. *South Durham Brewery Company* (1885) 3 Ch. D 261]. The memorandum of a company was not clear as to the classes of shares to be issued by a company, but the articles made clear the doubt by giving the power to the company to issue shares of different classes.

The relationship between the two documents was further emphasized in *Guinness* v. *Land Corporation of Ireland,* (1882) 22 Ch D 349, where it was observed: "The memorandum contains the fundamental conditions upon which alone the company is allowed to be incorporated. They are conditions introduced for the benefit of the creditors, and the outside public, as well as of the shareholders. The articles of association are the internal regulations of the company. How can it be said that in all cases the fundamental conditions of the charter of incorporation and the internal regulations of the company are to be construed together... In any case it is, as

it seems to me, certain that for anything which the Act of Parliament says shall be in the memorandum you must look at the memorandum alone. If the legislature has said one instrument is to be dominant you cannot turn to another instrument and read it in order to modify the provisions of the dominant instrument". Where the memorandum clearly establishes the rights of shareholders, a reference in the memorandum to the articles and an ambiguity said to arise from the construction of the articles should not be used to depart from the clear meaning of the memorandum so as to diminish those rights [*Scottish National Trust Co. Ltd. 1928 SC 499 (Scot); Kinetic Engineering Ltd.* v. *Sadhana Gadia,* (1992) 1 Comp LJ 62 (CLB)].

REGISTRATION OF ARTICLES

Section 7(1) provides that at the time of incorporation of a company the company shall file with the Registrar within whose jurisdiction the registered office of a company is proposed to be situated, the memorandum and articles of the company duly signed by all the subscribers to the memorandum in the prescribed manner.

Every type of company whether public or private and whether limited by shares or limited by guarantee having a share capital or not having a share capital or an unlimited liability company must register their articles of association.

Section 5(2) provides that the articles shall also contain such matters, as prescribed in Rule 11 of the Companies (Incorporation) Rules, 2014. However, nothing prescribed in this sub-section shall be deemed to prevent a company from including such additional matters in its articles as may be considered necessary for its management. The articles of a company shall be in respective forms specified in Tables, F, G, H, I and J in Schedule I as may be applicable to such company either in totality or otherwise. [Section 5(6)].

A company may adopt all or any of the regulations contained in the model articles applicable to such company. [Section 5(*7*)].

Section 5(*8*) provides that in case of any company, which is registered after the commencement of Companies Act 2013, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

Therefore, in terms of Section 5 of the Companies Act, 2013, a public company limited by shares may at its option register its articles of association signed by the same subscribers as to the memorandum, or alternatively it may adopt all or any of the regulations contained in Table F of First Schedule of the Act. If articles are not registered, automatically Table F in Schedule I would apply, and if registered, Table F in Schedule I would apply except in so far as it is excluded or modified by the articles. To avoid any confusion, normally every public company delivers its articles alongwith the memorandum for registration. Further, it will be specifically stated therein that Table 'F' will not apply. The articles of a private company must contain the three restrictions as contained in Section 2(68).

A company limited by guarantee having a share capital or a company limited by guarantee not having a share capital or an unlimited company having a share capital or an unlimited company not having a share capital might adopt any of the appropriate regulations of Table G, H, I and J respectively in Schedule I [Section 5(6)].

However, nothing in section 5 shall apply to the articles of a company registered under any previous company law unless amended under this Act [Section 5(9)].

ENTRENCHMENT PROVISIONS-

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures that are more restrictive than those applicable in the case of a special resolution, are met or complied with. [Section 5 (3)]

The Companies Act 2013, recognizes an interesting concept of entrenchment. Essentially, the entrenchment provisions allow for certain clauses in the articles to be amended upon satisfaction of certain conditions or restrictions greater than those prescribed under the Act (such as obtaining 100% consent). This provision acts as a protection to the minority shareholders and is of specific interest to the investment community. This shall empower the enforcement of any pre-agreed rights and provide greater certainty to investors, especially in joint ventures.

The provisions for entrenchment referred to in section 5(3) shall be made either (a) on formation of a company, or (b) by an amendment in the articles agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company. [Section 5 (4)]

Where the articles contain provisions for entrenchment, whether made on formation or by amendment, the company shall give notice to the Registrar of such provisions in such form and manner as may be prescribed. [Section 5 (5)]

STATUTORY REQUIREMENTS

The articles must be printed, divided into paragraphs, numbered consecutively, stamped adequately, signed by each subscriber to the memorandum and duly witnessed and filed along with the memorandum. The articles must not contain anything illegal or *ultra vires* the memorandum, nor should it be contrary to the provisions of the Companies Act 2013.

CONTENTS OF ARTICLES

The articles set out the rules and regulations framed by the company for its own working. The articles should contain generally the following matters:

1. Exclusion wholly or in part of Table F.
2. Adoption of preliminary contracts.
3. Share Capital, variation of rights, Number and value of shares.
4. Issue of preference shares.
5. Allotment of shares.
6. Calls on shares.
7. Lien on shares.
8. Transfer and transmission of shares.
9. Nomination.
10. Forfeiture of shares.
11. Alteration of capital.
12. Buy back.
13. Share certificates.
14. Dematerialisation.
15. Conversion of shares into stock.
16. Voting rights and proxies.
17. Meetings and rules regarding committees of the Board.
18. Directors, their appointment and delegations of powers.

19. Nominee directors.
20. Issue of Debentures and stocks.
21. Audit committee.
22. Managing director, Whole-time director, Manager, Secretary, Chief Executive Officer and Chief Financial Officer.
23. Additional directors.
24. Seal.
25. Remuneration of directors.
26. General meetings, proceedings at general meetings, adjournment of meeting.
27. Board of Directors, Proceedings of the Board meetings.
28. Borrowing powers.
29. Dividends and reserves.
30. Accounts and audit.
31. Winding up.
32. Indemnity.
33. Capitalisation of profits, reserves.
34. Secrecy

Utmost caution must be exercised in the preparation of the articles of association of a company. At the same time, certain provisions of the Act are applicable to the company "notwithstanding anything to the contrary in the articles". Therefore, the articles must contain provisions in respect of all matters which are required to be contained therein so as not to hamper the working of the company later.

CONSISTENCY OF ARTICLES OF ASSOCIATION WITH COMPANIES ACT, 2013

Section 5(2) provides that the articles shall also contain such matters, as may be prescribed. The proviso to Section 5(2) provides that nothing in that sub-section shall be deemed to prevent a company from including any additional matters in its Articles, as may be considered necessary for its management. Section 5(8) provides that in case of any company, which is registered after the commencement of the Companies Act 2013, in so far as the registered articles of such company do not exclude or modify the regulations contained in the model articles applicable to such company, those regulations shall, so far as applicable, be the regulations of that company in the same manner and to the extent as if they were contained in the duly registered articles of the company.

Section 6 of the Companies Act, 2013 provides that: -

(a) the provisions of this Act shall have effect notwithstanding anything to the contrary contained in the memorandum or articles of a company, or in any agreement executed by it, or in any resolution passed by the company in general meeting or by its Board of Directors, whether the same be registered, executed or passed, as the case may be, before or after the commencement of this Act; and

(b) any provision contained in the memorandum, articles, agreement or resolution shall, to the extent to which it is repugnant to the provisions of this Act, become or be void, as the case may be.

In the light of above provisions, if there is a provision in the Articles empowering the Directors of the company to expel any member of the company under any of the given conditions, then such a provision shall be totally inconsistent with the provisions of Section 6 of the Act. It is opposed to the fundamental principles of the company's jurisprudence and is ultra vires of the company. [(Circular No. 32 of 1975) dated 01.11.1975)]

But the Stock exchanges, registered under the provisions of the Companies Act, can carry such a provision in its Articles. The regulation of stock exchanges is mainly governed by Securities Contracts Regulation Act, 1956 (SCRA) and SEBI, Act, 1992 which are Special Acts. Hence, the Articles of Stock Exchange may provide for additional matters as per SCR Act, which may not be possible for inclusion in the Articles of a company, as per the provisions of the Companies Act. [*Madras Stock Exchange Ltd*. v. *S.S.R. Rajkumar* (2003) 116 Com Cases 214 (Mad.)].

DOCTRINE OF *ULTRA VIRES*

In the case of a company whatever is not stated in the memorandum as the objects or powers is prohibited by the doctrine of *ultra vires**. As a result, an act which is *ultra vires* is void, and does not bind the company. Neither the company nor the contracting party can sue on it. Also, as stated earlier, the company cannot make it valid, even if every member assents to it.

The general rule is that an act which is *ultra vires* the company is incapable of ratification. An act which is *intra vires* the company but outside the authority of the directors may be ratified by the company in proper form [*Rajendra Nath Dutta* v. *Shilendra Nath Mukherjee*, (1982) 52 Com Cases 293 (Cal.)].

The rule is meant to protect shareholders and the creditors of the company. If the act is *ultra vires* (beyond the powers of) the directors only, the shareholders can ratify it. If it is *ultra vires* the articles of association, the company can alter its articles in the proper way and thereby such acts can be duly ratified.

CASE LAW

The doctrine of ultra vires was first enunciated by the House of Lords in a classic case, *Ashbury Railway Carriage and Iron Co. Ltd.* v. *Riche*, (1878) L.R. 7 H.L. 653.

The memorandum of the company in the said case defined its objects thus: “The objects for which the company is established are to make and sell, or lend or hire, railway plants to carry on the business of mechanical engineers and general contractors. ”.

The company entered into a contract with M/s. Riche, a firm of railway contractors to finance the construction of a railway line in Belgium. On subsequent repudiation of this contract by the company on the ground of its being ultra vires, Riche brought a case for damages on the ground of breach of contract, as according to him the words “general contractors” in the objects clause gave power to the company to enter into such a contract and, therefore, it was within the powers of the company. More so because the contract was ratified by a majority of shareholders.

The House of Lords held that the contract was ultra vires the company and, therefore, null and void. The term “general contractor” was interpreted to indicate as the making generally of such contracts as are connected with the business of mechanical engineers. The Court held that if every shareholder of the company had been in the room and had said, “That is a contract which we desire to make, which we authorize the directors to make”, still it would be ultra vires. The shareholders cannot ratify such a contract, as the contract was ultra vires the objects clause, which by Act of Parliament, they were prohibited from doing.

However, later on, the House of Lords held in other cases that the doctrine of ultra vires should be applied reasonably and unless it is expressly prohibited, a company may do an act which is necessary for or incidental to the attainment of its objects. Section 13(1)(d) of the Companies Act, 1956 [Corresponds to section 4(1)(c) of the Companies Act, 2013] provides that the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof be stated in the memorandum. However, even when the matters considered necessary in furtherance of the objects are not stated, they would be allowed by the principle of reasonable construction of the memorandum.

**The word ‘ultra’ means beyond and the word ‘vires’ means powers.*

CASE LAW

Justice Shah (afterwards C.J.) in the case *A. Lakshmanaswami Mudaliar* v. *L.I.C.*, A.I.R. 1963 S.C. 1185, upheld the doctrine of *ultra vires*. In this case, the directors of the company were authorized "to make payments towards any charitable or any benevolent object or for any general public or useful object". In accordance with shareholders' resolution the directors paid Rs. 2 lacs to a trust formed for the purpose of promoting technical and business knowledge. The company's business having been taken over by L.I.C., it had no business left of its own.

The Supreme Court held that the payment was *ultra vires* the company. Directors could not spend company's money on any charitable or general objects. They could spend for the promotion of only such charitable objects as would be useful for the attainment of the company's own objects. It is pertinent to add that the powers vested in the Board of directors, e.g., power to borrow money, is not an object of the company. The powers must be exercised to promote the company's objects. Charity is allowed only to the extent to which it is necessary in the reasonable management of the affairs of the company. Justice Shah held: "There must be proximate connection between the gift and the company's business interest". Thus "gifts to foster research relevant to the company's activities" and "payments to widows of ex-employees on the footing that such payments encourage persons to enter the employment of the company" have been upheld as valid and *intra vires*.

In this regard the Act provides for bonafide charitable spending by the company. Section 181 of the Companies Act, 2013 authorizes the Board of directors to contribute to bona fide charitable and other funds. However, prior consent of the company in general meeting, has to be obtained in order to contribute for any *bona fide* charitable or other purpose any amount exceeding five per cent of the average net profits for the three immediately preceding financial years.

The power of the Board as regards contribution to funds, which do directly relate to business of the company is unrestricted. It should not be inferred from the language of the section that with the consent of the company in general meeting, the board of directors may contribute to charitable funds to an unlimited extent, unless MoA and AoA authorizes such expenditure. If it does not authorize so it will be *ultra vires* the powers of the company.

A bank or any other person lending to a company, for purposes *ultra vires* the memorandum, cannot recover [*National Provincial Bank* v. *Introductions Ltd.,* (1969) 1 All. E.R. 887].

Further, in the case of *Bell Houses Ltd.* v. *City Wall Properties Limited* (1966) 36 Com Cases 779, the objects clause included a power to "carry on any other trade or business whatsoever which can, in the opinion of the Board of directors, be advantageously carried on by the company." The Court has held the same to be in order.

Loans, Borrowings, Guarantees and *Ultra Vires* Rule

An *ultra vires* borrowing does not create a relationship of a debtor and creditor. In a case, a company had accepted deposits from outsiders which was outside the scope of the Memorandum. When the company was ordered to be wound up, a question was raised whether the depositors were creditors of the company and whether the contributories could be asked to contribute towards payment of deposits. The Court held that the relationship between the company and the depositors was not that of debtor and creditor. But if the lender had lent the amount for discharging lawful expenses, he may recover the amount.

Whether a transaction is ultra vires the company can be decided on the basis of the following:

(1) if a transaction entered into by a company falls within the objects, it is not ultra vires and hence not void;

(2) if a transaction is outside the capacity (objects) of the company, it is ultra vires;

(3) if a transaction is in excess or abuse of the company's powers, it is ultra vires and such transaction will be set aside by the shareholders or even ratification by the shareholders would not validate the acts done beyond the authority of the company itself;

Implied Powers

The powers exercisable by a company are to be confined to the objects specified in the memorandum. While the objects are to be specified, the powers exercisable in respect of them may be express or implied and need not be specified.

Every company may necessarily possess certain powers which are implied, such as, a power to appoint and act through agents, and where it is a trading company, a power to borrow and give security for the purposes of its business, and also a power to sell. Such powers are incidental and can be inferred from the powers expressed in the memorandum. [*Oakbank Oil Co.* v. *Crum* (1882) 8 App Cas 65]. The principle underlying the exercise of such powers is that a company, in carrying on the business for which it is constituted, must be able to pursue those things which may be regarded as incidental to or consequential upon that business. [See *Egyptian Salt and Soda Co.* v. *Port Said Salt Association*].

Powers which are not implied

The following powers have been held not to be implied and it is, therefore, prudent to include them expressly in the objects clauses:

(1) acquiring any business similar to the company's own business. [Ernest v. Nicholls, (1857) 6 HLC 40];

(2) entering into an agreement with other persons or companies for carrying on business in partnership or for sharing profit, joint venture or other arrangements. Very clear powers are necessary to justify such transactions [Re European Society Arbitration Act (1878) 8 Ch 679];

(3) taking shares in other companies having similar objects. [Re Barned's Banking Co., ex parte and The Contract Corporation (1867) 3 Ch. App. 105. Re William Thomas & Co. Ltd. (1915) 1 Ch 325];

(4) taking shares of other companies where such investment authorizes the doing indirectly that which will not be intra vires if done directly;

(5) promoting other companies or helping them financially [Joint Stock Discount Co. v. Brown, (1869) LR 8 EQ 381];

(6) a power to sell and dispose of the whole of a company's undertaking;

(7) a power to use funds for political purposes;

(8) a power to give gifts and make donations or contribution for charities not relating to the objects stated in the memorandum;

(9) acting as a surety or as a guarantor.

Shareholder's right in respect of ultra vires acts

A shareholder can get back the money paid by him to the company under an *ultra vires* allotment of shares. A transferee of shares from him would not have been so allowed. [*Margarate Linz* v. *Electric Wire Co. of Salestine Ltd.* (1948) 18 Com Cases 201, 205 : AIR 1949 PC 51].

Effects of *ultra vires* Transactions

(i) *Void ab initio* – The ultra vires acts are null and void ab initio. The company is not bound by these acts. Even the company cannot sue or be sued upon [Ashbury Railway Carriage and Iron Company v. iche].

Ultra vires contracts are void ab initio and hence cannot become intra vires by reason of estoppel or ratification.

(ii) Injunction: The members can get an injunction to restrain a company wherein ultra vires act has been or is about to be undertaken [Attorney General v. Gr. Eastern Rly. Co., (1880) 5 A.C. 473].

(iii) Personal liability of Directors: It is one of the duties of directors to ensure that the corporate capital is used only for the legitimate business of the company and hence if such capital is diverted to purposes alien to the company's memorandum, the directors will be personally liable to replace it. In Jehangir R. Modi v. Shamji Ladha, [(1866-67) 4 Bom. HCR (1855)], the Bombay High Court held, "A shareholder can maintain an action against the directors to compel them to restore to the company the funds of the company that have by them been employed in transactions that they have no authority to enter into, without making the company a party to the suit".

In case of deliberate misapplication, criminal action can also be taken for fraud.

However, a distinction must be drawn between transactions which are ultra vires the company and the transactions which are ultra vires the directors. Where the directors exceed their authority the same may be ratified by passing the resolution in the general body meeting of the shareholders. Provided the company has the capacity to do that transaction as per its memorandum of association.

(iv) Where a company's money has been used ultra vires to acquire some property, the company's right over such property is held secure and the company will be the right party to protect the property. This is because, though the property has been acquired for some ultra vires object, it represents the money of the company.

(v) Ultra vires borrowing does not create the relationship of creditor and debtor [In Re. Madras Native Permanent Fund Ltd., (1931) 1 Com Cases 256 (Mad.)].

DOCTRINE OF INDOOR MANAGEMENT

While the doctrine of 'constructive notice" seeks to protect the company against the outsiders, the principal of indoor management operates to protect the outsiders against the company.

According to this doctrine, as laid down in *Royal British Bank* v. *Turquand,* (1856) 119 E.R. 886, persons dealing with a company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and articles, are not bound to inquire the regularity of any internal proceedings. In other words, while persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. It is not a part of the duty of an outsider to see that the company carries out its own internal regulations.

CASE LAWS UNDER ERSTWHILE COMPANIES ACT

In *Royal British Bank* v. *Turquand,* the directors of a banking company were authorized by the articles to borrow on bonds such sums of money as should from time to time, by resolution of the company in general meeting, be authorized to borrow. The directors gave a bond to Turquand without the authority of any such resolution. It was held that *Turquand* could sue the company on the strength of the bond, as he was entitled to assume that the necessary resolution had been passed. *Lord Hatherly* observed: "Outsiders are bound to know the external position of the company but are not bound to know its indoor management".

Section 176 of the Companies Act, 2013 provides for the Validity of Acts of Directors - No act done by a person as a director shall be deemed to be invalid, notwithstanding that it was subsequently noticed that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the articles of the company:

Provided that nothing in this section shall be deemed to give validity to any act done by the director after his appointment has been noticed by the company to be invalid or have been terminated.

The object of the section is to protect persons dealing with the company - outsiders as well as members by providing that the acts of a person acting as director will be treated as valid although it may afterwards be discovered that his appointment was invalid or that it had terminated under any provision of this Act or the Articles of the company [*Ram Raghubir Lal v. United Refineries (Burma) Ltd., (1932) 2 Com Cases 359; AIR 1931 Rang 139*].

Relation of company with members and outsiders

The validation of the acts of unqualified directors may apply to circumstances from two different angles: (1) as between outsiders, strangers and the company as in *Royal British Bank* v. *Turquand,* (1856) 5 E&B 327, *British Asbestos Co. Ltd.* v. *Boyd*. (1903) 2 Ch 439 : (1900-3) All ER Rep 323; and *Ram Buran Singh* v. *Mufassil Bank Ltd.* AIR 1925 All 206; and (2) in relation to the internal affairs of the company as in *Dawson* v. *African Consolidated Land & Trading Co.,* (1898) 1 Ch 6 (CA), where calls made by unqualified directors were held valid. Even if the public documents of the company, and the facts which are apparent, would make it clear that a director was not duly qualified to act, this will not oust the effect of the Section 176 (British Asbestos case) (supra). Similarly in *Boschoek Proprietary Co. Ltd.*, v. *Fuke,* (1906) 1 Ch 148, a resolution of a general meeting convened by de facto directors was upheld.

Forgery and incompetent acts

This section does not apply where the act itself is not in the competence of the Board of directors, e.g. compromising unpaid calls under the guise of forfeiture, the transaction being ultra vires and invalid [*Bhagirath Spinning & Wvg. Co*. v. *Balaji Bhavani Pawar,* AIR 1930 Bom. 267].

Directors not aware of their disqualification

The allotment and forfeiture of shares made by the directors who continued to act even after they were disqualified but were not aware of it, were saved by the Section 176. [*Shiromani Sugar Mills Ltd.* v. *Debi Prasad,* (1950) 20 Com Cases 296: AIR 1950 All 508]. Where this section does not save the situation, the company may in general meeting ratify allotment of shares even if made by *de facto* directors with *mala fide* intentions [*Bamford* v. *Bamford,* (1969) 39 Com Cases 838 : (1969) 2 WLR (1107) (CA) and an appeal (1969) : 1All ER 969].

Where the directors in question were not aware of the fact that by virtue of certain provisions in the articles, they had vacated their office, their acts in passing resolutions for starting certain business transactions were held to be valid [*Seth Mohan Lal* v. *Grain Chambers Ltd.,* (1968) 38 Com Cases 543 : AIR 1968 SC 772; *Shiromani Sugar Mills Ltd.* v. *Debi Prasad, (Supra).]*

It is important to remember that the doctrine of “constructive notice”, can be invoked by the company and it does not operate against the company. It operates against the person who has failed to inquire but does not operate in his favour. But the doctrine of “indoor management” can be invoked by the person dealing with the company and cannot be invoked by the company.

An outsider is entitled to act on a certified copy of the resolution of the Board of directors delegating the powers of borrowing money to the managing director subject to the limitation mentioned therein [*C.K. Siva Sankara Panicker* v. *Kerala State Financial Corporation,* (1980) 50 Com Cases 817 (Ker.)].

EXCEPTIONS TO THE DOCTRINE OF INDOOR MANAGEMENT

The above noted ‘doctrine of indoor management’ is, however, subject to certain exceptions. In other words, relief on the ground of ‘indoor management’ cannot be claimed by an outsider dealing with the company in the following circumstances.

1. ***Where the outsider had knowledge of irregularity –*** The rule does not protect any person who has actual or even an implied notice of the lack of authority of the person acting on behalf of the company. Thus, a person knowing fully well that the directors do not have the authority to make the transaction but still enters into it, cannot seek protection under the rule of indoor management. In *Howard* v. *Patent Ivory Co.* (38 Ch. D 156), the articles of a company empowered the directors to borrow upto one thousand pounds only. They could, however, exceed the limit of one thousand pounds with the consent of the company in general meeting. Without such consent having been obtained, they borrowed 3,500 pounds from one of the directors who took debentures. The company refused to pay the amount. Held that, the debentures were good to the extent of one thousand pounds only because the director had notice or was deemed to have the notice of the internal irregularity.

2. ***No knowledge of memorandum and articles –*** Again, the rule cannot be invoked in favour of a person who did not consult the memorandum and articles and thus did not rely on them. In *Rama Corporation* v. *Proved Tin & General Investment Co.* (1952) 1All. ER 554, T was a director in the company. He, purporting to act on behalf of the company, entered into a contract with the Rama Corporation and took a cheque from the latter. The articles of the company did provide that the directors could delegate their powers to one of them. But Rama Corporation people had never read the articles. Later, it was found that the directors of the company did not delegate their powers to T. The Plaintiff relied on the rule of indoor management. Held, they could not because they even did not know that power could be delegated.

3. ***Forgery –*** The rule of indoor management does not extend to transactions involving forgery or to transactions which are otherwise void or illegal ab initio. In the case of forgery it is not that there is absence of free consent but there is no consent at all. The person whose signatures have been forged is not even aware of the transaction, and the question of his consent being free or otherwise does not arise. Consequently, it is not that the title of the person is defective but there is no title at all. Therefore, howsoever clever the forgery might have been, the personates acquire no rights at all. Thus, where the secretary of a company forged signatures of two of the directors required under the articles on a share certificate and issued certificate without authority, the applicants were refused registration as members of the company. The certificate was held to be nullity and the holder of the certificate was not allowed to take advantage of the doctrine of indoor management [*Rouben* v. *Great Fingal Consolidated* (1906) AC 439].

   Forgery, in the case of a company, can take place in different forms. It may, besides forgery of the signatures of the authorized officials, include the execution of a document towards the personal discharge of an official's liability instead of the liability of the company. Thus, a bill of exchange signed by the manager of a company with his own signature under words stating that he signed on behalf of the company, was held to be forgery when the bill was drawn in favour of a payee to whom the manager was personally indebted [*Kreditbank Cassel* v. *Schenkers Ltd.* (1927) 1 KB 826]. The bill in this case was held to be forged because it purported to be a different document from what it was in fact; it purported to be issued on behalf of the company in payment of its debt when in fact it was issued in payment of the manager's own debt.

4. ***Negligence –*** The 'doctrine of indoor management', in no way, rewards those who behave negligently. Thus, where an officer of a company does something which shall not ordinarily be within his powers, the person dealing with him must make proper enquiries and satisfy himself as to the officer's authority. If he fails to make an enquiry, he is estopped from relying on the Rule. In the case of *Underwood* v. *Benkof Liverpool* (1924) 1 KB 775, a person who was a sole director and principal shareholder of a company deposited into his own account cheques drawn in favour of the company. Held, that, the bank should have made inquiries as to the power of the director. The bank was put upon an enquiry and was accordingly not entitled to rely upon the ostensible authority of director.

Similarly, in the case of *Anand Behari Lal* v. *Dinshaw & Co.* (Bankers) Ltd. AIR 1942 Oudh 417, an accountant of a company transferred some property of a company in favour of Anand Behari. On an action brought by him for breach of contract, the Court held that the transfer to be void. It was observed that the power of transferring immovable property of the company could not be considered within the apparent authority of an accountant.

5. Again, the doctrine of indoor management does not apply where the question is in regard to the very existence of an agency. In *Varkey Souriar* v. *Keraleeya Banking Co. Ltd.* (1957) 27 Com Cases 591 (Ker.), the Hon'ble Kerala High Court held that the 'doctrine of indoor management' cannot apply where the question is not one as to scope of the power exercised by an apparent agent of a company but is with regard to the very existence of the agency.

6. This Doctrine is also not applicable where a pre-condition is required to be fulfilled before company itself can exercise a particular power. In other words, the act done is not merely ultra vires the directors/ officers but ultra vires the company itself – *Pacific Coast Coal Mines* v. *Arbuthnot* (1917) AC 607.

In the end, it is worthwhile to mention that section 6 of the Companies Act, 2013 gives overriding force and effect to the provisions of the Act, notwithstanding anything to the contrary contained in the memorandum or articles of a company or in any agreement executed by it or for that matter in any resolution of the company in general meeting or of its board of directors. A provision contained in the memorandum, articles, agreement or resolution to the extent to which it is repugnant to the provisions of the Act, will be regarded as void.

A corporation, organization or other entity set up to provide a legal shield for the person actually controlling the operation.

CONSTRUCTIVE NOTICE OF MEMORANDUM AND ARTICLES

The memorandum and articles, when registered, become public documents and can be inspected by anyone on payment of nominal fee. Therefore, every person who contemplates entering into a contract with a company has the means of ascertaining and is consequently presumed to know, not only the exact powers of the company but also the extent to which these powers have been delegated to the directors, and of any limitations placed upon the exercise of these powers. In other words, every person dealing with the company is deemed to have a "constructive notice" of the contents of its memorandum and articles. In fact, he is regarded not only as having read those documents but also as having understood them according to their proper meaning [*Griffith* v. *Paget,* (1877) Ch. D. 517]. Consequently, if a person enters into a contract which is beyond the powers of the company, as defined in the memorandum, or outside the limits set on the authority of the directors, he cannot, as a general rule, acquire any rights under the contract against the company [*Mohony* v. *East Holyfrod Mining Co.,* (1875)

L.R. 7 H.L. 869]. For example, if the articles provide that a bill of exchange to be effective must be signed by two directors, a person dealing with the company must see that it is so signed; otherwise he cannot claim under it.

In another case, the articles required that all documents should be signed by the managing director, secretary and the working director on behalf of the company. A deed of mortgage was executed by the secretary and the working director only and the Court held that no claim would lie under such a deed. The Court said that the mortgagee should have consulted the articles before the deed was executed. Therefore, even though the mortgagee may have acted in good faith and the money borrowed applied for the purpose of the company, the mortgage was nevertheless invalid [*Kotla Venkataswamy* v. *Rammurthy*, AIR 1934 Mad 579]. The doctrine of indoor management protects third parties who are entitled to an assurance that all the procedural aspects of a transaction are carried out.

Outsiders dealing with incorporated bodies are bound to take notice of limits imposed on the corporation by the memorandum or other documents of constitution. Nevertheless, they are entitled to assume that the directors

or other persons exercising authority on behalf of the company are doing so in accordance with the internal regulations as set out in the Memorandum & Articles of Association.

The impact of this doctrine on practical relations is thus stated in HALSBURY: "A company is subject to the rule that, where the conduct of a party charged with a notice shows that he had suspicions of a state of facts the knowledge of which would affect his legal rights, but that he deliberately refrained from making inquiries, he will be treated as having had notice, though he is not entitled to claim for his own advantage," [*Jones* v. *Smith,* (1841) 1 Hare 43].

MONIES PAYABLE BY MEMBERS IS A DEBT [SUB-SECTION (2) OF SECTION 10]

Though all monies payable under the memorandum or articles by members is a debt due, the liability on the debt is not enforceable, unless proper notice is given in accordance with the articles. [*Pabna Dhana-Bhandar Co. Ltd.* v. *Foyezud din Mia* (1933) 3 Com Cases 41 : AIR 1932 Cal 716].

INTERPRETATION OF MEMORANDUM AND ARTICLES

Articles should be construed as a business document so as to give business efficacy preference to a construction which will prove unworkable [*Holmes v. Keyes (Lord) (1958) 2 All ER 129 (CA)*;]. Where the conduct of the parties reveals that there has been some practice in vogue for several years which was accepted by everyone concerned without any challenge or question, then that practice in the course of long years in itself becomes an indication that the rules or articles which are framed by way of internal management were understood in that sense [*Krishnaswamy (S)* v*. South India film Chamber of Commerce*, AIR 1969 Mad 42 : (1968) 1 Comp LJ 75; cited in *Sunil Dev* v. *Delhi and District Cricket Assn.,* (1990) 2 Comp LJ 245, 255 : (1994) 80 Com Cases 174 (Del)].

The memorandum must like any other document be construed according to accepted principles applicable to the interpretation of all legal documents. No rigid canon of construction is to be applied to such a document. Like any other document, it must be read fairly and its import derived from a reasonable interpretation of the language which it employs. [*A Lakshamanaswami Mudaliar* v. *LIC of India* (1963) 33 Com Cases 420, 430 (SC); *Egyptian Salt & Soda Co. Ltd.* v. *Port Said Salt Assn Ltd.,* (1931) AC 677 : AIR 1931 PC 182)].

The memorandum and articles must be read together in the event of any ambiguity. In *Angostura Bitters & Co. Ltd.* v. *Kerr,* (1933) AC 550 : (1934) 4 Com Cases 1; the Privy Council held, "Except in respect of such matters as must be statutorily provided for by the conjunction with the articles. The two documents must be read together at all events so far as may be necessary to explain any ambiguity appearing in the terms of the memorandum or to supplement it upon any matter as to which it is silent" – quoted with approval by the Supreme Court in *A. Lakshmanaswami Mudaliar* v. *LIC of India Ltd.* (1963) SC 1185.

DOCTRINE OF ALTER EGO

It is used by the courts to ignore the status of shareholders, officers, and directors of a company in reference to their liability in their respective capacity so that they may be held personally liable for their actions when they have acted fraudulently or unjustly.

In *Lennards Carying Co. Ltd.* v. *Asiatic Petroleum Co. Ltd.* [1915] AC 705, Viscount Haldane propounded the "alter ego" theory and distinguished it from vicarious liability. The House of Lords stated that the default of the managing director who is the "directing mind and will" of the company, would be attributed to him and he be held for the wrong doing of the company.

DISTINCTION BETWEEN MEMORANDUM AND ARTICLES

The main points of distinction between the memorandum and articles are given below:

1. Memorandum of association is the charter of the company and defines the fundamental conditions

and objects for which the company is granted incorporation. Articles of association are the rules and regulations framed to govern this internal management of the company.

2. Clauses of the memorandum cannot be easily altered. They can only be altered in accordance with the mode prescribed by the Act. In some of the cases, alteration requires the permission of the Central Government or the Court. In the case of articles of association, members have a right to alter the articles by a special resolution. Generally, there is no need to obtain the permission of the Court or the Central Government for alteration of the articles.
3. Memorandum of association cannot include any clause contrary to the provisions of the Companies Act. The articles of association are subsidiary both to the Companies Act and the memorandum of association.
4. The memorandum generally defines the relation between the company and the outsiders, while the articles regulate the relationship between the company and its members and between the members inter se.
5. Acts done by a company beyond the scope of the memorandum are absolutely void and ultra vires and cannot be ratified even by unanimous vote of all the shareholders. But the acts of the directors beyond the articles can be ratified by the shareholders.

LEGAL EFFECT OF THE MEMORANDUM AND ARTICLES

The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles. Also, all monies payable by any member to the company under the memorandum or articles shall be a debt due from him to the company (Section 10).

We shall examine the extent to which the memorandum and articles bind:

(a) the members to the company;

(b) the company to the members;

(c) the members inter se; and

(d) the company to outsiders.

Members Bound to the Company

The memorandum and articles constitute a contract binding on the members of the company. The members, as members, are bound to the company. Each member must, therefore, observe the provisions of the memorandum and articles.

Each member is bound by the covenants of the Memorandum as originally made and as altered from time to time [*Malleson v. National Insurance Co.*]. In another case, the shareholders could not enter into an agreement which was contrary to or inconsistent with the articles of association of the company [*V.B. Rangaraj v. V.B. Gopalkrishnan* (1992) 73 Com Cases 201 (SC)].

CASE LAW

In *Boreland's Trustee v. Steel Brother and Co. Ltd. (1901) 1 Ch. 279*, the articles of a company contained a clause that on the bankruptcy of a member his shares would be sold to other persons and at a price fixed by the directors. B, a shareholder was adjudicated bankrupt. His trustee in bankruptcy claimed that he was not bound by these provisions and should be at liberty to sell the shares at their true value. It was held that the trustee was bound by the articles, as the shares were purchased by B in terms of the articles.

Company Bound to the Members

Since the articles constitute a contract binding the company to its members in their capacity as members, a member can bring an action against the company for infringement by it of the memorandum or articles. For example, an individual member can sue the company for an injunction restraining it from improper payment of dividend [*Hoole* v. *Great Western Railway* (1867) 3 Ch. D. 262]. Further, the company is bound to individual members in respect of their ordinary rights as members, e.g. the right to receive share certificate in respect of shares allotted to them, or to receive notice of general meeting, etc. Normally, action for breach of articles against the company can be brought only by a majority of the members. Individual or minority members cannot bring such a suit except when it is intended for enforcement of personal rights of members or to prevent the company from doing any ultra vires or illegal act, fraud, or oppression and mismanagement.

Member Bound to Member

As between the members inter se each member is bound by the articles to the other members but that does not mean the memorandum and articles create an express contract among the members of the company. Thus, a member of a company has no right to bring a suit to enforce the articles in his own name against any other member or members. It is the company alone which can sue the offender so as to protect the aggrieved member. It is in this way that the rights of members inter se are regulated. A shareholder may, however, sue in his own name to restrain another, or others from doing fraudulent or ultra vires acts.

Articles do not affect or regulate the rights arising out of a commercial contract, with which the members have no concern, i.e., rights completely outside the company's relationship.

Company not Bound to Outsiders

The term "outsider" signifies a person who is not a member of the company even if he is a director of or solicitor to the company. Even in regard to members, the articles bind the company to them in their capacity as members.

As between outsiders and the company, neither the memorandum nor the articles would give any contractual rights to outsiders against the company or its members even though the names of outsiders are mentioned in those documents in connection with the arrangements that the company might have contemplated for carrying on its business. The articles do not confer any contractual rights even upon a member in a capacity other than that of a member. To succeed, the party suing must prove a contract outside and independent of the articles [*Eley* v. *Positive Life Insurance Co.,* (1876) 1 E.X.D. 88].

In this case the articles provided that the solicitor to the company would not be removed from office except for misconduct. Eley acted as solicitor to the company and also became a member of the company. The company discontinued his services and then he sued the company for damages for breach of contract. It was held that he had no cause of action because the articles did not constitute any contract between the company and himself. His action was dismissed.

This rule, however, proved to be rather harsh and so the Courts later on modified it. The modified rule is as follows:

(i) While the articles cannot create a contract between the company and any person other than a member in his capacity as a member, they may indicate the basis upon which contracts may be made by the company. If such a contract is entered into whether with a member of the company or any other person, the conditions stated in the articles will be tacitly adopted by that contract, unless expressly stated in the negative form or varied by the contract itself.

(ii) The question sometimes arises as to whether directors are bound by whatever is contained in the articles. In case the directors contravene the provisions in the articles, the directors render themselves liable for an action by members. On the other hand, members can also ratify acts of

directors. If any loss is incurred by the company, directors are liable to reimburse to the company any loss so incurred.

LESSON ROUND-UP

- The Memorandum of Association is a document which sets out the constitution of the company and is the foundation on which the structure of the company stands. It defines as well as confines the powers of the company. If the company enters into contract or engages in any trade or business which is beyond the powers conferred on it by the memorandum, such a contract or the act will be ultra vires the company and hence void. However, the Companies Act, 2013 shall override the provisions in the memorandum of a company, if the latter contains anything contrary to the provisions in the Act.
- The memorandum of association of a company may be altered by changing its name, altering it in regard to the State in which the registered office is to be situated or its objects, altering or reorganizing its share capital, reducing its capital or making the liability of the directors unlimited.
- Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act. It also includes the regulations contained in Tables F to J in Schedule I of the Act, in so far as they apply to the company.
- The memorandum lays down the scope and powers of the company and the articles govern the ways in which the objects of the company are to be carried out and can be framed and altered by the members.
- A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. Any alteration so made shall be as valid as if originally contained in the articles.
- The memorandum and articles, when registered, bind the company and its members to the same extent as if they have been signed by the company and by each member to observe and be bound by all the provisions of the memorandum and of the articles.
- As per doctrine of constructive notice, every person dealing with the company is deemed to have a “constructive notice” of the contents of its memorandum and articles. Outsiders dealing with incorporated bodies are bound to take notice of limits imposed on the corporation by the memorandum or other documents of constitution. Nevertheless, they are entitled to assume that the directors or other persons exercising authority on behalf of the company are doing so in accordance with the internal regulations as set out in the Memorandum & Articles of Association.
- While the doctrine of constructive notice seeks to protect the company against the outsiders, the doctrine of indoor management operates to protect the outsiders against the company. While persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the provisions of the articles have been observed by the officers of the company. However, there are certain exceptions to doctrine of indoor management.

GLOSSARY

Indoor Management	It operates to protect outsiders against the company. It protects innocent parties who are doing business with the Company and are not in a position to know if some internal rule or procedural requirement has not been complied with.
Rule of Constructive Notice	To protect the company against outsiders. The rule of constructive notice is confined to the external position of the company and, therefore, it follows that

	there is no notice as to how the company's internal machinery is handled by its officers. It is a presumption in favour of the company which mean that an outsider has a knowledge of the Memorandum and Articles of Association of the company with which he/ she is about to entering into the contract.
Alteration	The state of being altered; a change made in the form or nature of a thing; changed condition. In Company Law the memorandum and articles sometime require alterations.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What do you understand by the memorandum of association? What is its purpose?
2. "Memorandum of association is a charter of the company". Comment upon the statement and explain the clauses which are included in a memorandum of association of a company.
3. What is "registered office" of a company? Within how much time a company must have a registered office? Explain the procedure n brief for shifting of Registered office from the jurisdiction of one Registrar of Companies to another within the same state.
4. What do you understand by the doctrine of "ultra-vires"? Discuss the decided case "Ashbury Railway & Iron Co. v. Riche".
5. What is the importance of the objects clause of the memorandum of association? If a company undertakes to do anything which is not either expressly or impliedly provided for by the objects clause, what would be the consequences?
6. "The power of altering the articles is wide, yet it is subject to a large number of limitations". Explain.
7. Discuss the extent to which articles of association binds:
   (a) the members to the company,
   (b) the company to the members,
   (c) the members among themselves, and
   (d) the company to the outsiders.
8. Distinguish Articles from Memorandum.
9. "The articles may contain provisions for entrenchment." Comment upon the statement and explain the significance of the entrenchment provisions.
10. What is the meaning and significance of the doctrine of "Indoor Management". Discuss with reference to decided case "Royal British Bank v. Turquand".

Lesson 3 – Part II

Alteration of Charter Documents

LESSON OUTLINE

- Definitions
- Introduction
- Alteration of Memorandum of Association
  - Name Change
  - Registered Office Change
  - Object Change
  - Liability Clause Change
  - Capital Clause Change
  - Alteration of Articles of Association
  - Procedure of alteration of Articles of Association
  - Effect of altered article
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

To understand the scope and procedural aspects of alteration of various clauses contained in the Memorandum of Association of the Company which may be permissible under the provisions contained in Section 13 and Section 14 of the companies Act, 2013 to be read with relevant rules framed and amended from time to time thereunder.

Definitions of key words in the Companies Act, 2013:

"Alter" or "Alteration" – As per section 2(3) of the Companies Act, 2013 "Alter" or "alteration" includes the making of additions, omissions and substitutions.

Articles – As per section 2(5) of the Companies Act,2013 "articles" means the articles of association of a company as originally framed or as altered from time to time or applied in pursuance of any previous company law or of this Act.

Memorandum – As per section 2(56) of the Companies Act, 2013 "memorandum" means the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous company law or of this Act.

INTRODUCTION

Memorandum of association (MOA) is the charter of the company and defines the scope of its activities.

As per section 4(6) of the Act, the Memorandum of a company shall be in respective forms specified in Tables A, B, C, D and E in Schedule I as may be applicable to such company.

As per section 4(1) Memorandum contains following important clauses:

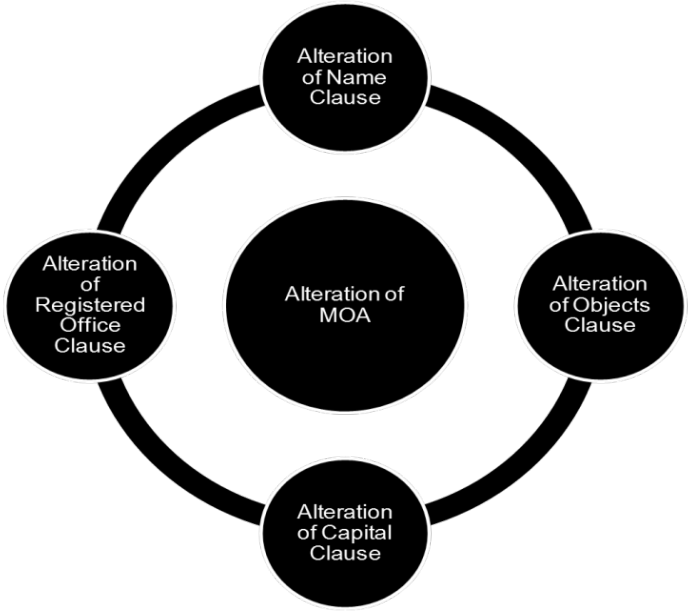
1. Name Clause which contains name of the Company
2. Registered Office Clause which contains State of India where registered office of the company is situated
3. Objects Clause of the Company and matters considered necessary in furtherance thereof
4. Liability Clause which defines liability of members of the company, and
5. Share Capital Clause which defines Authorized share capital of the company.
6. Subscription clause which prescribes the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share.

Articles of Association (AOA) of the company is a document which regulates the internal management of the company. It shall not prevent a company from including such additional matters in its articles as may be considered necessary for its management provided such matters are not inconsistent with the provisions of the Companies Act, 2013.

The articles may contain provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.

The AOA shall be in respective forms specified in Tables F ,G, H, I and J as may be applicable to such company.

ALTERATION OF MEMORANDUM OF ASSOCIATION (MOA)



APPLICABLE SECTION FOR ALTERATION OF MOA

Section 13(1) of the Act provides that save as provided in section 61 (Dealing with power of limited company to alter its share capital), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. The memorandum of association of a company may be altered in the following respects:

1. Alteration in the Name clause [Section 13 (2) and (3)]
2. Alteration in the Registered Office Clause [Section 13 (4) (5) and (7)]
3. Alteration in the Object clause [Section 13 (8) and (9)]
4. Alteration in the Capital clause [Section 61 read with section 64]

The provisions or conditions of the memorandum of association relating to the name clause, registered office clause, the objects clause, limited liability clause, capital clause, subscriber's share clause as provided in Section 4 of the Companies Act, 2013 or any other specific provisions contained therein, can be altered by following the prescribed procedure laid down in the Act. Strict compliance of the prescribed procedure is demanded by law. Failure to comply with the express provisions made under the Act for the purpose of alteration of the provisions or conditions contained in the memorandum will be deemed as a nullity.

Further section 13(6) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1).

Section 13(10) provides that no alteration made under this section shall have any effect until it has been registered in accordance with the provisions of the said section.

Further, any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. [Section 13 (11)]

The procedure for the alteration of the compulsory clauses or conditions of the memorandum is discussed in detail in the following paragraphs.

ALTERATION OF MOA DUE TO CHANGE IN NAME CLAUSE [SECTION 13 (2) AND (3)]

The name of the company can be altered by a special resolution and with the approval of the Central Government in writing. Approval of the Central Government is not required, in case where the change in the name of the company relates to the addition/deletion of the word 'Private' to the name of the company consequent to the conversion of a company into a public company and vice versa. [Section 13 (2)]

When any change in the name of a company is made under section 13(2), the Registrar shall enter the new name in the register of companies in place of the old name and issue a fresh certificate of incorporation with the new name and such change in the name shall be complete and effective only on the issue of such a certificate [Section 13(3)].

According to Rule 29 of Companies (Incorporation) Rules, 2014, the change of name shall not be allowed to a company which has not filed annual returns or financial statements due for filing with the Registrar or which has failed to pay or repay matured deposits or debentures or interest thereon. Provided that the change of name shall be allowed upon filing necessary documents or payment or repayment of matured deposits or debentures or interest thereon as the case may be.

An application shall be filed in Form No. INC-24 along with the fee for change in the name of the company and a new certificate of incorporation in Form No. INC-25 shall be issued to the company consequent upon change of name.

Under Section 16 of the Act, rectification of the name of the company is required to be carried out if, through inadvertence or otherwise, a company (whether on its first registration or on its registration by a new name) is registered by a name which is identical to or too nearly resembles the name of a company already in existence.

The rectification of the name must also be carried out if the Central Government so directs at any point of time after the registration of the company. The direction of the Central Government is required to be complied with by the company within a period of 3 months from the date of issue thereof. Further where a company changes its name or obtains a new name under section 16 (1), it shall within a period of fifteen days from the date of such change, give notice of the change to the Registrar along with the order of the Central Government, who shall carry out necessary changes in the certificate of incorporation and the memorandum. Any default in complying with the direction issued by the Central Government would render the company liable for punishment with fine which may extend to one thousand rupees for every day during which default continues and its officers in default shall be liable for fine which shall not be less than five thousand rupees but which may extend to one lakh rupees.

- Change in name of the Company involves alteration of Clause I of the Memorandum of Association of the Company.
- Section 13 of the Companies Act, 2013 says that name of a company may be changed by passing a special resolution in the general meeting and with the Central Government approval.

Methods of changing the name

After incorporation, a company can change their name through following methods:

(a) Conversion of private limited company into public limited company and thereby change in the name from private to public, or

(b) Conversion of public limited company into private limited company and thereby change in the name from public to private, or

(c) Change of name from ABC limited to XYZ limited.

As per Section 13 of the Companies Act, 2013, the name of the company can be changed by passing a Special Resolution by the members of the company in their general meeting and with the approval of the Central Government. But on the other hand, if the change relates to the addition/deletion of the words “private” to the name, then approval of Central Government is not required.

Procedure for Alteration in Name Clause of Memorandum

1. Calling of Board Meeting

(a) Issue notice in accordance with the provisions of section 173(3) of the Companies Act, 2013, for convening a meeting of the Board of Directors to consider the reason for changing name of the company and get its approval for change in name of the Company.

(b) Pass a Board resolution authorizing the Company Secretary/ Director to make the required application to the Registrar of Companies.

2. Seeking name availability for proposed new name from the ROC

(a) As per section 4(4) of the Act read with Rule-9 of Companies (Incorporation) Rules, 2014, application for the reservation/availability of name shall be in RUN along with prescribed fee of ₹ 1,000/-

In selection of a Company name, it should be in accordance with name guidelines given in Rule-8 of Companies (Incorporation) Rules, 2014.

However, as per the Rule-9 substituted by the Companies (Incorporation) Amendment Rules, 2014, An application for reservation of name shall be made through the web service available at www.mca.gov. in by

using RUN (Reserve Unique Name) along with fee as provided in the Companies (Registration offices and fees) Rules, 2014, which may either be approved or rejected, as the case may be, by the Registrar, Central Registration Centre.

(b) The application in Form –RUN, to the ROC should have the following documents as attachment:

S. No.	Nature of Application	Attachment
1.	In case of change of name of an existing company	A copy of Board resolution
2	If change of name is due to direction received from the Central Government	A copy of such direction;
3	In case the proposed name(s) are based on a registered trademark or is a subject matter of an application pending for registration under the Trade Marks Act, 1999	Approval of the owner of the trademark or the applicant of such application for registration of Trademark;
4	In case the proposed name contains such word(s) or expression(s) for which the approval of Central Government is required;	Copy of Central Government's approval
5	In principle approval from the concerned regulator	Approval from IRDA, RBI, SEBI, MCA or any other needs to be attached in case proposed name includes the word such as Insurance, Bank, Stock Exchange, Venture Capital, Asset Management, Nidhi, or Mutual Fund etc.
6	NOC from the sole proprietor/ partners/ other associates;	No objection certificate from the sole proprietor/ partners/other associates needs to be attached if the promoters are carrying on any partnership firm, sole proprietary or unregistered entity in the name as applied for.
7	NOC from existing company	In case the name is similar to any existing company or to the foreign holding company. Then, a certified true copy of No objection certificate by way of board resolution needs to be attached.
8		Copy of affidavit executed on non-judicial stamp paper to the effect that the name to be obtained shall be only for the purpose of registration of companies under Electoral Trusts scheme, 2013 as notified by CBDT.
9	Resolution of unregistered companies in case of Chapter XXI (Part I) companies;	Such resolution is mandatory to be attached in case of Part I companies.

10	Order of competent authority	Order of Tribunal in course of compromise, arrangement and amalgamation is required to be attached in case proposed name is the name released on change of name.
11	Resolution passed by foreign company	No Objection Certificate by way of resolution passed by the Board of the Foreign holding company or group companies is mandatory to be attached in case the proposed name is of the foreign holding Company or of the group companies.
12	Optional attachments	Any other information can be provided as an optional attachment(s).

3. Obtaining ROC Approval and Name Availability Letter

After approval of name, ROC will issue a name availability letter w.r.t. approval for availability of name for a proposed company. As per section 4(5), available name will be valid for a period of 60 days from the date on which the application for reservation was made.

However, according to Section 4(5)(i) of the Companies (Amendment) Act, 2017 which has substituted the above provision, such name may be reserved by the Registrar for a period of 20 days from the date of the approval of the name or for such period as may be prescribed. And, the said period of reservation of name by the Registrar for the change of the name of an existing company may be for the period of 60 days from the date of approval.

On receipt of approval of name, the Company Secretary/Director shall convene another Board meeting:

(a) To take note of the name approval received from ROC

(b) To fix date, time and place for holding Extra-ordinary General meeting (EGM) to get approval of shareholders, by way of Special Resolution, for amendment in Name clause of Memorandum. This amendment in Name clause of Memorandum shall be in accordance with the requirement of section 13 of the Companies Act, 2013.

(c) To approve notice of EGM along with Agenda and explanatory statement pursuant to section 102 of the Companies Act, 2013 to be annexed to the notice of General Meeting as per section 102(1) of the Companies Act, 2013.

(d) To authorize the Director or Company Secretary to issue Notice of the Extra-ordinary General meeting (EGM) as approved by the board.

4. Issue of Notice of Extra-ordinary General Meeting (EGM)

(a) Issue Notice of the EGM to all the Members, Legal Representatives of any deceased member or assignee of an insolvent member, Directors and the Auditors of the company in accordance with the provisions of Section 101 of the Companies Act, 2013;

(b) In the case of listed companies, the provisions of SEBI (LODR) Regulations shall be applicable

(c) A general notice of the proposed general meeting may also be published in newspapers.

5. Holding of Extra ordinary General Meeting

Hold the Extra-ordinary General meeting on the fixed date and pass the necessary Special Resolution under section 13(1) of the Companies Act, 2013, for change in the Name clause of Memorandum.

6. ROC filings

As per section 13(6), the Company is required to file Special Resolution passed by shareholders for alteration of Memorandum with concerned ROC and file **Form MGT -14** (certified by a Practicing Professional i.e. CS/ CA/CWA) within 30 days of passing the resolution with prescribed fees and along with following attachments:

- Certified True copy of Special Resolution along with explanatory statement pursuant to Section 102
- Altered Memorandum of Association
- Certified True copy of Special Resolution along with explanatory statement pursuant to Section 102 for the Alteration of Articles pursuant to alteration in the name clause of the Memorandum of Association of the company
- Altered Articles of Association

Also, the application for the fresh certificate of incorporation in the new name of the company be made in form INC-24 to the Registrar within the 30 days along with the prescribed fees and the following document should be attached along with such application: -

- Minutes of the member's meeting
- The copy of the Certificate of Incorporation along with the copy of the Altered MOA and AOA of the company may be attached to the form INC-24 as an optional attachment.

7. After scrutiny of the documents filed, the ROC shall issue a fresh certificate of incorporation digitally signed in Form INC-25.

8. Intimate all concerned persons/authorities about the changed name of the Company, particularly the Stock Exchanges, National Securities Depository Ltd., Central Depository Services (India) Ltd., statutory and other authorities like Inspector of Factories, Regional Provident Fund Commissioner, suppliers of raw materials, customers, banks etc.

9. Arrange for a new Common Seal and have the same adopted at a meeting of the Board of directors and keep it under safe custody and get stationery printed with the new name and/or affix rubber stamp of the new name on all the existing documents. However, it is also to be noted that having the common seal is no longer mandatory requirement.

10. Get the new name of the Company painted on all the signboards or name boards wherever they are displayed.

11. Correct all records, registers including the Register of Members, every copy of Memorandum and Articles of Association, other books and documents pertaining to the company's business and affairs to display the new name.

12. It is also to be noted that in every document as above-mentioned the company shall paint, affix or print as the may be the former name or names so changed during the period of last two years. (First proviso to Section 12(3)).

Name change requirement under regulation 45 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

• All listed companies which decide to change their names shall be required to comply with the following conditions:

1. A time period of at least 1 year should have elapsed from the last name change.
2. At least 50% of its total revenue in the preceding 1year period should have been accounted for by the new activity suggested by the new name, or,

3. The amount invested in the new activity/project (Fixed Assets + Advances + Work in Progress + Inventories + Investments+ Trade Receivables + Cash & Cash equivalents) is at least 50% of the assets of the company. The 'advances' shall include only those extended to contractors and suppliers towards execution of project, specific to new activity as reflected in the new name.

   To confirm the compliance, the company would have to submit auditor's certificate to the stock exchange.

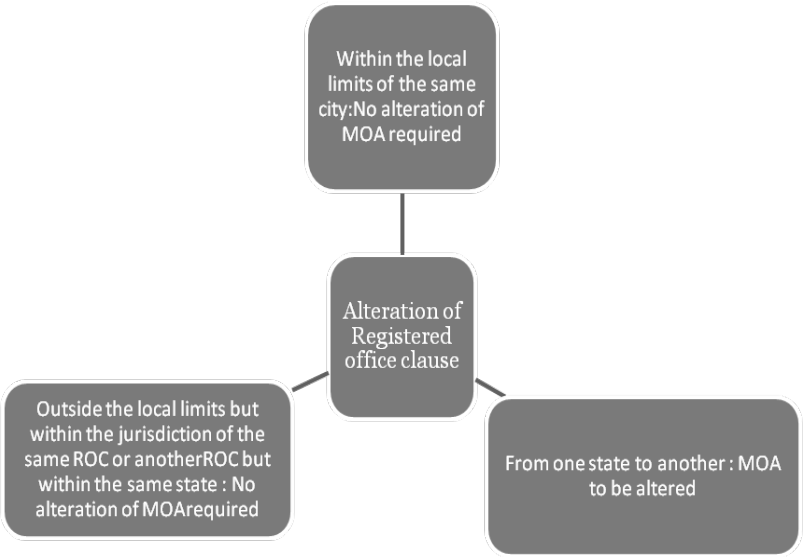
4. The new name along with the old name shall be disclosed through the web sites of the respective stock exchange/s where the company is listed for a continuous period of one year, from the date of the last name change. (Regulation 46)

• If any listed entity has changed its activities which are not reflected in its name, it shall change its name in line with the activities within a period of six months from the change of activities in compliance of provisions as prescribed in the Companies Act, 2013. (Regulation 45)

EFFECT OF CHANGE

- The change of name shall not affect any rights or obligations of the company or render defective any legal proceedings by or against it, and any legal proceedings which might have been continued or commenced by or against the company in its former name may be continued by or against the company in its new name.
- However, where a company changes its name and the new name has been registered by the Registrar, the commencing of legal proceedings in the former name is not valid [Malhati Tea Syndicate Ltd. v. Revenue Officer, (1973) 43 Com Cases 337]. In spite of a change in name the entity of the company continues. The company is not dissolved nor does any new company come into existence. If any legal proceeding is commenced, after change in the name, against the company in its old name, the company should be treated as if it is not in existence. It is not an incurable defect and the plaint can be amended to substitute the new name [Pioneer Protective Glass Fibre (P) Ltd. v. Fibre Glass Pilkington Ltd., (1986) 60 Com Cases 707 (Cal.)].
- The courts have held that proceedings commenced by the company in its former name can be continued under its new name [Solvex Oils and Fertilizers v. Bhandari Cross-Fields (P) Ltd., (1978) 48 Com Cases 260 (P & H)].

ALTERATION OF SITUATION OF REGISTERED OFFICE CLAUSE IN THE MOA [SECTION 13 (4) (5) AND (7)]



Shifting of Registered Office	Effect on MOA
Within the local limits of city, town or village	No alteration required
Outside the local limits of the city, town or village (within the same state) and within the jurisdiction of the same ROC	No alteration required
Outside the local limits of the city, town or village (within the same state) but from the jurisdiction of one ROC to another	No alteration required
From one state to another	MOA to be altered

(a) Change within the local limits of same town

The change of registered office of the company within the local limits can be implemented by the Board of Directors.

A company by passing Board Resolution can change the situation of its registered office within the limits of same city, town or village. An intimation of the change of registered office and verification of registered address shall be given to the registrar in e-form INC-22, within 15 days of such change.

This does not involve alteration of memorandum.

(b) Change outside the local limits of any city, town or village

According to Section 12(5) of the Act except on the authority of a special resolution passed by a company, the

registered office of the company shall not be changed, –

(i) in the case of an existing company, outside the local limits of any city, town or village where such office is situated at the commencement of this Act or where it may be situated later by virtue of a special resolution passed by the company; and

(ii) in the case of any other company, outside the local limits of any city, town or village where such office is first situated or where it may be situated later by virtue of a special resolution passed by the company.

In case the company is eligible for conducting business through postal ballot any change in place of registered office outside the local limits of any city, town or village the same shall be transacted only by means of voting through a Postal Ballot [Rule 22 of Companies (Management and Administration) Rules, 2014.

(c) Change within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies

No company shall change the place of its registered office from the jurisdiction of one Registrar to the jurisdiction of another Registrar within the same State unless such change is confirmed by the Regional Director. Proviso to Section 12(5) of the Act provides that confirmation by the Regional Director will be necessary for changing registered office of a company from one place to another if the change of registered office is from the jurisdiction of one Registrar to the jurisdiction of another within the same State.

Section 12(6) states that the Regional Director, after hearing the parties shall pass necessary orders within a period of thirty days from the date of the receipt of the application. Thereafter, the company concerned shall file a copy of the said order with the Registrar of Companies (ROC) within a period of sixty days from the date of the confirmation order by Regional Director. The said ROC shall record the ordered changes in its records.

The ROC of the state where the registered office of the company was previously situated, shall transfer all the documents and papers to the new ROC.

Rule 28 of Companies (Incorporation) Rules 2014 states that an application seeking confirmation from the Regional Director for shifting the registered office within the same State from the jurisdiction of one Registrar of Companies to the jurisdiction of another Registrar of Companies, shall be filed by the company with the Regional Director in Form No. INC- 23 along with the fee.

The company shall, not less than one month before filing any application with the Regional Director for the change of registered office.-

(a) publish a notice, at least once in a daily newspaper published in English and in the principal language of that district in which the registered office of the company is situated and circulating in that district; and

(b) serve individual notice on each debenture holder, depositor and creditor of the company, clearly indicating the matter of application and stating that any person whose interest is likely to be affected by the proposed alteration of the memorandum may intimate his nature of interest and grounds of opposition to the Regional Director with a copy to the company within twenty one days of the date of publication of that notice:

(c) Additionally, Form no MGT-14 is to be filed with the Registrar towards special resolution.

Change of Registered office from one State to another

The change of registered office from one State to another State involves alteration of memorandum, and the change can be effected by a special resolution of the company which must be confirmed by the Central Government on an application made to it [Section 13(4)].

According to Section 13(1) of the Act, a company may, by special resolution and after complying with the procedure specified alter the provisions of its memorandum.

Further, the alteration of the provisions of the memorandum relating to the change of the place of its registered office from one State to another shall not take effect unless it is confirmed by the Central Government on an application made to it in the prescribed form and manner [Section 13(4)].

The Central Government shall dispose of the application under sub-section (4) within a period of sixty days and before passing its order may satisfy itself that the alteration has the consent of the creditors, debenture-holders and other persons concerned with the company or that a sufficient provision has been made by the company either for the due discharge of all its debts and obligations or that adequate security has been provided for such discharge. [Section 13(5)].

A company shall, in relation to any alteration of its memorandum involving change of registered office from one State to another, file with the Registrar the special resolution passed by it in MGT- 14 [Section 13(6)].

Where an alteration of the memorandum results in the shifting of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within 30 days time from the receipt of the certified copy of the order and in INC-28, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration. [Section 13(7) read with Rule 31 of the Companies (Incorporation) Rules, 2014].

Rule 30-31 of Companies (Incorporation) Rules 2014

Rule 30 states that –

30. Shifting of registered office from one State or Union territory to another State.-

(1) An application under sub-section (4) of section 13, for the purpose of seeking approval for alteration of memorandum with regard to the change of place of the registered office from one State Government or Union territory to another, shall be filed with the Central Government in Form No. INC.23 along with the fee and shall be accompanied by the following documents, namely:-

(a) a copy of Memorandum of Association, with proposed alterations;

(b) a copy of the minutes of the general meeting at which the resolution authorising such alteration was passed, giving details of the number of votes cast in favour or against the resolution;

(c) a copy of Board Resolution or Power of Attorney or the executed vakalatnama, as the case may be.

(2) There shall be attached to the application, a list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:-

(a) the names and address of every creditor and debenture holder of the company;

(b) the nature and respective amounts due to them in respect of debts, claims or liabilities:

Provided that the list of creditors and debenture holders, accompanied by declaration signed by the Company Secretary of the company, if any, and not less than two directors of the company, one of whom shall be a managing director, where there is one, stating that:

(i) they have made a full enquiry into the affairs of the company and, having done so, have concluded that the list of creditors are correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts of or claims against the company to their knowledge, and

(ii) no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state and also there shall be an application filed by the company to the Chief secretary of the concerned State Government or the Union territory.

(3) A duly authenticated copy of the list of creditors shall be kept at the registered office ofthe company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect and take extracts from the same on payment of a sum not exceeding ten rupees per page to the company.

(4) There shall also be attached to the application a copy of the acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory where the registered office is situated at the time of filing the application.

(5) The company shall, not more than thirty days before the date of filing the application in Form No. INC-23 –

(a) advertise in the Form No. INC-26 in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with the widest circulation in the tate in which the registered office of the company is situated:

Provided that a copy of advertisement shall be served on the Central Government immediately on its publication.

(b) serve, by registered post with acknowledgement due, individual notice, to the effect set out in clause (a) on each debenture-holder and creditor of the company; and

(c) serve, by registered post with acknowledgement due, a notice together with the copy of the

application to the Registrar and to the Securities and Exchange Board of India, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.

(6) There shall be attached to the application a duly authenticated copy of the advertisement and notices issued under sub-rule (5), a copy each of the objection received by the applicant, and tabulated details of responses along with the counter -response from the company received either in the electronic mode or in physical mode in response to the advertisements and notices issued under sub-rule (5).

(7) Where no objection has been received from any person in response to the advertisement or notice under sub-rule (5) or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within fifteen days of the receipt of the application.

(8) Where an objection has been received,

(i) the Central Government shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Central Government shall pass an order approving the shifting, within sixty days of filing the application.

(ii) where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which the Central Government shall pass an order confirming or rejecting the alteration within sixty days of the filing of application.

(9) The order passed by the Central Government confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper:

Provided that the shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

(10) On completion of such inquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed.

Procedure to be followed as laid down in Rule 30 of the Companies (Incorporation) Rules, 2014 (as amended from time to time) are enumerated below:

1. Send notice of Board Meeting at least seven days before the date of Board Meeting for:
   - Shifting of Registered office form one state to another state.
   - Approval of Notice for Calling of Extraordinary General Meeting (EGM) for passing special resolution for altering the memorandum.
   - Authorization to Director/ Company Secretary to sign the documents.
   - Engagement of Company Secretary to represent the company before Regional Director (RD).
2. In Case of Listed Company, at least 7 days before of the Board Meeting, publish notice of the board meeting in the newspaper. Simultaneously, send the copies of said publication to the Stock exchanges.
3. Hold the Board Meeting and approve the :
   - Resolution Shifting of Registered office from one state to another state.
   - Notice for Calling of EGM for passing special resolution for shifting of registered office.
   - Authorization to Director/ Company Secretary to sign the documents.

– Engagement of Company Secretary to represent the company before RD.

4. Intimate the Stock Exchanges about passing of resolution in the board meeting at the earliest within 24 hours of the occurrence of such event or information and in case of any delay the disclosure should be made along with an explanation for such delay. [Regulation 30(6) of SEBI(LODR)Regulations, 2015]

5. Send Notice of the EGM to at least 21 days clear days before the members of the company. Send copies of the notice to the stock exchanges simultaneously. Also, an intimation to be sent to the concerned stock exchanges that the notice of the extra-ordinary general meeting was sent to the shareholders of the company at the earliest within 24 hours of the occurrence of such event or information and in case of any delay the disclosure should be made along with an explanation for such delay. [Regulation 30(6) of SEBI (LODR) Regulations, 2015].

6. Publish the notice of EGM in newspaper and send the copy of such publication to the stock exchanges.

7. Hold EGM of the company and pass the special resolution for shifting of registered office from one state to another state and authorize Director/ Company Secretary to sign/ file/ deal with department.

8. Intimate about the proceedings of the EGM and the amendments to the memorandum and articles of association to the stock exchanges at the earliest within 24 hours of the conclusion of such extra-ordinary general meeting and in case of any delay the disclosure should be made along with an explanation for such delay. [Regulation 30(6) of SEBI (LODR) Regulations, 2015].

9. File e-form MGT-14 with ROC for registering special resolution passed in the EGM within 30 days from the date of passing such resolution.

10. Prepare the application for shifting of registered office to be filed to RD. File a copy of the application along with all annexures to ROC in form INC-23 along with the following annexures/ attachments. -

a	Copy of the Memorandum and Articles of association;
b	Certified true copy of the special resolution passed approving the shifting of the registered office of the company and Copy of the notice convening the extra-ordinary general meeting along with relevant explanatory statement pursuant to Section 102.
c	Copy of the minutes of the general meeting at which the resolution authorizing such alteration was passed, giving details of the number of votes cast in favor or against the resolution
d	An affidavit verifying the application
e	The list of creditors and debenture holders entitled to object to the application
f	An affidavit verifying the list of creditors
g	The document relating to payment of application fee;
h	A certified true copy of the board resolution authorizing such alteration and Power of Attorney or the executed Vakalatnama, as the case may be.
i	A list of creditors and debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than one month, setting forth the following details, namely:- a) the names and address of every creditor and debenture holder of the company; b) the nature and respective amounts due to them in respect of debts, claims or liabilities

j	An affidavit, signed by the Company Secretary of the company, if any and not less than two directors of the company, one of whom shall be a managing director, where there is one, to the effect that they have made a full enquiry into the affairs of the company and, having done so, have formed an opinion that the list of creditors is correct, and that the estimated value as given in the list of the debts or claims payable on a contingency or not ascertained are proper estimates of the values of such debts and claims and that there are no other debts of or claims against the company to their knowledge.
k	An affidavit from the directors of the company that no employee shall be retrenched as a consequence of shifting of the registered office from one state to another state
l	A copy of the acknowledgment of service of a copy of the application with complete annexures to the Registrar and Chief Secretary of the State Government or Union territory / SEBI / regulatory authority as the case may be where the registered office is situated at the time of filing the application.
m	Proof of serving by registered post individual notice(s) to debenture holder(s) and creditors of the company
n	Details that objecting creditors/depositors/debenture holders have been discharged with their due debts/ has given consent to such alteration
o	Details of prosecution/inquiry/inspection
p	Copy of the Notice published in two different newspapers which is not one month before filing of the application in case of shifting of registered office from jurisdiction of one RoC to another within the same state
q	Copy of publication of notice in newspaper which is not 14 days before the date of hearing in case of shifting of registered office from one state to another in two languages i.e. one in English and in vernacular language of the district in which the office is situated
r	Statement of reasons for shifting the registered office of the company from one state to another/ from jurisdiction of one RoC to another
s	Justification alongwith the details of objections if any received in response to the advertisement

11. The company shall, not more than thirty days before the date of filing the application in Form No. INC-23 -

    (a) advertise in the Form No.INC-26 in the vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper with the widest circulation in the State in which the registered office of the company is situated:

    Provided that a copy of advertisement shall be served on the Central Government immediately on its publication.

    (b) serve, by registered post with acknowledgement due, individual notice, to the effect set out in clause (a) on each debenture-holder and creditor of the company; and

    (c) serve, by registered post with acknowledgement due, a notice together with the copy ofthe application to the Registrar and to the Securities and Exchange Board of India, in the case of listed companies and to the regulatory body, if the company is regulated under any special Act or law for the time being in force.

12. Here shall be attached to the application a duly authenticated copy of the advertisement and notices issued under sub-rule (5), a copy each of the objection received by the applicant, and tabulated details of responses along with the counter response from the company received either in the electronic mode or in physical mode in response to the advertisements and notices issued under sub-rule (5).

13. Here no objection has been received from any person in response to the advertisement or notice under sub-rule (5) or otherwise, the application may be put up for orders without hearing and the order either approving or rejecting the application shall be passed within fifteen days of the receipt of the application.

14. Here an objection has been received,

    (i) the Central Government shall hold a hearing or hearings, as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Central Government shall pass an order approving the shifting, within sixty days of filing the application.

    (ii) where no consensus is reached at the hearings the company shall file an affidavit specifying the manner in which objection is to be resolved within a definite time frame, duly reserving the original jurisdiction to the objector for pursuing its legal remedies, even after the registered office is shifted, upon execution of which the Central Government shall pass an order confirming or rejecting the alteration within sixty days of the filing of application.

15. The order passed by the Central Government confirming the alteration may be on such terms and conditions, if any, as it thinks fit, and may include such order as to costs as it thinks proper:

    Provided that the shifting of registered office shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act.

16. On completion of such inquiry, inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, shifting of registered office shall be allowed"

17. The change of address of the registered office shall be effective from the date of issue of registration certificate by the ROC of the State to which the registered office is shifted.

18. Once the order is passed by the RD, approving shifting of the registered office, file form INC- 22 with the ROC along with supportive documents –

    - the registered document of the title of the premises of the registered office in the name of the company; or
    - the notarized copy of lease or rent agreement in the name of the company along with a copy of rent paid receipt not older than one month;
    - the authorization from the owner or authorized occupant of the premises along with proof of ownership or occupancy authorization, to use the premises by the company as its registered office; and
    - the proof of evidence of any utility service like telephone, gas, electricity, etc. depicting the address of the premises in the name of the owner or document, as the case may be, which is not older than two months.
    - Copy of order passed by the competent Authority.

If the documents are in order, Registrars of both states will approve the forms and the change in registered office will be updated in register of companies with the Registrar and new Certificate of Incorporation will be issued by the Registrar of the State within 30 days, where the company's registered office is going to be shifted.

Rule 31. The certified copy of the order of the Central Government, approving the alteration of the memorandum for transfer of registered office of the company from one State to another, shall be filed in Form No.INC-28 along with the fee as with the Registrar of the State within thirty days from the date of receipt of certified copy of the order.

Steps after obtaining new certificate from ROC

- Make alteration in the MOA with respect to the state in every copy of Memorandum.
- Each stationery, banner, signboard, bills, invoice etc. should show the new address and necessary advice should be sent to shareholders, debenture holders, and other concerned parties.
- Necessary changes are required to be made in the letter heads, books, records etc. of the company. The necessary changes are required to be made in PAN, TAN and ST2 or various returns under the GST etc and inform all the Government departments, banks, customers and others wherever required.
- Cases under the erstwhile Companies Act 1956
- No notice of the petition is required to be served on the State, but in view of the wider language of Section 17 [Corresponds to section 13 of the Companies Act, 2013] Central Government may direct notice to be served on the State if it is of the view that the interest of the State will be affected by the alteration. Where the alteration is affected by changing the registered office from one State to another State, the loss of revenue in one State would be accompanied by increase in revenue in the other and in such a case the interest of a particular State ought not to be considered but it is the interest of the country as a whole which should be considered. The decision to shift the registered office of the company to another state being a domestic matter rests with shareholders and the company is the best judge of how to run its business more economically, efficiently or conveniently, even though it would result in loss of revenue to the State. [Satyashree Balaji Wires & Cables (P) Ltd., In re (2006) 71 CLA 231 (CLB)].
- A company was allowed to shift its registered office from Bihar to West Bengal in spite of the fact that Bihar Government had granted lease of land for the company's factory on the condition that it would not shift its registered office. The CLB also held that interest free loans, sales tax, electricity and other subsidies would have no bearing on the shifting [Usha Beltron Re, (2000) 27 SCL 124].

Employees' right to object in case of shifting of registered office from one state to another – Some legal cases

- In the case of Bharat Commerce and Industries Ltd., Re, (1973) 43 Com Cases 162 (Cal.), it was held that employees' union, which was a registered body and which represented quite a number of the employees at the registered office of the company, would have the legal standing to appear before the court and oppose the application on the ground that their interests are likely to be prejudicially affected if the resolution for shifting the registered office of the company from one state to another is confirmed by the court. However, it was held that the employees' union cannot oppose on the ground that there would be loss of revenue or unemployment in the State or that the meeting at which the special resolution was passed was itself not valid.
- Further, in the case of Metal Box India Ltd. Re, (2000) 37 CLA 15, it was held that where the shifting of the registered office was in accordance with a scheme approved by the BIFR, it was held that the workers had no right of objection because their continuation in the company's employment was ensured unless, of course, a worker preferred voluntary retirement.
- A different dimension to the employees' right can be seen in the case of Kwality Ice Creams (India) P

Ltd., Re, (2009) 91 SCL 231 : (2009) 148 Com Cases 631 : (2010) 98 CLA 218 (CLB). In that case, the company's petition for shifting its registered office from West Bengal to Delhi was opposed by two employees of the head office on the ground that their action against the company would be prejudiced.

The CLB said that the facility for litigation is not a valid ground to stall shifting. There was no restraint order from any Court against the proposed shifting. The Company Law Board allowed shifting subject to the condition that the interest of none of the employees at the registered office would be prejudiced by retrenchment or otherwise.

ALTERATION OF MOA DUE TO CHANGE IN OBJECT CLAUSE [SECTION 13 (8) AND (9)]

According to section 13(1), a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can change its objects by passing a special resolution. Further section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1). As per section 13(9), the Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with section 13(6)(a).

Consequently, pursuant to Section 13(1) a company can change its objects clause by passing a special resolution. Further, in case the company is eligible for conducting business through postal ballot any alteration in the objects clause of the Memorandum of Association, shall implement the same through Postal Ballot in terms of section 110 read with Rule 22 of the Companies (Management & Administration) Rules, 2014.

Further, section 13(8) lays down that a company, which has raised money from public through prospectus and has any unutilised amount out of the money so raised, shall not change its objects for which it raised the money through prospectus unless a special resolution is passed by the company and –

(i) the details, as may be prescribed, in respect of such resolution shall be published in the newspapers (one in English and one in vernacular language) which is in circulation at the place where the registered office of the company is situated and shall also be placed on the website of the company, if any, indicating there in the justification for such change;

(ii) the dissenting shareholders shall be given an opportunity to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

Also, for deleting any portion of the objects clause, the procedure laid down in this section has to be followed. A company may wish to alter its objects stated in its memorandum due to various reasons e.g. if a company wishes to cut-back i.e. where it feels it has diversified in various directions and that management of the company has become difficult or uneconomical, it may alter its objects to sell or dispose of whole or part of its undertaking(s).

- Object Clause of Memorandum of Association of a Company can be altered by passing special resolution and complying with other prescribed conditions.
- Following companies are required to pass special resolution for alteration of Object clause of Memorandum of Association by means of Postal Ballot only:
  - All Companies having more than 200 members. [Section 110 read with Rule 22 of Companies (Management and Administration) Rules, 2014,
  - Company which has raised money from public through prospectus and still has any unutilized amount out of the money so raised. [Section 13(8) read with Rule 32 of the Companies (Incorporation) Rules, 2014];

Procedure is to be followed for alteration of objects clause of MOA under Section 13 read with Rule No.32 of Companies (Incorporation) Rules, 2014 and Rule No 22 (Postal Ballot, if applicable) of Companies (Management and Administration) Rules, 2014:

1. Issue not less than 7 days' notice and agenda of Board meeting, or a shorter notice in case of urgent business, in writing to every director of the company at his address registered with the company and call a Board Meeting to consider the proposal of alteration of objects clause of memorandum of association of company. [Section 173(3)]. Also follow the procedure prescribed for issuing and signing of notice of Board Meeting.

2. Hold a meeting of Board of Directors-

- To pass the Board Resolution for approving the proposed amendments to the objects clause of MOA of the company subject to the approval of shareholders in General meeting.
- To delegate authority to any one director of the company to sign, certify and file the requisite forms with ROC and to do all such acts and deeds as may be necessary to give effect to the proposed alteration.
- To fix day, date, time and venue for holding the general meeting of the Company for passing a special resolution as required by section 13.
- To approve the draft notice of general meeting along with explanatory statement annexed to the notice as per requirement of the Section 102.
- To authorize the Director or Company Secretary to sign and issue notice of the general meeting.

3. If the company has raised money from public through prospectus and has any unutilized amount out of the money so raised, it shall follow the following additional steps for altering the objects clause of MOA of the Company:

(a) Pass special resolution for alteration of Object clause of Memorandum of Association by means of Postal Ballot only.

(b) Notice of the resolution for altering the objects shall contain the following particulars: total money received;

- total money utilized for the objects stated in the prospectus;
- unutilized amount out of the money so raised through prospectus,
- particulars of proposed alteration/ change in the objects;
- justification for the alteration/change;
- amount proposed to be utilized for the new objects;
- estimated financial impact of the proposed alteration on the earnings and cash flow of the company;
- other relevant information which is necessary for the members to take an informed decision on the proposed resolution;
- Place from where any interested person may obtain a copy of the notice of the resolution to be passed.

(c) Publish an advertisement, giving above mentioned details of special resolution to be passed, which shall be published simultaneously with the dispatch of postal ballot notices to shareholder at least once in a vernacular newspaper in the principal vernacular language and in English language in an English newspaper circulating at the place where the registered office of the company is situated and place it on the website of the Company if any, along with the justification for such change.

(d) Give an opportunity to the dissenting shareholders to exit by the promoters and shareholders having control in accordance with regulations to be specified by the Securities and Exchange Board.

4. Send notice of the General meeting proposing the aforementioned special resolution to all the shareholders, directors, auditors and other persons entitled to receive it, by giving not less than clear 21 days' notice or shorter notice, if consent for shorter notice is given by at least 95% of members entitled to vote at such meeting, either in writing or through electronic mode in accordance with Section 101 of the Act.

5. Hold a shareholders meeting on the date for the meeting and pass the Special Resolution for altering the object clause of Memorandum of Association by 3/4th majority in accordance with Section 114 (2) of the Act.

Special Resolution shall be passed by means of Postal ballot, if company has more than 200 members or the company has raised money from public through prospectus and still has any unutilized amount out of the money so raised.

6. Follow the procedure prescribed for preparing, signing and compiling of minutes of General Meeting.

7. After passing special resolution, file a certified copy of special resolution with the Registrar in form MGT- 14 under Section 117 of the Act within 30 days of passing Special Resolution in general meeting along with the following attachments:

(a) Copy of Special Resolution passed along with explanatory statement.

(b) Notice for convening the General Meeting of the Company

(c) Altered Memorandum of Association.

(d) Shorter Notice Consent Letters from the members in case the General Meeting was convened and held at a shorter notice.

(e) Any other attachment as may be considered as necessary in this regard.

(f) The Registrar shall register the alteration of objects in Memorandum and certify the registration within a period of 30 days from the date of filing of the special resolution. [Section 13(9)]

(g) Every Alteration made in the memorandum of the company shall be noted in every copy of the Memorandum of Association. [Section 15(1)]

Notes:

1. No alteration of object clause of Memorandum of Association shall have any effect until it has been registered in accordance with the provisions of this section. [Section 13(10)]
2. Any alteration of the memorandum, in the case of a company limited by guarantee and not having a share capital, purporting to give any person a right to participate in the divisible profits of the company otherwise than as a member, shall be void. [Section 13(11)]

REGISTRATION OF ALTERATION

Section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar:

(a) the special resolution passed by the company under section 13(1); and

(b) the approval of the Central Government under section 13(2), if the alteration involves any change in the name of the company.

The special resolution shall be filed with the Registrar within thirty days of the passing or making thereof in the prescribed manner and payment of prescribed fees within the time specified under section 403.

As per section 13(9), the Registrar shall register any alteration of the memorandum with respect to the objects of the company and certify the registration within a period of thirty days from the date of filing of the special resolution in accordance with section 13 (6)(a).

Further section 13(7) provides that where an alteration of the memorandum results in the transfer of the registered office of a company from one State to another, a certified copy of the order of the Central Government approving the alteration shall be filed by the company with the Registrar of each of the States within such time and in such manner as may be prescribed, who shall register the same, and the Registrar of the State where the registered office is being shifted to, shall issue a fresh certificate of incorporation indicating the alteration.

The certificate of incorporation shall be conclusive evidence that all the requirements of this Act with respect to the alteration and confirmation thereof have been complied with. The Registrar of the State from which the registered office is transferred will send to the Registrar of the other State all the documents relating to the company registered in his office.

No alteration made under section 13 (i.e., alteration of memorandum) shall have any effect until it has been registered in accordance with the provisions of this section. [Section 13(10)].

The main spirit behind Section 13(7) of the Companies Act, 2013 in regard to the filing of the order confirming the transfer of the company's registered office from one State to another State with the Registrar of Companies of each State is that the Registrar of Companies from whose State the registered office is transferred should keep the order duly registered in his office as an evidence to such shifting and should transfer all other records of the company to the Registrar of Companies to whose State the Registered Office of the company has been so shifted. The other Registrar of Companies will register the other copy of the order and keep that order with the records transferred to him by his counterpart.

ALTERATION OF LIABILITY CLAUSE

According to section 13(1) of the Act, a company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum. It means that a company can change the liability clause of its memorandum of association by passing a special resolution. Further section 13(6)(a) provides that a company shall, in relation to any alteration of its memorandum, file with the Registrar the special resolution passed by the company under section 13(1).

ALTERATION OF CAPITAL CLAUSE IN MOA [SECTION 61 READ WITH SECTION 64]

Types of alteration of capital clause in the general meeting of a company limited by shares as per section 61 (1) of the Companies Act, 2013 can be enumerated as below: -

(a) increase its authorised share capital by such amount as it thinks expedient;

(b) consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares:

Provided that no consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner;

(c) convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;

(d) sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;

(e) cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled.

All the above alterations do not require the confirmation by the Tribunal except that alteration relating to consolidation and division which results in changes in the voting percentage of shareholders shall not take effect unless it is approved by the Tribunal on an application made in the prescribed manner.

These alterations are, however, required to be notified and a copy of the resolution should be filed with the Registrar within 30 days of the passing of the resolution along with an altered memorandum. [Section 64(1)]

The Registrar shall record the notice and make any alteration which may be necessary in the company's memorandum or articles or both.

The cancellation of shares under section 61(1) of the Act shall not be deemed to be a reduction of share capital. Section 64 (1) provides that a notice is required to be given to the Registrar for alteration for share capital.

Procedure for altering the Memorandum of Association for increasing the Authorised Capital of the Company under Section 61 and 64 of the Companies Act 2013 read with Rule no 15 of Companies (Share Capital and Debenture) Rules, 2014

1. Check for Authorization in Articles: Section 61 of the Companies Act, 2013, mandates that for increasing the Authorised share capital, authorization in Articles of Association is a pre-condition.

If there is no such provision then the company has to take steps for alteration of its Articles of Association in accordance with the provision of Section 14 of the Companies Act, 2013, so as to insert the clause enabling increase in the authorised share capital.

2. Calling of Board Meeting: Issue notice in accordance with the provisions of section 173(3) for convening a meeting of the Board of Directors. Main agenda for this Board meeting would be:

(a) To get in-principal approval of Directors for Increase in authorised share Capital;

(b) Fix date, time and place for holding Extra-ordinary General meeting (EGM) to get approval of shareholders, by way of Ordinary Resolution, for amendment in authorised share Capital clause of Memorandum of Association. This amendment in authorised share Capital clause of Memorandum of Association shall be in accordance with the requirement of section 61 of the Companies Act, 2013;

(c) To approve notice of EGM along with Agenda and explanatory statement pursuant to be annexed to the notice of General Meeting as per section 102(1) of the Companies Act, 2013;

(d) To authorize the Director or Company Secretary to issue Notice of the Extra-ordinary General meeting (EGM) as approved by the board under clause 2(c) mentioned above.

3. Issue Notice of the EGM to all members, legal representative of deceased member, assignee of an insolvent member if any, directors and the auditors of the company in accordance with the provisions of Section 101.

4. Holding of general meeting: To hold the EGM on fixed date and pass the necessary ordinary resolution under section 61(1)(a) for increase in the authorized share capital of the Company.

5. ROC Form filing: File Form SH-7 within 30 days of passing of Ordinary Resolution with the concerned ROC, with prescribed fees and along with following attachments as desired by section 64 read with Rule 15 of the Companies (Share Capital and Debentures) Rules, 2014:

a. Notice of EGM;

b. Certified True copy of Ordinary Resolution along with the explanatory statement pursuant to Section 102 of the Act;

c. Altered Memorandum of Association.

6. Concerned ROC will check the e-form and attached documents and will approve the increase in authorize share capital.

7. The company shall file a notice in the prescribed form with the Registrar within a period of 30 days of alteration to its share capital along with a copy of altered Memorandum. [Section 64].

8. No need to pass Special Resolution for increase in authorised share capital.

However, in case the alteration of capital clause of the Memorandum of Association of the company requires the alteration of the Articles of Association of the company then, the special resolution for the alteration of articles of association of the company be passed and form MGT-14 should also be filed for the filing of copy of such special resolution with the concerned Registrar within 30 days from the date of passing of such resolution along with the prescribed fees.

ALTERATION OF ARTICLES OF ASSOCIATION OF A COMPANY

A company has a statutory right to alter its articles of association. But the power to alter is subject to the provisions of the Act and to the conditions contained in the memorandum. Section 14(1) provides that subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of a private company into a public company; or a public company into a private company. First proviso to section 14(1) lays down that where a company being a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company. Second proviso to section 14(1) stipulates that any alteration having the effect of conversion of a public company into a private company shall not take effect unless it is approved by an order of the Central Goernment on an application made in prescribed form shall make such order as it may deem fit.

Every alteration of the articles under this section and a copy of the order of the Central Government approving the alteration as per section 14(1) shall be filed with the Registrar, together with a printed copy of the altered articles, within a period of fifteen days in such manner as may be prescribed, who shall register the same. [Section 14 (2)]

Any alteration of the articles registered under section 14(2) shall, subject to the provisions of this Act, be valid as if it were originally in the articles. [Section 14(3)]

The right to alter the articles is so important that a company cannot in any manner, either by express provisions in the articles or by independent contract, deprive itself of the powers to alter its articles [Walker v. London Tramway Co. (1879) 12 Ch. D. 705].

However, in spite of the power to alter its articles, a company can exercise this power subject only to certain limitations. These are:

1. The alteration must not exceed the powers given by the memorandum. In the event of conflict between the memorandum and the articles, it is the memorandum that will prevail.
2. The alteration must not be inconsistent with any provisions of the Companies Act or any other statute.

   Similarly, where a resolution was passed expelling a member and authorizing the director to register the transfer of his shares without an instrument of transfer, the resolution was held to be invalid as being against the provisions of the Act [*Madhava Ramachandra Kamath* v. *Canara Banking Corporation* [1941] 11 Com Cases 78 (Mad)].

   On the other hand, articles may impose on the company conditions stricter than those provided under

the law; for example, they may provide that a matter should be passed by a special resolution when the Act requires it to be passed by an ordinary resolution.

3. The Articles must not include anything which is illegal or opposed to public policy.
4. The alteration must be bona fide for the benefit of the company as a whole.
5. The alteration must not constitute a fraud on the minority by a majority. If the alteration is not for the benefit of the company as a whole, but for majority of shareholders, then the alteration would be bad. In other words, an alteration to the articles must not discriminate between the majority shareholders and the minority shareholders so as to give the former an advantage over the latter. [*All India Railway Mens Benefit Fund* v. *Jamadar Baheshwarnath Bali* (1945) 15 Com Cases 142 (Nag.)]

   In *Mathrubhumi Printing & Publishing Co. Ltd.* v. *Vardhaman Publishers Ltd.* [1992] 73 Com Cases 80 (Ker.), the Hon'ble Kerala High Court held that no majority of shareholders can, by altering the article retrospectively, affect, the prejudice of the consenting owners of shares, the right already existing under a contract nor take away the right accrued, e.g., after a transfer of share is lodged, the company cannot have a right of lien so as to defeat the transfer.
6. Articles cannot be altered so as to compel an existing member to take or subscribe for more shares or in any way increase his liability to contribute to the share capital, unless he gives his consent in writing (Section 38 of the Companies Act, 1956).
7. By effecting alteration in its articles, a company cannot defeat escape from its contractual obligation with any person. The company will always be liable in such a case.
8. The Articles of Association cannot be altered so as to have retrospective effects. The articles only operate from the date of the amendment [*Pyare Lal Sharma* v. *Managing Director, J.K. Industries Ltd.* (1989) 3 Comp LJ (SL) 70].
9. The alteration must not be inconsistent with an order of the Court under Sections 397 or 398 and 404 of the Companies Act, 1956.

Subject to the foregoing conditions, the Articles in a company can be altered and no clause can be included in the Articles that it is not alterable. Persons who become members of a company have no right to assume that the Articles will always remain in a particular form.

Of course, a section or a class of shareholders cannot be unfairly or oppressively treated. Thus, though the requisite majority of members could pass a special resolution to alter the Articles and if the alteration has the effect of making a fraud on the minority, the minority shareholders not being less than the number specified in Section 397 and 398 could move the Court for redressing their grievances. The Courts have entertained such applications from shareholders even where they are smaller in number [See *Menier N. Hooper Telegraph Works* (1874) 9 Ch. App. 350].

As already mentioned, a company is not prevented from altering its Articles on the ground that such an alteration would be breach of a contract but an action for damages may lie against the company. [*Southern Foundries* v. *Shirlaw*, [1940] AC 701].

The discussion on the above matter will not be complete without referring to the rule in *Foss* v. *Harbottle* (1843) 2 Hare 461 where the court held that no individual shareholder nor a minority of shareholders in a company can take it upon himself or themselves to remedy an alleged wrong involved in the actions of directors if the said wrongful act is something which the majority can regularise and approve of.

Section 14(1) of the Companies Act, 2013 states that subject to the provisions of this Act and the conditions contained in its memorandum, if any, a company may, by a special resolution, alter its articles including alterations having the effect of conversion of –

(a) a private company into a public company; or

(b) a public company into a private company.

Manner of Altering AOA

A Company may alter its Articles in accordance with the above provisions in any of the following manner

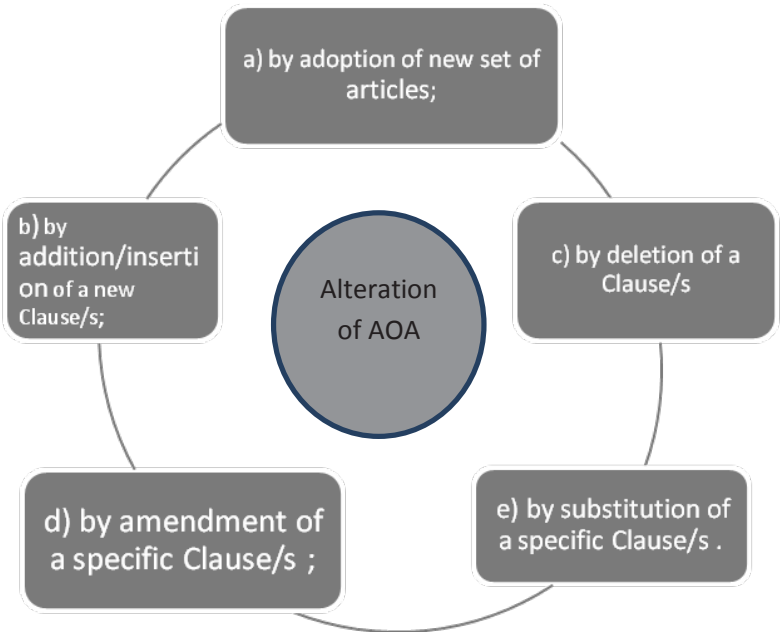
(a) by adoption of new set of articles;

(b) by addition/insertion of a new Clause/s;

(c) by deletion of a Clause/s ;

(d) by amendment of a specific Clause/s ;

(e) by substitution of a specific Clause/s.



Key Considerations:

- For effecting any change in the AOA resulting in the conversion of private company into a public company or vice-versa, company shall additionally follow the procedure prescribed for the conversion of private company into a public company or vice-versa.
- By amendment, Company may insert provisions for entrenchment to the effect that specified provisions of the articles may be altered only if conditions or procedures as that are more restrictive than those applicable in the case of a special resolution, are met or complied with.[Section 5(3)]
- The provisions of entrenchment can be inserted only if agreed to by all the members of the company in the case of a private company and by a special resolution in the case of a public company.[Section 5(4)]

Every alteration of articles shall be filed with the Registrar together with a printed copy of the altered articles within a period of 15 days in form INC-27 where the conversion of a private company into public or vice versa is contemplated. [Section 14(2)]

And, in all the cases of the alteration of articles of association of the company form MGT-14 is to be filed with the

Registrar within 30 days from the passing of the special resolution along with the prescribed fees. The copy of the special resolution along with the explanatory statement, copy of the altered AOA and the copy of the shorter notice consent received from at least 95% of the members of the company be attached with form MGT-14 in case the general meeting of the members held at a shorter notice.

Procedure for alteration of AOA under Section 14

1. Issue not less than 7 days' notice and agenda of Board meeting, or a shorter notice in case of urgent business, in writing to every director of the company at his address registered with the company and call a Board Meeting to consider the proposal of alteration of articles of association of a company. (Section 173(3). Also follow the procedure prescribed for issuing and signing of notice of Board Meeting.

2. Hold a meeting of Board of Directors-

- To consider and decide the articles required to be changed/altered.
- To pass the necessary Board Resolution for approving proposal of alteration of articles of association of a company subject to the approval of Shareholders.
- To delegate authority to any one director of the company to sign, certify and file the requisite forms with Registrar of Companies or any statutory authority to do all such acts, deeds as may be necessary to give effect to the proposed alteration.
- To fix day, date, time and venue for holding general meeting of the Company for passing a special resolution as required by section 14(1) of the Companies Act, 2013.
- To approve the draft notice of general meeting along with Explanatory Statement
- To authorize the Director or Company Secretary to sign and issue notice of the general meeting.

3. Prepare and circulate draft minutes within 15 days from the date of the conclusion of the Board Meeting, by hand/speed post/registered post/courier/e-mail to all the Directors for their comments. Follow the procedure prescribed for preparing, circulation, signing and compiling of Board Minutes. (Revised Secretarial Standards-1 w.e.f. 1st October, 2017).

4. Send notice of the General meeting proposing the aforementioned special resolution to all the shareholders, directors, auditors and other persons entitled to receive it, by giving not less than clear 21 days' notice or shorter notice, if consent for shorter notice is given by at least 95% of members entitled to vote at such meeting, either in writing or through electronic mode in accordance with the Section 101 of the Act. Also follow the procedure prescribed for issuing and Signing of notice and convening of General Meeting. (Revised Secretarial Standards-2)

5. Hold a shareholders meeting on the date fixed for the meeting and pass the Special Resolution for altering the Articles of Association by 3/4th majority or unanimously, in case of insertion of provisions of entrenchment by a private company in accordance with Section 114 (2) of the Act read with Section 5(4) and Section 14 of the Companies Act, 2013.

6. After passing special resolution, file a certified copy of special resolution with the Registrar in e-Form MGT-14 under Section 117 of the Act within 30 days of passing Special Resolution in general meeting along with the following attachments:

a. Copy of Special Resolution passed along with explanatory statement
b. Notice for convening the General Meeting of the Company along with explanatory statement as an optional attachment.
c. Certified True copy of the Altered Articles including the provisions of entrenchment inserted in the articles, if any.

d. Shorter Notice Consent Letters from at least 95% of the members in case the General Meeting was convened at a shorter notice.

e. Any other attachment as may be required/applicable.

7. Follow the procedure prescribed for preparing, signing and compiling of minutes of General Meeting. (Revised Secretarial Standards-2)

8. Make necessary amendments in all the copies of Articles of association of the Company. [Section 15(1)]

Note:

1. Where a private company alters its articles in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company under this Act, the company shall, as from the date of such alteration, cease to be a private company. [First proviso to Section 14(1)]
2. Any alteration having the effect of conversion of a public company into a private company shall n o t take effect except with the approval of the Tribunal which shall make such order as it may deem fit. [Second proviso to Section 14(1)]
3. For effecting the conversion of a private company into a public company or vice versa, company shall file the application in Form No.INC -27 along with the prescribed fee. [Section 14 and Rule 33 of Companies (Incorporation) Rules, 2014]

EFFECT OF ALTERED ARTICLES

Alteration binds members in the same way as original articles. The altered articles shall bind the company and the members to the same extent as if they had been signed by the company and by each member, means the articles as originally framed, or as they may from time to time stand altered are valid under the provisions of the Act. There is clear power to alter the articles, and as altered, they bind members just in the same way as did the original articles.

Section 8 Company cannot alter Articles except with the prior approval of Central Government

Section 8(4)(i) provides that a company registered under section 8 i.e. companies with charitable objects shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.

ALTERATIONS OF MEMORANDUM OR ARTICLES TO BE NOTED IN EVERY COPY

Every alteration made in the memorandum or articles of a company shall be noted in every copy of the memorandum or articles, as the case may be. [Section 15(1)]

If a company makes any default in complying with the provisions of section 15(1), the company and every officer who is in default shall be liable to a penalty of one thousand rupees for every copy of the memorandum or articles issued without such alteration. [Section 15(2)]

Sample Board Resolution for Change in the Name of the Company

“RESOLVED THAT pursuant to the provisions of section 13 and other applicable provisions of the Companies Act, 2013 if any and the rules framed there under, and subject to the approval of the Registrar of Companies, Central Registration Center, Ministry of Corporate Affairs and the approval of the members, the consent of the board be and is hereby accorded to change the name of the company from_____to _____ or_____or_____a s may be approved by the Registrar.

FURTHER RESOLVED THAT for the purpose of giving effect to this resolution,___, Director of the Company

be and is hereby authorized, on behalf of the Company, to make an application to the MCA for ascertaining availability of proposed name and to do all acts, deeds, and things as may be necessary, proper or desirable and to sign and execute all necessary documents, applications and returns, e-forms for the purpose of giving effect to the aforesaid resolution."

Sample Shareholder's Resolution to be Passed in the General Meetings for Change in the Name Clause of MOA

"RESOLVED THAT pursuant to section 13(2) and other applicable provisions of the Companies Act, 2013 if any and the rules framed there under, the consent of members be and is hereby accorded to change the name of the company from_____PRIVATE LIMITED to__PRIVATE LIMITED.

"RESOLVED FURTHER THAT Clause I of the Memorandum of Association of the Company be substituted by the following:

'The Name of the company is___PRIVATE LIMITED".

"RESOLVED FURTHER THAT Clause ------ of the Articles of Association of the Company be substituted by the following:

The company means___PRIVATE LIMITED".

SAMPLE BOARD RESOLUTION FOR CHANGING THE SITUATION OF REGISTERED OFFICE CLAUSE IN MOA:

"RESOLVED THAT pursuant to the provisions of Sections 12,and 13 of the Companies Act, 2013 and the rules made there under (including any statutory modifications or re-enactment thereof for the time being in force) and subject to the confirmation of the Central Government and subject to the confirmation of the members, approval of the Board of Directors of the company be and is hereby accorded for shifting of the registered office of the company from the state of Maharashtra to the state of Gujarat.

RESOLVED FURTHER THAT Shri ..... and Shri....., the Company Secretary and Director of the company respectively, be and are hereby jointly and severally authorised –

(i) to sign and file, the petition under Sub-section (4) of Section 13 of the Act to the Regional Director for securing confirmation to the alteration to the memorandum of association of the company so as to change the place of the Registered office of the company from the State of Maharashtra to the State of Gujarat,

(ii) to represent the company in all hearings concerning the petition of the company; and

(iii) to appoint, on behalf of the company, Company Secretaries in whole-time practice, Advocates, lawyers, counsels and other consultants, if and when required, to represent the company and plead on its behalf before the concerned Regional Director and or any other agency in all matters connected with the petition of the company.

RESOLVED FURTHER THAT Shri....., Director of the Company be & is hereby authorised on behalf of the Company, including to prepare, sign, execute Power of Attorney in favour of Shri. ...., and Shri....., the Company secretary and the Director of the company respectively in this regard but not limited to file & submit necessary E-forms, applications, documents & returns with Registrar of Companies, Ministry of Corporate of Affairs & to do all acts, deeds & things as may deem necessary, proper or desirable for the purpose of giving effect to above resolution."

Sample Shareholder's Resolution to be Passed in the General Meeting for Shifting of Registered Office of the Company from One State to Another

"RESOLVED THAT pursuant to the provisions of section 13 read with section 12 and other applicable provisions,

if any, of the Companies Act, 2013 and rules made thereunder, and subject to the approval of the Regional Director, ... Region or any other Government Authority, the consent of the members of the Company be and is hereby accorded to shift the registered office of the Company from the State of .... (State) to ..... (State).

RESOLVED FURTHER THAT Clause No. II of the Memorandum of Association of the Company be and is hereby substituted by the following clause:

'II.The Registered Office of the Company shall be situated in the State .....'.

RESOLVED FURTHER THAT Mr. ..... and Mr. ..... , the director and the company secretary of the Company respectively, be and are hereby severally authorized for and on behalf of the Company to do all such acts, deeds and things as may be necessary or desirable in this regard for the purpose of giving effect to this resolution."

Explanatory Statement Pursuant to Section 102 of the Companies Act 2013

Item No. ……

When the company was incorporated it was decided that the main manufacturing unit of the company would be located in the State of Maharashtra and in the memorandum of association it was stated that the registered office of the company would be situated in that State.

Subsequently it was found that the location of the main manufacturing unit in the State of Gujarat would be more advantageous to the company. At present, all the factories of the company are located in the State of Gujarat. for better management and control, the Head Office of the company has already been shifted to Ahmedabad. Gujarat. The directors, therefore, consider that the memorandum of association of the company should be altered so as to change the place of its registered office from its present situation at ..... in the State of Maharashtra to ....., a place situated in the State of Gujarat. After the proposal is approved by the shareholders, a petition is required to be made, under Section 13(4) of the Companies Act, 2013, to the Regional Director for confirmation of the alteration to the memorandum of association of the company so as to shift the company's registered office from the State of Maharashtra to the State of Gujarat. It is also proposed to authorize severally to Mr. ..... and Mr. ....., the Director and Company Secretary of the company respectively to sign and file the petition and appear before the Regional Director in connection with the petition. An enabling clause has also been provided authorizing the Director and Company Secretary of the company to appoint any other authorized representative such as the company secretary in the whole-time practice, Advocate, counsel etc., as they consider necessary in connection with the petition.

The Board recommends the resolution to the members for their consideration and approval.

None of the directors of the company or KMP or their relatives are concerned or interested in the proposed resolution.

Sample Board Resolution for Alteration of Object Clause in MOA

"RESOLVED THAT pursuant to the provisions of section 13, 15 and other applicable provisions, if any, of the Companies Act, 2013 (Act) read with rule No. 32 (to be mentioned if applicable), of the Companies (Incorporation) Rules, 2014 (including any statutory modification(s) or re-enactment thereof for the time being in force)and subject to the consent of the members in General meeting and approval from the Registrar of Companies Maharashtra Mumbai and or any other statutory or regulatory authority, as may be necessary, Clause III (Objects Clause) of the Memorandum of Association of the Company, be and is hereby altered by inserting the following sub-clause under Part - A of Clause III, after the existing sub-clause 3 and the remaining sub-clauses be re-numbered accordingly.:

'4. To render services as brokers or commission agents and to carry on the business of retail and institutional distribution of Insurance Policies or any other products issued by the Insurance Companies, on the basis of a commission, remuneration or a fee.'

RESOLVED FURTHER that any of the Directors, and the Company Secretary of the company, be and are hereby severally authorized to file, sign, verify, execute and submit all such e-forms, papers or documents, as may be required and do all such acts, deeds and things as may be necessary and incidental for giving effect to this Resolution".

Sample Shareholder's Resolution to be Passed in the General Meeting for Alteration of Object Clause in MOA

"RESOLVED THAT pursuant to the provisions of section 13, 15 and other applicable provisions, if any, of the Companies Act, 2013 (Act) read with rule no. 32 (to be mentioned if applicable), of Companies (Incorporation) Rules, 2014 (including any statutory modification(s) or re-enactment thereof for the time being in force) consent of the members in General meeting be and is hereby given for re-structuring of the Object clause of the memorandum of association of the company subject to the approval from the Registrar of Companies Maharashtra, Mumbai and or any other statutory or regulatory authority, as may be necessary, Clause III (Objects Clause) of the Memorandum of Association of the Company, be and is hereby altered by inserting the following sub-clause under Part - A of Clause III, after the existing sub-clause 3 and the remaining sub-clauses be re-numbered accordingly:

'4. To render services as brokers or commission agents and to carry on the business of retail and institutional distribution of Insurance Policies or any other products issued by the Insurance Companies, on the basis of a commission, remuneration or a fee.'

RESOLVED FURTHER that any Director, the Chief Financial Officer and the Company Secretary of the Company, be and are hereby severally authorized to file, sign, verify, execute and submit all such e-forms, papers or documents, as may be required and do all such acts, deeds, matters and things as may be necessary and incidental for giving effect to this Resolution, including agreeing to any change to the aforesaid sub-Clause 4 under Clause III of the Memorandum of Association of the Company which pertains to the Objects of the company , as may be required by the ROC and/or any statutory/regulatory authority."

Explanatory Statement Pursuant to Section 102 of the Companies Act, 2013

Item No. 1

The principal business of the Company is providing long term finance to any person or persons, company or corporation, society or association of persons with or without interest and with or without any security, to construct/purchase any houses, buildings or flats, furnished or otherwise. The Company proposes to undertake the activity of distribution of life insurance products of PQR Life Insurance Company Limited with no risk participation.

To enable the Company to commence the aforesaid business, it is proposed to amend the Main Objects under the Objects Clause of the Memorandum of Association of the Company, by the insertion of sub-clause 4 after the existing sub-clause 3 as stated in the Resolution in the annexed notice. The above amendment would be subject to the approval of the Registrar of Companies, Maharashtra, Mumbai and any other Statutory or Regulatory Authority, as may be necessary in this regard.

A copy of the Memorandum and Articles of Association of the Company together with the proposed alterations is available for inspection by the Members of the Company at its Registered Office during normal business hours on all working days up to the date of the Meeting and is also attached to the annexed notice,

The Directors recommend the passing of the Draft Resolution placed under Item No. 1 of the accompanying Notice for the approval of the Members of the Company.

None of the other Directors of the Company or the Key Managerial Persons of the Company or their relatives, are concerned or interested in the passing of the above resolution.

Sample Board Resolution for Alteration of Capital Clause in MOA

A. Increase in Authorised Share Capital

"RESOLVED THAT pursuant to the provisions of Section 61 and 64 and other applicable provisions, if any, of the Companies Act, 2013 (including any amendment thereto or re-enactment thereof) and the rules framed there under, the consent of the Board of Directors of the Company be and is hereby accorded, subject to the approvals of shareholders in the General meeting, to increase the Authorized Share Capital of the Company from existing Rs. 50,00,000 (Rupees Fifty Lacs) divided into 5,00,000 (Five Lacs) Equity Shares of Rs. 10/- each to Rs. 75,00,000 (Rupees Seventy Five Lacs) divided into 7,50,000 (Seven Lacs Fifty Thousand) Equity Shares of Rs. 10/- each by creation of additional 2,50,000 (Two Lacs Fifty Thousand) Equity Shares of Rs. 10/- each ranking pari passu in all respect with the existing Equity Shares of the Company.

B. Alteration in the Capital Clause of Memorandum of Association of the company

"RESOLVED THAT pursuant to the provisions of Section 13, 61 and 64 and other applicable provisions of the Companies Act, 2013 (including any amendment thereto or re-enactment thereof) and the rules framed thereunder, the consent of the Board of Directors of the Company be and is hereby accorded, subject to the approvals of shareholders in the General meeting, for substituting Clause V of the Memorandum of Association of the Company with the following clause.

"V. The Authorised Share Capital of the Company is Rs. 75,00,000/- (Rupees Seventy Five Lacs Only) divided into 7,50,000 (Seven Lacs Fifty Thousand) Equity Shares of face value of Rs. 10/- (Rupees Ten Only) each."

Sample Shareholders' Resolution to be Passed in the General Meeting

a. Increase in Authorised Share Capital

Special Business

1. To consider, and if thought fit, to pass with or without modification(s), the following resolution as an Ordinary Resolution:

"RESOLVED THAT pursuant to the provisions of Section 61 read with Section 64 and other applicable provisions, if any, of the Companies Act, 2013 (including any amendment thereto or re-enactment thereof) and the rules framed there under, the consent of the members of the Company be and is hereby accorded to increase the Authorized Share Capital of the Company from existing ₹50,00,000/- (Rupees Fifty Lacs Only) divided into 5,00,000 (Five Lacs) Equity Shares of ₹10/- each to Rs. 75,00,000/- (Rupees Seventy Five Lacs Only) divided into 7,50,000 (Seven Lacs Fifty Thousand) Equity Shares of ₹10/- (Rupees Ten Only) each by creation of additional 2,50,000 (Two Lacs Fifty Thousand) Equity Shares of ₹10/- each ranking pari passu in all respect with the existing Equity Shares of the Company.

RESOLVED FURTHER THAT the Memorandum of Association of the Company be altered in the following manner i.e. existing Clause V of the Memorandum of Association of the company be deleted and the same be substituted with the following new clause as Clause V:

'V. The Authorised Share Capital of the Company is ₹75,00,000/- (Rupees Seventy Five Lacs) divided into 7,50,000 (Seven Lacs Fifty Thousand) Equity Shares of face value of ₹10/- (Rupees Ten Only) each.'

RESOLVED FURTHER THAT for the purpose of giving effect to this resolution, the Board of Directors of the Company (hereinafter referred to as "Board" which term shall include a Committee thereof authorized for the purpose) be and is hereby authorized to take all such steps and actions and give such directions as may be in its absolute discretion deemed necessary and to settle any question that may arise in this regard, without being required to seek any further consent or approval of the shareholders or otherwise and that the shareholders shall be deemed to have given their approval thereto expressly by the authority of this resolution."

Sample Board Resolution for Alteration of Articles of Association of the Company

Adoption of new set of Articles of Association of the Company:

"RESOLVED THAT pursuant to Section 5 and 14 and other applicable provisions, if any, of Companies Act, 2013, (including any statutory modifications or re-enactment thereof, for the time being in force), and the rules framed there under, consent of the Board of Directors of the Company be and is hereby accorded, subject to the approval of the Registrar of Companies, and subject to the approval of Shareholders in General

Meeting, to adopt new set of Articles of Association of Company.

FURTHER RESOLVED THAT for the purpose of giving effect to this resolution, Mr. ABC, Director of the Company be and is hereby authorised, on behalf of the Company, to do all acts, deeds and things as may deemed to be necessary, proper or desirable and to sign and execute all necessary documents, applications and returns for the purpose of giving effect to the aforesaid resolution along with filing of necessary E-forms with the Registrar of Companies,… "

Sample Shareholders Resolution for Alteration of Articles

Adoption of new set of Article of Association of the Company:

"RESOLVED THAT pursuant to the provisions of Section 14 and other applicable provisions, if any, of the Companies Act, 2013, (including any amendment thereto or re-enactment thereof), the Articles of Association of the Company be and are hereby altered by replacing all the existing regulations 1 to 49 with the new regulations 1 to 93, a copy of which is annexed to the EXPLANATORY STATEMENT PURSUANT TO SECTION 102 OF THE COMPANIES ACT 2013, be and is hereby adopted as new regulations of the Articles of Association of the Company.

FURTHER RESOLVED THAT for the purpose of giving effect to this resolution, Mr. ..... (DIN: .....), Director of the Company be and is hereby authorized, on behalf of the Company, to do all acts, deeds and things as may be deemed to be necessary, proper or desirable and to sign and execute all the necessary documents, applications and returns for the purpose of giving effect to the aforesaid Resolution along with filing of necessary E-forms with the Registrar of Companies,"

EXPLANATORY STATEMENT PURSUANT TO SECTION 102 OF THE COMPANIES ACT, 2013

The Existing regulations 1 to 49 of the Articles of Association of the company are being replaced by the new set of Articles containing regulations 1 to 93 and adopted as new set of Articles of Association of the company. The modification in the Articles of Association of the company is carried out to give effect to the provisions of the Companies Act, 2013. Consent of the shareholders by passing a Special Resolution is required in this regard. New set of regulations forming 1 to 93 articles of Articles of Association of the company is attached herewith separately as Annexure A.

Copy of the Articles of Association of the Company together with the proposed alterations is available for inspection by the Members of the Company at its Registered Office during normal business hours on all working days up to the date of the Meeting and is also attached to the accompanying notice.

The Directors recommend the passing of the Resolution under Item No. 1 of the accompanying Notice for the approval of the Members of the Company by way of Special Resolution.

None of the Directors of the Company or the Key Managerial Persons of the Company or their relatives are concerned or interested in the passing of the above resolution.

Specimen of Notice for the Board Meeting for Convening General Meeting for Alteration of Articles to Convert a Public Company into a Private Company

Shri ..... Managing Director

Shri ..... Whole-time Director

Shri ..... Director

Shri ..... Director

Shri ..... Director

Shri ..... Director

Dear Sirs,

Notice is hereby given that the next meeting of the Board of directors of the company will be held at ....Hrs. on ..... (day), ... (month) ..... 20..... at the Corporate Office of the company at ..... to transact the following business:

1. To grant requests from directors for leave of absence, if any.
2. To confirm the minutes of the previous Board Meeting held on .....and the chairman to sign the same.
3. Directors to make disclosure of their interest, or changes thereof, if any.
4. To discuss and approve financial results for the quarter ended and to authorise the chairman to sign the same on behalf of the Board of directors of the company
5. To authorise the company secretary to arrange for the publication of the approved financial results in the English daily newspaper ..... and the Hindi daily newspaper .... in their earliest available editions and also to send the same to the stock exchanges where the securities of the company are listed within forty-eight hours of the close of the Board meeting.
6. To fix time, date and venue for holding an extraordinary general meeting of the company to transact the business as detailed in the agenda including an item for conversion of the company into a private company the draft whereof would be placed before the meeting as initialled by the chairman as a mark of identification.
7. To authorise the company secretary or any director to issue notice for the general meeting on behalf of the Board in accordance with the provisions of Section 101 of the Companies Act, 2013 along with the Explanatory Statement as required under Section 102 of the Act.
8. Any other business with the permission of the chair. Please make it convenient to attend the meeting. Thanking you,

Yours faithfully

(.....)

Company Secretary

LESSON ROUND-UP

- A company may, by a special resolution and after complying with the procedure specified in this section, alter the provisions of its memorandum.
- In Case of Listed Company, at least 7 days before of the Board Meeting, publish notice of the board meeting in the newspaper. Simultaneously, send the copies of said publication to the Stock exchanges.
- Amendment in authorised share Capital clause of Memorandum of Association shall be in accordance with the requirement of section 61 of the Companies Act, 2013

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Enumerate the procedural steps required for change of name of a company.
2. Explain the procedure for shifting the registered office of a company from the State of Karnataka to the State of Maharashtra.
3. What are the different modes of alteration of share capital of a company?
4. Draft the Notice of an Extraordinary General Meeting to be convened for considering the change of name of a company.

Lesson 4

Legal Status of Registered Company

LESSON OUTLINE

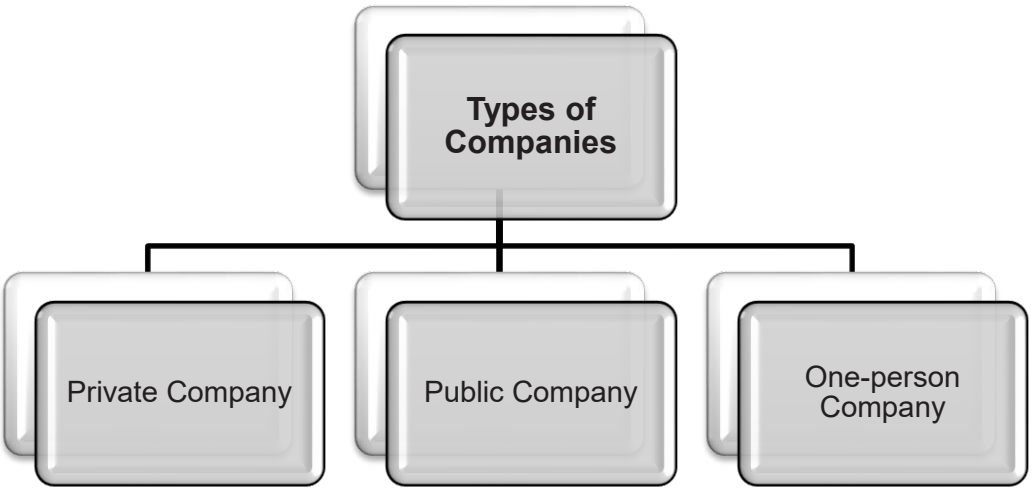
- Provisions relating to
  - Small Company
  - Holding Company
  - Subsidiary Company
  - Associate Company
  - Inactive/ Dormant Company
  - Government Company
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

This Lesson will highlight the characteristics of three types of companies, namely, private limited company, public limited company and a One Person Company (OPC). It will also provide an overview of certain types of companies, such as Small Company, Holding Company, Subsidiary Company and Associate Company and the procedure for classifying a company into Dormant/ Inactive Company. It further explains what is a Government Company and the exemptions available to them.

The word "Company" is an amalgamation of the Latin word 'Cum' meaning "with or together" and "Panis" meaning "bread." Originally, it referred to a group of persons who took their meals together. A company is nothing but a group of persons who have come together or who have contributed money for some common purpose and who have incorporated themselves as a separate legal entity in the form of a company for that purpose. Under Halsbury's Laws of England, the term " company" has been defined as a collection of many individuals united into one body under special denomination, having perpetual succession under an artificial form and vested by the policies of law with the capacity of acting in several respect as an individual, particularly for taking and granting of property, for contracting obligation and for suing and being sued, for enjoying privileges and immunities in common and exercising a variety of political rights, more or less extensive, according to the design of its institution or the powers upon it, either at the time of its creation or at any subsequent period of its existence. However, the Supreme Court of India has held in the case of State Trading Corporation of India v/s. CTO that a company cannot have the status of a citizen under the Constitution of India.

In India, there are three types of limited companies: Private company, Public company and a One- Person Company. A company's liability may be limited by shares, in which case the liability of the company's members is limited to the amount of the shares held by them, or it may be limited by guarantee, in which case the liability is limited to a predetermined amount to which the company's members have agreed to contribute if the company is dissolved with outstanding liabilities.



A private company is a company incorporated under section 2(68) of the Companies Act, 2013 (or any one of its predecessor acts), with an article that restricts the transfer of its shares; it may have members between two to two hundred members, prohibits any invitation to the public to subscribe for any securities of the company; and its name ends with "Private Limited". The private company shall have minimum of two directors.

A public company must have at least seven members and its name ends with "Limited" (abbreviated as – 'Ltd.'). Subject to the provisions of the Companies Act, 2013, the shares issued by them are freely transferable and it can raise deposits from public as provided under the Companies Act, 2013. The public company shall have minimum of three directors. (Section 2(71))

An **One-Person Company (OPC**) is a company which has only one person as a member. OPC must be a private company. OPC is a private company with similar proprietorship and privileges as applicable to a private company, but with fewer compliance requirements; this type of company may have more than one director but cannot have more than one member. (Section 2(62))

A company as an entity has several distinct features which together make it a unique organization. The following are the defining characteristics of a company:

Corporate Personality

When a company is incorporated under law, it is vested with a corporate personality distinct from individuals who are its members. Being a separate legal entity, it bears its own name and acts under a corporate name. It may have a seal of its own. Its assets are separate and distinct from those of its members. As such, it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and sue or be sued in the same manner as in the case of any individual. Its members are its owners but they can be its creditors simultaneously as it has a separate legal entity. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital. The case of Salomon V. Salomon and Co. Ltd. (1897) clearly established the principle that once a company has been validly constituted under the Companies Act, it becomes a legal person distinct from its members. However, since this is a statutory privilege, it must be used for legitimate business purposes only.

LIMITED LIABILITY

The company being a separate legal entity, its members are not liable for its debts. The liability of the member is limited to the extent of the nominal value of the shares held by him. In no event, a shareholder can be asked to pay anything more than the unpaid value of his shares. In the case of a company limited by guarantee, the members are liable only to the extent of the amount guaranteed by them and not beyond, and only when the company goes into liquidation. There are exceptions to this limited liability, however, the courts may pierce the corporate veil under certain exceptional circumstances. It will look behind the corporate entity and take action as though no entity separate from the members existed and make the members or the controlling persons liable for debts and obligations of the company.

Some of the instances where the Courts have lifted the corporate veil are illustrated below:

(i) Where the corporate veil has been used for commission of fraud or improper conduct. [Gilford Motor Co. V. Horne, (1933)]

(ii) Where there is evasion of tax and the entity relies on its corporate personality as a shield to cover its wrong doings. {BSN (UK) Ltd. v. Janardan Mohandas Rajan Pillai [1996} 86 Comp. Cas. 371(Bom)], [Commissioner of Income Tax v. Meenakshi Mills Ltd. AIR (1967)].

(iii) Where the corporation is really an agency or trust for someone else and the corporate façade is used to cover up that agency or trust. [R.G. Films Ltd., (1953) 1 All E.R.615]

(iv) Where the doctrine conflicts with public policy. Courts have lifted the corporate veil for protecting public policy [Connors Bros. v. Connors (1940) 4 All. E.R. 179]

PERPETUAL SUCCESSION

Members may come and members may go, but the company goes on forever. Variation in members or their identity does not affect the legal existence and identity of a company. A company is a creation of law and can be dissolved only under law.

SEPARATE PROPERTY

As a corporate entity, the company is entitled to own and hold property in its own name or to dispose the same. No member can claim ownership of any item of the company's assets.

TRANSFERABILITY OF SHARES

The capital of a company is divided into parts, called shares. The shares are said to be movable property and subject to certain conditions as contained in the Companies Act and/or the Memorandum and Articles of Association of the company the shares of a company is a transferable property. In case of a private company,

the Companies Act requires it to put certain restrictions on the transferability of shares. Every member owning fully paid shares is at liberty to dispose them off according to his choice but subject to the Articles of Association of the company. In the case of a public company, the shares are freely transferable.

CAPACITY TO SUE OR BE SUED

A company, being a body corporate, can sue and be sued in its own name. All legal proceedings against the company are to be instituted in its own name. Similarly, the company may bring an action against anyone in its own name. In case of unincorporated association, an action may have to be brought in the name of the members, either individually or collectively.

PROVISIONS RELATING TO CERTAIN TYPES OF COMPANIES

SMALL COMPANY

For the first time in India, the concept of Small Company was introduced in the Companies Act, 2013. This is a new step towards the de-regulation of entities through providing some exemptions, privileges and liberation with lesser compliances burden on the entities which are smaller in size and operations.

Sub section (85) of Section 2 of the Companies Act, 2013 defines a small company as under:

A "small company" means a company, other than a public company, –

(i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and

(ii) turnover of which as per its last profit and loss account for immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees:

Provided that nothing in this clause shall apply to –

(A) a holding company or a subsidiary company;

(B) a company registered under section 8; or

(C) a company or body corporate governed by any special Act.

Advantages of a Small Company

A private limited company that can be classified as a small company enjoys a number of benefits under the Companies Act, 2013 and lesser compliance formalities. Some of the advantages enjoyed are:

1. Filing of annual return

The annual return of a private limited company classified as a small company, can be signed by a Company Secretary or by a Director of that private limited company.

The annual return of a private limited company not classified as a small company must be signed by a Director and a Company Secretary.

2. Board Meeting

It is sufficient for a small company to conduct only two Board Meetings in a calendar year, one in every half calendar year with a gap of not less than 90 days between these two meetings.

Private limited company not classified as a small company are required to conduct four Board Meetings in a financial year, i.e. at least one meeting in every quarter and the gap between the two consecutive meetings should not be more than 120 days.

3. Cash Flow Statement

A private limited company classified as a small company need not prepare cash flow statement as a part of the financial statements.

Private limited company not classified as a small company must prepare cash flow statement as a part of the financial statements.

4. Rotation of Auditors

(a) Private limited company classified as a small company are not required to rotate their statutory Auditors.

(b) Private limited company not classified as a small company must rotate their Auditors every 5 or 10 years as per the provisions of the Act, if these companies falls within the prescribed category such as their paid up share capital is more than Rs.50 Crores more or these are having public borrowings from financial institutions, banks or public deposits of Rs. 50 Crores or more.

Further, as per the definition of a small company, holding and subsidiary companies are specifically excluded from the concept of small company.

Thus, even though both the holding company and subsidiary company may fulfil the capital or turnover requirement of a small company, they will still fall outside the purview of small company and accordingly, the benefits which are available to a small company cannot be applied to a company which is holding or subsidiary company.

In other words, a holding or a subsidiary company can never enjoy the privileges of a small company even though they may fulfil the capital or turnover requirement of a small company.

Similarly, a company may be classified as a small company in a particular year but may become ineligible in the next year and may become eligible again in the subsequent year.

The privileges/exemptions available to a small company are same as that available to a one person company, but not all privileges available to a one person company are available to a small company.

So also, a company registered under Section 8 of the Companies Act, 2013 is also specifically excluded from the definition of small company. Hence, any company registered under Section 8 of the Companies Act, 2013 would not be small company though it may be a private company.

Further, Section 233 of the Companies Act, 2013 was notified with effect from December 15, 2016 and the Companies (Compromises, Arrangements and Amalgamations) Rules came into effect from the said date. Section 233 deals with fast track mergers. Two or more small companies are permitted to undertake fast track merger under section 233 of the Act. Such merger would require approval of Registrar of Companies having jurisdiction over the company, the Official liquidator, members holding at least 90% of total number of shares and majority of creditors representing 9/10th in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose, or otherwise approved in writing.

HOLDING COMPANY

As per the Company law, a company controlled by another company is called a subsidiary company and the controlling company is called a holding company. Thus “control” is used as the benchmark in company law to determine holding company’s status. The control can be through control of management or through ownership of shares.

By definition, a holding company is a company organized with the intention of acquiring equity ownership in other companies. Holding companies are popular in India, mainly in two forms – (1) corporate groups running multiple and varied businesses; and (2) private equity funds looking to create platforms to consolidate multiple

assets within specific sectors or verticals, in which there are not the companies of the required size and scale.

This structure lends several advantages to either the corporate group or the investor.

Firstly, a holding company can gain control over its subsidiaries without investing the entire equity requirement.

Thus, a holding company allows for structural leverage due to its ability to control the business of its subsidiaries by holding majority (just over 50% shareholding), but at the same time allowing for fresh external investment for the balance stake.

Secondly, it can assist in raising capital based on the consolidated financial strength of its subsidiaries, which otherwise could be difficult for each individual subsidiary company. Flexibility to reorganize and structure finances is also available for individual businesses. Another key advantage of a holding company structure is that while it allows investment in multiple businesses under one parent company, it also ring-fences each business from the risks of the other, by preventing the business performance of one business from affecting the performance and valuation of another. For investors, this offers the option to gain an exposure to any preferred business along with the flexibility to structure the investment (as debt, equity etc.) to meet their investment objectives.

Clause (46) of section 2 of the Companies Act, 2013 states as under:

A **"holding company"** in relation to one or more other companies, means a company of which such companies are subsidiary companies.

Explanation: For the purpose of this clause, the expression "Company" includes any body corporate. As per Section 2(87), a "subsidiary company" or "subsidiary", in relation to any other company (that is to say the holding company), means a company in which the holding company –

(i) controls the composition of the Board of Directors; or

(ii) exercises or controls more than one-half of the total voting power either at its own or together with one or more of its subsidiary companies:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed.

Explanation. –For the purposes of this clause, –

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression "company" includes any body corporate;

(d) "layer" in relation to a holding company means its subsidiary or subsidiaries;

It must be noted that under Sec. 2(87), Company includes a 'Body Corporate' and under Sec 2(11), body corporate includes a 'Company incorporated outside India.'

Thus, any Indian body corporate can be 'holding company' even if that body corporate is not registered as a 'company' in India under the Companies Act.

Provisions in the Companies Act, 2013 relating to holding company

The summarized provisions relating to financial statements as contained in Section 129 and Companies (Accounts) Rules, 2014 are given below:

Financial Statements of Holding Company

The Consolidated Financial Statement of holding company is required to disclose prescribed details about subsidiary companies, associate companies and joint ventures.

If Holding Company has more than one subsidiary

If a Company has one or more subsidiaries, associate companies and joint ventures, it shall, prepare a consolidated financial statement of the company and of all the subsidiaries, associate companies and joint venture in the same form and manner as that of its own.

Separate financial statement of Holding Company

This Statement is in addition to the separate financial statement of the holding company. The consolidated financial statement shall also be placed before the annual general meeting of the holding company along with the laying of its own financial statement.

Disclosure in balance Sheet of Holding Company

Balance sheet of holding company shall specifically disclose investments in the subsidiaries.

Disclosure in Profit and Loss account of Holding Company

Profit and Loss account of Holding company shall disclose:

(a) Dividends from subsidiary Companies

(b) Provisions for losses of subsidiary Companies

Every Company having a subsidiary or subsidiaries has to submit consolidated financial statements in addition to its own 'financial statements' to Registrar of Companies within 30 days from the date of Annual General Meeting along with the prescribed fees. {sub section (1) of section 137}

In case the company has a website:

The Company is required to place separate audited accounts in respect of each of its subsidiary on its website, if any, and provide a copy of separate audited financial statements in respect of each of its subsidiary, to any shareholder of the Company, who asks for it (4th proviso to sub section (1) of section 136)

SUBSIDIARY COMPANY

Section 2(87) of the Companies Act, 2013 provides for the circumstances in which a company is deemed to be a subsidiary of another (holding company).

Where the composition of the Board of Directors of a company (including body corporate), say S Ltd., is controlled by another company (holding company), say H Ltd., either directly (on its own) or together with its one or more subsidiaries, then such company (or body corporate) [S Ltd.] is said to be subsidiary of the other company, H Ltd. Such control can also be through any subsidiary of the holding company, H Ltd. The composition of a company's Board of Directors shall be deemed to be controlled by another company, even if the same is not actually so controlled, if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors .

The term 'control' is defined u/s.2(27) as under:

'Control' shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.

Where more than one-half of the total voting power of a company (including body corporate), Z Ltd., is controlled by another company (holding company), Y Ltd., either directly (on its own) or together with its one or more subsidiaries, then such company (or body corporate), Z Ltd., is said to be subsidiary of the other company, Y Ltd. Such control can be through any one or more subsidiary / subsidiaries of the holding company.

The proviso to sub-section (87) of section 2 of the Companies Act, 2013 provided as under:

Provided that such class or classes of holding companies as may be prescribed shall not have layers of subsidiaries beyond such numbers as may be prescribed. The said proviso got notified with effect from 20th September, 2017 by issue of the Companies (Restriction on number of layers) Rules, 2017. Under Rule 2 of the said Rules, no company, other than a company belonging to a class specified in sub-rule (2) of the said Rules shall have more than two layers of subsidiaries.

References have been made to a subsidiary company in various provisions contained in the Companies Act, 2013. Key provisions of the Act relating to such companies may be noted:

1. A subsidiary company cannot be a small company.{proviso to section 2(85)}
2. Approval of the National Company Law Tribunal is required for following a different financial year than April 01 to March 31, where an Indian company is either a holding company or a subsidiary company of a company incorporated outside India and is required to follow different financial year for consolidation of accounts.{first proviso to section 2(41)}
3. A subsidiary of a government company is treated as government company.{Section 2(45)}
4. A company which is subsidiary of a public company, shall be deemed to be a public company. {Section 2(71)}
5. A subsidiary company is treated as related party. {section 2(76)(viii) }
6. Certain class of holding companies can have only limited number of layers of subsidiary companies. {proviso to section 2(87)}. Layer means subsidiary of subsidiary. {explanation(d) to section 2(87)}
7. Associate company does not include subsidiary company. {Section 2(6)}.
8. Subsidiary company cannot hold shares (directly or through nominee) of its holding company. {Section 19(1)}
9. Companies are prohibited to buy-back its securities through, inter alia, its subsidiaries. {Section 70(1)(a)}
10. The Auditor of the holding company can access records of its subsidiary (including its associates and joint ventures) for the purpose of consolidation of its financial statements. {Proviso to section 143(1)}
11. An individual can be director of maximum 10 public companies and in reckoning 10 public companies, directorship held in private companies which are either holding or subsidiary company of a public company shall be included. {explanation to section 165(1)}
12. Short form of merger procedure (fast track merger) is available for merger or amalgamation of holding company and its wholly owned subsidiary company. {section 233(1)}.
13. Section 185 does not apply to loan by holding company to its wholly owned subsidiary company; any guarantee given or security provided by a holding company in respect of any loan made to its wholly owned subsidiary. {Rule 10(1) of the Companies (Meetings of Board and its Powers) Rules, 2014}.
14. Further, section 185 does not apply to any guarantee given or security provided by a holding company

in respect of loan made by any bank or financial institution to its subsidiary company {Rule 10(2) of the Companies (Meetings of Board and its Powers) Rules, 2014}.

15. Acompany shall make investment through not more than two layers of investment companies. However, if investor company is a subsidiary company, it can have more than two layers of investment companies for the purposes of meeting the requirements under any law or under any rule or regulation framed under any law for the time being in force.{proviso to section 186(1)}

The public Company shall not give financial assistance for purchase of its shares or shares of its holding company to any person {Section 67(2)}. An exception being ESOP {section 67(3)(b)} or loan to employees up to 6 months of salary for beneficial ownership {section 67(3)(c)}.

ASSOCIATE COMPANY

Under sub section (6) of section 2 of the Companies Act, 2013, "associate company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.

Explanation. – For the purpose of this clause, –

(a) the expression "significant influence" means control of at least twenty per cent of total voting power, or control of or participation in business decisions under an agreement;

(b) the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement;'.

For the purpose of "significant Influence", the following two conditions need to be fulfilled:

1. Control of at least 20% of total voting power but less than 50% of share capital by another company;
2. Control of business decisions under an agreement.

Sub-section (27) of Section 2 of Companies Act, 2013 defines 'control'. It includes –

- Appoint majority of Directors;
- Right to control the management;
- Policy decisions need to be exercisable by a person;
- Person acting individually or in concert, directly or indirectly, including virtue of shareholding or voting agreements in any other manner.

The second condition, namely, "control of business decisions under an agreement" has been the subject of controversy and debate. It may be noted that if this condition is satisfied, then a company will be an associate company, even if there is no control of even 20% of total voting power. The clause is applicable even when the control of business decision is under an oral agreement or a written agreement.

Additional compliances if a company has an Associate Company Sub section (76) of section 2

It will be considered as Related Party. Section 188 (Related Party Transaction) as per the Companies Act, 2013 will be applicable where the transactions prescribed in section 188(1) of the Companies Act, 2013 are being entered by the company with its Associate Company.

Section 129

Consolidated Financial Statements shall also include financial statements of Associate Company.

Section 149(6)

Following persons cannot be appointed as independent director in a company if they are:

1. A promoter or related to promoters or Director of an Associate Company.
2. Has/had or any of his relatives has or had pecuniary relationship with Associate Company.
3. Holding or any of their relative(s) held the position of key managerial personnel or has been employee of an Associate Company.

Section 192

If directors of an Associate Company want to do any Non-Cash transactions with the company, then they need to pass Ordinary resolution. This section provides for the manner in respect of regulation of arrangements with respect to acquisition of assets for consideration other than cash. Such arrangements shall require prior approval by a resolution in general meeting and if the director or connected person is a director of its holding company, approval is required to be obtained by passing a resolution in general meeting of the holding company.

INACTIVE COMPANY / DORMANT COMPANY

The definition of an Inactive Company can be found in the explanation to sub-section (1) of Section 455 of the Companies Act, 2013. It reads as under:

Explanation. – For the purposes of this section, –

(i) "inactive company" means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

Sub-section (1) of Section 455 of the Act relating to dormant company also refers to an inactive company. The section provides that where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

Thus, the words "dormant company" and "inactive company" are synonymous. However, a company has to obtain a status as "dormant company" and hence, such companies are not incorporated as such.

Procedural aspects relating to dormant company / inactive company

Rule 3 to 8 of the Companies (Miscellaneous) Rules, 2014 contains provisions relating to dormant company/ inactive company.

To obtain the status of dormant company, an application is to be filed in MSC-1 with the Registrar. After considering the same, the Registrar shall issue a certificate in Form MSC-2 allowing the status of a Dormant Company.

A dormant company shall file a "Return of Dormant Company" annually indicating financial position duly audited by a chartered accountant in practice in Form MSC-3 within 30 days from the end of each financial year. The company shall continue to file returns of allotment and change in directors within the time specified in the Act, whenever the company allots any security to any person or there is any change in the directors of the company.

In case a Dormant Company wants to seek status as a active company, it shall apply to the Registrar in Form MSC-4 along with prescribed fees along with a return in Form MSC-3 in respect of the financial year in which the application for obtaining the status of an active company is filed.

After considering the application, the Registrar shall issue a certificate in MSC-5 allowing the status of an active company to the applicant.

If the company remains a dormant company for a period of consecutive five years, the Registrar shall initiate the process of striking off the name of the company.

Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly, he may initiate the proceedings for enquiry under section 206 of the Act and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been functioning, the Registrar may remove the name of such company from register of dormant companies and treat it as an active company. (Sub-rule 4 of Rule 8 of the Companies (Miscellaneous) Rules, 2014)

The following points relating to dormant companies may be noted:

1. A dormant company shall have a minimum number of three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company.
2. The provisions of the Act in relation to the rotation of auditors shall not apply on dormant companies.
3. The financial statement, with respect to One Person Company, small company and dormant company, may not include the cash flow statement.
4. A Dormant Company may hold one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings is not less than ninety days, which will be treated as compliance of section 173 of the Companies Act, 2013.
5. If a company has not obtained the status of a dormant company under section 455 or has not made any application for it and has not been carrying on any business or operation for a period of two immediately preceding financial years, the Registrar may remove the name of the company from the Register of Companies under Section 248 of the Act. [Section 248(1)]

Consent of shareholders is mandatory

In accordance with rule 3 of the Companies (Miscellaneous) Rule, 2014 shareholders' approval in any of the following two manners is required to be obtained before making an application to the Registrar of Companies:

(i) Special resolution to this effect in the general meeting of the company or

(ii) Obtaining consent of at least 3/4th shareholders in value, after issuing a notice to all the shareholders of the company for this purpose.

Listed companies are ineligible to apply for status of dormant companies

Rule 3 provide for the conditions to be met, where the company applies for obtaining status of dormant status. One of the conditions in the said rule is that the securities of the company are not listed on any stock exchange.

On the other hand, sub-section 4 prescribes the circumstance wherein the Registrar can *suo -moto* enter the

name of the company in the register of dormant companies. It is significant to note that the condition of listed companies is not given as essential condition when the Registrar takes *suo- moto* action under the said sub-section 4.

GOVERNMENT COMPANY

Sub section (45) of Section 2 of the Companies Act, 2013 contains the definition. According to the said sub section, "Government company" means any company in which not less than fifty-one per cent of the paid-up share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments, and includes a company which is a subsidiary company of such a Government company.

Government Companies are subject to all provisions of the Act unless specified otherwise (i.e., by way of exemptions granted by the Central Government). A Government Company may be formed as a Private Limited Company or Public Limited Company.

Government Companies enjoyed many exemptions and reliefs under the Companies Act, 1956. The introduction of Companies Act, 2013 proved a challenge to them. Many of the provisions of the Companies Act, 2013 were posing difficulty in their practical application, like those relating to appointment of independent directors, seeking deposit from directors seeking appointment at general meetings etc.

The Ministry of Corporate Affairs notified total/partial exemptions to Government companies from compliance with certain sections of the Companies Act, 2013 vide notification No. G.S.R. 463(E) dated 5th June, 2015.

Summary of the exemptions is given below:

Name:

The name of all Government Companies shall end with the word "Limited", be it Public or a Private Company. The word "STATE" is allowed in name.

Transfer of Shares:

Provisions of Sub Section 1 of Section 56 (Transfer of Shares) are not applicable on Government Company in respect of Securities held by nominees of the Government. The requirement of execution of an instrument of transfer (SH-4) and delivering the same to the company has also been done away with in case of transfer of securities held between nominees of the Government.

Transfer of Bonds:

As per Second proviso of Section 56(1), in case of transfer of Bonds issued by a Government Company, Instrument of transfer is not required to be executed and delivered to the Company provided an intimation regarding the transfer supported by the details of the transferee and the relevant bond certificate and in case where it is not in existence then the letter of allotment is delivered to the Company.

Declaration in respect of beneficial interest in any share and investigation of beneficial ownership of shares in some cases (sections 89 and 90)

Both the sections are not applicable to Government Companies.

Annual General Meeting [Section 96(2)]

Every Annual General Meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any

day that is not a National Holiday and shall be held either at the registered office of the Company or at some other place as the Central Government may approve in this behalf:

Declaration of dividends out of accumulated profits of previous year

The second proviso to sub-section (1) of section 123 do not apply.

Deposit of dividend in a scheduled bank within five days from the date of declaration

Sub-section (4) of section 123 shall not apply.

Exemption from Accounting Standard 17 relating to Segment Reporting

Section 129 shall not apply to the extent of application of Accounting Standard 17 (Segment Reporting) to the companies engaged in defence production.

Exemption from certain disclosure requirements in Board's Report

Board's Report of Government Company need not include the disclosure requirement contained in section 134(3)(e) of the Act and Section 134(3)(p) of the Act where the directors are evaluated by Ministry of or Department of Central Government which is administratively in charge of the company or as the case may be the State Government as per its own evaluation methodology.

The requirement of disclosing the Company's nomination and remuneration policy etc in the Board's Report has been relaxed for Government Company.

Appointment of more than 15 Directors

As per the exemption in respect of Section 149(1) (b) and first proviso to Section 149(1), a Government Company can have more than 15 directors. Such a company is now no longer required to pass a special resolution for appointing more than 15 directors.

Independent Director

With respect to provision in section 149(6)(a) of the Act, the "Board" will be substituted by "Department of Central Government which is administratively in charge of the company or as the case may be the State Government" and Section 149(6)(c) will not apply to Government Company.

Appointment of Director (sub section 5 of section 152)

The requirement of seeking consent from a Director and filing the same within 30 days of appointment to ROC is relaxed where appointment of such Director is done by the Central Government or State Government. Retirement by rotation and connected matters (sub-section (6) and (7) of section 152)

These sub-sections are not applicable to

(i) A Government Company, in which the entire paid up share capital is held by the Central government, or by any State Government(s) or by the Central Government and one or more State Governments;

(ii) A subsidiary of a government Company referred to in (i) above, in which the entire paid up share capital is held by that Government Company.

Right of persons other than retiring directors to stand for directorship (Section 160)

The section is not applicable to –

(i) A Government Company, in which the entire paid up share capital is held by the Central government, or by any State Government(s) or by the Central Government and one or more State Governments;

(ii) A subsidiary of a government Company referred to in (i) above, in which the entire paid up share capital is held by that Government Company.

Appointment of directors to be voted individually (section 162) and option to adopt principle of proportional representation for appointment of directors (section 163)

These sections are not applicable to

(i) A Government Company, in which the entire paid up share capital is held by the Central government, or by any State Government(s) or by the Central Government and one or more State Governments;

(ii) A subsidiary of a government Company referred to in (i) above, in which the entire paid up share capital is held by that Government Company.

Disqualification of directors {sub-section (2) of section 164}

The sub-section is not applicable to Government company.

Register of Directors, KMP and their shareholding & its inspection: (sections 170 and 171)

Section 170 and 171 shall not apply to a Government Company in which the entire paid up share capital is held by the Central Government, or by the State Government or Governments or by the Central Government and one or more State Governments.

Audit committee, Nomination and Remuneration committee and Stakeholders Relationship Committee

Minor changes effected vide notification relating to clause (i) of sub section (4) of section 177 and sub-sections (2), (3) and (4) of section 178.

Loan to Director (Section 185)

The restrictions contained in Section 185 regarding giving of loans / guarantees / securities etc. by a Company to its Directors and other entities in which a Director is interested has been relaxed for Government Companies, Provided it seeks prior approval of their Administrative in charge of Ministry or Department of the Central/State Government, as applicable, for the proposed transactions.

Loan and Investment by Company (Section 186)

The requirement of seeking member's approval by means of a Special Resolution for making loan/investments or giving guarantee/security in excess of the threshold limits specified in Section 186 has been relaxed for following Government Companies:

- Government Companies engaged in Defence production and
- Other Unlisted Government Companies which seek prior approval of their administrative Ministry or Department for the proposed transactions.

Related Party Transaction (Section 188)

First and Second proviso to sub-section (1) of Section 188 shall not apply to following-

(a) A Government Company in respect of contracts or arrangements entered into by it with any other Government Company;

(b) a Government Company other than a Listed Company in respect of contracts or arrangements other than those referred to in clause (a), in case such Company obtains approval of the Ministry or Department of the Central Government which is administratively in charge of the Company, or, as the case may be, the State Government before entering into such contract or arrangement.

Appointment of Managerial Personnel (Section 196)

Sub-sections (2), (4) and (5) of Section 196 shall not apply –

The following provisions of Section 196 shall not apply to Government Companies:

- Requirement of Appointment/Re-appointment of MD/WTD/Manager for a term not exceeding 5 years at a time.
- Requirement of seeking approval of Board and Members at a meeting for appointment of Managerial Personnel and also of Central Government where such appointment/ remuneration of Managerial Personnel is not in accordance with provisions of Schedule V.
- Requirement that notice convening the Board or General Meeting for considering such appointment shall include the terms and conditions of such appointment, remuneration payable and such other matters including, interest, of a Director or Directors, in such appointment, if any.
- Requirement of filing return of appointment of Managerial Personnel within 60 days with the ROC in form MR-1
- Provision that where an appointment of a Managing Director, Whole Time Director or Manager is not approved by the Company at a General Meeting, any act done by him before such approval shall not be deemed to be invalid.

Appointment of Key Managerial Personnel (Section 203)

The provisions of sub-sections (1), (2), (3) and (4) of this section shall not be apply to a Managing Director or Chief Executive Officer or Manager and in their absence, a Whole-Time Director of the Government Company.

All the provisions of Section 203, attracting the penal provision contained in sub-section (5) will not apply to a Managing Director or Chief Executive Officer or Manager and in their absence, a Whole-Time Director of the Government Company.

All the provisions of Section 203 will continue to apply to CFO and CS of Government Companies as only these persons will be mandatorily required to be appointed as whole time KMP in case of select class of companies prescribed in the Act.

Provisions relating to Auditor

I. Appointment of First Auditor in a Government Company:

In the case of Government Company, the First Auditor shall be appointed by the Comptroller and Auditor General of India (C & AG) within 60 (Sixty) days from the date of registration of the Company.

If CAG fails to appoint first Auditor within 60 days, then the Board of Directors of the Company shall appoint the Auditor within the next 30 days.

The First Auditor holds office till the conclusion of the First Annual General Meeting.

II. Appointment for Subsequent Financial year:

The appointment of Auditor in a Government Company in every subsequent financial year shall be made by C & AG within period of 180 days from the commencement of the financial year. The Auditor shall hold office upto the conclusion of the Annual General Meeting.

III. Appointment of for Subsequent Financial year:

Where a casual vacancy arises in the office of the Auditor in a Government Company other than by resignation of Auditor, the causal vacancy will be filled by the Comptroller and Auditor General of India within 30 days.

Auditor Report in a Government Company [sub-section (5) of section 143]

In case of Government Company, the Controller and Auditor General of India shall appoint the auditor under sub-section (5) or sub-section (7) of Section 139 and direct such Auditor the manner in which the Accounts of the Company are required to be audited. Accordingly, the Auditor shall submit a copy of the report to the C and AG which shall include the directions, if any, issued by the C and AG, the action taken thereon and its impact on the accounts and financial statement of the Company.

Supplementary Audit Ordered by C & AG [sub section (6) of section 143]

The C & AG shall, with in 60 (Sixty) days of the receipt of the Audit Report, have a right to -

(a) Conduct a supplementary audit of the Company's accounts by himself or by such person or persons as he may authorize and for the purpose of such audit require information or additional information to be furnished to any person or persons, so authorized, on such matters, by such person or persons and in such form as the C & AG may direct.

(b) Comment upon the Audit Report or supplement such Audit Report.

The Company shall send copy of the C & AG reports to every member and any other person entitled to it as per Section 136(1) and also the same be placed at the Annual General Meeting of the Company at the same time and in the same manner as the Audit Report.

Annual Report of Government Company (Section 394)

In terms of Section 394, where the Central Government is a member, the Central Government shall, within 3 (three) months after the Annual General Meeting is held cause an Annual Report on the working and affairs of a Government Company to be prepared and have the same laid before both the Houses of the Parliament together with a copy of the Audit Report and comments upon or supplement to the Audit made by the C & AG explained above.

Where in addition to the Central Government, any State Government is also is a member of Government Company, the State Government shall cause a copy of the Annual Report referred to above laid before both Houses of the State Legislature together with copy of the said enclosures.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Explain the characteristics of a corporate form of organization.
2. Under what circumstances can a company be considered as a Holding Company.
3. What are the benefits available to a small company? When does a company cease to be a small company?
4. Explain the procedure for classifying a company as a Dormant Company. Also, state it's merits and demerits.
5. Define a Government Company. State any four exemptions available to a Government Company.

Lesson 5

Formation of LLP

LESSON OUTLINE

- Definitions of LLP
- Nature and Characteristics of LLP
- Advantages of LLP
- Disadvantages of LLP
- Formation and Registration of LLP
- LLP Agreement
- Alteration to LLP Agreement
- Checklist for Shifting of Registered Office
- Annual Compliances of LLP
- Event bases compliances for LLP
- Drafting of LLP Agreement
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Limited Liability Partnership is governed by the Limited Liability Partnership Act, 2008 and the Rules framed thereunder.

In this Lesson, we shall learn about the Limited Liability Partnership (LLP), its formation and registration; It will also cover the features of an LLP agreement and the manner of alterations therein .

LLP is required to make various compliances and file various forms with the Registrar. We shall also study the various annual and event based compliances applicable to the LLP.

CONCEPT OF LLP

Definition of LLP

LLP is a corporate business vehicle that enables professional expertise and entrepreneurial initiative to combine and operate in flexible, innovative and efficient manner, providing benefits of limited liability while allowing its members the flexibility for organizing their internal structure as a partnership.

The Limited Liability Partnership Act, 2008(LLP Act) does not provide an exhaustive definition. Sub-section (n) of section 2 of the Act states that "limited liability partnership" means a partnership formed and registered under this Act.

Nature and Characteristics of LLP

- The LLP is a body corporate having separate entity from its partners and perpetual succession.
- An LLP in India is governed by the Limited Liability Partnership Act, 2008 and, therefore, the provisions of Indian Partnership Act, 1932 are not applicable to it.
- Every Limited Liability Partnership shall use the words "Limited Liability Partnership" or its acronym "LLP" as the last words of its name.
- An LLP is a result of an agreement between the partners, and the mutual rights and duties of partners of an LLP are determined by the said agreement subject to the provisions of LLP Act, 2008.
- The LLP being a separate legal entity is liable for all its assets, with the liability of the partners limited only to the amount of contributed by them just like a company. No partner will be individually liable for any wrongful acts of other partners. However if the LLP was formed for the purpose of defrauding creditors or for any fraudulent purpose, then the liability of the partners who had the knowledge will be unlimited.
- There must be at least two designated partners in every LLP of whom one shall be resident in India.
- Every LLP shall maintain annual accounts to show its true state of affairs. It must prepare a statement of accounts and solvency every year and file with the Registrar.
- The Central Government may, whenever it thinks fit, investigate into the affairs of an LLP by appointing a competent Inspector.
- A firm, private company or an unlisted public company have the option to convert itself into LLP as per the provisions of the Act. Upon such conversion, the Registrar will issue a certificate to that effect. After issuance of a certificate of registration, all the property of the firm or the company, all assets, rights, obligations relating to the company shall be vested in the LLP so formed, and the firm or the company stands dissolved. The name of the firm or the company is then removed from the Registrar of Firms or Registrar of Companies, as the case may be.
- Like the company, an LLP can be wound up either voluntary or by the Tribunal established under The Companies Act, 2013
- The LLP Act 2008 also enables the Central Government to apply the provisions of the Companies Act whenever it thinks appropriate.

Advantages of LLP

1. **Easy to form:** Forming an LLP is an easy process. It is less complicated and time consuming unlike the process of formation of a company.

2. **Liability:** The partners of the LLP is having limited liability which means partners are not liable to pay the debts of the company from their personal assets. No partner is responsible for any other partner's misconduct.
3. **Perpetual succession:** The life of the Limited Liability Partnership is not affected by death, retirement or insolvency of the partner. The LLP will get wound up only as per provisions of the LLP Act.
4. **Management of the company:** An LLP has partners, who own and manage the business. This is different from a private limited company, whose directors may be different from shareholders.
5. **Easy transferability of ownership:** There is no restriction upon joining and leaving the LLP. It is easy to admit as a partner and to leave the firm or to easily transfer the ownership to others.
6. **Taxation:** an LLP is not subject to Dividend Distribution Tax. (DDT). Distributed profits in the hands of the partners is not taxable. For Income Tax purposes, LLP is treated on par with partnership firms.
7. **No compulsory audit required:** Every business has to appoint an auditor for checking the internal management of the company and its accounts. However, in the case of LLP, there is no mandatory audit required. The audit is required only in those cases where the turnover of the company exceeds Rs 40 lakhs and where the contribution exceeds Rs 25 lakhs.
8. **Fewer compliance requirements:** An LLP is much easier and cheaper to run than a private limited company as there are just three compliances per year. On the other hand, a private limited company has a lot of compliances to fulfil and has to compulsorily conduct an audit of its books of accounts.
9. **Flexible agreement:** The partners are free to draft the agreement as they please, with regard to their rights and duties.
10. **Easy to wind-up:** Not only is it easy to start, it is also easier to wind-up an LLP, as compared to a private limited company.

Disadvantages of LLP

1. **Restricted Access to Capital Markets:** LLPs are small form of business and cannot get its shares listed in any stock exchange through initial public offerings. With this restriction, limited liability partnerships may find it difficult to attract outside investors to buy the shares.
2. **Rights of partners:** An LLP can be structured in such a way that one partner has more rights than another. So it isn't a one vote per share system. So, some lesser partners may feel compromised if higher shareholders choose to move the business in a direction that affects their interests.
3. **Public Disclosure of LLP Information:** A LLP must file its Annual Returns, Financial Statements etc to the Registrar of LLPs annually. Which become public document once filed with Registrar of LLPs and may be inspected by general public including competitors by paying some fees to the Registrar of LLPs. Information disclosure can make an entity competitively disadvantaged. Competitors – especially those not required to disclose any documents – can access that information and use it to improve their own business.
4. **Limitations in Formation of LLP:** LLP cannot be formed by a single person. A non – resident Indian and a Foreign National willing to form a LLP in India must have one person resident in India to act as Designated Partner. Further FDI in LLP is allowed only through government route only and that too in those sectors only where 100% FDI is allowed under automatic route under the FDI Policy. This limitation makes LLP an unattractive form of business.
5. **Offenses and penalties:** Limited Liability Partnership Act, 2008 provides that for non-compliance on procedural matters such as delay in filing of e-forms, one has to pay default fee for every day for which

the default continues. Such default fee would be payable at the rate of rupee one hundred per day after the expiry of the date of filing up to a period of three hundred days. The offense can result in either (i) through payment of fine or (ii) through payment of fine as well as imprisonment of the offender.

6. **Exit Options are Not Easy for LLPs in default of Filings:** A LLP who has defaulted in filings its statement of accounts and annual return with the Registrar of LLPs, willing to shut down its operations and wind up, will have to make its default good first by filing necessary e-forms with late filing fee. This provision is making LLP an unattractive form of business as in India there are many businesses that are ignorant about compliances.
7. **Limitation in External Commercial Borrowings (ECB):** Limited Liability Partnerships are not allowed to raise ECB. Therefore, a LLP cannot avail commercial loans from its foreign partners, FIIs, Foreign Banks, and any financial institution located outside India.

Procedure for Incorporation of LLP

The incorporation document shall be filed in Form FiLLiP (Form for incorporation of Limited Liability Partnership) with the Registrar having jurisdiction over the State in which the registered office of the limited liability partnership is to be situated. if an individual required to be appointed as designated partner does not have a DPIN or DIN, application for allotment of DPIN shall be made in Form FiLLiP The application for allotment of DPIN shall not be made by more than two individuals in Form FiLLiP: an application for reservation of name may be made through Form FiLLiP: Provided also that where an applicant had applied for reservation of name under rule 18 in Form RUN-LLP (Reserve Unique Name-Limited Liability Partnership) and which has been approved, he may fill the reserved name as the proposed name of limited liability partnership. The Summaries procedure for incorporation of LLP is as under:

Procure DSC and DIN: Procure DSC and DIN for the individuals acting as Designated Partners of LLP. A person, who already has a DIN, is not require to obtain any new DIN. Existing DIN to be used for Designated Partner (However, DIN should have all latest details such as resident of India, name, address etc.).

Any person proposed to become the Designated Partner in a new LLP shall have to make an application through eform FiLLiP. An application for allotment of DIN up to two Designated Partners, shall be filed in eform FiLLiP with the Registrar, in case of proposed Designated Partners not having approved DIN.

Name reservation: The first step in incorporation of an LLP is reservation of name of the proposed LLP. There are two ways of reserving name of the proposed LLP.

i. File an application under LLP-RUN for ascertaining availability and reservation of the name of an LLP
ii. Name can be proposed in eform FiLLiP, an application for incorporation of LLP

Incorporate LLP: After reserving a name under LLP-RUN, applicant should file eform FiLLiP for incorporating a new LLP. eform FiLLiP contains the details of LLP proposed to be incorporated, Partners'/ Designated Partners' details and consent of the Partner/ Designated Partners to act as Partners/ Designated Partners. On approval of the form, the RoC will issue the certificate of incorporation.

Where the Registrar, on examining Form FiLLiP, finds that it is necessary to call for further information or finds such application or document to be defective or incomplete in any respect, he shall give intimation to the applicant to remove the defects and re-submit the e-form within fifteen days from the date of such intimation given by the Registrar.

After re-submission of the document, if the Registrar still finds that the document is defective or incomplete in any respect, he shall give one more opportunity of fifteen days time to remove such defects or deficiencies: Provided that the total period for re-submission of documents shall not exceed thirty days.

Documents to be attached with form FiLLiP:

i. Consent of partners;

ii. In case of partners are body corporates, certified true copy of board resolution passed by such body corporate partners;

iii. Proof of address of registered office of LLP;

iv. Subscribers' sheet including consent;

v. Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner;

vi. Copy of approval obtained from any sectoral regulator/in-principle approval;

vii. Identity and address proof of individuals acting as Partner and/or Designated Partner;

viii. List of main objects of an LLP;

ix. If the name proposed is liked to registered trademark, NoC from the trade mark owner;

x. NOC of foreign body corporate for usage of name (In case of foreign entities intending to incorporate LLPs in India)

LLP AGREEMENT

After incorporation of LLP, the partners should execute LLP Agreement and a copy of executed agreement is required to be filed with the RoC in e-form 3 within 30 (thirty) days from the date of incorporation of LLP. Section 2(1)(O) of the Limited Liability Partnership Act, 2008 defines it as under:

"Limited liability LLP Agreements mean any written agreement between the partners of the Limited Liability Partnership or between the Limited Liability Partnership and its partners which determines mutual rights and duties of the partners and their rights and duties in relation to that limited liability partnership [section 2(1)(0)]."

It is compulsory to make and execute a LLP agreement within 30 days of the incorporation of LLP.

The value of stamp paper on which the LLP agreement must be printed or stamp duty to be paid on the LLP agreement is dependent on the state of incorporation and amount of capital contribution from the partners

How to draft LLP agreement

LLP agreement defines the roles, responsibilities, rights, and powers of the partners to LLP and to each other. Hence, it creates the foundation for the smooth running of LLP. LLP agreement clarifies the managerial, operational as well administrative responsibilities and sets clear methodologies for decision making, adding a new partner and disassociation of existing partner.

How to prepare LLP agreement

- Draft the agreement and print it on a Stamp paper of requisite value. Value of Non-judicial Stamp Paper depends on the state in which Registration of LLP is done and on the amount of capital contribution.
- All partners should sign the agreement at the bottom of all pages
- Two witnesses should sign the agreement at the end of the document
- Each partner should be provided a copy of the agreement

Essential Clauses to be included in the LLP agreement

S. No	Section no along with the relevant rules	Clauses to be included in the LLP Agreement
1	**Section 23(4)**	**INTERPRETATION / DEFINITIONS** This clause is the essence of any LLP agreement. An LLP Agreement must provide for various definitions such as the definition of designated partners, the accounting period, business of LLP and the name with which the LLP will be known. The agreement must also provide with full address of the registered office of the LLP as well as the address of all the partner.
2	Section 7(1) and 7(2) r.w. rules 7 to 9 of the LLP Rules 2009	**DESIGNATED PARTNERS** LLP agreement shall clearly mention the name, age and address of each of the Designated Partners correctly.
3	Section 5,16,19 read with Rule 18 of LLP Rules	**NAME OF THE LLP AND CHANGES TO IT** This clause shall state that business of the LLP shall be carried on in the name and style of [Name of LLP]. Any change in the name of the LLP shall be notified to the Registrar by the Designated Partner(s) in accordance with the provisions of the LLP Act and the Rules.
4	Section 13 read with Rule 17 of LLP rules	**REGISTERED OFFICE OF THE LLP** LLP agreement shall state that partnership business shall be carried on at the under mentioned address, which shall also be its registered office The business shall also be carried from such other places as may be mutually decided by the partners from time to time.
5	Section 23(4) r.w. the First schedule to the LLP Act 2008	**BUSINESS OF THE LLP** This clause must clearly specify the nature of the business that the LLP will be carrying on.. The LLP may engage in any and all activities necessary, desirable or incidental to the accomplishment of the conduct of such business of the LLP including but not limited to such ancillary business. It may also include any other business conducted in such manner as may be decided by the majority of Partners from time to time.
6	Section 3(3),32 and 33 r.w. rule 2 in the First schedule to the LLP Act 2008	**CAPITAL CONTRIBUTION** Total contribution of the LLP and the contribution by each partner along with the percentage of contribution to be mentioned in this clause. .If any partner is contributing in non-monetary form, that is, he / she is going to render services instead of monetary contribution, add the same. Manner of Additional capital contribution by partner during the course of agreement to be included as well .Manner in which contribution can be withdrawn by the partners shall also be stated in this clause.

7	Section 42(1) of the LLP Act 2008	**PROFIT SHARING RATIO** An ideal LLP Agreement must also mention the ratio in which the profits and the losses of the business will be shared among the partners. The partners must clearly state the amount of profit that each member receives, or the amount of the loss that they're liable for will be set out in the agreement.
8	Section 23(4) read with the First schedule of LLP Act 2008	**RIGHTS AND DUTIES OF DESIGNATED PARTNERS** The LLP Agreement must specify the various rights and duties of the Designated Partners as may be mutually agreed by them. In the absence of such separate agreement between the partners about such rights and duties, etc., the provisions of Schedule I of the Limited Liability Act, 2008 will apply as given in Section 23(4) of the said act.
9	Section 22,23read with the First schedule of LLP Act 2008	**ADMISSION OF PARTNER, RETIREMENT RESIGNATION AND EXPULSION OF PARTNERS** LLP agreement must include the provisions regarding admission of new partners, retirement as well as the death of a partner, etc. The agreement must provide guidelines for the expulsion of partners as well.
10	Section 23(4)	**REMUNERATION & INTEREST TO BE PAID TO PARTNERS** The LLP agreement shall contain a clause regarding the amount of remuneration to the Designated Partner(s), for rendering the services as such. This clause shall contain the rate of interest to be paid to the partners on their capital contribution
11	Section 23(4)	**BANK ACCOUNT** This clause shall set out the modus operandi of the Bank account transactions of the LLP
12	Section 34(1)	**BOOKS OF ACCOUNTS AND ACCOUNTING YEAR** The LLP agreement shall contain clause relating to maintenance of books of accounts and other documents, method of accounting and the details relating to the Accounting year of the LLP.
13	Section 23(4)	**MEETINGS** LLP agreement shall clearly state the manner in which the decisions of LLP shall be taken in the meeting of the partners and shall also provide as to how the same shall be recorded in the minutes and the place of maintenance of such minutes book etc

14	Section 23(4) read with First schedule	**INDEMNITY** The LLP agreement should contain a provision regarding indemnities. The clause of indemnity states that the LLP must protect its partners from any kind of liability or claim incurred by them while carrying the business of the LLP. The partners should also agree to indemnify the LLP for the loss caused by it due to any breach committed by them.
15	Section 23(4) read with First schedule	**DISPUTE RESOLUTION** A well-drafted LLP must always contain a provision for resolving disputes between the members. In a normal course, every LLP prefers Arbitration as a mode of resolving disputes. Such LLP is governed by the Arbitration and Conciliation Act, 1996. Thus, every LLP agreement must incorporate a clause providing for a dispute resolution mechanism to avoid disputes that result in lengthy and expensive litigation.
16	Section 63 & 64	**TERM OF LLP /WINDING UP** The partners must specify the term of validity of such LLP agreement whether it is a perpetual agreement or is valid for a fixed period. The agreement must also provide for the situations when the partners have agreed to wound up the affairs of the LLP either voluntarily or by an order of Tribunal for the specific violations as mentioned in Section 64 of the Act.
17	Section 23(4)	**GENERAL PROVISIONS** The LLP agreement shall in addition to the above mentioned clauses shall include general provisions on binding on heirs ,successors ,counterparts, serving of notices, waiver, Governing law etc.

ALTERATION TO THE LLP AGREEMENT

The Limited Liability Partnership (LLP) Agreement is the charter of the LLP, similar to the Memorandum of Association and Articles of Association for a private limited company. It defines the scope and extent of the LLP's operations as well as the rights, duties, obligations of the partners.

Altering the agreement can be done passing a resolution approving the revision in the LLP Agreement. The second step is to file Form 3 with the Registrar within 30 days of the amendment in the agreement.

The Documents to be attached to the Form 3 shall include the following

- Initial LLP Agreement
- Supplementary/ Altered agreement
- Optional attachments if any

Change in Partner /Designated Partner

If the change in LLP agreement is due to change in partner(s)/ designated partner(s), Form 4 is also required to be filed along with Form 3.

Documents to be attached with Form 4

- Consent of the partner
- Evidence of cessation

- Affidavit or any proof of change of name
- If the partner or a designated partner is a company, copy of resolution of the company to become partner in LLP
- Copy of resolution/ authorization letter mentioning name and address of individual nominated as representative nominee/ partner.

Change of name

The procedure for the name change is governed by provisions of Section 19 of the Limited Liability Partnership Act, 2008. A Limited Liability Partnership (LLP) that is registered in India may, under certain circumstances, need to change its name. The reasons can be business-related or on account of certain directives from the Central Government (if the name of the LLP is considered undesirable or similar to an already existing LLP, the Government can ask for a name change and failure to comply with the directives could attract a penalty of up to Rs. 5 lakh for the business and up to Rs.1 lakh for each partner)

Procedure for Changing the Name of the LLP

An application for changing the name of the LLP should be, first, submitted to the Ministry of Corporate Affairs. The application must have maximum six name preferences. One must ensure that the preferences are in tandem with the LLP naming guidelines that have been laid out in India. To start with, it should not be identical or similar to an already existing one. You can also check out the availability of a name on the MCA portal and then finalize a name.

Along with the LLP name change application, the partners need to submit the following documents.

1. Certified copy of consent of all partners involved for the name change;
2. Copy of the existing LLP agreement;
3. Trademark copy or a copy of the registration certificate;

After the suggested name gets approved, one has to file Form LLP-5, giving notice of the change in the name.

The form has to be submitted to the Registrar within 30 days.

The ROC, after taking into consideration the application, will approve/deny the name change.

If the name is approved, the ROC will issue a certificate and the new name will be effective from the date mentioned in the certificate.

Once the partners get the new certificate of registration, a supplementary agreement needs to be laid out mentioning the changes in the LLP agreement as a result of the name change.

Shifting of Registered office

Notice of change of registered office to be filed with the Registrar within 30 days from the date of the change in LLP -Form 15 prescribed under Rule 17 of the LLP Rules 2009 along with the prescribed fees.

List of documents required to attached with LLP Form 15:

1. Consent letter of all DP's
2. Consent letter of all Secured Creditors
3. Copy of Board Resolution
4. Copy of Advertisement

5 Proof of New Registered Office Address (If Rented then Rent Agreement, Utility Bill in the name of Owner & NOC)

Checklist for Shifting of Registered Office

Action to be taken	Change of Registered office within the same State and within jurisdiction of same Registrar	Change of Registered Office within the same State from the jurisdiction of one Registrar to another Registrar	Change of registered office from one state to another
Resolution for Change of Address	Consent of all partners shall be required for changing the place of Registered Office of Limited LLP to another place.	Consent of all partners shall be required for changing the place of Registered Office of Limited LLP to another place.	Consent of all partners shall be required for changing the place of Registered Office of Limited LLP to another place.
Secured Creditors	No Consent Required.	No Consent Required.	Consent of secured creditors is required.
Form to be filed	Form- 15 prescribed under Rule 17 of the LLP Rules 2009 along with the prescribed fees. to be filed with Registrar with which it is registered within 30 days from the date of the change.	Form- 15 prescribed under Rule 17 of the LLP Rules 2009 along with the prescribed fees. to be filed with Registrar with which it is registered within 30 days from the date of the change.	Form- 15 prescribed under Rule 17 of the LLP Rules 2009 along with the prescribed fees. to be filed with Registrar with which it is registered within 30 days from the date of publishing notice
Public Notice	No public notice required.	No public notice required.	Publish a general notice, not less than 21 days before filing any notice with Registrar, in a daily newspaper published in English and in the principal language of the district in which the registered office of the LLP is situated and circulated in that district giving notice of change of registered office.
Time limit for filing	Within 30 days of resolution so passed.	Within 30 days of resolution so passed.	Within 30 days of publishing of notice.

ANNUAL COMPLIANCES OF LLP

All LLPs registered under the LLP Act, 2008 need to file Annual Returns and Statement of Accounts for every Financial Year. It is mandatory for a LLP to file a return irrespective of whether it has done any business or not. There are three mandatory compliance requirements to be followed by LLPs.

Filing of Annual Return

- Annual returns are filed in Form 11. This form is a summary of the management affairs of the LLP, such as number of partners and their names. Form 11 needs to be filed within 60 days of the closure of the Financial year. Hence this Annual Return should be filed on or before 30th May every year by the LLP.
- In case the annual turnover of the LLP crosses Rs 5 crores or the Capital contribution from Partners exceeds more than Rs 50 Lakhs the Annual return should be accompanied by a Certificate from Practising Company Secretary.

Filing of Statement of the Accounts or Financial Statements

- All LLPs are required to maintain their Books of Accounts in Double Entry System. They also need to prepare a Statement of Solvency (Accounts) every year ending on 31st March. For this purpose, LLP Form 8 should be filed with the Registrar of Companies on or before 30th October every year.
- It should be noted that LLPs whose annual turnover exceeds Rs. 40 lakh or whose contribution exceeds Rs. 25 lakh are required to get their accounts audited by a qualified Chartered Accountant mandatorily.
- The penalty for non-filing of these forms with the ROC is Rs. 100 per day per form.

Filing of Income Tax Returns

- Every LLP is required to close its financial year on 31st March every year as per the Income Tax Act and is also required to file their returns with the Income Tax Department. The LLP whose annual turnover exceeds Rs. 40 lakhs or capital contribution exceeds Rs. 25 Lakhs are required to get their accounts audited under the provisions of the Income Tax Act. Maintenance of book of accounts is mandatory for LLP, irrespective of annual turnover.

However, it is mandatory for LLP to file return of income electronically under digital signature, if its accounts are required to be audited under section 44AB of the Income Tax Act.

Due dates for an LLP to file their Income Tax Returns are as follows:

Particulars	Due Dates
LLP who is required to get its accounts audited under the Income-tax Act or under any other law	September 30 of the assessment year
LLP who is required to furnish a report in Form No. 3CEB under Section 92E of Income Tax Act	November 30 of the assessment year
In any other case	July 31 of the assessment year

EVENT BASED COMPLIANCES FOR LLP

Section	Nature of events	Compliance requirement	Penalty for non- compliance
7(3)&(4)	Consent & Particulars of Partner/ Designated Partner	Filing of consent of Partner/ Designated Partner to act as such with the Registrar of Companies in E Form- 4 within 30 days of the appointment as the designated partner	The LLP and all its partner shall be punishable with fine which shall not be less than Rs. 10,000 & may extend to Rs. 5,00,000

9	Vacancy of Designated Partner	Filing of vacancy in Designated Partner within 30 days of vacancy and intimation of same to Registrar in E Form- 4 and in case if no designated partner being appointed or if any time there is only one designated partner, then each partner shall be deemed to be the designated partner	The LLP and all its partner shall be punishable with fine which shall not be less than Rs. 10,000 & may extend to Rs. 5,00,000
13(3)	Change of Registered Office	File the notice of any change in registered office with the Registrar of Companies in E Form - 15 within 30 days of shifting and any such change shall take effect only upon such filing.	The LLP and all its partner shall be punishable with fine which shall not be less than Rs. 2000 & may extend to Rs. 25000
19	Change of Name	LLP may change its name registered with the Registrar by filing with the Registrar notice of such change in E Form- 5 within 30days of such change.	Person guilty of offence shall be punishable with fine which may extend to Rs 5,00,000 but which shall not be less than Rs 50000 and with a further fine which may extend to Rs 50 for everyday after the first day after which thedefault continues
23	LLP Agreement & Changes there in	LLP Agreement and any changes made therein shall be filed with the Registrar in E Form-3 within 30days of incorporation of LLP or such alteration of LLP agreement	The LLP and every designated partner of the LLP shall be punishable with fine which shall not be less than Rs 2000 & may extend to Rs. 25,000
25(2)	Change in Designated Partners	Where a person becomes or ceases to be a partner or where there is any change in the name or address of a partner, notice of the same signed by the designated partner and to be filed within 30 days to the Registrar in E Form - 4.	The LLP and every designated partner of the LLP shall be punishable with fine which shall not be less than Rs 2000 & may extend to Rs. 25,000

DRAFT LLP AGREEMENT

THIS Agreement of LLP made at ..... this..... Day of ..... 20.....

BETWEEN

1. ……. S/o …….. R/o……. residing at which expression shall, unless it be repugnant to the subject or context -thereof, include their legal heirs, successors, nominees and permitted assignees and hereinafter called the FIRST PARTY, and
2. ……. S/o …….. R/o……. residing at which expression shall, unless it be repugnant to the subject or context thereof, include their legal heirs, successors, nominees and permitted assignees and hereinafter called the SECOND PARTY, and

THAT THEY BOTH SHALL BECOME Partners who shall be Designated Partners on incorporation of the LLP to carry on the partnership business as a Limited Liability Partnership (LLP) registered under the provisions of Limited Liability Partnership Act, 2008 (LLP Act) with a view to shall the profits/losses on the following terms:

DEFINITIONS : In this agreement unless the context otherwise requires :-

"Accounting year" means the financial year as defined in the Limited Liability Partnership Act, 2008.

"Act" or "LLP Act" means the Limited Liability Partnership Act, 2008 "Business" includes every trade, profession service and occupation. "Designated Partner" means any partner designated as such.

"LLP" means the limited liability partnership formed pursuant to this LLP Agreement.

"LLP Agreement" means this Agreement or any supplement thereof determining the mutual right, duties and obligations of the partner in relation to each other and in relation to LLP.

"Partner" means any person who becomes a partner in the LLP accordance with this LLP Agreement

1. Name: Limited Liability Partnership shall be carried on in the name and style of M/s. ..... LLP and hereinafter called as …X… LLP.
2. Business: The Partnership business shall be ..... until and unless changed as per the mutual decision of all the partners of the LLP at the time of the decision.
3. Place of Office: The partnership business shall be carried on at the under mentioned address, which shall also be its registered office..... The business shall also be carried from such other places as may be mutually decided by the partners from time to time.
4. Duration : The Partnership shall commence from the date of registration of the firm, and shall continue to operate in accordance with the provisions of LLP Act, 2008 and rules framed thereunder, until termination of this agreement with the the mutual consent of all the partners.
5. Contribution: The Contribution of the LLP shall be Rs. ..... (Rupees ..... only) which shall be contributed by the partners in the following proportions. First Party ..... % i.e. Rs. ..... (Rupees ..... only) Second Party ..... % i.e. Rs..... (Rupees ..... only) The further Contribution if any required by the LLP shall be brought by the partners in their profit sharing ratio.
6. Number of Designated Partners: The maximum number of designated partners appointed for the LLP shall be as mutually agreed between the partners initially at the time of incorporation of LLP or as decided by the designated partners of the LLP from time to time unanimously.
7. Sleeping Partners: All the partners other than those appointed as the designated partners of the LLP shall be sleeping partners, and they shall not interfere with the day to day conduct of business of the LLP.
8. Common Seal: LLP shall have a common seal to be affixed on documents as defined by partners under the signature of any of the Designated Partners.
9. Immovable Properties: The immovable properties purchased by the LLP shall be clear, marketable and free from all encumbrances.
10. Audit: The Statement of Accounts and Solvency of LLP mad each year shall be audited by a qualified Chartered Accountant in practice in accordance with the rules prescribed under section 34(3) of the LLP act, 2008, namely, rule 24 of the LLP Rules & Forms, 2008. It shall be the responsibility of the Designated Partners of the LLP to comply with Rule 24 of the rules.
11. Remuneration to Partners: No partners shall be entitled to any remuneration for taking part in the conduct of the LLP's business.
12. Drawings: Each partner may draw out of the partnership funds as drawings from the credit balance of

his income account. Such drawls shall be duly accounted for in the yearly settlement of accounts and divisions of profits of the partnership at the end of each financial year.

13. Interest on Capital or Loan : Interest at the rate of_% per annum on the capital contributed or loan given or credited as given by each of the partners and standing to his credit as on the first day of each calendar month for the previous month out of the gross profits of the partnership business shall be credited in the respective accounts, and such interest shall be cumulative such that any deficiency in one financial year shall be made up out of the gross profits of any succeeding financial year or years.

14. Business transaction of partner with LLP : A partner may lend money to and transact other business with the LLP, and in that behalf the Partner shall have the same rights and obligations with respect to the loans or other business transactions as a person who is not a Partner.

15. Profits : The net profits of the LLP shall be divided in the following proportions:

To the said .....%

To the said .....%

16. Losses: The losses of the LLP including loss of capital, if any, shall be borne and paid by the partners in the following proportions:

To the said .....%

To the said .....%

17. Bankers: The bankers of the partnership shall be ..... Bank, ... branch and/or such other bank or banks as the partners may from time to time unanimously agreed upon.

18. Accounting year: The accounting year of the LLP shall be from 1st April of the year to 31st March of subsequent year. The first accounting year shall be from the date of commencement of this LLP till 31st March of the subsequent year.

19. Place of keeping books of accounts: The books of accounts of the firm shall be kept at the registered office of the LLP.

20. Division of Annual profits of LLP: As soon as the Annual Statements of Accounts and Solvency shall have been signed by the Partners and the same duly audited and the auditor rendering his report thereon, the net profits, if any of the LLP business, shall be divided between the partners in the proportion specified in and in accordance with the provisions of this Agreement.

21. Term of validity of deed: Duration of this Agreement shall be ..... years beginning from the date first above mentioned, subject to the condition that this deed may be extended further by mutual consent in writing of the Parties hereto upon such terms and conditions or with such modifications as may be mutually agreed upon between them.

22. Arbitration: In the event of any dispute or differences arising between the parties hereto either touching or concerning the construction, meaning or effect of this Deed or the respective rights and liabilities of the parties hereto, or their enforcement there under, it shall be first settled amicably through discussions between the parties and if not resolved then otherwise referred to the arbitration of a Sole Arbitrator if agreed upon, failing which to the Sole Arbitrator as appointed by the Court in accordance with the provisions of the Arbitration and Conciliation, Act 1996. The arbitration proceedings shall be conducted at New Delhi in English language.

23. Auditors: The Auditors of the firm shall be ..... having their office at ..... The auditors shall be responsible for all the accounts/taxation related tasks of the firm including but not

limited to income tax, VAT, preparation of balance sheet/ assets and liabilities/ profit and loss of the LLP etc.

24. The legal advisors of the firm shall be .....

25. Severability: This deed constitutes the entire understanding/agreement between the parties taking precedence over and superseding any prior or contemporaneous oral or written understanding. Unless otherwise provided herein, this deed cannot be modified, amended, rescinded or waived, in whole or part except by a written instrument signed by all the parties to this deed. The invalidity or unenforceability of any terms or provisions of this deed shall not affect the validity or enforceability of the remaining terms and provisions of this deed, which shall remain in full force and effect.

Admission of New Partner

26. The new partner may not be introduced with the consent of all the existing partners. Such incoming partner shall give his prior consent to act as Partner of the LLP.

27. The Contribution of the partner may be tangible, intangible, Moveable or immoveable property and the incoming partner shall bring minimum contribution of Rs. .....

28. Person whose business interests are in conflict to that of the firm shall not be admitted as the Partner.

29. The Profit sharing ratio of the incoming partner will be in proportion to his contribution towards the capital of LLP.

Rights of Partner

30. All the partners hereto shall have the rights, title and interest in all the assets and properties in the firm in the proportion of their Contribution.

31. Every partner has a right to have access to and to inspect the books of accounts of the LLP.

32. Each of the parties hereto shall be entitled to carry on their own, separate and independent business as hitherto they might be doing or they may hereafter do as they deem fit and proper and other partners and the LLP shall have no objection thereto provided that the said partner has intimated the said fact to the LLP before the start of the independent business. Provided the business is not in competition to the existing business being carried on by the LLP.

33. On retirement of a partner, the retiring partner shall be entitled to full payment in respect of all his rights, title and interest in the partner as herein provided.

34. Upon the death of any of the partners herein any one of his or her heirs will be admitted as a partner of the LLP in place of such deceased partner.

35. On the death of any partner, if his or her heir legal heirs opt not to become the partner, the surviving partners shall have the option to purchase the contribution of the deceased partner in the firm.

Duties of Partners

36. Each Partner shall be just and faithful to the other partners in all transactions relating to the LLP.

37. Each partner shall render true accounts and full information of all things affecting the limited liability partnership to any partner or his legal representatives.

38. Every partner shall account to the limited liability partnership for any benefit derived by him without the consent of the LLP of any transaction concerning the limited liability partnership.

39. Every partner shall indemnify the limited liability partnership and the other existing partner for any loss

caused to it by his fraud in the conduct of the business of the limited liability partnership.

40. In case any of the Partners of the LLP desires to transfer or assign his interest or shares in the LLP he can transfer the same with the consent of all the Partners.

41. No Partner shall without the written consent of other Partners :-

(a) Engage or except for gross misconduct, dismiss any employee of the partnership

(b) Commit to buy any immovable property for the LLP

(c) Submit a dispute relating to business of LLP business to arbitration.

(d) Assign, mortgage or charge his or her share" in the partnership or any asset or property thereof or make any other person a partner therein.

(e) Engage directly or indirectly in any business competing with that of the limited liability partnership.

(f) Withdraw a suit filed on behalf of LLP.

(g) Admit liability in a suit or proceedings against LLP.

(h) Share business secrets of the LLP with outsiders.

(i) Remit in whole or part debt due to LLP.

(j) Go and remain out of station in connection with the business of LLP more than ..... days at a time.

(k) Open a banking account on behalf of LLP in his name.

(l) Draw and sign any cheque on behalf of LLP unauthorizedly in excess of Rs. ..... on its banking account.

(m) Give any unauthorized security or promise for the payment of money on account on behalf of the LLP except in the ordinary course of business.

(n) Draw or accept or endorse unauthorized any bill of exchange or promissory note on LLP's account.

(o) Lease, sell, pledge or do other disposition of any of the LLP's property otherwise than in the ordinary course of business.

(p) Do any act or omission rendering the LLP liable to be wound up by the Tribunal.

(q) Derive any profits from any transactions of the LLP or from the use of its name, resources or assets or business connection by carrying on a business of the nature as competes with that of the LLP.

Duties of Designated Partner

42. Devote their whole time and attention to the said partnership business diligently and faithfully by employing themselves in it, and carry on the business for the greatest advantage of the partnership.

43. The Designated Partners shall be responsible for the doing of all acts, matters and things as are required to be done by the LLP in respect of compliance of the provisions of this Act including filing of any document, return, statement and the like report pursuant to the provisions of Limited Liability Partnership Act, 2008.

44. Protect the property and assets of the LLP.

45. Upon every reasonable request, inform the other partners of all letters, writings and other things which shall come to their hands or knowledge concerning the business of the LLP.

46. Punctually pay their separate debts to the LLP.

47. The Designated Partners shall be responsible for the doing of all such other acts arising out of this agreement.

Cessation of Existing Partners

48. Partner may cease to be partner of the LLP by giving a notice in writing of not less than__days to the other partners of his intention to resign as partner.

49. Majority of Partners can expel any partner in the situation where the partner has been found guilty of carrying of activity/business of LLP with fraudulent purpose or has been found to engage in a business which competes with the business of LLP.

IN WITNESS WHEREOF THIS DEED IS SIGNED BY THE PARTIES HERETO THE DAY, MONTH AND YEAR FIRST ABOVE WRITTEN.

Party of the First Part .....

Party of the Second Part .....

Witness 1:

Witness 2:

LESSON ROUND-UP

- LLP is a body corporate having separate entity from its partners and perpetual succession is liable for all its assets, with the liability of the partners limited only to the amount of contributed by them just like a company. No partner will be individually liable for any wrongful acts of other partners. However if the LLP was formed for the purpose of defrauding creditors or for any fraudulent purpose, then the liability of the partners who had the knowledge will be unlimited.
- Annual returns are filed in Form 11. Form 11 needs to be filed within 60 days of the closure of the Financial year.
- The books of accounts of the firm shall be kept at the registered office of the LLP.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Explain the characteristics of a Limited Liability Partnership and distinguish it from a private company.
2. What are the benefits of forming a Limited Liability Partnership?
3. What is an LLP Agreement? State the procedure for altering the LLP Agreement.
4. A Limited Liability Partnership wants to change its name. Explain under what factors have to be borne in mind and the procedure for the same.
5. State whether the partners of a Limited Liability Partnership are liable for its debts and if so, under what circumstances.

Lesson 6

Different Forms of Business Organisations & its Registration

LESSON OUTLINE

- Introduction
- Sole Proprietorship
- Limitations of Sole proprietorship
- Partnership
- Features of Partnership
- Types of Partnership
- Partnership Deed
- Hindu Undivided Family
- Characteristics of Joint Hindu Family
- Benefits of Hindu Undivided Family
- Multi State Cooperative Society
- Benefits of Multi State Co-operative Society
- Procedure for formation of different types of Business Organisation
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In this lesson, you will learn about the various forms of business organisation, such as sole proprietorship, partnership, Hindu Undivided Family and Multi State Co-operative Societies. The lesson will also highlight their respective merits and demerits and the manner in which they can be registered in India.

INTRODUCTION

One of the first decisions that is faced by an entrepreneur is how the business should be structured. All businesses must adopt some legal configuration that defines the rights and liabilities of participants in the business's ownership, control, personal liability, life span, and financial structure. This decision will have long-term implications, so he has to select the form of ownership that is right for him. In making a choice, he will want to take into account the following:

- his vision regarding the size and nature of the business.
- The level of control he wishes to have.
- The level of "structure" he is willing to deal with.
- The business's vulnerability to litigation.
- Tax implications of the different organizational structures.
- Expected profit (or loss) of the business.
- Whether or not he will need to re-invest earnings into the business.
- his need for access to cash out of the business for himself.

Sole Proprietorship

The vast majority of small businesses start out as sole proprietorships. The sole proprietorship is a form of business that is owned, managed and controlled by an individual. He has day-to-day responsibility for running the business. He has to arrange capital for the business and he alone is responsible for its management. He is therefore, entitled to the profits and has to bear the loss of business. Sole proprietorships own all the assets of the business. He also assumes complete responsibility for any of its liabilities or debts. In the eyes of the law and the public, the sole proprietor and the business are one and the same.

It is the simplest and most easily formed business organization. This is because not much legal formality is required to establish it. For instance to start a factory, the permission of the local authorities is sufficient. Similarly to start a restaurant, it is only necessary to get the permission of local health authorities. Or again, to run a grocery store, the proprietor has only to follow the rules laid down by local administration.

Merits of Sole Proprietorship

A sole proprietary organisation has the following advantages:

(i) **Easy formation**: A sole proprietorship business is easy to form where no legal formality involved in setting up this type of organization. It is not governed by any specific law. It is simply required that the business activity should be lawful and should comply with the rules and regulations laid down by local authorities.

(ii) **Better Control**: In sole proprietary organisation, all the decisions relating to business operations are taken by one person, which makes functioning of business simple and easy. The sole proprietor can also bring about changes in the size and nature of activity. This gives better control to business.

(iii) **Sole beneficiary of profits**: The sole proprietor is the only person to whom the profits belong. There is a direct relation between effort and reward. This motivates him to work hard and bear the risks of business.

(iv) **Benefits of small-scale operations**: The sole proprietorship is generally organized for small-scale business. This helps the proprietor's family members to be employed in business. At the same time

such a business is also entitled to certain concessions from the government. For example, small industrial organisations can get electricity and water supply at concessional rates on a priority basis.

(v) **Inexpensive Management**: The sole proprietor does not appoint any specialists for various functions.

He personally supervises various activities and can avoid wastage in the business.

Limitations of Sole Proprietorship

A sole proprietor generally suffers from the following limitations:

(i) **Limitation of management skills**: A sole proprietor may not be able to manage the business efficiently as he is not likely to have necessary skills regarding all aspects of the business. This poses difficulties in the growth of business also.

(ii) **Limitation of Resources**: The sole proprietor of a business is generally at a disadvantage in raising sufficient capital. His own capital may be limited and his personal assets may also be insufficient for raising loans against their security. This reduces the scope of business growth.

(iii) **Unlimited liability**: The sole proprietor is personally liable for all business obligations. For payment of business debts, his personal property can also be used if the business assets are insufficient.

(iv) **Lack of continuity**: A sole proprietary organisation suffers from lack of continuity. If the proprietor is ill, this may cause temporary closure of business. If he dies, the business may be permanently closed.

From the above account of the merits and limitations, it becomes clear that it is only personal services like repair work, tailoring etc. small factories, retail shops and professional activities which can be set up as sole proprietary organisations. In India, this form of organisation is quite popular and accounts for the largest number of business units.

Procedure for Formation Sole Proprietorship Firm

Sole Proprietor is formed, managed and controlled by one individual. No deed or agreement is required to constitute a Sole Proprietorship.

However, in actual practice and keeping in mind the nature of business activity, registration may be required under the following enactments as prevailing in the respective States or of the Central Government, such as

i. Shops and Commercial Establishments Act(State specific)

ii. Law relating to Professional Tax (State specific)

iii. Registration under Micro, Small and Medium Enterprises Development Act, 2006.

iv. Registration as a Small Scale Industry(State specific)

v. GST registration (with the launch of GST, only GSTIN will be used for Import-Export Code Number)

vi. Intellectual Property laws.

PARTNERSHIP

Partnership is an association of persons who agree to combine their financial resources and managerial abilities to run a business and share profits in an agreed ratio. Since the resources of a sole proprietor to finance, and his capacity to manage a growing business are limited, he feels the need for a partnership firm. Partnership business, therefore, usually grows out of the need for expansion of business with more capital, better supervision and control, division of work and spreading of risks.

The Indian Partnership Act defines partnership as "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all. The persons who have agreed to join in partnership are individually called "Partners" and collectively a 'firm'. A partnership firm can be formed with a minimum of two partners and it can have a maximum of twenty partners.

Certain key definitions contained in the Indian Partnership Act, 1932

As per Section 2(a) of Indian Partnership Act, 1932 an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;

As per Section 4 of Indian Partnership Act, 1932 "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name".

As per Section 7 of Indian Partnership Act, 1932 where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, the partnership is partnership at will.

Section 8

Particular partnership means a person may become a partner with another person in particular adventures or undertakings.

Section 28

Holding out

1. Anyone who by words spoken or written or by conduct represents himself or knowingly permits himself to be represented, to be a partner in a firm, is liable as a partner in that firm to any one who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit.
2. Where after a partners death the business is continued in the old firm name, the continued use of that name or of the deceased partners name as a part thereof shall not of itself make his legal representative or his estate liable for any act of the firm done after his death.

Section 39

Dissolution of a firm

The dissolution of partnership between all the partners of a firm is called the dissolution of the firm.

Insolvency and Bankruptcy of Partnership Firm

The Insolvency and Bankruptcy of partnership firms where the amount of default is not less than one thousand rupees shall be governed by Insolvency and Bankruptcy Code, 2016.

Features of Partnership

The features of partnership are as follows:

(i) **Existence of an agreement**: Partnership is formed on the basis of an agreement between two or more persons to carry on business. It does not arise out of the operation of law as in the case of joint Hindu family business. The terms and conditions of partnership are laid down in a document known as Partnership Deed.

(ii) **Engagement in business**: A partnership can be formed only on the basis of a business activity. Its business may include any trade, industry or profession. Thus, a partnership can engage in any occupation - production and/or distribution of goods and services with a view to earning profits.

(iii) **Sharing of profits and losses**: In a partnership firm, partners are entitled to share in the profits and are also to bear the losses, if any.

(iv) **Agency relationship**: The partnership business may be carried on by all or any of the partners acting for all. Thus, each partner is a principal and so can act in his own right. At the same time he can act on behalf of other partners as their agent. Thus, every partner can bind the firm by his acts.

(v) **Unlimited Liability**: The liability of partners is unlimited as in the case of sole proprietorship. In case some obligation arises then not only the partnership assets but also the private property of the partners can be taken for the payment of liabilities of the firm.

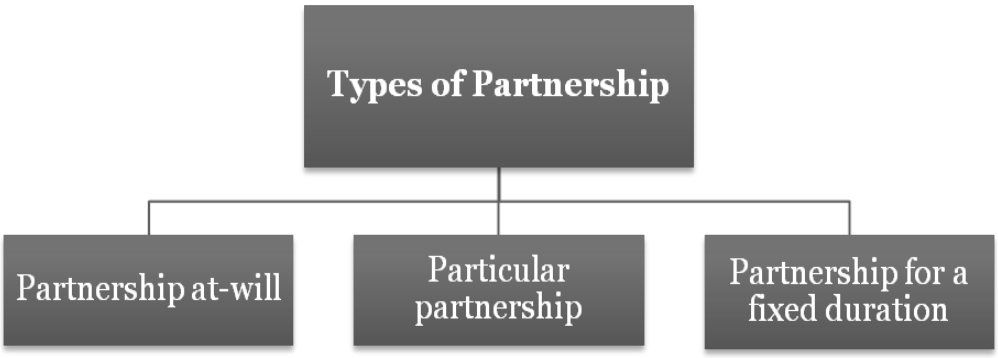
(vi) **Common Management**: Every partner has a right to take part in the running of the business. It is not necessary for all partners to participate in the day-to-day activities of the business but they are entitled to participate. Even if partnership business is run by some partners, the consent of all other partners is necessary for taking important decisions.

(vii) **Restriction on transferability of share**: No partner can transfer his share in partnership to any other person. He may, however, do so with the consent of all other partners.

(viii) **Registration**: To form a partnership firm, it is not compulsory to register it. However, if the partners so decide, it may be registered with the Registrar of Firms.

(ix) **Duration**: The partnership firm continues at the pleasure of the partners. Legally a partnership comes to an end if any partner dies, retires or becomes insolvent. However, if the remaining partners agree to work together under the original firm's name, the firm will not be dissolved and will continue its business after settling the claim of the outgoing partner.

TYPES OF PARTNERSHIP



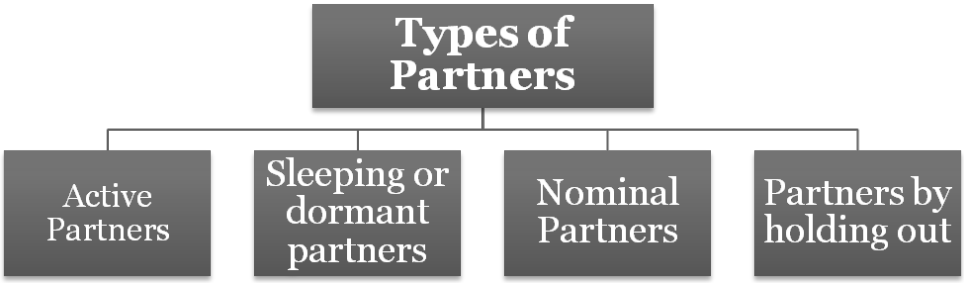
According to the nature of agreement among partners, there can be three types of partnership as follows:

(i) **Partnership at-will**: Such a partnership exists on the will of the partners. That is, it can be brought to an end whenever any partner gives notice of his intention to do so.

(ii) **Particular partnership**: A particular partnership is formed for undertaking a particular venture. It comes to an end automatically with completion of the venture.

(iii) **Partnership for a fixed duration**: Such partnership is for a fixed period of time say 2 years, 5 years or any other duration.

TYPES OF PARTNERS



The various types of partner found in partnership firms are as follows:

(i) **Active Partners**: Partners who take active part in the conduct of day-to-day business of the firm are called active partners. These partners carry on business on behalf of the other partners.

(ii) **Sleeping or dormant partners**: Sleeping or dormant partners are those who do not take active part in the management of the business. Such partners only contribute capital in the firm and are bound by the activities of other partners. However, they share in the profits and losses of the business.

(iii) **Others**: Active and sleeping partners are, as a matter of fact, the full-fledged partners i.e. they share in profits and losses of the business and are liable for its dues. However, there are other types of partners also who may be associated with partnership directly or indirectly. They are not full-fledged partners, such partners may include the following:

(a) **Nominal Partners**: Nominal partners are those who do not have interest in the business but lend their name to the firm. They do not make any capital contribution, and are not entitled to take part in management, but are liable, like other partners, to third parties. Such partners generally have a pecuniary interest (like a share in the profits) in lending their name to a firm. However in certain cases they may not have any pecuniary interest in doing so. For example, a reputed industrialist may, without any profit motive lend his name to a firm run by his family members.

(b) **Partners by holding out** : If a person by his words or conduct holds out to another that he is a partner, he will be prevented from denying that he is not a partner. The person who thus becomes liable to third parties to pay the debts of the firm is known as a partner by holding out.

Minor admitted into the benefits of partnership

A minor is a person who has not attained the age of 18 years. Since a minor is not capable of entering into a valid agreement, he cannot become partner of a firm. He may, however, be admitted to the benefits of an existing partnership.

Merits of Partnership

A partnership form of organisation offers the following advantages:

(i) **Ease in formation**: A partnership is very easy to form. All that is required is an agreement among the partners. Even the expenses to be incurred for registration are-not much.

(ii) **Pooling of financial resources**: A partnership commands more financial resources compared to sole proprietorship. This helps in expanding business and earning more profits. As and when a firm requires more money, more partners can be admitted.

(iii) **Pooling of managerial stalls**: A partnership facilitates pooling of managerial skills of all its partners. This leads to greater efficiency in business operations. For instance, in a big partnership firm, one

partner can handle production function, another partner can look after all marketing activity, still another can attend to legal and personnel problems, and so on.

(iv) **Balanced business decisions**: In a partnership firm, decisions are taken unanimously after considering all the major aspects of a problem. This ensures not only balanced business decisions but also removes difficulties in the smooth implementation of those decisions.

(v) **Sharing of risks**: Unlike sole proprietary organisation, the risks of partnership business are shared by partners on a predetermined basis. This encourages partners to undertake risky but profitable business activities.

Limitations of Partnership

A partnership form of organisation suffers from the following major limitations:

(i) **Uncertainty of existence**: The existence of a partnership firm is very uncertain. The retirement, death, bankruptcy or lunacy of any partner can put an end to the partnership. Further, the partnership business can come to a close if any partner demands it.

(ii) **Risks of implied authority**: It is true that like the sole proprietor each partner has unlimited liability. But his liability may arise not only from his own acts but also from the acts and mistakes of co-partners over whom he has no control. This discourages many persons with money and ability, to join a partnership firm as partner.

(iii) **Risks of disharmony**: In partnership, since decisions are taken unanimously, it is essential that all partners reconcile their views for the common good of the organisation. But there may arise situations when some partners may adopt rigid attitudes and make it impossible to arrive at a commonly agreed decision. Lack of harmony may paralyse the business and cause conflict and mutual bickering.

(iv) **Difficulty in withdrawal from the firm**: Investment in a partnership can be easily made but cannot be easily withdrawn. This is so because the withdrawal of a partner's share requires the consent of all other partners.

(v) **Lack of institutional confidence**: A partnership business does not enjoy much confidence of banks and financial institutions. It is because the nature of its activities is not disclosed at public and the agreement among partners is not regulated by any law. As a result large financial resources cannot be raised by partnership and growth of business cannot be ensured.

(vi) **Difficulties of expansion**: It is difficult for a partnership firm to undertake modernization of expansion of its operations. This is because of its inability to raise adequate funds for the purpose. Limited membership (restricted to 20) and their limited personal resources do not permit large amounts of capital to be raised by the partners. Therefore, large-scale business cannot generally be organised by partnerships.

It is quite obvious from the discussions that the partnership form of organisation is excellent when the size of business is medium, i.e. neither too small not too large, and when the partners can work in full co-operation with one another.

Partnership Deed

Partnership deed, also known as a partnership agreement, is a document that outlines in detail the rights and responsibilities of all parties to a business operation. It has the force of law and is designed to guide the partners in the conduct of the business. It is helpful in preventing disputes and disagreements over the role of each partner in the business and the benefits which are due to them.

The key ingredients of a Partnership Deed are given below:

1. Definitions and vital information

The partnership deed normally carries the name of the business, the address of its principal place of business and a short summary of the nature of business the partners intend to operate.

2. Investment

The deed gives important financial details of the partnership, such as the amount of capital to be invested by each partner, the Profit /Loss sharing of each partner, the salaries to be paid to each partner and the method of distributing the business income. The partnership deed also documents the accepted method of raising additional capital, if necessary how loan funds may be raised and rate of interest if any, applicable on the loans.

3. Accounting

The partnership deed provides for the accepted method of accounting for the cash flow, profit and loss, and assets and liabilities of the business; it also defines the fiscal year to be used in accounting statements and how these statements will be distributed among the partners and other shareholders.

4. Duties, powers and obligations of the partners

The duties, powers and obligations of each partner may also be spelt out in the Partnership Deed. The Deed may also provide designate a partner as the Managing Partner, who will be responsible for day to day management and conduct of the business.

5. Withdrawals

The document must also provide for actions to be taken in case of the voluntary withdrawal or death of a partner. In such a case, accounts will have to be drawn up to ascertain the assets, liabilities and the entitlement of each partner (including the outgoing partner)

6. Expulsion

If a partner is proving to be a hindrance or detriment to the business, or loses legal rights in a bankruptcy or other court action, the other partners must have a method of modifying the partnership rights of or expelling him.

7. Dissolution

The partnership deed should also describe the methods by which the partnership and business will be dissolved, if desired, and how the accounts among the partners would be settled at the termination of the business.

8. Arbitration

As in all business contracts, a partnership deed must provide for the means of arbitration of disputes. The main goal of the deed is to avoid expensive litigation over details that have not been fully worked out in the signed agreement.

Partnership

Partnership firms in India are governed by the Indian Partnership Act, 1932. While it is not compulsory to register your partnership firm as there are no penalties for non-registration, it is advisable since the following rights are denied to an unregistered firm:

- A partner cannot file a suit in any court against the firm or other partners for the enforcement of any right arising from a contract or right conferred by the Partnership Act
- A right arising from a contract cannot be enforced in any Court by or on behalf of your firm against any third party

- Further, the firm or any of its partners cannot claim a set off (i.e. mutual adjustment of debts owned by the disputant parties to one another) or other proceedings in a dispute with a third party.

Registration under Income Tax

It should be noted that registration with the Registrar of Firms is different from registration with the Income Taxation Department. It is mandatory for all firms to apply for registration with the Income Tax Department and have a PAN Card. After obtaining a PAN Card, the partnership firm is required to open a Current Account in the name of the partnership firm and to operate all its operations through this bank account.

HINDU UNDIVIDED FAMILY (HUF)

Meaning of Joint Hindu Family Business

The Joint Hindu Family Business is a distinct form of organisation peculiar to India. Joint Hindu Family Firm is created by the operation of law. It does not have any separate and distinct legal entity from that of its members. The laws that govern HUFs are not codified and are read along with the Hindu Succession Act and the Income-tax Act.

The business of Joint Hindu Family is controlled under the Hindu Law instead of Partnership Act. The membership in this form of business organisation can be acquired only by birth or by marriage to a male person who is already a member of Joint Hindu Family.

"When two or more families agree to live and work together, throw their resources and labour with joint stock and share profits and the losses together, then this family is known as composite family."

There are two schools of Hindu Law-one is Dayabhaga which is prevalent in Bengal and Assam and the other is Mitakshara prevalent in the rest of the-country. According to Mitakshara law, there is a son's right by birth in the property of joint family. It means, when a son is born in family, he acquires an interest in the property jointly held by the family.

The business of the Joint Hindu Family is controlled and managed by one person who is called 'Karta' or 'Manager'. The Karta or manager works in consultation with other members of the family but ultimately he has a final say. The liability of Karta is unlimited while the liability of other members is limited to their shares in the business.

CHARACTERISTICS OF A JOINT HINDU FAMILY BUSINESS

1. Governed by Hindu Law:

The business of the Joint Hindu Family is controlled and managed under the Hindu law.

There are two schools of Hindu law:

(i) Dayabhaga, and

(ii) Mitakshara.

2. Management:

All the affairs of a Joint Hindu Family are controlled and managed by one person who is known as 'Karta' or 'Manager'. The Karta is the senior most male member of the family. He works in consultation with other members of the family but ultimately he has a final say.

The members of the family have full faith and confidence in Karta. Only Karta is entitled to deal with outsiders.

But other members can deal with outsiders only with the permission of Karta.

3. Membership by Birth:

The membership of the family can be acquired only by birth. As soon as a male child is born in family, he becomes a member. Membership requires no consent or agreement.

4. Liability:

Except the Karta, the liability of all other members is limited to their shares in the business. The Karta is not only liable to the extent of his share in the business but his separate property is equally attachable and amount of debt can be recovered from his separate property.

5. Permanent Existence:

The death, lunacy or insolvency of any member of the family does not affect the existence of the business of Joint Hindu Family. The family goes on doing its business.

6. Implied Authority of Karta:

In a joint family firm, only Karta has the implied authority to contract debts and pledge the credit and property of the firm for the ordinary purpose of the businesses of the firm.

7. Minor also a Partner:

In a partnership, minor cannot become co-partner though he may be admitted to the benefit of partnership. In a Joint Hindu Family firm minor is a partner.

8. Dissolution:

The Joint Hindu Family Business can be dissolved only at the will of all the members of the family. Any single member has no right to get the business dissolved.

BENEFITS OF HUF

1. Easy to Start:

It is very easy to start the Joint Hindu Family Business. No legal formalities are required to be faced, such as registration. It requires no agreement, though in actual practice, it is documented to avoid litigation and for regulatory purposes.

2. Efficient Management:

The management of Joint Hindu Family Business is centralised in the hands of Karta of family. In this business, Karta takes all decisions and gets them implemented with the help of other member. No other member interferes in his management.

3. Secrecy:

In Joint Hindu Family Business, all the decisions are taken by the 'Karta' himself. He is in a position to keep all the affairs to himself and maintains perfect secrecy in all matters.

4. Prompt Decision:

The Karta is the only person who exercises control and direction over the business. He may not consult anyone in taking decisions. This ensures prompt or quick decisions. Being the sole master, he takes prompt decisions and makes advantage of the opportunity.

5. Economy:

For the success of any business, economy is a must. It is well- balanced and maintained in Joint Hindu Family Business. The Karta of family spends money with great caution and economy.

6. Credit Facilities:

In Joint Hindu Family Business the credit facilities are more. One reason for this is that liability of the 'Karta' is unlimited. Karta is having personal relations with others, which are also helpful in raising credit.

7. Natural Love between Members:

In Joint Hindu Family Business, it is the natural love and affection which the members are having for each other. It helps to run the business more efficiently and smoothly.

8. Freedom regarding Selection of Business:

The Karta is at freedom to select any business of his choice. He has not to depend on others.

Hindu Undivided Family (HUF)

(i) Create a HUF Deed.

You have to prepare a deed on stamp paper declaring the formation of the HUF. It should have all the details, including the name of karta, co-parceners, address and source of funds in the corpus. Creating a HUF Deed is not mandatory. However it is always beneficial to have a HUF Deed. Key issues to be noted in preparation of a HUF Deed are :

(a) A HUF deed is a written formal document on a stamp paper (as applicable in the respective State) specifying the name of Karta and Coparceners of HUF.

(b) The eldest male member of HUF becomes Karta of HUF.

(c) The name of members of HUF and the name of the HUF is also required to be stated in the HUF Deed at the time of creating of HUF.

(d) The name of HUF is usually the name of the Karta followed by the word HUF e.g. Ram Kumar HUF.

(e) HUF Deed also states the capital with which the HUF has been initiated. There are various sources through which capital can be introduced.

(f) A declaration is also provided by each member of family where they declare the name of Karta and also state that –

i. Karta has the authority of the accounts vested in his hand

ii. Karta holds the right to govern all the transactions of the HUF accounts on behalf of the members.

(g) Further, a rubber stamp of HUF will also be prepared. Rubber stamp should be Rectangular. Rubber Stamp will be affixed on all the documents pertaining of HUF to authorize the transaction.

(h) It is recommended that the Deed should be notarised.

(ii) Register the Deed

(iii) Obtain PAN.

Once the declaration deed is made, the karta should apply for a permanent account number (PAN) for the HUF. This is mandatory because all financial transactions must carry PAN.

(iv) Open bank account

After you are allotted a PAN, open a bank account in the name of the HUF. It is also advisable to get

some stationery printed for official communication. The HUF is now functional . The karta will have to invest in tax saving instruments and file tax returns on behalf of the HUF.

While there are tax advantages of forming an HUF, the following matters merit consideration:

- One person cannot form HUF. An HUF is formed by a family.
- An HUF is automatically created at the time of marriage.
- HUF consists of a common ancestor and all of his lineal descendants, including their wives and unmarried daughters. after 1-9-2005, daughter married or unmarried, is a coparcener like a son.
- Hindus, Buddhists, Jains and Sikhs can form HUFs.
- HUF usually has assets which come as a gift, a will, or ancestral property, or property acquired from the sale of joint family property or property contributed to the common pool by members of HUF.
- Once an HUF is formed it must be formally registered in its name. An HUF should have a legal deed. The deed shall contain details of HUF members and the business of the HUF. A PAN number and a bank account should be opened in the name of the HUF.
- Use a capital asset to establish the corpus of the HUF. This can be ancestral property, assets gifted by relatives and friends, or received by the HUF through a will. If you give a personal asset to the HUF, the income will be clubbed with your own. Gifts of over 50,000 a year received by HUF will be taxable. The best way is for the HUF to receive assets as part of a will.

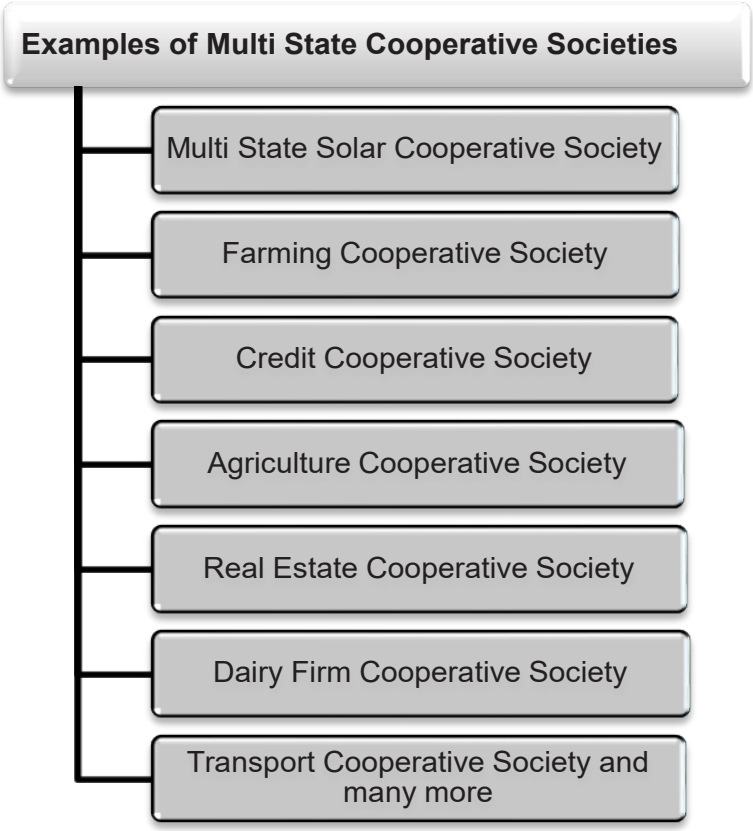
Key Points in creation of HUF and format of Deed for creation of HUF

- Under the Income Tax Act, an HUF is a separate entity for the purpose of income tax return.
- The same tax slabs are applicable to HUF as to individual assessee.
- You cannot transfer your own assets/money into HUF.
- If you have ancestral property and earning some income from this property, then it is better to transfer this asset to HUF and save tax up to exemption limit applicable to individual.
- You can transfer the money received on sale of ancestral property /assets into your HUF.
- The income from property of HUF can be further invested in instruments such as shares, mutual funds, etc. and will be assessed under HUF.
- Existence of property or multiple members is not a pre-requisite to create HUF. A family which does not own any property may still have the character of Hindu joint family. This jointness is understood in terms of faith and food. This is because a Hindu is born as a member of the joint family.
- Any gifts received by the members of HUF (birthday, marriage, etc.) can be treated as assets of HUF.
- The HUF is taxable as separate person under income tax hence one can save tax from basic exemption of Rs. 2.5 lakh. HUF will also gain from the tax slab structure of computing income tax.
- Apart from basic exemption of Rs. 2.50 lakh, section 80C deduction up to Rs. 1.50 lakh is also available.

MULTI STATE CO-OPERATIVE SOCIETY

The Multi-State Cooperative Societies (MSCS) Act, enacted in 1984, was modified in 2002, in keeping with the spirit of the Model Cooperatives Act. Unlike the State Laws, which remained as a parallel legislation to co-exist with the earlier laws, the MSCS Act, 2002 replaced the earlier Act of 1984. The Act and the Rules thereunder facilitates the incorporation of cooperative societies whose objects and functions spread over to several states.

The Act provides for formation of both primary (with both individual and institutional members) and federal cooperatives (with only institutional membership).



Their main objects shall be serving the interests of members in more than one state and their by-laws shall provide for social and economic betterment of their members through self-help and mutual aid in accordance with co-operative principles (Sec. 7). Otherwise, they are ineligible for registration. Under Section 9 of the said Act, A multi-state co-operative society is a body corporate with limited liability .

In order to ensure financial discipline, extensive provisions have been enacted. No part of the fund other than net profit shall be distributed among members (Sec.62). Investment of society's fund only in recognized securities is permissible (Sec.64). Contribution to political parties or loans to non-members or borrowing from external sources are prohibited. Annual auditing by recognized auditors is mandatory (Sec.65).

Central Government may direct for special audit if it is of the opinion that the society's affairs are not being managed in accordance with the co-operative principles or prudent commercial practices (Sec.77).

Any application for the registration of a multi-state cooperative society, of which all the members are individuals, should be signed by at least fifty persons from each of the states concerned. In the case of a society of which the members are cooperative societies, it should be signed by duly authorized representations of at least five such societies registered in different states.

BENEFITS OF MULTI STATE CO-OPERATIVE SOCIETY

1. MSCS provides loans at reasonable rates of interest to the poor. This benefits them, as they do not have to go to financiers who lend at high interest rates.
2. MSCS can function pan India as they can start branches in different districts and states.

3. As regulatory requirements of filing, etc, is minimum, MSCS have low compliance costs.
4. A Multi State Co-operative Credit Society belongs to its members, who are at the same time the owners and the customers of their Society. This creates a sense of belonging and ownership among the members.

Registration Procedure

A partnership firm can be registered whether at the time of its formation or even subsequently. You need to file an application with the Registrar of Firms of the area in which your business is located.

(i) Application for partnership registration should include the following information, namely, name of your firm, name of the place where business is carried on, names of any other place where business is carried on, date of partners joining the firm, full name and permanent address of partners and duration of the firm. The Application should be duly signed by all the partners of the firm or by their duly authorised agents.

(ii) Every partner needs to verify and sign the application

(iii) Ensure that the following documents and prescribed fees are enclosed with the registration application :

- Application for Registration in the prescribed Form -1
- Duly filled Affidavit
- Certified copy of the Partnership deed(The deed so created by the partners should be on a stamp paper in accordance with the Indian Stamp Act/ stamp paper as applicable in the State where the Partnership Deed is executed)
- Proof of ownership of the place of business or the rental/lease agreement thereof.

As per section 71 of Indian Partnership Act, states are authorized to make their own regulations with respect to prescribe the fee structure for registration or incorporation of partnership.

It may be also be noted that the name of the partnership firm should not contain any words which may express or imply the approval or patronage of the government except where the government has given its written consent for the use of such words as part of the firm's name.

Once the Registrar of Firms is satisfied that the application procedure has been duly complied with, he shall record an entry of the statement in the Register of Firms and issue a Certificate of Registration.

FORMATION OF MULTI STATE CO-OPERATIVE SOCIETY

[A] An application in Form -1 (under sub-rule(1) of rule 3 of the Multi State Cooperative Societies Rules, 2002) should be filed with the Central Registrar of Cooperative Societies, New Delhi along with the following enclosures:

1. A certificate from the bank stating credit balance there in favour of the proposed multi-state co-operative society.
2. A scheme explaining how the proposed multi state co-operative society has reasonable prospects of becoming a viable unit.
3. Four copies of bye-laws in original.
4. Proposed area of operation for registration shall initially be permitted for two contagious states only.
5. List of at least 50 members from each state. The list has to be submitted in the format annexed with the

Multi State Cooperative Societies Act, 2002 (MSCS Act, 2002) along with the copies of ID proofs of the members duly attested by Chief promoter.

6. Certified copies of the resolutions passed by the proposed society along with the certified copy of the resolution of the promoters which shall specify the name and address of one of the applicant(s) to whom the Central Registrar may address correspondence under the rules before registration and dispatch or hand over registration documents.
7. Contact number and e-mail address of the Chief Promoter or Society on cover page.

[B] For societies having objects related to thrift and credit and for multi-purpose societies following additional documents are required to be submitted along with documents mentioned at point [A] above:

1. No Objection Certificate from the Registrar of Cooperative Societies of the States/U.T. where the area of operation of the society is proposed to be confined.
2. A certificate to the effect that the credentials of the Chief Promoter/Promoters have been verified by the Registrar of Co-operative Societies of the state where the head office is proposed to be located.

All documents to be submitted in original with the signatures of the Chief Promoter/Promoters on each page.

Note: Societies which are already registered under the MSCS Act, 2002 and are desirous of expanding their area of operations falling under category (B) above shall be required to submit an No Objection Certificate as mentioned at [B](1)

The application shall be signed by:-

- In the case of a multi-state Cooperative society of which all the members are individuals, by at least fifty persons from each of the states concerned.
- In case the members are Cooperative Societies, by duly authorised representatives on behalf of at least five such societies as are not registered in the same state;
- In case the members are other Multi-State Cooperative Societies and other Cooperative Societies, by duly authorised representatives of each of such societies; However, not less than two of the co-operative societies referred to in this clause, shall be such as are not registered in the same State.
- If the members are cooperative societies or multi-state Cooperative societies and individuals, by at least (i) fifty persons, being individuals from each of the two states or more and; (ii) one Cooperative society each from two states or more or one Multi-state Cooperative society.

The application for registration of the Multi- State Cooperative Society shall be disposed of by the Central Registrar within a period of four months from the date of receipt thereof by him and if the application for registration is not disposed of within a period of four months and in case the Central Registrar fails to communicate the order of refusal to the applicant within the period prescribed, the application shall be deemed to have been accepted for registration and the Central Registrar shall issue the registration certificate in accordance with the rules made thereunder which shall be conclusive evidence that the society is registered under the MSCS Act, 2002.

LESSON ROUND-UP

- Partnership is an association of persons who agree to combine their financial resources and managerial abilities to run a business and share profits in an agreed ratio.
- The business of the Joint Hindu Family is controlled and managed under the Hindu law.
- There are two schools of Hindu law:
  - (i) Dayabhaga, and
  - (ii) Mitakshara
- Partnership deed, also known as a partnership agreement, is a document that outlines in detail the rights and responsibilities of all parties to a business operation. It has the force of law and is designed to guide the partners in the conduct of the business.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What are the various forms of business organisations?
2. What are the advantages of partnership compared to sole proprietorship?
3. What are the different types of partners and the role they play in partnerships?
4. Are the partners personally liable for the debts of the partnership firm?
5. What are the benefits of a Multi State Cooperative Society? Compare the same with a State Cooperative Society.

Lesson 7

Formation and Registration of NGO's

LESSON OUTLINE

- Introduction
- Features of Section 8 Company
- Exemptions available to section 8 Companies
- Trust-Introduction
- Person who can create trust
- Person who can be trustee
- Difference between Public Trust and Private Trust
- Exemptions available to trust
- Exemptions under Income tax Act,1961
- Society- Introduction
- Consequences of registration/ non-registration of a society
- Benefits of forming a society
- Procedure for registration of NGO's
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In this Lesson, we shall examine the formation and registration of NGO's, namely, Section 8 Company, Trust and Society.

We shall see various aspects concerning:

Section 8 Company; its features and exemptions available to them.

Trust; difference between public trust and private trust, and exemptions available to them, more specifically, under the Income Tax Act.

Society, its advantages and disadvantages, consequences of non-registration and benefits of forming a Society.

Lastly, this Lesson provides the process of registration of a Section 8 Company, Trust and Society.

SECTION 8 COMPANY

A company incorporated under Section 8 of the Companies Act, 2013(corresponding to Section 25 of the Companies Act, 1956) Company incorporated for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object, provided the profits, if any, or other income is applied for promoting only the objects of the company. Such a company is a non-profit body and is akin to a NGO. In some respects, they are similar to a Trust or Society, except that such companies are incorporated under the Companies Act, whereas a Trust or Society is registered under the regulations of the respective State Government where it is located.

Section 8 of the Companies Act, 2013 reads as under:

(1) Where it is proved to the satisfaction of the Central Government that a person or an association of persons proposed to be registered under this Act as a limited company –

(a) has in its objects the promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;

(b) intends to apply its profits, if any, or other income in promoting its objects; and

(c) intends to prohibit the payment of any dividend to its members, the Central Government may, by licence issued in such manner as may be prescribed, , and on such conditions as it deems fit, allow that person or association of persons to be registered as a limited company under this section without the addition to its name of the word “Limited”, or as the case may be, the words “Private Limited” , and thereupon the Registrar shall, on application, in the prescribed register such person or association of persons as a company under this section.

(2) The company registered under this section shall enjoy all the privileges and be subject to all the obligations of limited companies.

(3) A firm may be a member of the company registered under this section.

(4) (i) A company registered under this section shall not alter the provisions of its memorandum or articles except with the previous approval of the Central Government.

(ii) A company registered under this section may convert itself into company of any other kind only after complying with such conditions as may be prescribed.

(5) Where it is proved to the satisfaction of the Central Government that a limited company registered under this Act or under any previous company law has been formed with any of the objects specified in clause (a) of sub-section (1) and with the restrictions and prohibitions as mentioned respectively in clauses (b) and (c) of that sub-section, it may, by licence, allow the company to be registered under this section subject to such conditions as the Central Government deems fit and to change its name by omitting the word “Limited”, or as the case may be, the words “Private Limited” from its name and thereupon the Registrar shall, on application, in the prescribed form, register such company under this section and all the provisions of this section shall apply to that company.

(6) The Central Government may, by order, revoke the licence granted to a company registered under this section if the company contravenes any of the requirements of this section or any of the conditions subject to which a licence is issued or the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, and without prejudice to any other action against the company under this Act, direct the company to convert its status and change its name to add the word “Limited” or the words “Private Limited”, as the case may be, to its name and thereupon the Registrar shall, without prejudice to any action that may be taken under sub-section (7), on application, in the prescribed form, register the company accordingly:

Provided that no such order shall be made unless the company is given a reasonable opportunity of being heard:

Provided further that a copy of every such order shall be given to the Registrar.

(7) Where a licence is revoked under sub-section (6), the Central Government may, by order, if it is satisfied that it is essential in the public interest, direct that the company be wound up under this Act or amalgamated with another company registered under this section:

Provided that no such order shall be made unless the company is given a reasonable opportunity of being heard.

(8) Where a licence is revoked under sub-section (6) and where the Central Government is satisfied that it is essential in the public interest that the company registered under this section should be amalgamated with another company registered under this section and having similar objects, then, notwithstanding anything to the contrary contained in this Act, the Central Government may, by order, provide for such amalgamation to form a single company with such constitution, properties, powers, rights, interest, authorities and privileges and with such liabilities, duties and obligations as may be specified in the order.

(9) If on the winding up or dissolution of a company registered under this section, there remains, after the satisfaction of its debts and liabilities, any asset, they may be transferred to another company registered under this section and having similar objects, subject to such conditions as the Tribunal may impose, or may be sold and proceeds thereof credited to Insolvency and Bankruptcy Fund formed under section 224 of the Insolvency and Bankruptcy Code, 2016.

(10) A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.

(11) If a company makes any default in complying with any of the requirements laid down in this section, the company shall, without prejudice to any other action under the provisions of this section, be punishable with fine which shall not be less than ten lakh rupees but which may extend to one crore rupees and the directors and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to three years or with fine which shall not be less than twenty-five thousand rupees but which may extend to twenty-five lakh rupees, or with both:

Provided that when it is proved that the affairs of the company were conducted fraudulently, every officer in default shall be liable for action under section 447.

Features of a Section 8 Company

Certain features of a Section 8 company can be summarized as under:

1. It is formed for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
2. The profits, if any, are applied in promoting its objects;
3. It prohibits the payment of dividends to its members.
4. The name of the Company can be incorporated without using the word "Limited" or "Private Limited" as the case may be.
5. There is no requirement of any minimum paid up capital.
6. It is exempted from stamp duty registration.
7. Many privileges and exemptions are available to such a company . Section 8 companies have been

granted total/partial exemptions from various sections of the Companies Act, 2013 vide Notification No. F. No. 1/2/2014-CL.I dated June 5, 2015.

8. A One Person Company cannot function as a Section 8 Company.
9. Section 8 company has its independent corporate legal entity, similar to private company, public company or a Limited Liability Partnership and hence enjoys credibility in the eyes of the public.

Exemptions available to Section 8 Company

By Notification No. F. No. 1/2/2014-CL.I dated June 5, 2015, the Central Government has granted various exemptions, either in full or in part from the provisions of the Companies Act, 2013. The key exemptions are summarized below:

(a) Company Secretaries no longer mandatory

Section 8 companies are no longer required to appoint a company secretary to ensure compliance with the provisions of the Companies Act 2013. This exemption will result in cost reduction for the section 8 companies.

(b) No need for minimum share capital

In line with the relaxation announced for private limited companies, section 8 companies too are no longer required to maintain a minimum share capital.

(c) Shorter notice period for AGMs

By amendment to section 101, it is proposed that only 14 days' notice shall be required to convene an annual general meeting of a section 8 company. This is in contrast to the earlier limit of 21 days. Provisions which pertain to sharing of financials and other associated documents before the meetings have also been amended to reflect such new timelines.

(d) No necessity to record minutes of meetings, unless required, etc.

Section 118 which requires recording of minutes of proceedings of general meetings, board meetings and other resolutions including those passed by way of postal ballot, shall now no longer apply to non profit enterprises. However, the minutes of meetings may be recorded within 30 days of conclusion of the meeting in cases where the company's articles provide for confirmation by way of circulation of minutes.

(e) Despatch of financial statements and other documents {Section 136(1)}

Instead of twenty one days prescribed under the section, Section 8 companies are allowed to despatch the said documents not less than fourteen days before the date of the meeting.

(f) Only two directors required

Section 149(1) shall no longer apply to section 8 companies; implying that such companies shall not be required to have a minimum number of directors on its board. However quorum for board meetings has been fixed at 2.

(g) Independent Directors not required

Clauses requiring and governing appointment of independent directors have been waived and section 8 company is not required to appoint independent directors.

(h) exemption regarding first meeting and board meetings

Further, section 8 companies shall no longer be required to hold the first meeting of the board within 30 days of incorporation of the company. A meeting of the directors shall however still be required once every six months.

(i) Right of persons other than retiring directors to stand for directorship (Section 160)

This right shall no longer be enforceable in section 8 companies, similar to an exemption provided to private limited companies. However this exemption shall not apply to companies whose articles provide for election of directors by ballot.

(j) Directorship in more than 20 companies

The bar on taking up directorship in more than twenty companies (section 165) has been relaxed in the case of section 8 companies. Therefore an individual, if he is eligible, can be a director in more than 20 section 8 companies.

(k) Meetings of the Board (section 173)

The Board of Directors of a section 8 company may hold at least one meeting within every six calendar months.

(l) Relaxation in formation of certain Committees referred to in Section 178 of the Act

Section 8 companies shall not be required to form the Nomination and Remuneration Committee and the Stakeholders Relationship Committee as provided in Section 178 of the Act, as the section has been exempted from compliance for such companies.

(m) Certain decisions by circulation instead of at a meeting

By modification to Section 179, the board has been empowered to take decisions pertaining to borrowing, investments and granting of loans and advances by way of circulation as compared to taking such decisions by calling a meeting of the board.

(n) Disclosure of interest in related party transactions in some cases only {section 184(2) and section 189}

A director shall be required to disclose his interest in any firm with which the company is making a transactions, and the company shall be required to maintain a register of all such transactions in which its director are interested only and only if with reference to section 188 (related party transactions) , the contract or arrangement exceeds one lakh rupees in value.

PROCEDURE FOR REGISTRATION OF NGO'S

Section 8 Company

The procedure for registration of a Section 8 company is slightly different than incorporation of a private or public company. It involves two steps, namely:

(i) obtaining of licence under section 8(1) of the Companies Act, 2013 and

(ii) obtaining certificate of incorporation

Before formation of the company, the promoters must decide on the following:

(a) the proposed name to be applied;

(b) objects to be carried by the Company;

(c) proposed registered office address;

(d) authorized capital;

(e) number of promoters, number of directors, and number of shares to be subscribed by each promoter. In deciding the proposed name, the following rules have to be borne in mind:

(i) The name of the company should be in consonance with the principal objects of the company as set out in the memorandum of association. Every name need not be necessarily indicative of the objects of the company, but when there is some indication of objects in the name, then it shall be in conformity with the objects mentioned in the memorandum. [Rule 8(2)(b)(ii) of Companies (Incorporation) Rules, 2014].

(ii) The proposed name should not fall in the ambit of undesirable names specified in Rule 8 of Companies (Incorporation)Rules, 2014

(iii) Name of Section 8 Company shall include the words Foundation, Forum, Association, Federation, Chambers, Confederation, Council, Electoral trust and the like words. [Rule 8(7) of the Companies (Incorporation) Rules, 2014].

(iv) There is no requirement to add the word Limited or Private Limited to its name. [Proviso to Section 4(1)(a) and Section 8(1)]

After deciding on the name and the structure of the proposed company, the following steps will be taken:

1. It has to be ensured that all the proposed directors should have valid DIN. If not, steps are to be taken for applying for DIN and obtaining the same.
2. Digital Signature for any one of the Directors is required to digitally sign the E-Forms to be submitted with the Registrar of Companies.
3. Memorandum of Association and Articles of Association have to be drafted. Care must be taken to ensure see that:
   (a) Objects of Section 8 Company must be the promotion of Commerce, Art, Science, Sports, Education, research, social welfare, religion, Charity, protection of environment or any such other object [Section 8(1)(a)]
   (b) the proposed company should intend to apply its profits, if any or other income in promoting its objects. [Section 8(1)(b)]
   (c) It should intend to prohibit the payment of dividend to its members. [Section 8(1)(c)].
4. The following provisions have to be noted before incorporation:
   (a) There must be at least 2 or 3 subscribers to the memorandum in case company is proposed to be incorporated as private company or public company respectively. [Section 3(1)(a) and Section 3 (1)(b)]
   (b) Minimum number of Directors required is 2 Directors or 3 Directors, in case company is proposed to be incorporated as private company or public company respectively with a maximum limit of up to 15 Directors. A Company may appoint more than 15 directors after passing a special Resolution in a general Meeting. [Section 149(1)(a) (b)]
   (c) Section 8 company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.[(Section 149(3)]

The procedural aspects for incorporating a Section 8 company are as under:

1. The promoter of the proposed entity will apply to the Ministry of Corporate Affairs for reservation of name in Form RUN.
2. Once name is reserved, an application will be made for obtaining licence under sub-section(1) of Section 8 of the Act in Form No. INC12. The application shall be accompanied by the following documents:
   (a) The draft memorandum and articles of association of the proposed company (Form No. INC-13)

(b) the declaration in Form No. INC-14 by an Advocate, a Chartered Accountant, Cost Accountant or Company Secretary in practice, that the draft memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and that all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;

(c) an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;

(d) the declaration by each of the persons making the application in Form No. INC. 15.

3. After obtaining the license number, applicant can proceed further to incorporate a company by filing e-forms SPICe along with linked forms as the case may be.

Application for Incorporation

The incorporation procedure can be carried out through eForm SPICe (INC-32) deals with the single application for reservation of name, incorporation of a new company and/or application for allotment of DIN and/or application for PAN and TAN. This eForm is accompanied by supporting documents including details of Directors & subscribers, MOA and AoA etc.

Once the e-Form is processed and found complete, company would be registered and CIN would be allocated. Also DINs gets issued to the proposed Directors who do not have a valid DIN. Maximum three Directors are allowed for using this integrated form for filing application of allotment of DIN while incorporating a company. Also PAN and TAN would get issued to the Company.

Incorporation application is filed in Form e forms SPICe along with the following attachments:

1. Memorandum of Association;
2. Article of Association;
3. Declaration by professional in Form INC 8;
4. Declaration by each subscriber of the memorandum in Form INC 9;
5. Address Proof of the subscribers;
6. Identity proof of subscribers;
7. Specimen Signature in Form INC 10;
8. PAN card;
9. NOC if there is any change in the name of promoters after name approval;
10. Board Resolution authorizing the subscription to MOA;
11. The verification of the registered office shall be filed in Form No. INC. 22 (when address for correspondence is the address of registered office of the company) and the following documents shall be attached thereto:

    (a) the registered document of the title of the premises of the registered office in the name of the company; or

    (b) the notarized copy of lease or rent agreement in the name of the company along with a copy of rent paid receipt not older than one month;

    (c) the authorization from the owner or authorized occupant of the premises along with proof of ownership or occupancy authorization, to use the premises by the company as its registered

office; and

(d) the proof of evidence of any utility service like telephone, gas, electricity, etc. depicting the address of the premises in the name of the owner or document, as the case may be, which is not older than two months.

12. Appointment of directors of the company in Form DIR - 12 along with the following attachments:
    - Consent to act as Directors in Form DIR- 2.
    - Affidavit by the Directors for Not accepting Deposits (On Non- judicial stamp paper of Rs. 100/- and duly notarised).
    - Declaration by each Subscriber to Memorandum of Association (On Non- judicial stamp paper of Rs. 100/- and duly notarised) in Form INC-9

Certificate of Incorporation

If the Concerned Registrar of Companies is satisfied that all the requirements of the Companies Act, 2013 have been complied with, a Certificate of Incorporation is issued which carries a unique Company Identification Number (CIN).

TRUST

A Trust is a relationship in which a person or entity holds a valid legal title to a certain property which is known as the Trust property. The Trust is bound by a fiduciary duty to exercise that legal title for the benefit of any one or more individuals or group of individuals or organisations, who are known as the Beneficiaries. The Trust shall be governed by the terms of the Written Trust agreement.

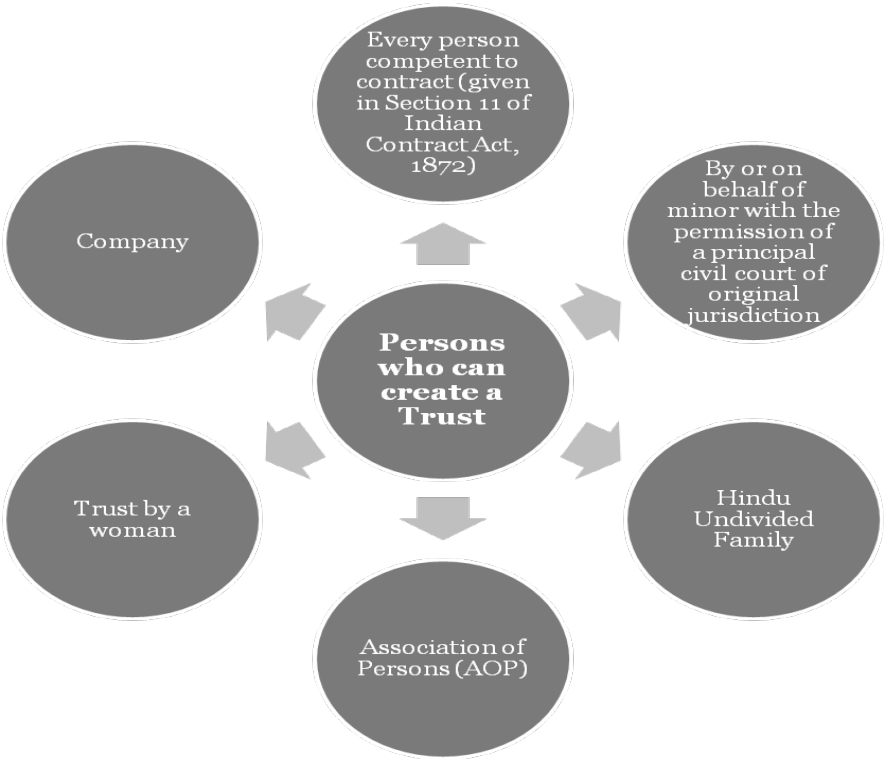
Trust is defined in section 3 of the Indian Trust Act, 1882 as “an obligation annexed to the ownership of property and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another or of another and the owner. In other words, it is simply a transfer of property by one person (the settlor) to another (the “trustee”) who manages that property for the benefit of someone else (the “beneficiary”). The settlor must legally transfer ownership of the assets to the trustee of the trust.

The statutory basis governing Trusts, in general, under Indian law is the Indian Trusts Act, 1882. Generally, there are two types of trusts in India: private trusts and public trusts. Private trusts are regulated by the Indian Trusts Act, 1882, whereas Public trusts are classified as Charitable and religious trusts. The Charitable and Religious Trust Act, 1920, the Religious Endowments Act, 1863, the Charitable Endowments Act, 1890, the Societies Registration Act, 1860, and the Bombay Public Trust Act, 1950 are the relevant legislations for the recognition and enforceability of public trusts. Moreover, in recent times, trusts can also be used as a vehicle for investments, such as mutual funds and venture capital funds. These trusts are governed by Securities and Exchange Board of India (SEBI).

In India, there are thousands of trusts created by the owner of industrial houses and rich individuals and their families. Under Indian laws, Public Charitable Trusts are treated as organisations with charitable purpose entitling all the tax benefits applicable. Examples of Public Charitable Trusts promoted by business families are Paragon Charitable Trust, Sir Dorabji Tata Trust, etc. Private trust or family trust is not a Public Charitable Trusts and hence does not enjoy the privileges entitled to a trust with charitable purpose.

Persons who can create a Trust

According to Section 7 of Indian Trusts Act, 1882, a trust may be created by the following persons:



Persons who can be a Trustee

As per Section 10, any person who is capable of holding property may be a trustee; except to the condition of discretion of trust, in that case, he cannot execute it unless he is competent to contract.

Difference between Public Trust and Private Trust

(a) Identification of the beneficiaries of the Trust is a simple way to differentiate between a public and a private trust . If the beneficiaries make up a large or substantial body of public, then the trust in question is public. A public trust exists "for the purpose of its objects, the members of an uncertain and fluctuating body," and is managed by a board of trustee. If, however, the beneficiaries are a narrow and specific group such as the employees of a company, then the trust is private.

(b) in a Public Trust, the interest is vested in an uncertain and fluctuating body . They are the general public or class thereof. In a Private Trust, beneficiaries are definite and ascertained individuals. (Supreme Court in *Deoki Nandan* v. *Murlidhar* 1957 AIR 133 1956 SCR 756)

(c) Their domains are different; public trusts have larger and wider domain whereas private trusts have limited and narrow domain.

A trust for the benefit of employees of a company however numerous would not be considered as public charitable. For example, an industrialist who creates a trust for the benefit of his 5,000 people, their spouses and children is considered private because who the beneficiaries are known.

While a public trust is set up for what is called 'uncertain and fluctuating body of persons' , it is possible to create a sectarian or communal trust as a public charitable trust. There are trusts which are only for specific religious communities. However, such trusts may not be tax-exempt.

Exemptions available to Trusts

Exemptions available to Trusts are primarily governed by the provisions of the Income Tax Act, 1961. The exemption has to be read keeping in mind whether the Trust is a Public Charitable Trust, Private Trust, Religious Trust, etc.

Certain key exemptions are listed below:

Tax exemption under Section 10 of the Income Tax Act, 1961

Total tax exemption is available for certain types of trusts which include those which are formed for any of the activities related to sports, education, scientific research, professions, or promotion of khadi and village based industries, hospitals etc. and are notified as charitable or religious institutions.

Tax exemption under Section 11 of Income Tax Act, 1961

As per Section 11, any income, profits or gains obtained by a trust from a property held by the trust established wholly for the purposes of religious or charitable nature shall not be included in the total income of the trust. Since such income shall not constitute to be a part of the trust's income, therefore, it is not taxable. However, as per section 13, there are certain situations where the tax exemptions under section 11 are not applicable.

Such instances include where

(a) income earned from the property held under the trust of private religious nature and does not endure benefit for the public, or

(b) the entire income of a charitable trust which is established for a particular religion, community or caste, income of those charitable trust whose funds do not get invested in the modes specified under section 11(5).

Tax exemption under Section 12 of the Income Tax Act, 1961

The incomes that are excluded from the computation of taxable income of trust or society are as follows:

1. Income which is derived from the property that is held under the authority of trust with the purposes which are wholly charitable or religious in nature.
2. Income which is kept aside to the extent that does not exceed 25% of the total income received in lieu of the property.
3. In cases of charitable trusts, specifically those formed before 1st of April, 1961, income which is acquired from the property which is held partially for religious or charitable purposes within India
4. In furtherance of the above case, the income which is set apart to a certain extent and which does not exceed twenty five percent of the total income.
5. In cases of income that is obtained from a trust created before 1st April, 1952 for charitable purposes and spent outside India.
6. Income made by way of voluntary contributions towards the corpus of the trust.
7. Charitable trusts created for the benefit of any of the socially and economically backward castes such as Scheduled Castes, Scheduled Tribes or women or children.

Trusts are allowed to set apart or accumulate some of the funds received from voluntary contributions for certain specific purposes. The resultant benefit obtained by the trust is that amount so deducted is not considered as forming part of income of the previous year and therefore not taxed.

Tax exemption for a Private Trust

The taxability of the Trust depends upon the type of the trust. In the case of a non-discretionary trust, all income is taxable in the hands of the beneficiaries. But if the beneficiaries are minors, the income is to be clubbed with that of the parent with the higher income.

On the other hand, in the case of a discretionary trust, in which the shares of the beneficiaries are unknown and indeterminate, it is taxed in the hands of trust at the maximum marginal rate.

Section 161(1A) of the IT Act provides that if any part of the income of such a trust includes profits and gains from business, then the aforesaid principle of Section 161(1) would be ignored and the entire income of the trust including any profits and gains from business would be liable to income tax at the maximum marginal rate.

Thus, tax planning requires that the trustee should not have any income in the nature of profits and gains from business in the trust otherwise the entire income of the trust would become liable to maximum marginal rate of tax.

FORMATION OF TRUST

A Trust can be created by any person over 18 years of age and mentally sound and capable of understanding.

Before registration of a trust, the following aspects have to be decided:

(a) Name of the trust

(b) Address of the trust

(c) Objects of the trust (charitable or Religious)

(d) One settler of the trust

(e) Two trustees of the trust

(f) Property of the trust-movable or immovable property (normally a small amount of cash/cheque is given to be the initial property of the trust, in order to save on the stamp duty).

1. Creation of a Trust Deed

A trust may be created by any language sufficient to show the intention and no technical words are necessary. A trust may even be created by the use of words which are primarily words of condition, but such words will constitute a trust only where the requisites of a trust arc present. Though the use of the word 'trust' is not needed to create a valid trust, the terms of the grant or will make it clear that an obligation is actually annexed to the ownership of the trust property.

A trust-deed, generally, incorporates the following:

(i) the name(s) of the author(s)/settlor(s) of the trust;

(ii) the name(s) of the trustee(s);

(iii) the name(s) if any, of the beneficiary/ies or whether it shall be the public at large;

(iv) the name by which the trust shall be known;

(v) the place where its principal and or other offices shall be situate;

(vi) the property that shall devolve upon the trustee(s) under the trust for the benefit of the beneficiary/ies;

Note: In terms of section 21 of the Indian Registration Act, a deed of trust relating to immovable property, must contain a description of the property sufficient to identify it for the purposes of registration.

(vii) an intention to divest the trust property upon the trustee(s);

Note: The intention should be expressed in unequivocal language and with a reasonable degree of certainty. Though no particular or technical words are necessary, yet the words used must be capable of definite meaning.

(viii) the object and purpose of the trust;

(ix) the procedure for appointment, removal or replacement of a trustee, their rights, duties and powers, etc;

(x) the rights and duties of the beneficiary/ies;

(xi) the mode and method of determination of the trust.

(2) Obtain the signatures of Settlor, Trustees and Witnesses s at the appropriate places. Their photographs and Identity proof is also to be furnished. The Deed must be witnessed by at least two witnesses. The Settlor must sign all the pages of the Trust Deed.

(3) Print the Trust Deed on stamp paper of appropriate value, depending on the stamp duty applicable in the State of execution.

(4) Register the Original deed in a Sub-Registrar office paying registration charges. A photocopy of the Deed is also required to be submitted. The photocopy of the Deed should also contain the signature of settlor on all the pages.

(5) At the time of registration, the settlor and witnesses must be personally present with their identity proof in original.

(6) The Sub- Registrar retains the photocopy and returns the original copy of the Trust Deed.

(7) Thereafter, the Trust can apply for a permanent account number for the trust and open a bank account for it as it is a separate entity.

SOCIETY

Definition

A society is an association of persons united together by mutual consent to deliberate, determine and act jointly for some common purpose. Societies are usually registered for promotion of charitable activities like education, art, religion, culture, music, sports, etc., In India, The Societies Registration Act, 1860 lays down the procedure for society registration and operation in India. The Act has been adopted by most of the State Governments with/without modifications as considered by the respective State Governments.

According to Section 20 of the Societies Registration Act, 1860, societies can be formed for the following purposes:

(i) Charitable societies,

(ii) the military orphan funds or societies established at the several presidencies of India,

(iii) societies established for the promotion of science, literature, or the fine arts for instruction, the diffusion of useful knowledge,

(iv) The diffusion of political education,

(v) the foundation or maintenance of libraries or reading-rooms for general use among the members or open to the public

(vi) public museums and galleries of paintings and other works of art, collections of natural history, mechanical and philosophical inventions, instruments, or designs.

Besides these purposes, the respective State Governments may provide for any other objects by their legislations.

Advantages of Society

- The process of formation and registration is simple.
- Record-keeping requirements are minimum and compliance with regulations is easy.
- Cost of compliance is low.
- Least possibility of interference by the regulator.
- Exemption from tax due to charitable nature of operations.

Disadvantages of Society

- Tax exemption extended to societies may apply to public trusts only to the extent the Income Tax department accepts their activities as being charitable.
- Since such institutions are of charitable nature, it is an inappropriate form of a commercial venture;
- The concept of equity investment or ownership is virtually absent; Hence, it is not attractive for commercial investors interested in microfinance;
- Commercial investors regard the investments in such entities as risky mainly on account of their lack of professionalism and managerial practices and political leanings(in some cases) and are, therefore, reluctant to provide large scale funding to such bodies;
- In accordance with Section 45S of the RBI Act, 1934, no unincorporated bodies are allowed to accept deposits from the public. Organisations registered under the Societies Registration Act and the Trust Act are considered unincorporated bodies. Hence, legally speaking, they are not allowed to collect savings from their clients; and
- It is vulnerable to the implication under the Money Lenders Acts s (prevention of usurious interest rates) of various State Governments.

Consequences of Registration / Non-Registration of a Society

The Societies Registration Act, 1860 lays down procedure for registration of societies for various bonafide purposes. The registration gives the society a legal status and is essential for :

- obtaining registration and approvals under Income Tax Act;
- lawful vesting of property in the societies;
- provides authenticity and recognition to the society before all authorities and the world at large; and
- for opening bank accounts and transaction of business.

When the society is registered, it and its members become bound to the same extent, as if each member had signed the memorandum.

Once registered under the Societies Registration Act, the society must restrict its activities to the objects contained in its Memorandum.

A society registered under the Act enjoys the status of a legal entity apart from the members constituting it. A society so registered is a legal entity/person similar to an individual but with no physical existence. As such it can acquire and hold property and can sue and be sued in its own name.

The society should be registered under the Act to acquire the status of juridical person.

In the absence of registration, all the trustees in charge of the fund have alone a legal status and the society has no legal status, and, therefore, it cannot sue and be sued.

If a society is not registered, it may exist in fact and theory, but not in the eyes of law. If benefits are to be claimed, the registration of society under the Act us required. An unregistered society cannot claim benefits under the Income-tax act.

Accounts and Audits

The societies are in possession of funds and properties provided to them by the members or by other persons (by way of donation etc.). The funds and properties are to be applied in furtherance of its objects, for which the society was formed. The members of the governing body are the trustees who apply the funds.

Therefore, it becomes necessary for societies to maintain proper and regular account books and get them audited and present them to the members at the general meeting and file the same with the Registrar of Societies (of the respective State where it is located) for scrutiny.

Every society should get its accounts audited once a year by duly qualified auditor and have balance sheet prepared by him.

Litigation

As every society is a legal entity distinct from its members . It is capable of filing suits against any person or any member. Similarly, suits can also be filed against the society.

A registered society can file a suit anywhere in India and in any State although it may not be registered in that particular state.

Benefits of forming a Society

1. Under Income Tax Act, and subject to fulfilment of certain conditions, a society can avail of exemption from income tax , if it obtains registration under Section 12A/12AA of the Income Tax, 1961.
2. Donors to societies may claim a rebate under Income Tax Act for donations made to the Society, provided the society has applied and obtained approval under Section 80G. Registration under section 12A is one-time registration. Once the registration is granted to the trust, it will be hold good till the cancellation of registration. There is no provision which requires any renewal of registration. Thus, the benefits of registration can be claimed for lifetime by NGO.
3. Societies, being NGO's receive various grants from government and other agencies. They are eligible to get grants and financial funding from various agencies. These agencies generally make grants to societies registered under Section 12A.
4. Societies are run on democratic principles and ensures wider participation by members in the activities.
5. In view of the election process, there is scope for removing inefficient management and effect changes in the management to ensure better governance.

FORMATION OF A SOCIETY

Under Section 1 of the Societies Registration Act, 1860, any seven or more persons who have come together for any legal pursuits, including literary, scientific, charitable or social pursuits, may subscribe their names to a memorandum of association and file the same with the Registrar and form themselves into a society under this Act.

The memorandum of association filed with the Registrar should contain details such as the name and objectives of the society, names, addresses and occupations of the members of the governing body with which the management of the affairs of the society is entrusted.

A copy of the rules and regulations of the society should be provided.

With the completion of these processes, the society could be registered with the Registrar after payment of a fee, which will be specified by the State Government from time to time. As per Section 4 of the Act, once in every year, an annual general meeting of the society should be conducted.

If the rules do not provide for an annual general meeting, a list of the names, addresses and occupations of the members of the governing body should be presented to the Registrar, every year.

- Registration can be done either at the state level (i.e., in the office of the Registrar of Societies) or at the district level (in the office of the District Magistrate or the local office of the Registrar of Societies)
- Memorandum of association and rules and regulations
- Consent letters of all the members of the managing committee
- Authority letter duly signed by all the members of the managing committee
- An affidavit sworn by the president or secretary of the society on non-judicial stamp paper of Rs.20-/, together with a court fee stamp
- A declaration by the members of the managing committee that the funds of the society will be used only for the purpose of furthering the aims and objects of the society.
- The documents needed to be submitted to the Registrar are:
    1. A letter requesting registration, signed by founding members. This letter will state the purpose of formation of the society and a requisition indicating that the society is registered under the Act. The signature of all members is mandatory.
    2. A certified copy of the MoA, signed by the founding members, with a duplicate.
    3. A certified copy of the rules and regulations, signed by the founding members, along with a duplicate copy.
    4 A table with the names and address and occupation of all members of the society with their signatures
    5 Minutes of the meeting (general body meeting conducted to set the rules and regulations)
    6. Declaration by the president of the society
    7. A sworn affidavit from the President or Secretary, declaring the relationship between the subscribers.
    8. Address proof of registered office and no-objection certificate from the landlord.

The documents are to be filed with the Registrar along with the fees, and a suitable name (which should be unique and not suggest a relationship with the government or violate the provisions of the Emblem and Names Act, 1950). If the Registrar is satisfied with the application, the society will be registered.

Steps for Registering a society In India

A Society can be created by a minimum of 7 or more persons. Apart from persons from India, companies, foreigners, as well as other registered societies can also register for the Memorandum of the society.

Society registration is maintained by state governments. Thus, the application for society registration must be created to the specific authority of the state, where the registered office of society is situated.

For Society registration, the establishing members must agree with the name of society first and then prepare for the Memorandum, followed by Rules & Regulations of the society.

Selection of a Name

When selecting a name for society registration, it is vital to understand that according to Society Registration Act, 1860, an identical or similar name of a currently registered society will not be allowed. Moreover, the proposed name shall not suggest any patronage of State Government or Government of India or contravene the provisions of the Emblem & Names Act, 1950.

Memorandum of Association

The Memorandum of society along with Rules & Regulations of society must be signed by every establishing member, witnessed by Gazetted Officer/Notary Public/ Chartered Accountant/ Oath Commissioner/ Advocate/ Magistrate first class /Chartered Accountant with their official stamping and complete address. The memorandum must also contain details of members of the society registration along with their names, addresses, designations, and occupations.

The following documents have to be prepared, submitted and signed for the sake of registration:

- Requesting society registration by providing covering letter, signed by all establishing members
- Duplicate copy of memorandum of association of society along with certified copy
- Duplicate copy of Rules & Regulations of society along with duplicate copy duly signed by all establishing members
- Address proof of registered office of society as well as no-objection certificate (NOC) issued by landlord.
- Affidavit by secretary or president of society declaring relationship among subscribers
- Few minutes of meeting regarding the society registration along with providing some essential documents.

Following are the documents required for the Society Registration in India:

1. PAN Card of all the members of the proposed society has to be submitted along with the application.
2. The Residence Proof of all the members of the society also has to be submitted. The following can be used as a valid residence proof:
    - Bank Statement
    - Aadhaar Card
    - Utility Bill
    - Driving License
    - Passport
3. Memorandum of Association has to be prepared which will contain the following clauses and information:

    The work and the objectives of the society for which it is being established
    - The details of the members forming the society
    - It will contain the address of the registered office of the society
4. Articles of Association also have to be prepared which will contain the following information:
    - Rules and regulations by which the working of the society will be governed and the maintenance of day to day activities
    - It will contain the rules for taking the membership of the society

- The details about the meetings of the society and the frequency with which they are going to be held is to be mentioned
- Information about the Auditors
- Forms of Arbitration in case of any dispute between the members of the society
- Ways for the dissolution of the society will also be mentioned

Once the rules have been formed, they can be changed but the new set of rules will be signed by the President, Chairman, Vice President and the Secretary of the Society.

5. A covering letter mentioning the objective or the purpose for which the society is being formed will be annexed to the beginning of the application. It will be signed by all the founding members of the society.
6. A copy of the proof of address where the registered office of the society will be located along with a NOC from the landlord if any has to be attached.
7. A list of all the members of the governing body has to be given along with their signatures.
8. A declaration has to be given by the president of the proposed society that he is willing and competent to hold the said post.

All the above documents have to be submitted to the Registrar of Societies along with the requisite fees in two copies. On receiving the application, the registrar will sign the first copy as acknowledgment and return it while keeping the second copy for approval. On proper vetting of the documents, the registrar will issue an Incorporation Certificate by allotting a registration number to it.

The signed Rules & Regulations, as well as Memorandum, has to be filed with concerned society or registrar of state with a mentioned fee. If the registrar is fulfilled with society registration application, then they will certify that the society is registered.

LESSON ROUND-UP

- A company incorporated under Section 8 of the Companies Act, 2013(corresponding to Section 25 of the Companies Act, 1956) Company incorporated for promoting commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object, provided the profits, if any, or other income is applied for promoting only the objects of the company.
- A Trust is a relationship in which a person or entity holds a valid legal title to a certain property which is known as the Trust property. The Trust is bound by a fiduciary duty to exercise that legal title for the benefit of any one or more individuals or group of individuals or organisations, who are known as the Beneficiaries.
- A society is an association of persons united together by mutual consent to deliberate, determine and act jointly for some common purpose. Societies are usually registered for promotion of charitable activities like education, art, religion, culture, music, sports, etc.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What are the characteristics of a Section 8 Company? Can it be merged with any other company?
2. List five exemptions available to a Section 8 Company.
3. What is a Trust? Who can create a Trust?

4. Differentiate between a settlor, trustee and beneficiary.
5. Distinguish between a Public Trust and Private Trust.
6. Specify the purposes mentioned in section 20 of the Societies Registration Act, 1860 for which a Society can be formed?

Lesson 8

Financial Services Organisation and its Registration Process

LESSON OUTLINE

- Introduction
- Non Banking Financial Company
- Types/categories of NBFC's
- Benefits of incorporating an NBFC
- Process of incorporation of NBFC
- Housing Finance Companies
- Benefits of incorporating a Housing Finance Company
- Housing Finance Company : Registration Process
- Asset Reconstruction Company(ARC)
- Benefits of incorporating an Asset Reconstruction Company (ARC)
- Micro Finance Institutions(MFI)
- Incorporation of MFI
- Nidhi Companies
- Benefits of incorporating a Nidhi Company
- Incorporation of a Nidhi Company
- Payment Banks
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In this Lesson, you will study the different forms of Financial Services Organisations operating in India such as Non-Banking Finance Companies (NBFC'S) and the various categories of such companies, Housing Finance Companies (HFC's), Asset Reconstruction Companies (ARC's), Micro Finance Institutions (MFI's), Nidhi Companies and Payment Banks.

This lesson will also explain the process of registering such entities.

After going through this Lesson, having knowledge about the concept, the benefits and the procedures involved, you, as a Company Secretary, would be able to register such Financial Services Organisations.

INTRODUCTION

NBFC is a financial Institution that is into Lending or Investment or collecting monies under any scheme or arrangement but does not include any institutions which carry on its principal business as agriculture activity, industrial activity, trading and purchase or sale of immovable properties. A company that carries on the business of accepting deposits as its principal business is also a NBFC.

India has a diversified financial sector undergoing rapid expansion, both in terms of strong growth of existing financial services firms and new entities entering the market. The sector comprises commercial banks, insurance companies, non-banking financial companies, co-operatives, pension funds, mutual funds and other smaller financial entities. The banking regulator has allowed new entities such as payments banks to be created recently thereby adding to the types of entities operating in the sector. However, the financial sector in India is predominantly a banking sector with commercial banks accounting for more than 64 per cent of the total assets held by the financial system.

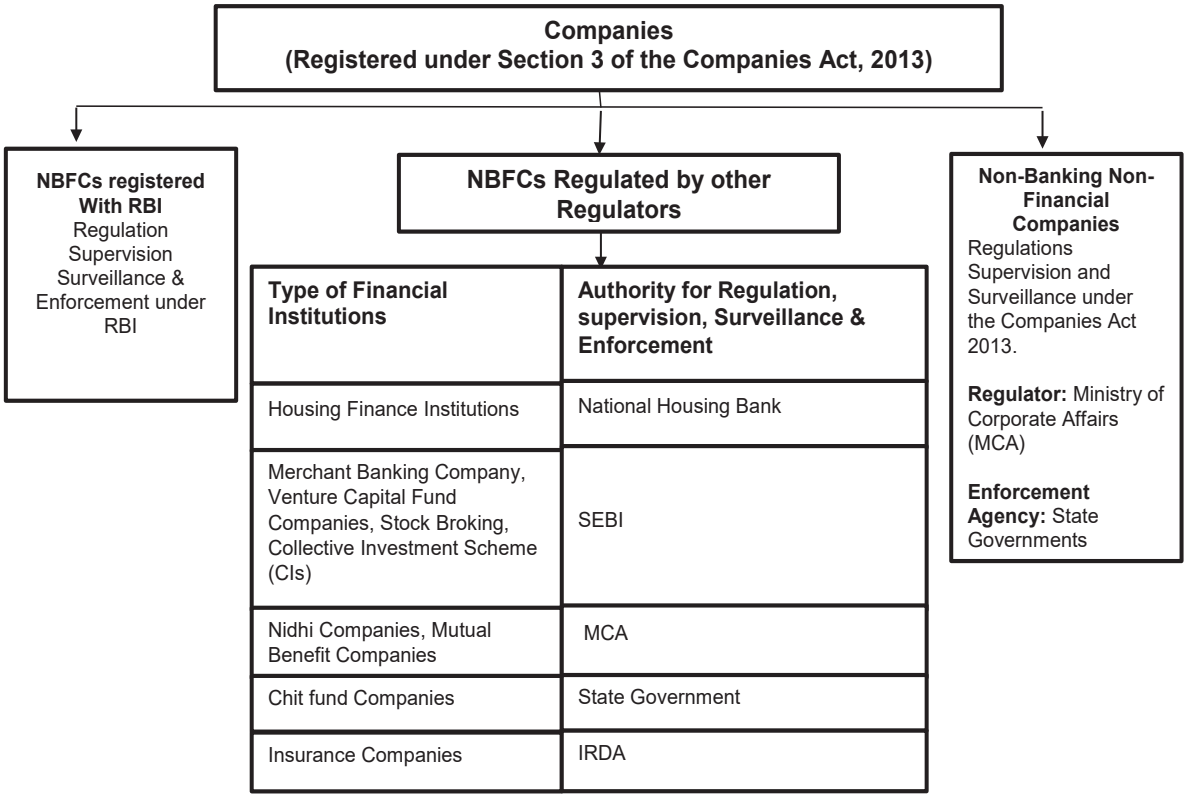
The Government of India has introduced several reforms to liberalise, regulate and enhance this industry. The Government and Reserve Bank of India (RBI) have taken various measures to facilitate easy access to finance. These measures include (to name a few) launching different categories of Non Banking Finance Companies (NBFCs), Asset Reconstruction Companies (ARCs) and Micro Finance Institutions (MFIs).With a combined push by both government and private sector, India is undoubtedly one of the world's most vibrant capital markets.

Over the years, Non Banking Financial Companies (NBFC'S), Housing Finance Companies (HFC's), Asset Reconstruction Companies (ARC's), Micro Finance Institutions (MFI's), and Nidhi Companies have played a dominant role in mobilisation and disbursal of funds.

With the advent of mobile technology and vast strides made by the country in the field of information technology,

Payment Banks has emerged as a new model of banks conceptualised by the Reserve Bank of India (RBI)

Financial Services Organisations Structure in India:



NON BANKING FINANCIAL COMPANY

A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, 2013 (or any earlier enactments) engaged in the business of loans and advances, acquisition of shares/stocks/bonds/ debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/construction of immovable property. A non-banking institution which is a company and has principal business of receiving deposits under any scheme or arrangement in one lump sum or in instalments by way of contributions or in any other manner, is also a non-banking financial company (Residuary non-banking company).

Financial activity as principal business is when a company's financial assets constitute more than 50 per cent of the total assets and income from financial assets constitute more than 50 per cent of the gross income. A company which fulfils both these criteria will be registered as NBFC by RBI. Interestingly, this test is popularly known as 50-50 test and is applied to determine whether or not a company is into financial business.

NBFCs lend and make investments and hence their activities are akin to that of banks; however there are a few differences as given below:

i. NBFC cannot accept demand deposits;

ii. NBFCs do not form part of the payment and settlement system and cannot issue cheques drawn on itself;

iii. deposit insurance facility of Deposit Insurance and Credit Guarantee Corporation is not available to depositors of NBFCs, unlike in case of banks.

In terms of Section 45-IA of the RBI Act, 1934, no Non-banking Financial Company can commence or carry on business of a non-banking financial institution without a) obtaining a certificate of registration from the Bank and without having a Net Owned Funds of Rupees Two crore.

However, in terms of the powers given to the Bank, to obviate dual regulation, certain categories of NBFCs which are regulated by other regulators are exempted from the requirement of registration with RBI viz. Venture Capital Fund/Merchant Banking companies/Stock broking companies registered with SEBI, Insurance Company holding a valid Certificate of Registration issued by IRDA, Nidhi companies as notified under Section 620A of the Companies Act, 1956 or formed under section 406 of the Companies Act, 2013, Chit companies as defined in clause (b) of Section 2 of the Chit Funds Act, 1982,Housing Finance Companies regulated by National Housing Bank, Stock Exchange or a Mutual Benefit company.

Note: Under the Companies (Amendment) Act, 2017, Nidhi Companies are required to be notified by the Central Government as such; This is similar to the provisions of Section 620A of the Companies Act, 1956.

NBFCs whose asset size is of Rupees. 500 cr or more as per last audited balance sheet are considered as systemically important NBFCs. The rationale for such classification is that the activities of such NBFCs will have a bearing on the financial stability of the overall economy.

TYPES/CATEGORIES OF NBFCS

NBFCs are categorized :

a) in terms of the type of liabilities into Deposit and Non-Deposit accepting NBFCs,

b) non deposit taking NBFCs by their size into systemically important and other non-deposit holding companies (NBFC-NDSI and NBFC-ND) and

c) by the kind of activity they conduct.

Within this broad categorization the different types of NBFCs are as follows:

I. Asset Finance Company (AFC) :

An AFC is a company which is a financial institution carrying on as its principal business the financing of physical assets supporting productive/economic activity, such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipments, moving on own power and general purpose industrial machines. Principal business for this purpose is defined as aggregate of financing real/physical assets supporting economic activity and income arising therefrom is not less than 60% of its total assets and total income respectively.

II. Investment Company (IC)

IC means any company which is a financial institution carrying on as its principal business the acquisition of securities,

III. Loan Company (LC)

LC means any company which is a financial institution carrying on as its principal business the providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an Asset Finance Company.

IV. Infrastructure Finance Company (IFC)

IFC is a non-banking finance company -

a) which deploys at least 75 per cent of its total assets in infrastructure loans,

b) has a minimum Net Owned Funds of ₹ 300 crore,

c) has a minimum credit rating of 'A' or equivalent d) and a CRAR of 15%.

V. Systemically Important Core Investment Company (CIC-ND-SI):

CIC-ND-SI is an NBFC carrying on the business of acquisition of shares and securities which satisfies the following conditions:-

(a) it holds not less than 90% of its Total Assets in the form of investment in equity shares, preference shares, debt or loans in group companies;

(b) its investments in the equity shares (including instruments compulsorily convertible into equity shares within a period not exceeding 10 years from the date of issue) in group companies constitutes not less than 60% of its Total Assets;

(c) it does not trade in its investments in shares, debt or loans in group companies except through block sale for the purpose of dilution or disinvestment;

(d) it does not carry on any other financial activity referred to in Section 45I(c) and 45I(f) of the RBI Act, 1934 except investment in bank deposits, money market instruments, government securities, loans to and investments in debt issuances of group companies or guarantees issued on behalf of group companies.

(e) Its asset size is ₹ 100 crore or above and

(f) It accepts public funds

VI. Infrastructure Debt Fund: Non- Banking Financial Company (IDF-NBFC)

IDF-NBFC is a company registered as NBFC to facilitate the flow of long term debt into infrastructure projects. IDF-NBFC raise resources through issue of Rupee or Dollar denominated bonds of minimum 5 year maturity. Only Infrastructure Finance Companies (IFC) can sponsor IDF-NBFCs.

VII. Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI)

"Non-Banking Financial Company – Micro Finance Institution (NBFC-MFI)" means a non-deposit taking NBFC (other than a company formed and registered under section 25 of the Companies Act, 1956 or Section 8 of the Companies Act, 2013) that fulfils the following conditions:

(a) Minimum Net Owned Funds of ₹ 5 crore. (For NBFC-MFIs registered in the North Eastern Region of the country, the minimum NOF requirement shall stand at ₹ 2 crore).

(b) Not less than 85% of its net assets are in the nature of "qualifying assets."

(Only the assets originated on or after January 1, 2012 shall have to comply with the Qualifying Assets criteria. As a special dispensation, the existing assets as on January 1, 2012 shall be reckoned towards meeting both the Qualifying Assets criteria as well as the Total Net Assets criteria. These assets shall be allowed to run off on maturity and shall not be renewed).

Here, "**Net assets**" shall mean total assets other than cash and bank balances and money market instruments; and **"Qualifying assets**" shall mean a loan which satisfies the following criteria:-

i. loan disbursed by an NBFC-MFI to a borrower with a rural household annual income not exceeding ₹1,25,000 or urban and semi-urban household income not exceeding ₹2,00,000;

ii. loan amount does not exceed ₹75,000 in the first cycle and ₹1,25,000 in subsequent cycles;

iii. total indebtedness of the borrower does not exceed ₹1,25,000; Provided that loan, if any availed towards meeting education and medical expenses shall be excluded while arriving at the total indebtedness of a borrower.

iv. tenure of the loan not to be less than 24 months for loan amount in excess of ₹ 30,000 with prepayment without penalty;

v. loan to be extended without collateral;

vi. aggregate amount of loans, given for income generation, is not less than 50 per cent of the total loans given by the MFIs;

vii. loan is repayable on weekly, fortnightly or monthly instalments at the choice of the borrower.

VIII. Non-Banking Financial Company – Factors (NBFC-Factors)

NBFC-Factor is a non-deposit taking NBFC engaged in the principal business of factoring. The financial assets in the factoring business should constitute at least 50 percent of its total assets and its income derived from factoring business should not be less than 50 percent of its gross income.

IX. Mortgage Guarantee Companies (MGC)

MGC are financial institutions for which at least 90% of the business turnover is mortgage guarantee business or at least 90% of the gross income is from mortgage guarantee business and net owned fund is ₹100 crore.

X. NBFC- Non-Operative Financial Holding Company (NOFHC) is financial institution through which promoter / promoter groups will be permitted to set up a new bank. It's a wholly-owned Non-Operative Financial Holding Company (NOFHC) which will hold the bank as well as all other financial services companies regulated by RBI or other financial sector regulators, to the extent permissible under the applicable regulatory prescriptions.

XI. Systemically important non-deposit taking non-banking financial company means a non-banking financial company not accepting / holding public deposits and having total assets of ₹ 500 crore and above as shown in the last audited balance sheet;

BENEFITS OF INCORPORATING AN NBFC

According to research and studies it is proved that NBFCs are outperforming banks. The continued better performance from NBFCs has given rise to an uptick of 15% customer satisfaction as compared to the banking customers. The same is agreed by the RBI according to the recent Financial Stability Report. Banks and Non-Banking Financial Companies (NBFCs) are financial intermediaries and the services offered by them are pretty much the same as banks. However, the benefits of incorporating an NBFC and carrying on its activities are listed below:

1. Competitive Interest Rates

Rate of interest is one of the main aspects of all types of loans. Non-Banking Financial Sectors have started to concentrate on this area in the recent decades and have brought down the interest rates to either equal to bank lending rates or at times even lower to bank rates. With all the other benefits when rate of interest is also lowered, borrowers found this more easy and affordable. This has also resulted in lower EMI (Equated Monthly Instalment) for borrowers. Based on the income, credit scoring and repayment, rate of interest is charged on the borrowers However it is at competitive rates.

2. Quick Processing

At banks, it is very important that the applicant should fulfil the eligibility criteria but NBFC are lenient in this aspect. This makes loan approval easier, smoother process and quicker. Most of the times, people apply for loan when they are in immediate need of money. NBFCs have taken this as an opportunity to meet the demand by quickly processing the loans at competitive rate of interest. At times, borrowers are even ready to compromise on the interest rates if the loan amount is huge and if they could get it approved quickly.

3. Less Rules and Regulations

As NBFC are incorporated under the Companies Act, (though regulated by the Reserve Bank of India), the rules and regulations for lending are not as stringent as banks. This helps borrowers to get loans easily. In view of less complicated loan processing requirements, borrowers are highly satisfied. Of course, the risk of default is high with NBFC and thus interest rates and other charges will be according priced by the NBFC. Even the loan amount approved will be quite lesser than the collateral value. This is due to the high risk of default. NBFCs do not have statutory reserve ratios and can open branches at will.

4. Loan available for Individuals with Poor Credit Rating

Individuals with poor credit rating generally will not get loans from banks. The reason for this is banks consider borrowers are high-risk individuals if the credit scoring is low. Unless the credit score is above 600 -650, it is very difficult to get a loan sanctioned from banks. On the other hand, loans will be offered to individuals with low credit score by NBFCs but most of the time the interest rates for such borrowers will be higher than market rates. Due to these aforementioned advantages, most of the NBFCs are growing.

5. With regard to offering loans, banks and NBFCs will offer business, personal and retail loans. And this is totally on the basis of the repayment capacity of the borrower. Most of the corporate sector prefers banks; however retail sector chooses NBFCs over banks. Simple loans such are vehicle financing loans, gold loans, home loans and durable loans are offered by NBFCs and customer satisfaction ratio is high here. NBFC sector is also set to expand even further in the coming days.

INCORPORATION OF NBFCS

The enactment of Companies Act, 2013 impacted many areas including banks and NBFCs. However, there have been no major changes in incorporating the NBFCs under the new act. Accordingly, Non- Banking Financial Companies (NBFCs) are companies incorporated under Companies Act, 2013 or Companies Act, 1956.

The procedure for incorporating a Non Banking Finance Company (NBFC) is the same as any other company. Form RUN for approval of name should contain financing as the principal activity. Their principal business, to be stated in the MOA, while registering under the Companies Act shall be lending credit, making investments in various types of shares and stocks, leasing, hire-purchase, insurance business, chit business, and receiving deposits under any scheme or arrangement.

Since the Net Owned Funds of the entity should be not less than Rupees Two Crore, it must be ensured that the Authorised Share Capital of the NBFC is not less than Rupees Two Crore.

Registration Process with Reserve Bank of India

After incorporation of the company, the NBFC must obtain certificate of registration. Before applying for registration, the company should ensure the following:

(a) It should have minimum one director from NBFC background or senior Bankers as full-time director in the company

(b) Clean CBIL records

(c) Understanding of NBFC / Finance business

In terms of Section 45-IA of the RBI Act, 1934, a Non-banking Financial company can commence or carry on business of a non-banking financial institution only after

(a) obtaining a certificate of registration from the Reserve Bank of India and

(b) having a Net Owned Funds of Rupees Two Crore.

To obviate dual regulation, certain categories of NBFCs which are regulated by other regulators are exempted from the requirement of registration with RBI, viz.

(a) Venture Capital Fund/Merchant Banking companies/Stock broking companies registered with SEBI,

(b) Insurance Company holding a valid Certificate of Registration issued by IRDA,

(c) Nidhi companies as notified under the Companies Act,1956/ 2013

(d) Chit companies as defined in clause (b) of Section 2 of the Chit Funds Act, 1982,

(e) Housing Finance Companies regulated by National Housing Bank,

(f) Stock Exchange or a Mutual Benefit company.

Procedure for filing application with Reserve Bank of India

(1) The applicant company is required to apply online and submit a physical copy of the application along with the necessary documents to the Regional Office of the Reserve Bank of India.

(2) The application can be submitted online by accessing RBI's secured website *https://cosmos.rbi.org.in*. At this stage, the applicant company will not need to log on to the COSMOS application and hence user ids are not required.

(3) The company can click on "CLICK" for Company Registration on the login page of the COSMOS Application. A window showing the Excel application form available for download would be displayed. The company can then download suitable application form (i.e. NBFC or SC/RC) from the above website, key in the data and upload the application form.

(4) The company may note to indicate the correct name of the Regional Office in the field "C-8" of the "Annex-Identification Particulars" in the Excel application form. The company would then get a Company Application Reference Number (CARN) for the CoR application filed on-line.

(5) Thereafter, the company has to submit the hard copy of the application form (indicating the online Company Application Reference Number) along with the supporting documents, to the concerned Regional Office.

(6) The company can then check the status of the application from the above mentioned secure address, by keying in the acknowledgement number.

Certain documents are also required to be filed with the application with the Reserve Bank of India for registration.

These are listed below.

Note: The documents required may vary depending on the category of registration sought by the applicant.

Documents required for registration as Type I - NBFC-ND

Sr. No.	Requirements to be complied with and documents to be submitted to RBI by Companies for obtaining certificate and Registration from RBI as NBFC
1	Certified copies of Certificate of Incorporation and Certificate of Commencement of Business in case of public limited companies.
2	Certified copies of extract of only the main object clause in the MOA relating to the financial business.
3	Board resolution stating that: • the company is not carrying on any NBFC activity/stopped NBFC activity and will not carry on/commence the same before getting registration from RBI • the UIBs in the group where the director holds substantial interest or otherwise has not accepted any public deposit in the past /does not hold any public deposit as on the date and will not accept the same in future • the company has formulated “Fair Practices Code” as per RBI Guidelines • the company has not accepted public funds in the past/does not hold any public fund as on the date and will not accept the same in the future without the approval of Reserve Bank of India • the company does not have any customer interface as on date and will not have any customer interface in the future without the approval of Reserve Bank of India
4	Copy of Fixed Deposit receipt & bankers certificate of no lien indicating balances in support of NOF
5	For companies already in existence, the Audited balance sheet and Profit & Loss account along with directors & auditors report or for the entire period the company is in existence, or for last three years, whichever is less, should be submitted
6	Banker’s report in respect of applicant company, its group/subsidiary/associate/holding company/ related parties, directors of the applicant company having substantial interest in other companies The Banker’s report should be about the dealings of these entities with these bankers as a depositing entity or a borrowing entity. Note: Please provide bankers report from all the bankers of each of these entities and provide the report for all the entities. The details of deposits and loans balances as on the date of application and the conduct of the account should be specified.

For different forms of application as applicable to different categories of NBFC’s, please refer to the official website of the Reserve Bank of India, viz., www.rbi.org.

Housing Finance Companies

Housing Finance Company (HFC) is a type of non-banking financial institution which is primarily engaged in the business of providing home loans and other related products. Unlike other Non-Banking Financial Companies which are governed under the regulatory framework of RBI, HFCs are regulated by the National Housing Bank (NHB).

Collateral securities are accepted against loans advanced by HFCs which include the property for which loan has been granted and some other collaterals as well. Since properties serve as the underlying asset on which financing is given, the amount of loan advanced depends upon the value of the collateral offered. The value of the collateral ensures that the lender is secured and has covered itself from the risk of default. Hence, correct and realistic valuation of properties or fixed assets becomes necessary at the time of advancement of loan. Further, loans given by HFCs are usually for a long period of time. Though the value of property is less volatile but there are chances that the same may fluctuate during the loan tenure. Usually after a loan has been granted, HFCs do regular property valuation to understand how the property value is changing. There is a need for revaluation at regular intervals so that the lender is assured of little or no deviation in the Loan to Value (LTV) ratio and also that the property is valued at its current fair market value.

A Housing Finance Company (HFC) is a company registered under the Companies Act, 2013 or any earlier enactment which primarily transacts or has as one of its principal objects, the transacting of the business of providing finance for housing, whether directly or indirectly. In addition to it being a company registered under the Companies Act, an HFC also requires registration with National Housing Bank (NHB) for commencing or carrying on the business of housing finance. The National Housing Bank was set up under the National Housing Bank Act, 1987. Housing Finance Companies are governed by the said Act and by Circulars, Guidelines, Notifications and Directions issued by National Housing Bank.

In terms of Section 29A of the National Housing Bank Act, 1987, no Housing Finance Company shall commence or carry on the business of a housing finance institution without -

(i) Obtaining a certificate of registration from National Housing Bank issued under Chapter V of the said Act, and

(ii) Having the net owned fund of Rupees 10 Crore or such other higher amount, as the National Housing Bank may, by notification, specify.

Benefits of incorporating a Housing Finance Company

(1) At present, the macro environment is extremely favourable for housing finance companies. The Modi government's incentives in terms of allocation related to Pradhan Mantri Awas Yojana (PMAY) of Rs 23,000 crore would provide the much-needed momentum to the sector. The total allocation for the infrastructure sector in the Budget stood at Rs 39,6135 crore in 2017-18.

(2) The holding period for capital gains tax in case of immovable properties has been reduced from three to two years. Moreover, the Finance Minister has proposed to shift the base year for indexation from 1.4.1981 to 1.4.2001 for all classes of assets, including immovable property. This step would allow more realistic calculation of the cost of acquisition of the house while claiming indexation benefits.

(3) It is expected that with several associated benefits and the advantage of digital documents, the cost of finance is expected to come down, which may be passed on to the real buyers.

(4) In the days to come, supported by growth drivers such as rising disposable income, personal income-tax benefits, increasing urbanisation and economic growth of tier II and tier-II cities, the sector is likely to see immense growth.

Housing Finance Company: Registration Process

The procedure for incorporating a Housing Finance Company (HFC) is the same as any other company. Form RUN for approval of name should contain housing financing as the principal activity. Their principal business, to be stated in the MOA, while registering under the Companies Act shall be providing finance for housing and related matters.

Since the Net Owned Funds of the entity should be not less than Ruppes Ten Crore, it is advisable that the Authorised Share Capital of the HFC is not less than Rupees Ten Crore.

A company registered under the Companies Act and desirous of commencing business of a housing finance institution, should comply with the following-

(i) either it should primarily transacts or has as one of its principal objects of transacting the business of providing finance for housing, whether directly or indirectly; and

(ii) it should have a minimum net owned fund of Rupees 10 crore.

NHB after satisfying itself on the fulfilment of following conditions provided under sub-section (4) of Section 29A of the National Housing Bank Act, 1987 may grant a Certificate of Registration:

(i) HFC is or shall be in a position to pay its present or future depositors in full as and when their claims accrue;

(ii) Affairs of the HFC are not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;

(iii) General character of the management or the proposed management of the HFC shall not be prejudicial to the public interest or to the interests of its depositors;

(iv) HFC has adequate capital structure and earning prospects;

(v) Public interest shall be served by the grant of certificate of registration to the HFC to commence or carry on the business in India;

(vi) Grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country; and

(vii) Any other condition, fulfilment of which in the opinion of the NHB, shall be necessary to ensure that the commencement of or carrying on the business in India by a HFC shall not be prejudicial to the public interest or in the interests of the depositors.

HFCs are categorized in terms of the type of liabilities, by NHB, into Deposit and Non-Deposit accepting HFCs and are issued Certificate of Registration accordingly.

Net Owned fund

According to the Explanation to Section 29A Net Owned Funds means:

(a) The aggregate of the paid-up equity capital and free reserves as disclosed in the latest balance sheet of the housing finance institution after deducting therefrom -

  (i) accumulated balance of loss;

  (ii) deferred revenue expenditure, and

  (iii) other intangible assets; and

(b) further reduced by the amounts representing –

  (i) investments of such institution in shares of-

- its subsidiaries;
- companies in the same group;
- all other housing finance institutions which are companies; and

(ii) the book value of debentures, bonds, outstanding loans and advances (including hire-purchase and lease finance) made to, and deposits with,-

- subsidiaries of such company; and
- Companies in the same group, to the extent such amount exceeds ten per cent of (a) above;

"subsidiaries" and "companies in the same group" shall have the same meanings assigned to them in the Companies Act.

The applicant company is required to submit a physical copy of the application (in duplicate) along with the essentials documents to the Head Office of the National Housing Bank. Further, Company is also required to attach a Demand Draft for Rupees 10,000 favouring National Housing Bank payable at New Delhi.

A filled-in physical copy of the application form (in duplicate) along with necessary enclosures stated in our website http://www.nhb.org.in/Regulation/applicationcr.php to be submitted to the Head Office of NHB.

An indicative checklist of the documents required to be submitted is also provided under the heading "Instructions for filling up the Application" in the same page.

ASSET RECONSTRUCTION COMPANY (ARC)

In India the problem of recovery from NPAs was recognized in 1997 by Government of India. The Narasimhan Committee Report mentioned that an important aspect of the continuing reform process was to reduce the high level of NPAs as a means of banking sector reform. It was expected that with a combination of policy and institutional development, new NPAs in the future could afford to be lower. However, the huge backlog of existing NPAs continued to hound the banking sector and this impinged severely on the banks performance and any ensuing hopes of their profitability. The Report envisaged creation of an "Asset Recovery Fund" to take the NPAs off the lenders books at a discount.

Asset Reconstruction Company (Securitization Company / Reconstruction Company) is a company registered under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act, 2002. It is regulated by Reserve Bank of India as a Non Banking Financial Company (u/s 45I (f) (iii) of RBI Act, 1934). RBI has exempted ARCs from the compliances under section 45-IA, 45-IB and 45-IC of the Reserve Bank Act, 1934. ARC functions like an AMC within the guidelines issued by RBI.

ARC has been set up to provide a focused approach to Non-Performing Loans resolution issue by:-

(a) Isolating Non Performing Loans (NPLs) from the Financial System (FS),

(b) Freeing the financial system to focus on their core activities and

(c) Facilitating development of market for distressed assets.

As per RBI Notification No. DNBS.2/CGM (CSM)-2003, dated April 23, 2003, ARC performs the following functions:-

(i) Acquisition of financial assets (as defined u/s 2(L) of SRFAESI Act, 2002)

(ii) Change or takeover of Management / Sale or Lease of Business of the Borrower

(iii) Rescheduling of Debt

(iv) Enforcement of Security Interest (as per section 13(4) of SRFAESI Act, 2002)

(v) Settlement of dues payable by the borrower

Asset Reconstructions companies are created to manage and recover Non Performing Assets acquired from the banking system. Asset Reconstruction Companies are act as a bad bank by isolating Non Performing Assets from the balance sheet of bank/FII and facilitate the latter to concentrate in normal banking activities. Banks and financial institutions with a large proportion of their bad loans or Non Performing Assets can sell to a separate entity i.e. Asset Reconstruction Company. Then Asset Reconstruction Companies recover a sum through attachment, liquidation etc. The objective is to help banks in making clean books by reducing Non Performing Assets. Asset Reconstruction Companies are also making profit by buying Non Performing Assets at a lower price.

Benefits of incorporating an Asset Reconstruction Company (ARC)

- As the cash realisation activity from defaulting borrowers is a lengthy and cumbersome procedure, relieving banks of the burden of NPAs will allow them to focus better on managing the core business including providing new business opportunities for the ARC.
- The transfer should help restore depositor and investor confidence by ensuring the lender's financial health. The banks use it as a method to hive off the bad loans from their balance sheet. ARCs can maximise recovery value while minimizing costs.
- ARCs also helps building industry expertise in loan resolution and restructuring management, besides serving as a catalyst for important legal reforms in bankruptcy procedures and loan collection.
- ARCs play an important role in developing capital markets through secondary asset instruments.

Asset Reconstruction Company – the Registration Process

Firstly, a company has to be incorporated under the Companies Act, 2013. The company may be a private company or a public company.

Secondly, after incorporation, the company has to register itself with the Reserve Bank of India.

Asset Reconstruction companies (ARCS)are governed by The Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 issued by the Reserve Bank of India as amended from time to time.

(i) Every ARC shall apply for registration in the form of application specified vide Notification No.DNBS.1/CGM (CSM)-2003 dated March 7, 2003 issued by the Reserve Bank of India and obtain a certificate of registration from the Bank as provided under Section 3 of the SARFAESI Act, 2002.

(ii) The ARCs seeking registration from the RBI shall submit their application in the format (Annexed to Notification No. DNBS.1/CGM(CSM)-2003 dated March 7, 2003) specified by the Bank, duly filled in with all the relevant annexures / supporting documents to the Chief General Manager-in-Charge, Department of Non-Banking Regulation, Central Office, Reserve Bank of India, Centre 1, World Trade Centre, Cuffe Parade, Colaba, Mumbai 400 005.

(iii) An ARC, which has obtained a certificate of registration issued by the Bank under Section 3 of the Act, can undertake both securitisation and asset reconstruction activities;

(iv) (a) An ARC shall commence business within six months from the date of grant of Certificate of Registration by the Bank; RBI may grant extension for further period not exceeding 12 months.

(b) Provisions of section 45 -IA, 45-IB and 45-IC of RBI Act,1934 shall not apply to non-banking financial company, which is an ARC registered with the Bank under Section 3 of the SARFAESI Act, 2002.

As per notification issued by RBI, an Asset Reconstruction Company shall have a Net Owned Funds (NOF) of Rupees 2 Crores or such higher amount as may be specified. By a Notification No. DNBR (PD-ARC) No. 05/

ED(SS)-2017 dated April 28, 2017, the requirement of NOF has been fixed at Rupees 100 Crore on an ongoing basis. This has been done keeping in mind the greater role envisaged for ARCs in resolving stressed assets and also the regulatory changes governing sale of stressed assets by banks to ARCs.

ARCs already registered with RBI as on the date of the said notification and not having the minimum revised NOF shall achieve the minimum NOF of Rupees100 Crore latest by March 31, 2019 and the same shall be duly certified by the Statutory Auditors.

Quarterly statements in the Format SCRC 1 and SCRC 2 on owned funds, assets acquired, securitized and reconstructed assets, assets realised during the year, value of financial assets unresolved at the end of the year, value of security receipts pending for redemption, etc. are to be submitted to RBI within 15 days from the close of the quarter to which it pertains. These statements can be filed online on the Banks website, viz, *https://cosmos.rbi.org.in*

MICRO FINANCE INSTITUTIONS (MFI)

A micro finance institution is an organization that offers financial services to low income populations. Almost all give loans to their members, and many offer insurance, deposit and other services. Organisations which finance on a larger scale are regarded as regarded as microfinance institutes. They are those that offer credits and other financial services to the representatives of poor strata of population (except for extremely poor strata). An increasing number of microfinance institutions (MFIs) are seeking non-banking finance company (NBFC) status from RBI to get wide access to funding, including bank finance.

NABARD has defined microfinance as “provision of thrift, credit and other financial services and products of very small amounts to the poor in rural, semi-urban and urban areas provided to customers to meet their financial needs; with only qualification that (1) transactions value is small and (2) customers are poor.”

Characteristics of a Micro Finance Institution

(1) Micro finance provides financial services to those whose income is small and unstable. These people are in need of credit facilities for several reasons. To name a few:

(a) their needs are small and arise suddenly.

(b) the institutional providers of finance, namely, the banks, demand collateral security which they cannot provide.

(c) most of the time, they are in urgent need of funds to meet their consumption demands, for example, to meet expenses related to education, illness, funerals, weddings for which it is difficult to obtain institution finance.

(d) for purpose of investment in income generating activities.

(2) Concept of Self Help Group (SHGs) is the most exciting discovery in the context of microfinance. The Indian microfinance scene is dominated by SHGs and their linkage with banks. This has helped in empowerment of women and eradication of property among people with low income.

(3) Microfinance provides a greater menu of options whereby the small loan can be garnered not just from the external sources but also through self mobilization, by way of saving and sale of assets.

(4) The biggest flexibility in the case of microfinance is the lack of any physical collateral, even in case of loan from the bank.

The characteristics of MFIs may be summarised as under:

i. The size of the loan given by the MFI is small.

ii. The repayment period is short.

iii. MFI can mobilise resources both from internal and external sources.

iv. No collateral for loan is required.

v. the purpose of end use of loan is flexible.

vi. loans given are mostly group loans, trickling down to individuals.

vii. Transaction cost is low, due to group lending.

Incorporation of MFI

Firstly, a company has to be incorporated under the Companies Act, 2013. The company may be a private company or a public company.

Secondly, after incorporation, the company has to register itself with the Reserve Bank of India, since a Micro Finance Institution (hereinafter referred to as MFI) is regulated by the Reserve Bank of India.

The list of documents to be filed with RBI for registration are given below:

1	Certified copies of Certificate of Incorporation.
2	Certified copies of extract of only the main object clause in the MOA relating to the financial business.
3	Board resolution stating that: • the company is not carrying on any NBFC activity/stopped NBFC activity and will not carry on/ commence the same before getting registration from RBI • the company has not accepted any public deposit, in the past (specify period)/does not hold any public deposit as on the date and will not accept the same in future without the prior approval of Reserve Bank of India • the UIBs in the group where the director holds substantial interest or otherwise has not accepted any public deposit in the past /does not hold any public deposit as on the date and will not accept the same in future • the company has formulated “Fair Practices Code” as per RBI Guidelines
4	Copy of Fixed Deposit receipt & bankers certificate of no lien indicating balances in support of NOF
5	For companies already in existence, the Audited balance sheet and Profit & Loss account along with directors & auditors report or for the entire period the company is in existence, or for last three years, whichever is less, should be submitted
6	Copy of the certificate of highest educational and professional qualification in respect of all the directors
7	Copy of experience certificate, if any, in the Financial Services Sector (including Banking Sector) in respect of all the directors
8	Banker’s report in respect of applicant company, its group/subsidiary/associate/holding company/ related parties, directors of the applicant company having substantial interest in other companies The Banker’s report should be about the dealings of these entities with these bankers as a depositing entity or a borrowing entity. **Note**: Please provide bankers report from all the bankers of each of these entities and provide the report for all the entities. The details of deposits and loans balances as on the date of application and the conduct of the account should be specified.

In addition to the documents required for registration as Type II-NBFC-ND, following list of documents / information to be submitted by the NBFC-MFI applicant:

(i) Board resolution stating that:

(a) the company will be a member of all the Credit Information Companies and will be a member of at least one Self-Regulatory Organisation

(b) the company will adhere to the regulations regarding pricing of credit, Fair Practices in lending and non-coercive method of recovery as per RBI Guidelines

(c) the company has fixed internal exposure limits to avoid any undesirable concentration in specific geographical locations

(d) the company is not licensed under Section 25 of the Companies Act, 1956 / Section 8 of the Companies Act, 2013.

(ii) Roadmap for achieving 85% qualifying assets.

NIDHI COMPANIES

Nidhi Companies have been in existence since centuries. They existed even prior to the existence of the Companies Act, 1956.

A Nidhi Company, is one that belongs to the non-banking finance sector and is recognized under section 406 of the Companies Act, 2013.Their core business is borrowing and lending money between their members. They are also known as Permanent Fund, Benefit Funds, Mutual Benefit Funds and Mutual Benefit Company. They are regulated by the Ministry of Corporate Affairs, Government of India and are registered under the Companies Act, 2013(or any earlier enactments). Nidhis are more popular in South India and are highly localized single office institutions. They are mutual benefit societies, because their dealings are restricted only to the members; and membership is limited to individuals. The principal source of funds is the contribution from the members. The loans are given to the members at relatively reasonable rates for purposes such as house construction or repairs and are generally secured. The deposits mobilized by Nidhis are not much when compared to the organized banking sector.

Nidhi company is governed by Nidhi Rules, 2014. They are incorporated in the nature of Public Limited company and hence, they have to comply with two set of norms, one of Public limited company as per Companies Act, 2013 and another is the Nidhi Rules, 2014. No RBI approval is necessary to register the company, as RBI has specifically exempted this category of NBFC in India to comply its core provisions such as registration with RBI etc. Even though Nidhis are regulated by the provisions of the Companies Act, 2013, they are exempted from certain provisions of the Act, as applicable to other companies, due to limiting their operations within members. The exemptions are contained in the Notification F. No. 2/11/2014-CL.V dated June 5, 2015 issued by the Ministry of Corporate Affairs.

Characteristics of a Nidhi Company

The characteristics of a Nidhi Company may be summarised below:

(1) It is allowed to transact business only with its members and with nobody else. Hence, in case a person wishes to place deposit with a Nidhi or borrow money from a Nidhi, he must first become a member (shareholder) of the Nidhi by subscribing to 10 equity shares or shares equivalent to Rs. 100.

(2) After commencement of the Companies Act, 2013, no Nidhi shall issue preference shares.

(3) They are allowed to open branches subject to compliance with Rule 10 of the Nidhi Rules, 2014, but do not operate on a pan India basis.

(4) They are incorporated as public companies with a minimum paid up equity share capital of ₹ 5,00,000.

(5) Loans may be provided only to its members and should be fully secured.

(6) A director of a Nidhi shall be a member and shall hold office for a term upto 10 consecutive years on the Board of a Nidhi.

(7) Nidhi can declare dividend not exceeding 25% and any higher amount shall be specifically approved by the Regional Director.

(8) Nidhi shall adhere to the prudential norms for revenue recognition and classification of assets in respect of mortgage loans or jewel loans as provided in Rule 20 of the Nidhi Rules, 2014.

General restrictions or prohibitions on Nidhis (Rule 6)

No Nidhi shall –

- carry on the business of chit fund, hire purchase finance, leasing finance, insurance or acquisition of securities issued by any body corporate;
- issue preference shares, debentures or any other debt instrument by any name or in any form whatsoever;
- open any current account with its members;
- acquire another company by purchase of securities or control the composition of the Board of Directors of any other company in any manner whatsoever or enter into any arrangement for the change of its management, unless it has passed a special resolution in its general meeting and also obtained the previous approval of the Regional Director having jurisdiction over such Nidhi.
- carry on any business other than the business of borrowing or lending in its own name. Nidhis which have adhered to all the provisions of these rules may provide locker facilities on rent to its members subject to the rental income from such facilities not exceeding twenty per cent of the gross income of the Nidhi at any point of time during a financial year.
- accept deposits from or lend to any person, other than its members;
- pledge any of the assets lodged by its members as security;
- take deposits from or lend money to any body corporate;
- enter into any partnership arrangement in its borrowing or lending activities;
- issue or cause to be issued any advertisement in any form for soliciting deposit. Private circulation of the details of fixed deposit Schemes among the members of the Nidhi carrying the words ”for private circulation to members only” shall not be considered to be an advertisement for soliciting deposits.
- pay any brokerage or incentive for mobilising deposits from members or for deployment of funds or for granting loans.

Benefits of incorporating a Nidhi Company

1. A Nidhi mobilises small savings, mostly of the middle class and disburses loans to eligible borrowers. Owing to their small size and closeness to the customers, disbursement of loans is speedy. This is especially useful in case the borrower is in urgent needs of funds.
2. The repayment is guaranteed, as the loans are secured and due to peer pressure, borrowers ensure that loan is repaid on due dates.
3. Nidhis offer a higher rate of interest on deposits. This makes it an attractive investment opportunity for people, especially the senior citizens.

4. The Board of Directors of a Nidhi normally consists of senior persons who have experience in handling finances and who are well respected in social circles. This lends credibility to the institution and instills confidence in the minds of borrowers and depositors.

Incorporation of a Nidhi Company

For incorporation, the normal procedure for incorporating a public company is required to be complied with, such as obtaining availability of name, filing of Memorandum and Articles of Association and other related documents. Care must be taken to see that the Objects Clause of the Memorandum should restrict itself to the object of cultivating the habit of thrift and savings amongst its members, receiving deposits from and lending to its members only for their mutual benefit and for other permitted purposes. The name of the company should end with the words "Nidhi Limited".

After incorporation as a Nidhi, according to Rule 5 of the Nidhi Rules, 2014, every Nidhi shall within a period of one year from the date of its incorporation, ensure that it has –

i. Not less than two hundred members;

ii. Net Owned Funds of ten lakh rupees or more;

iii. Unencumbered term deposits of not less than ten per cent of the outstanding deposits as specified in rule 14; and

iv. Ratio of Net Owned Funds to deposits of not more than 1:20.

PAYMENT BANKS

Payments banks is a new model of banks conceptualised by the Reserve Bank of India (RBI). These banks can accept a restricted deposit, which is currently limited to Rupees 1 lakh per customer and may be increased further. They can pay interest on these deposits just like savings bank account. Both current account and savings accounts can be operated by such banks. Payments banks can issue services like ATM cards, debit cards, net-banking, third party transfers and mobile-banking and offer remittance services, These banks cannot grant loans or issue credit cards.

The main objective of payments bank is to widen the spread of payment and financial services to small business, low-income households, migrant labour workforce in secured technology-driven environment.

With payments banks, RBI seeks to increase the penetration level of financial services to the remote areas of the country.

To open a bank account and the application process of payments bank is made very easy as compared to other banks. These bank accounts can be opened instantly through their respective mobile apps just by providing details like Aadhar number with KYC verification.

Most of the payment banks have a non-NBFC heritage and will use payment bank as a customer retention and acquisition mechanism.

Regulations

Payment Banks are regulated by the Reserve Bank of India. It released Guidelines for Licensing of Payment Banks on November 27, 2014 and Operating Guidelines for Payment Banks on October 6, 2016.

An application has to be filed with Reserve Bank of India in Form III under Section 22 of the Banking Regulation Act, 1949 for a licence to commence banking business by a company incorporated in India and desiring to commence banking business.

Key issues which requires compliance by an applicant company are summarised below:

1. The minimum capital requirement is Rupees 100 crore. For the first five years, the stake of the promoter should remain at least 40%.
2. Foreign share holding will be allowed in these banks as per the rules for FDI in private banks in India..
3. The voting rights will be regulated by the Banking Regulation Act, 1949. The voting right of any shareholder is capped at 10%, which can be raised to 26% by Reserve Bank of India. Any acquisition of more than 5% will require approval of the RBI.
4. The majority of the bank's board of directors should consist of independent directors, appointed according to RBI guidelines.
5. The bank should be fully networked from the beginning. The bank can acceptutility bills. It cannot form subsidiaries to undertake non-banking activities.
6. Initially, the deposits will be capped at Rs. 100,000 per customer, but it may be raised by the RBI based on the performance of the bank.
7. The bank cannot undertake lending activities. 25% of its branches must be in the unbanked rural area.
8. The bank must use the term "payments bank" in its name to differentiate it from other types of bank.
9. The banks will be licensed as payments banks under Section 22 of the Banking Regulation Act, 1949.
10. It will be registered as public limited company under the Companies Act, 2013.

LESSON ROUND-UP

- The financial sector comprises commercial banks, insurance companies, non-banking financial companies, co-operatives, pension funds, mutual funds and other smaller financial entities;
- However, the financial sector in India is predominantly a banking sector with commercial banks accounting for more than 64 per cent of the total assets held by the financial system;
- Over the years, Non Banking Finance Companies (NBFCS), Housing Finance Companies (HFCs), Asset Reconstruction Companies (ARCs), Micro Finance Institutions (MFIs), and Nidhi Companies have played a dominant role in mobilisation and disbursal of funds.
- A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act, 2013 (or any earlier enactments) engaged in the business of loans and advances, acquisition of shares/ stocks/bonds/debentures/securities issued by Government or local authority or other marketable securities of a like nature, leasing, hire-purchase, insurance business, chit business but does not include any institution whose principal business is that of agriculture activity, industrial activity, purchase or sale of any goods (other than securities) or providing any services and sale/purchase/ construction of immovable property.
- NBFCs are different from Banks;
- Different types of NBFCs are Asset Finance Company, Investment Company, Loan Company, Infrastructure Finance Company, Systemically Important Core Investment Company, Infrastructure Debt Fund: Non- Banking Financial Company (IDF-NBFC), Non-Banking Financial Company - Micro Finance Institution (NBFC-MFI), Non-Banking Financial Company – Factors (NBFC-Factors), Mortgage Guarantee Companies (MGC), NBFC- Non-Operative Financial Holding Company (NOFHC);
- Banks and Non-Banking Financial Companies (NBFCs) are financial intermediaries and the services offered by them are pretty much the same as banks. However, the benefits of incorporating an NBFC and carrying on its activities are different.

- For incorporation of NBFCs, the process is same as that of any other company. Apart form incorporation process, it requires registration with RBI.
- Housing Finance Company (HFC) is a type of non-banking financial institution which is primarily engaged in the business of providing home loans and other related products.
- Unlike other Non-Banking Financial Companies which are governed under the regulatory framework of RBI, HFCs are regulated by the National Housing Bank (NHB).
- NHB after satisfying itself on the fulfilment of following conditions provided under sub-section (4) of Section 29A of the National Housing Bank Act, 1987 may grant a Certificate of Registration.
- Asset Reconstruction Company (Securitization Company / Reconstruction Company) is a company registered under Section 3 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (SRFAESI) Act, 2002. It is regulated by Reserve Bank of India as a Non Banking Financial Company (u/s 45I (f) (iii) of RBI Act, 1934).
- A microfinance institution is an organization that offers financial services to low income populations. NABARD has defined microfinance as "provision of thrift, credit and other financial services and products of very small amounts to the poor in rural, semi-urban and urban areas provided to customers to meet their financial needs; with only qualification that (1) transactions value is small and (2) customers are poor."
- A Nidhi Company, is one that belongs to the non-banking finance sector and is recognized under section 406 of the Companies Act, 2013.
- Payments banks is a new model of banks conceptualised by the Reserve Bank of India (RBI). These banks can accept a restricted deposit, which is currently limited to Rs. 1 lakh per customer and may be increased further.
- Payment Banks are regulated by the Reserve Bank of India. It released Guidelines for Licensing of Payment Banks on November 27, 2014 and Operating Guidelines for Payment Banks on October 6, 2016.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Explain the various types of Financial Services Organisations operating in India.
2. List and briefly explain the various categories of Non- Banking Financial Companies.
3. Explain the role of Asset Reconstruction Companies and how far they have been successful in resolving the issue of stressed assets of banks.
4. What is the procedure for incorporating a Nidhi Company? Briefly explain any five exemptions granted by the Ministry to such companies.
5. What is a Payment Bank? What are the key issues to be kept in mind in the compliance requirement of a Payment Bank.

Lesson 9

Startups and its Registration

LESSON OUTLINE

- Startups
- Startup India Policy
- Process of Recognition of Startup
- Exemptions for Startups
- Registration steps
- Financing options available for Startup Companies
  - (a) Equity Financing
  - (b) Debt Financing
  - (c) Initial Public offerings
  - (d) Unconvetional modes
- Mudra Banks
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Startups have emerged as a fast-growing business model. This chapter will deal with the evolution of Startups in India, the Startup India Policy, developments initiated in various States to encourage Startups, the exemptions available to them and the registration process.

This Lesson also deals with the different kinds of Debt financing and Equity Financing which can be raised by Startups and the concept of MUDRA Banks.

After going through this chapter, having knowledge about the concept of Start ups, the benefits/ exemptions given to start ups, different financing options available and the procedures involved for incorporation and registration as startups, you, as a Company Secretary, would be able to Register and play an important role in ensuring compliances in successfully running a startup.

STARTUPS

A startup company (startup or start-up) is an entrepreneurial venture which is typically an emerging, fast-growing business that aims to solve an unmet need by developing a viable business model around an innovative product, service, processor a platform. A startup is usually a company designed to effectively develop and validate a scalable business model.

Start-ups may have high rates of failure, but the minority of successes includes companies that have become large and influential.

Evolution

Startup companies can come in all forms and sizes. Some of the critical tasks are to build a co-founding team to secure key or complementary skills, know-how, financial resources, and other elements to build the product for the target market.

Typically, a startup will begin by building a first minimum viable product (MVP), a prototype, to validate, assess and develop the new ideas or business concepts. In addition, startups founders do research to deepen their understanding of the ideas, technologies or business concepts and their commercial potential.

A Founders' agreement are often agreed early on to confirm the commitment, ownership and contributions of the founders and to deal with the intellectual properties and assets that may be generated by the startup. A Shareholders' Agreement (SHA) is entered into between the founders and investors to confirm investment terms, rights of investors, exit clauses and any other important agreement terms.

Business models for startups are generally found via a "bottom-up" or "top-down" approach. A company may cease to be a startup as it passes various mile stones, such as becoming publicly traded on the stock market in an Initial Public Offering (IPO), or ceasing to exist as an independent entity via a merger or acquisition. Companies may also fail and cease to operate altogether, an outcome that is very likely for startups, given that they are developing disruptive innovations which may not function as expected and for which there may not be market demand, even when the product or service is finally developed.

Given that startups operate in high-risk sectors, it can also be hard to attract investors to support the product/service development or attract buyers.

A number of organisation and/or organised activities exist with Startup activities. To name a few, Universities, Advisory and mentoring organizations Startup incubators, Startup accelerators, Co working spaces, Service providers(Consulting, Accounting, Legal, etc.), Event organizers, Start-up competitions, Startup Business Model Evaluators, Business Angel Networks, Venture capital companies, Equity Crowd funding portals, corporates (telcos, banking, health, food, etc.), other funding providers (loans, grants etc.), Start-up blogs and social networks and other facilitators.

Investors from these roles are linked together through shared events, activities, locations and interactions. Startup ecosystems generally encompass the network of interactions among people, organizations, and their environment. Any particular start-up ecosystem is defined by its collection of specific cities or online communities.

In addition, resources like skills, time and money are also essential components of a start-up ecosystem. The resources that flow through ecosystems are obtained primarily from the meetings between people and organizations that are an active part of those startup ecosystems. These interactions help to create new potential startups and/or to strengthen the already existing ones.

STARTUP INDIA POLICY

The "Startup India" initiative announced by the Hon"ble Prime Minister on 15.08.2015 aims at fostering entrepreneurship and promoting innovation by creating an ecosystem that is conducive to growth of Startup. Startup India is a flagship initiative of the Government of India, intended to build a strong ecosystem for nurturing

innovation and Startups in the country that will drive sustainable economic growth and generate large scale employment opportunities.

The efforts of the government are aimed at empowering Startups to grow through innovation and design. It is intended to provide the much needed impetus for the Startups to launch and scale greater heights. In order to meet the objectives of the initiative, the Hon"ble Prime Minister on 16th January 2016 launched the Startup India Action Plan.

The Startup India Action Plan consists of 19 action items spanning across areas such as "Simplification and handholding." "Funding support and incentives" and "Industry-academia partnership and incubation". Since the launch of the programme, a number of forward looking strategic amendments to the existing policy ecology have been introduced, like:

1. Fund of Funds

For providing fund support for Startups, Government has created a „Funds for Startups (FFS) at Small Industries Development Bank of India (SIDBI) with a corpus of Rs 10,000 crore. The FFS shall contribute to the corpus of Alternative Investment funds (AIFs) for investing in equity and equity linked instruments of various Startups. The FFS is managed by Small Industries Development Bank of India (SIDBI) for which operational guidelines have been issued. In 2015- 16, Rs.500 crores was released towards the FFS corpus.

2. Credit Guarantee Fund for Startups

Since debt funding for Sartups is perceived as high risk activity, a Credit Guarantee Fund for Startups is being setup with a budgetary corpus of Rs.500 crore per year, over the next four years, to provide credit guarantee cover to banks and lending institutions providing loans to Startups.

Once rolled out, the scheme in the lines of credit guarantee scheme for MSME, is likely to provide a huge impetus for enabling flow of much needed credit to the Startups which may run into several thousands of crores.

3. Relaxed Norms in Public Procurement for Startups

Provision has been introduced in the procurement policy of Ministry of Micro, Small and Medium Enterprises (Policy Circular No. 1(2)(1)/2016-MA dated March 10, 2016) to relax norms pertaining to prior experience/ turnover for Micro and Small Enterprises. Department of Expenditure has issued a notification for relaxing public procurement norms in respect of all Startups (including medium enterprises) by all central Ministries/ Departments.

4. Tax Incentives

(i) Income Tax Exemption on profits under Section 80-IAC of Income Tax (IT) Act.

The Inter-Ministerial Board of Certification is a Board set up by Department for Promotion of Industry and Internal Trade (DPIIT) which validates Startups for granting tax related benefits. A DPIIT recognized Startup is eligible to apply to the Inter-Ministerial Board for full deduction on the profits and gains from business (exemption under Section 80IAC of the Income Tax Act) provided the following conditions are fulfilled. The entity should be a private limited company or a limited liability partnership, Incorporated on or after 1st April 2016 but before 1st April 2021, and Products or services or processes are undifferentiated, have potential for commercialization and have significant incremental value for customers or workflow.

The deduction is for any three consecutive years out of seven years from the year of incorporation of start-up.

(ii) Tax Exemption on Investments above Fair Market Value.

- DPIIT Recognized Startups are exempt from tax under Section 56(2)(viib) of the Income Tax Act when

such a Startup receives any consideration for issue of shares which exceeds the Fair Market Value of such shares.

– The startup has to file a duly signed declaration in Form 2 to DPIIT {as per notification G.S.R. 127 (E)} to claim the exemption from the provisions of Section 56(2)(viib) of the Income Tax Act.

(iii) Introduction of Section 54EE in the Income Tax Act, 1961.

Exemption from tax on long-term capital gain if such long-term capital gain is invested in a fund notified by Central Government. The maximum amount that can be invested is Rs. 50 lakh.

(iv) Amendment in Section 54GB of the Income-tax Act

Exemption from tax on capital gains arising out of sale of residential house or a residential plot of land if the amount of net consideration is invested in prescribed stake of equity shares of eligible Startup for utilizing the same for purchase of specified asset:

a. The condition of minimum holding of 50% of share capital or voting rights in the start-up relaxed to 25%

b. The period of extension of capital gains arising from for sale of residential property for investment in start-ups has been extended up to 31st March 2021.

(v) Amendment in Section 79 of Income Tax Act.

Startups can carry forward their losses on satisfaction of any one of the following two conditions:

a. Continuity of 51% shareholding/voting power or

b. Continuity of 100% of original shareholder.

5. Legal Support and Fast-tracking Patent Examination at Lower Costs

A scheme for Startups IPR Protection (SIPP) for facilitating fast rack filing of Patents, Trademarks and Designs by Startups has been introduced. The scheme provides for expedited examination of patents filed by Startups. This will reduce the time taken in getting patents. The fee for filing of patents for Startups has also been reduced up to 80%. Panels of facilitators for Patents and Trademark applications have been formed to facilitate the process of patent filing and acquisition. The facilitators would provide legal guidance and handholding through the entire patent acquisition process free of cost.

6. Self-Certification based Compliance Regime:

Compliance norms relating to Environmental and Labour laws have been eased in order to reduce the regulatory burden on Startups thereby allowing them to focus on their core business and keep compliance costs low.

Ministry of Environment and Forests (MOEF) has published a list of 36 white category industries.

Startups falling under the “White category” would be able to self certify compliance in respect of 3 Environment Acts.

- The Water (Prevention & Control of Pollution) Act, 1974;
- The Water (Prevention & Control of Pollution) Cess (Amendment) Act, 2003;
- The Water (Prevention & Control of Pollution) Act, 1981.

Further, Ministry of Labour and Employment (MOLE) has issued guidelines to State Governments whereby Startups shall be allowed to self-certify compliance in respect of Labour laws. These shall be effective after concurrence of States/UTs. The Acts are :

- The Building and Other Constructions Works (Regulation of Employment & Conditions of Service) Act, 1996.
- The Inter-State Migrant Workmen (Regulation of Employment & Conditions of Service) Act, 1979.
- The Payment of Gratuity Act, 1972.
- The Contract Labour (Regulation and Abolition)) Act, 1970.
- The Employees Provident Funds and Miscellaneous Provisions Act, 1952
- The Employees State Insurance Act, 1948

So far 9 States have confirmed compliance to the advisory issued by Ministry of Labour and Employment (MOLE):

- Rajasthan
- Uttarakhand
- Madhya Pradesh
- Chhattisgarh
- Delhi
- Jharkhand
- Gujarat
- Chandigarh
- Daman & Diu

7. Setting up Incubators

Under Atal innovation Mission, Niti Aayog will set up Atal Incubation Centres (AICs) in Public and Private sector. Niti Aayog has received 3658 applications (1719) from academic institutions and 1939 from non-academic instution) for setting up Atal Incubation Centres (AICs) from both Public and Private sector organizations.

Under the Mission, a grant in aid of Rs.10 crore would be provided to scale up an existing incubator for a maximum of 5 years to cover the capital and operational costs in running the centre. Niti Aayog has received 233 applications for providing scale up support for established incubation centres.

8. Setting up of Startup Centres and Technology Business Incubators (TBIs)

14 Startup Centres and 15 Technology Business incubators are to be set up collaboratively by Ministry of Human Resource Development (MHRD) and the Department of Science and Technology (DST). Out of the 14 Startup Centres, 10 have been approved. Once MHRD releases its share of Rs.25 lakhs each for the Startup centres, the Startup centres would be supported by DST by December, 2016.

Against the target of sanctioning 15 TBIs, 9 TBIs have been approved and other 6 TBIs, 9 TBIs have been approved and other 6 TBIs are under process of being approved.

9. Research Parks

7 Research Parks will be set up as per the Startup India Action Plan. Out of these 7 IIT Kharagpur already has a functional Research Park. Further, DST will establish 1 Research Park at IIT Gandhinagar and the remaining 5 shall be set up by Ministry of Human Resource development (MHRD) at IIT Guwahati, IIT Hyderabad, IIT Kanpur, IIT Kanpur, IIT Delhi and IISc Bangalore.

Eligibility for becoming a Startup Company

The Government of India has announced 'Startup India' initiative for creating a conducive environment for startups in India. The various Ministries of the Government of India have initiated a number of activities for the purpose. An entity shall be considered as a Startup:

i. Upto a period of ten years from the date of incorporation/ registration, if it is incorporated as a private limited company (as defined in the Companies Act, 2013) or registered as a partnership firm (registered under section 59 of the Partnership Act, 1932) or a limited liability partnership (under the Limited Liability Partnership Act, 2008) in India.

ii. Turnover of the entity for any of the financial years since incorporation/ registration has not exceeded one hundred crore rupees. The words "Turnover" is as defined under the Companies Act, 2013.

iii. Entity is working towards innovation, development or improvement of products or processes or services, or if it is a scalable business model with a high potential of employment generation or wealth creation.

Provided that an entity formed by splitting up or reconstruction of an existing business shall not be considered a 'Startup'.

An entity shall cease to be a Startup on completion of ten years from the date of its incorporation/ registration or if its turnover for any previous year exceeds one hundred crore rupees.

Recognition as Startups

The process of recognition of an eligible entity as startup shall be as under:

i. A Startup shall make an online application over the mobile app or portal set up by the DPIIT.

ii. The application shall be accompanied by –

   a. a copy of Certificate of Incorporation or Registration, as the case may be, and

   b. a write-up about the nature of business highlighting how it is working towards innovation, development or improvement of products or processes or services, or its scalability in terms of employment generation or wealth creation.

iii. The DPIIT may, after calling for such documents or information and making such enquires, as it may deem fit, –

   a. recognise the eligible entity as Startup; or

   b. reject the application by providing reasons.

Certification of the Inter-Ministerial Board for availing the Tax Benefit under Section 80-IAC

A Startup being a private limited company or limited liability partnership, which fulfils the conditions specified in sub-clause (i) and sub-clause (ii) of the Explanation to section 80-IAC of the Income Tax Act,1961(Act) may, for obtaining a certificate for the purposes of section 80-IAC of the Act, make an application in Form-1 along with documents specified therein to the Board and the Board may, after calling for such documents or information and making such enquires, as it may deem fit, –

(i) grant the certificate referred to in sub-clause (c) of clause(ii) of the Explanation to section 80- IAC of the Act; or

(ii) reject the application by providing reasons.

The Board" means the Inter-Ministerial Board of Certification comprising of the following members:

(i) Joint Secretary, Department of Promotion of Industry and Internal Trade, Convener

(ii) Representative of Department of Biotechnology, Member

(iii) Representative of Department of Science & Technology, Member

Post getting recognition a Startup may apply for Tax exemption under section 80 IAC of the Income Tax Act. Post getting clearance for Tax exemption, the Startup can avail tax holiday for 3 consecutive financial years out of its first ten years since incorporation.

Eligibility Criteria for applying to Income Tax exemption (80IAC)

The entity should be a recognized Startup

- Only Private limited or a Limited Liability Partnership is eligible for Tax exemption under Section 80IAC
- The Startup should have been incorporated after 1st April, 2016.

Tax Exemption under Section 56 of the Income Tax Act (Angel Tax)

Post getting recognition a Startup may apply for Angel Tax Exemption. Eligibility Criteria for Tax Exemption under Section 56 of the Income Tax Act:

- The entity should be a DPIIT recognized Startup
- Aggregate amount of paid up share capital and share premium of the Startup after the proposed issue of share, if any, does not exceed INR 25 Crore.

Approval for the purposes of clause (viib) of sub-section (2) of section 56 of the Act:

A Startup shall be eligible for notification under clause (ii) of the proviso to clause (viib) of sub-section (2) of section 56 of the Act and consequent exemption from the provisions of that clause, if it fulfils the following conditions:

(i) it has been recognised by DPIIT under para 2(iii)(a) or as per any earlier notification on the subject.

(ii) aggregate amount of paid up share capital and share premium of the startup after issue or proposed issue of share, if any, does not exceed, twenty five crore rupees:

Provided that in computing the aggregate amount of paid up share capital, the amount of paid up share capital and share premium of twenty five crore rupees in respect of shares issued to any of the following persons shall not be included –

(a) a non-resident; or

(b) a venture capital company or a venture capital fund;

Provided further that considerations received by such startup for shares issued or proposed to be issued to a specified company shall also be exempt and shall not be included in computing the aggregate amount of paid up share capital and share premium of twenty five crore rupees.

(iii) It has not invested in any of the following assets,—

(a) building or land appurtenant thereto, being a residential house, other than that used by the Startup for the purposes of renting or held by it as stock-in-trade, in the ordinary course of business;

(b) land or building, or both, not being a residential house, other than that occupied by the Startup for its business or used by it for purposes of renting or held by it as stock-in trade, in the ordinary course of business;

(c) loans and advances, other than loans or advances extended in the ordinary course of business by the Startup where the lending of money is substantial part of its business;

(d) capital contribution made to any other entity;

(e) shares and securities;

(f) a motor vehicle, aircraft, yacht or any other mode of transport, the actual cost of which exceeds ten lakh rupees, other than that held by the Startup for the purpose of plying, hiring, leasing or as stock-in-trade, in the ordinary course of business;

(g) jewellary other than that held by the Startup as stock-in-trade in the ordinary course of business;

(h) any other asset, whether in the nature of capital asset or otherwise, of the nature specified in sub-clauses (iv) to (ix) of clause (d) of Explanation to clause (vii) of sub-section (2) of section 56 of the Act.

Provided the Startup shall not invest in any of the assets specified in sub-clauses (a) to (h) for the period of seven years from the end of the latest financial year in which shares are issued at premium;

Explanation.— For the purposes of this paragraph,-

(i) "specified company" means a company whose shares are frequently traded within the meaning of Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 and whose net worth on the last date of financial year preceding the year in which shares are issued exceeds one hundred crore rupees or turnover for the financial year preceding the year in which shares are issued exceeds two hundred fifty crore rupees.

(ii) the expressions "venture capital company" and "venture capital fund" shall have the same meanings as respectively assigned to them in the explanation to clause (viib) of sub Section(2) of Section 56 of the Act.

A startup fulfilling conditions mentioned in para 4 (i) and para 4 (ii) shall file duly signed declaration in Form 2 to DIPP that it fulfills the conditions mentioned in para 4. On receipt of such declaration, the DPIIT shall forward the same to the CBDT.

Indian States with Startup policies

States have a vital role to play in promoting the Startup ecosystem. One of the core strengths of India lies in its diversity, leading to enormous opportunities for cross-learning from each other. Only four State Governments were actively supporting Startups before the launch of Startup India through a State Startup policy. The Startup movement across the country was fragmented and there was a need for consolidating standalone efforts. Emphasis was also required simultaneously to encourage more and more States to undertake new initiatives. The national priority initiative has led to a wide spread movement across the country and presently 22 States have their own Startup policies. Many other States and Union Territories (UTs) are in the process of drafting their policies and operating guidelines. The core functioning of an enabling ecosystem in a State is a function of the policy framework and effective implementation of the same. In the journey of developing a conducive Startup community, it is important that States and UTs exchange and adopt good practices undertaken by each other.

Another important role of State is to reduce the regulatory burden on budding Startup founders by simplifying labour, taxation, land, and other laws and regulations under the State purview. Many States are organizing hackathons, boot camps, pitching sessions to promote Startups. Several other States have already begun to actively setup world class incubators for Startups across various sectors. However, a significant effort is required to accelerate the pace of these initiatives to be at par with the pace of growth of Startups. Concerted initiatives by States will accelerate the growth of Startup ecosystems in their respective territories and transform the country into a flourishing Startup Nation.

State Startup Ranking

The Department of Industrial Policy and Promotion conceived the States Startup Ranking Framework with the key objective to encourage States and Union Territories to take proactive steps towards strengthening the enabling Startup ecosystems within their jurisdictions. There are 38 action points categorized into 7 broad pillars such as Startup Policy and implementation, Incubation support, Seed Funding, Angel and Venture Funding, Simplification of Regulations, Easing Public Procurement and Awareness & Outreach. The ranking methodology is aimed at creating healthy competition among States to further learn, share and adopt best practices.

The entire exercise has been conducted in essence as a capacity development exercise for the States in the true spirit of cooperative federalism. Awareness Workshops in all States, Knowledge Workshops at 3 leading incubators, Pairing of States for intensive mentoring, International Exposure Visits to US and Israel and intensive engagement with States through assignment of specific resources from Startup India Team and regular Video Conferencing have helped many States appreciate and initiate effective measures for supporting Startups.

A total of 27 States and 3 Union Territories participated in the exercise. Evaluation Committees comprising independent experts from Startup ecosystem have done a painstaking assessment of responses across various parameters. Many parameters involved getting feedback from beneficiaries. More than 3200 calls were made in 9 different languages to empathetically connect with beneficiaries to get a real pulse at the implementation level.

The Startup initiative of the State Governments is according to the Startup Policy, and same can be referred from the startup India portal. However, the highlights of some states start up policy is provided below:

West Bengal: West Bengal launched its policies relating to startups in January 2016. It aims to nurture and help startups in various ways. They have launched a website by the name of startup bengal.in in an effort to get all the stakeholders in that community on a single platform. With this initiative, communication between startups, investors, service providers etc. is expected to become easier and smoother. These policies will be in effect until December 2021.

Uttar Pradesh: The Government in this State is working to get more IT investment into the state and promoting upcoming startups in this particular segment.

Odisha: The government of Odisha has launched its policy with a vision of making Odisha one of the top three investment destinations in India. To achieve their goal they have come up with a 10-year plan, which will work till 2025. The Government has announced its plan along with “Make In India” in February, 2016.

Rajasthan: Rajasthan launched its plans in October, 2015. The Government plans to help set up around 500 startups within the next five years. For this purpose, they have allocated funding and also plan to set up around 50 incubators across the state. With their efforts, they plan to bring in a funding of around Rs. 500 crores in the next 5 years.

Karnataka: Karnataka has a setup a 5-year plan with very specific goals and targets which they hope to achieve by the end of the plan. They want to have at least 25 technology related startups that aim to solve the social problems faced by the state. Along with this, they want around 2000 startups focused just on technology and 600 startups based on products. With their policies, they are aiming to create around 18 lakh jobs in the state itself.

Gujarat: They have a threefold strategy which involves the innovators, the Institutions, and the government committee. These three form a chain, wherein the innovators come up with the idea which will be facilitated by the institutions and then approved and financed by the government committee.

Jharkhand: Jharkhand is the most recent entrant in Indian states with startup policy. The state government has facilitated INR 10 Crores for Innovation and Incubation Centres in different part of states. An innovation lab would

also be set up with the help of IIM Ahmedabad. With this startup policy initiative, the state government aims to encourage the startups in the sectors like Information Technology, Health, Tourism, Agriculture, Biotechnology, and alternative energy.

EXEMPTIONS FOR STARTUPS

To promote growth and help Indian economy, many benefits are being given to entrepreneurs establishing start-ups.

1. Simple process

Government of India has launched a mobile app and a website for easy registration for startups. Anyone interested in setting up a startup can fill up a simple form on the website and upload certain documents. The entire process is completely online.

2. Reduction in cost

The government also provides lists of facilitators of patents and trademarks. They will provide high quality Intellectual Property Right Services including fast examination of patents at lower fees. The government will bear all facilitator fees and the startup will bear only the statutory fees. They will enjoy 80%reduction in cost of filing patents.

3. Easy access to Funds

A10,000 crore rupees fund is set-up by government to provide funds to the startups as venture capital. The government is also giving guarantee to the lenders to encourage banks and other financial institutions for providing venture capital.

4. Tax holiday for 3 Years

Startups will be exempted from income tax for 3 years provided they get a certification from Inter-Ministerial Board (IMB).

5. Apply for tenders

Startups can apply for government tenders. They are exempted from the “prior experience/turnover” criteria applicable for normal companies answering to government tenders.

6. R&D facilities

Seven new Research Parks will be set up to provide facilities to startups in the R&D sector.

7. No time-consuming compliances

Various compliances have been simplified for startups to save time and money. Startups shall be allowed to self-certify compliance (through the Startup mobile app) with 9 labour and 3 environment laws.

8. Tax saving for investors

People investing their capital gains in the venture funds setup by government will get exemption from capital gains. This will help startups to attract more investors.

9. Choose your investor

The startups will have an option to choose between the VCs, giving them the liberty to choose their investors.

10. Easy exit

In case of exit, a start up can close its business within 90 days from the date of application of winding up

11. Meet other entrepreneurs

Government has proposed to hold 2 startup fests annually both nationally and internationally to enable the various stakeholders of a startup to meet. This will provide huge networking opportunities.

Tax Exemptions for the Startups, Effective from 2017-18

Following tax exemptions for the startups had been introduced that was made effective from 2017-18. The proposed incentives and exemptions are:

- Under Section 80-IAC, the Startup incorporated after April 1, 2016 is eligible for getting 100% tax rebate on profit for a period of three years. The startups recognized under the Startup India policy can now claim tax benefits in three out of the first seven years under Section 80-IAC of the Income-tax Act, 1961. Also, the annual turnover must not exceed Rs. 25 crores in any financial year up to 31 March 2021.
- The startups have to pay Minimum Alternate Tax [MAT] at 18.5% along with the applicable surcharge and cess. The FM has assured to provide MAT exemptions for the first 5 years in case the startup fails to make any profit.
- Exemptions have been made against capital gains. Long term capital gains (LTCG) will be invested by the Government's special funds within a period of six months from the date of transfer of the asset. The investment may go up to INR 50 Lakh and the exemptions will be applied for three years.
- If the individual holds 50% equity then the company may utilize the invested amount for buying assets before the due date of filing the return.
- The domestic companies who hold turnover less than INR 5 Crore in the FY 2014-15 will be liable for 29% tax along with surcharge and other cess. It will be covered under the chapter VI-A
- The Finance Minister has also proposed different taxes for the new domestic manufacturing companies that have been setup on or after 1st March, 2016. Such companies will be taxed at 25% plus with cess and surcharge. The tax is proposed on the condition that the company do not claim any incentive under profit or investment.

Benefits / Exemptions to Start-ups under Companies Act, 2013

1. By Notification No. GSR. 583(E) dated June 13, 2017 an explanation has been inserted in Clause 40 of Section 2 of the Companies Act, 2013 which provides the definition of a "Start up" or "start-up company."

It states that "For the purposes of this Act, the term "start-up" or "start-up company" means a private company incorporated under the Companies Act, 2013 (18 of 2013) or the Companies Act, 1956 (1 of 1956) and recognised as start-up in accordance with the notification issued by the Department of Industrial Policy and Promotion, Ministry of Commerce and Industry."

2. The Companies (Acceptance of Deposit) Rules, 2014 have been amended to provide that 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 shall not be treated as a deposit.

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.

3. The provisions of clauses (a) to (e) of Section 73 of the Act shall not apply to a start-up company for five years from the date of its incorporation.

4. The maximum limit in respect of deposits to be accepted from members shall not apply to a private company which is a start-up, for five years from the date of its incorporation

5. Start-ups are allowed to issue Employee Stock Options to an employee who is a promoter or a person belonging to the promoter group; or a director who either himself or through his relative or through any body corporate, directly or indirectly, holds more than ten percent of the outstanding equity shares of the company up to ten years from the date of its incorporation or registration.

6. A startup company may issue sweat equity shares not exceeding fifty percent of its paid up capital upto five years from the date of its incorporation or registration

7. The annual return of a start-up company may be signed by the company secretary, or where there is no company secretary, by the director of the company.

8. For start-ups, convening at least one meeting of the board of directors in each half of a calendar year with the gap between the two meetings of not less than Ninety (90) days is sufficient to meet the requirement of Section 173 (5) of the Act.

REGISTRATION STEPS

What form should your Startup Venture have?

I. Formation of a Company in India

The law of companies in India is governed by the Indian Companies Act, 2013 which is a comprehensive legislation and provides for provisions relating to all phases of a company's life, i.e. incorporation, management, mergers, winding up, etc.

A Registrar of Companies ('ROC') is appointed under the Act for designated regions, who is the nodal authority for affairs related to companies in that particular region.

II. Types of Companies in India

Any person can choose to incorporate either a company with unlimited liability or one with liability limited either by shares or guarantee. An incorporated company may take one of the following three forms:

II.1. Private Company

With restrictions on transfer of shares, and limited number of members, a private limited company enjoys greater flexibility, less legal formalities, and the small shareholders body facilitates prompt decisions. A private company must have a minimum of two directors. A private company may be converted into a public company for raising capital from the public, if need arises, by completing certain legal formalities as specified in the Companies Act.

II.2. Public Company

Public companies are subject to stricter legal formalities. However, the free transferability of the shares of a public company and unlimited membership provides a larger base for raising of capital. Shares of a listed public company can be traded on stock exchange, which may open it to the scrutiny and watch of Securities and Exchange Board of India. A public company must have a minimum of seven members and three directors. Certain classes of public limited companies must have at least one third of the total number of directors as independent directors out of which one director has to be a woman director.

Minimum authorized and paid up share capital requirement of a private and public company: The criteria of

having minimum paid up share capital for both private public company, as stated in the erstwhile Companies Act, 1956, has been omitted in the revised Companies Act. This is a significant advantage to start-ups with respect to the requirement of maintaining minimum share capital under the Companies Act since inception.

II.3. One Person Company

This concept has been brought by the new Companies Act and states that One Person Company is in the nature of a private company which has only one person as its member/director

At the time of incorporation, the memorandum of association must name a nominee for the sole member of an OPC. The minimum number of directors for an OPC is also one. OPC provides the option of limited personal liability of proprietors (as opposed to unlimited liability in sole proprietorship).

Businesses which currently run under the proprietorship model could get converted into OPC's without any difficulty. The questions of consensus or majority opinions do not arise in case of OPCs, and is suitable for small entrepreneurs with low risk taking capacity.

III. Charter documents of a Company

III.1 Memorandum of Association

The MoA sets out the objects for which the company is proposed to be incorporated in the manner provided hereunder

a. The first and foremost clause in MoA shall be the name of the proposed company suffixed with the words limited or private limited, as the case may be;

b. The state where the registered office of the company shall be situated.

c. The third clause contains the main objects for which the company is going to be formed/incorporated. The MoA binds the area of operation of the company in respect to the objects mentioned therein and any decision or actions taken in contravention of the MoA shall be void. A company cannot run any business contrary to the main objects mentioned in their MoA.

The MoA and AoA of a company can be modified post incorporation in accordance with the applicable provisions of the Companies Act.

III.2. Articles of Association

The articles of a company contains regulations for the management of the company. This document is confined to the applicability of the provisions of the companies act, on private or public limited company, as the case may be.

IV. Legal formalities for incorporation of a company:

IV.1. Pre-incorporation formalities:

The below mentioned compliances are required to be carried out with regard to setting up of company in India:-

a. Digital Signature Certificates ('DSC') for the proposed directors of the company by preparing and filing of Incorporation documents as required under the provisions of the Companies Act, 2013.

b. Any person (not having DIN) proposed to become a first director in a new company shall have to make an application through eForm SPICe. The applicant is required to attach the proof of Identity and address along with the application. DIN would be allocated to User only after approval of the form.

c. The next step is filing of online Incorporating a company through Simplified Proforma for Incorporating Company electronically (SPICe -INC-32), with eMoA (INC-33), eAOA (INC-34), is the default option and most companies are required to be incorporated through SPICe only.

d. However, Application for allotment of DINs to the proposed first Directors in respect of new companies shall be made in SPICe form only and any person intending to become a director in an existing company shall have to make an application in eForm DIR-3 for allotment of DIN.

e. The final step of the incorporation process and obtaining a certificate of incorporation of the company.

IV.2. Post incorporation formalities:

Once the certificate of incorporation has been issued by ROC, the company becomes a separate legal entity in the eyes of laws in India, and requires certain basic registrations to initiate the business which includes filing of application for obtaining a permanent account number, tax deduction account number in the name of the company and any other business specific registrations from the relevant government authorities i.e. Import–Export Code Number in case of company carrying out the business of import and/or export.

Further, every company shall be required to carry out certain compliances, as required under the provisions of the Companies Act, for their day to day activities which includes holding of first board meeting immediately after incorporation, convening the annual general meeting every year, maintaining all the secretarial records at the registered office of the company, maintaining of statutory registers, minutes books etc. of company in compliance with the Companies Act, 2013.

Following are the important points for a Start-up:

1. Choose the right legal structure for your startup:

Choosing an appropriate legal structure is one of the most crucial decisions for any startup. The decision should be taken based on individual circumstances and a host of factors such as nature/sector of business operation, business trajectory, regulatory and tax considerations, costs of formation and ongoing administration, external capital requirement and type of funding sought, of legal liability protection required, number of stakeholders, balance required between ownership and management, proposed mechanism for profit sharing or distribution amongst stakeholders, et al. Preferred entity structures for startups in India are limited liability partnership and private limited company.

2. Registrations and business licenses:

Post incorporation of a business entity in India, some necessary registrations are required and mandated by law. Any user who intends to incorporate company through SPICe eform can now also apply for GSTIN / Establishment code as issued by EPFO / Employer Code as issued by ESIC through this eform (INC-35). User is required to file application (SPICe) for incorporation of a company accompanying linked e-form AGILE “Application for Goods and services tax Identification number, employees state Insurance corporation registration pLus Employees provident fund organisation registration” along with eform SPICe MOA (INC-33) and eForm SPICe AOA (INC-34) to obtain GSTIN / Establishment Code / Employer Code.

This process will be applicable only for Companies incorporated by MCA through SPICe application. Other categories of applicants (Tax Deductor, Tax Collector, Casual Taxable person, ISD, etc.) for GSTIN shall follow the existing process of registration through Common Portal for GST registration Similarly, other type of establishment such as Factory shall follow the existing process of registration through Common Portal for EPFO & ESIC registration).

Business licenses are permits issued by government authority that allow startups to start/continue to operate a particular business within its territorial jurisdiction lawfully. The nature of business activity determines most license requirements.

Other determining factors may include the number of employees, location of business and the form of business ownership. Some examples are Food safety license, Health/Trade license, Shops & Establishment License etc.

3. Intellectual Property Protection:

Intellectual Property Rights are a very important asset class for a startup. Developing and protecting intellectual property with proper registration can help startups gain competitive advantage. It is essential to obtain trademark registration for the business name/trade name under the Trademarks Act. Registration of a company or business in India does not by itself give protection against others who might commence using identical or similar marks.

A trademark search should be conducted before deciding on these business name/ trade names to prevent any issues in future including potential infringement. All Intellectual Property (including trademark, copyright, design, trade secrets, inventions, patents, etc.) should be registered in the name of the entity and not in the name of the promoters/founders of the startup.

4. Founder Equity – Split and Vesting:

Founder equity should be split amongst founders based on the nature of role played by each founder along with their time, effort and capital contribution to the startup. Splitting founder equity equally by default without a through discussion on expectations and contribution generally leads to tension and unhappiness amongst founding teams as the startup matures.

Founder shares should be always subject to vesting schedule – typically over a period of three to four years. When vesting is imposed on a founder equity, the unvested shares held by the founder become subject to a contractual right to repurchase/transfer often at a nominal value, if one of the founders is terminated or voluntarily leaves the startup. This is very important to ensure future viability of the business.

5. Founder agreements:

The founders agreement is the most valuable tool to establish the relationship between the founders of a startup. The agreement should represent a clear understanding between the founders on all key issues related to the startup. Founder agreements should clearly mention the roles and responsibilities of the founders and have clauses detailing the decision making and operating structure of the startup, founder equity split with vesting (explained above), assignment of all intellectual property in favour of the startup, termination of a promoter and exit process etc.

6. Employment contracts:

Startups must ensure to enter into clear employment contracts detailing terms and conditions of employment with their employees. While employment contracts are certainly valuable to the employees as it details terms regarding description of job profile, compensation and other associated benefits, a number of clauses may be inserted to safeguard and protect the interest of the startup – such as stopping employees from setting up competing entities (non- compete clause), poaching other employees/clients/customer (non-solicitation clause), preventing employees from claiming any intellectual property right on the work done/developed during the course of employment (assignment of intellectual property rights).

7. Employee Stock Option Pool (ESOP):

ESOP's are incentives given to employees/directors of a company to attract talent and retain employees by rewarding them. ESOPs create a sense of ownership amongst employees. It is important to note that ESOPs are not shares. They are structured in a way that they are option to buy shares at a discounted price and can be exercised only after a certain vesting period which is decided by the company granting the ESOPs.

8. Third Party Agreements:

Prior to entering into a third-party agreement and while negotiating the terms, it is advisable to execute a non-disclosure agreement. If creation/development of intellectual property is a component of such a third-party agreement, it must clearly state that all rights to the intellectual property rights shall vest and be owned by the startup and the third-party shall not stake any claim on the same and will do all acts to ensure the protection of

the intellectual property. Clauses related to breach, termination and dispute resolution should be well negotiated and captured in all third-party agreements.

9. Investment structuring:

One of the most challenging and time consuming aspects of operating a startup is to raise capital for working capital requirement and growth. In India, Investors (HNIs/Angels/Funds) invest in early and growth stage companies in different structures and on varied terms. It is imperative for startups to seek proper legal advice while negotiating the deal terms for investment and the rights of the investors.

Typically, as a process an intention document detailing the structure of the transaction called the term sheet is executed followed by due diligence of the startup and execution of investment related definitive agreements.

10. Compliance management:

Compliance and its importance is often overlooked by many startups. There are multiple laws applicable to specific entity structures under which separate event based and annual compliance is mandated. It is extremely critical for the sustainable growth of any business that the startup is in compliance with legal, secretarial, accounting, taxation, employee related and other associated compliances. The consequences of non-compliance can be levy of punitive fines on the startup.

FINANCING OPTIONS AVAILABLE FOR STARTUP COMPANIES

Finance is the life blood of any business. In case the venture is self-funded there can be no better option than that. However, a Startup is mostly the result of a novel idea that is the brainchild of its founder(s) and more often than not, funds are always a challenge.

Analysis of the different financing options are as under:

Characteristics of Investment	Equity Financing	Debt Financing	Grants
Nature	There is no component of repayment of the invested funds.	Invested Funds to be repaid within a stipulated time frame with interest	There is no component of repayment of the invested funds
Risk	Risk factor for the investor is higher as he has no guarantee against his investment	Risk Factor for the investor is lower as he generally has collateral against his investment	There is no risk factor for the startup as no collateral is involved
Pressure for Repayment	Less pressure for startups to adhere to a repayment timeline but added pressure from investors to achieve growth targets	More pressure for startups to adhere to repayment timeline and as a result more pressure to generate cash flows to meet interest repayments	No pressure for repayment as grants are a form of monetary support provided for a specific purpose
Return to Investor	Capital growth for investors	Interest payments	No Return
Involvement in Decisions	Equity Fund Investors usually prefer to involve themselves in decision making process	Debt Fund have very less involvement in decision making	No direct involvement in decision making

Sources	Angel Investors, Self-financing, Family and Friends, Venture Capitalists, Crowd Funding, Incubators/ Accelerators	Banks, Non-Banking Financial Institutions, Government Loan Schemes (CGTMSE, Mudra Loan, Standup India)	Central Government, State Governments, Corporate Challenges, Grant Programs of Private Entities

Seed Capital

Startup business needs the nurturing of finance to explore and grow. The funding done at the nascent stage is called seed funding and the capital is known as a seed capital.

Technically, seed capital is the initial capital used at the time of starting the business. This capital can come from the founders, families or friends. It is required for the market research, product development, and other initial stage operations.

Seed funding permits exploration of the business idea and converting it into a viable product or service that further attracts venture capitalists. A business founder must be clear on how to utilise seed capital in the most optimum manner to ensure smooth transition to the advanced stage of the business.

Seed funding is a risky investment option, as most funding agencies would like to adopt a wait and watch approach to see whether the idea has a business potential. From the founder's point of view, the option of obtaining seed funding has to be carefully utilised as obtaining seed funding may result in dilution of ownership of the founder.

The paperwork involved in seed funding is relatively less and straightforward, compared to advanced rounds of funding. Even the legal fees required are also quite less as compared to the seed equity. The interest rates too are usually lower and there are mostly no restrictions in the manner of business working as it is still in the nascent stage.

Financing is generally of two types i.e. (a) equity financing; or (b) debt-financing.

A. Equity Financing

Startups are usually equity financed/funded by way of a venture capital/ private equity investors and/or angel investors.

(i) Venture Capitalist/Private Equity

Venture capital ("VC") / Private Equity ("PE") is often the first large investment a startup can expect to receive. Convertible instruments are usually the preferred option and most commonly used securities for VC/PE investment which includes compulsory convertible preference shares and compulsory convertible debentures. The investor and startup will normally enter into a non-binding offer based on the preliminary valuation of the startup usually followed with a financial, legal and technical due diligence on the startup as required by the investors. Due-diligence will help the investors to finalize the representation and warranties and also to identify conditions precedent to the completion of investments and conditions subsequent in the aforesaid transaction documents.

Upon completion of due-diligence to the satisfaction of investor, such investments involve execution of essentially following transaction documents between the investors and startups:

Funding Procedure

(a) A Term Sheet / Letter of Intent /Memorandum of understanding is entered into, setting out the following:

- basic commercial understanding between the VC and the startup; and

- legal terms for the agreements to follow the due-diligence;

(b) The contracting parties will enter into a Share Subscription Agreement/ Debenture Subscription Agreement. It usually captures the following:

- the issuance of shares in the share capital or debentures at subscription amount determined based on the valuation of the startup;
- condition precedents to completion of transaction or conditions subsequent to be completed within the agreed time frame after the completion date;
- sets of representation and warranties and indemnification resulting from due-diligence exercise or otherwise, etc.

(c) Thereafter, the contracting parties may enter into a Shareholders' Agreement providing for the following:

- Nomination/representation rights on the board of investee;
- Information and reporting right and disclosure obligation of investee to the investors;
- Redemption rights on debenture or preference shares;
- Pre-emption rights, Right of First Refusal or Right of First Offer, Tag Along Right, Drag Along Rights, Lock-in-period for the investor or promoter's holding, put and call options, affirmative vote rights on certain reserved matters, anti-dilution provisions;
- Exit options to investors after the lock-in-period; etc.

(d) Issuance of Securities through Private Placement process;

(e) Filing of necessary eForms with ROC for completing the process of issuance and allotment of securities.

(f) Amendment of AOA as per Shareholders' Agreement;

(g) Completion of Condition Subsequents;

(ii) Angel Investors

Angel investors are usually individuals or a group of industry professionals who are willing to fund the venture in return for an equity stake. Under the SEBI (Alternative Investment Funds) Regulations, 2012 which was subsequently amended in 2013, SEBI has made the following restrictions applicable to angel funds investing in an Indian company:

a. An investee company has to be within 3 years of its incorporation, not listed on the floor of a stock exchange, and should have a turnover of less than INR 250 million and not be promoted by or related to an industrial group (with group turnover exceeding INR 3 billion).

b. The deal size is required to be between INR 5 million and INR 50 million. Separately, it is required that an investment shall be held for a period of at least 3 years.

(iii) Bridge Round

(iv) Series Funding

After Seed Funding Round or Angel Funding Round and Bridge Funding Round, Series Funding Round will start like Series A to Z. Series preferred stock is the first round of stock offered during the seed or early stage round by a portfolio company to the venture capital investor. Series preferred stock is often convertible into common stock in certain cases such as an Initial public offering (IPO) or the sale of the company.

Series rounds are traditionally a critical stage in the funding of new companies. A typical series A round is in the range of $2 million to $10 million, purchasing 10% to 30% of the company. The capital raised during a series round

is usually intended to capitalize the company for 6 months to 2 years as it develops its products, performs initial marketing and branding, hires its initial employees, and otherwise undertakes early stage business operations:

Sources of capital

Because there are no public exchanges listing their securities, private companies meet venture capital firms and other private equity investors in several ways, including warm referrals from the investors' trusted sources and other business contacts; investor conferences and demo days where companies pitch directly to investor groups. As equity crowd funding becomes more established, startups are increasingly raising part of their Series round online using platforms such as Onevest or Seed Invest in the USA and Seedrs in the UK, VC-Circle, Private Circle, Lets Vanture and Tracxn Labs, etc. in India. These blended rounds include a mix of angel investors, strategic investors and customers alongside the offline venture capital investors.

Structure

Smaller investment amounts are usually not worth the legal and financial expense, the burden on a company of adjusting its capital structure to serve new investors, and the analysis and due diligence on the part of institutional investors. A company that needs money for operations but is not yet ready for venture capital will typically seek angel capital. Larger amounts are usually unwarranted given the cost of business in fields such as software, data services, telecommunications, and so on. However, there are routinely series A rounds in excess of $10 million in fields such as pharmaceuticals, semiconductors, and real estate development.

Things to Know When Raising a 'Series A Round':

If a startup is looking to raise a Series A, it might be a good idea to get familiar with what venture funds looks for to ascertain if your company is Series A ready.

Most startups, even those who gets angel funding or seed-stage funding or investments from accelerators/ incubators, are unable to get follow-on funding. Why is Series-A funding so elusive?

The first time that a startup raises capital is normally called a 'seed round'. Other names include angel round or HNI round. Some even call it a pre-Series A round, but this term usually refers to a small interim fundraising exercise between the seed round and Series A.

1. Be Series A Ready

If you are looking to raise a Series A, it might be a good idea to get familiar with what venture funds looks for to ascertain if your company is Series A ready. Promising unit economics, revenue, proof of business model, systems ready to support efficient scaling, product/market fit, customer acquisition strategy and success, quality of team are some key factors that are taken generally taken into consideration and it is wise to evaluate where you company stands against these metrics to figure if you are ready for Series A.

2. Start Early

Fundraising in the current environment is a time consuming process - be realistic about the timeframe. Make sure you start the process at least 7-8 months prior to when you want to raise a Series A financing. The deal process has two parts, pre-termsheet and post-termsheet. Underestimating the time required inevitably leads to desperation and will often need to alter your funding strategy to include diverting attention to raise a bridge round to sustain the business.

3. Leverage Your Network

Seed funding is more plentiful and easier to raise as compared to Series A. Leveraging your network and building genuine relationships before you start your Series A fundraise will make it easier for you to get potential meetings with investors. Reach out to your extended network and request them to reach out to their connections.

These second degree network have powerful and favourable outcomes. Spreading word about your business through your network or through PR/marketing initiatives is always helpful.

4. Practice your "Pitch"

The key is to take as many meetings as possible. Speak to other founders who have successfully raised Series A and take their inputs for your pitch. Meet the low priority investors on your list first - they will ask you relevant question and provide you valuable feedback which you should incorporate in your pitch before meeting the top priority investors on your list. Treat the pitch a product – iterate on it until it is great.

5. Create a Fundraise Momentum

Approaching multiple venture funds at the same time is a good idea to get a competitive dynamic into the process. Try keeping your conversations with interested investors moving along at as close to the same pace as possible. This may not be easy but is if you manage to orchestrate well, you may be able to negotiate from a high bargaining power that generally leads to better valuation and deal terms. Nothing accelerates the process and you landing up a termsheet from one VC – you are likely to get few more.

6. Know the "standard market practice"

Keep yourself up to date with the commonly offered deal terms for a Series A. It is highly possible that the first version of your termsheet you receive is not exactly "founder-friendly". The strongest line of defence and the most accepted rationale for negotiating such terms is that they are not standard market practice.

7. Get the deal terms right

It is imperative that you ensure that the deal terms for your Series A are right and consistent with the trajectory of your business. The Series A terms will play as a foundation for all future rounds - many of those same terms that you have signed up for in your Series A are likely to carry through to future rounds i.e Series B or Series C – hence important to get them the right the first time itself.

8. Engage a Company Secretary

If you're raising venture capital – you need a lawyer who specializes in structuring venture capital financing. A lawyer who has done multiple such deals understands the nuances involved in structuring such rounds both from the perspective of which deal terms are important, what the "standard market practice" is and when to stay firm and when to concede to the investor. This will aid you to close your investment documents faster and more efficiently.

9. Paperwork in place

Shorten your transaction closing time by having all paper work in place for due diligence. Ensure that your company's legal documentation and compliance is up to date and have your team put together all records relating to employees, past financing, corporate structure and establishment, client contracts, intellectual property, cap table, etc. The paperwork should be organized and ready for review by the Investor appointed legal counsel/diligence team.

10. Raise 10-15% more than budgeted for

Within reason, if you have access to capital and the deal terms including dilution are decent, raise 10-15% more than budgeted as the business initiatives/operations don't always materialise as planned. Raise enough to allow you a fair shot to meet your milestones for the next round of financing so that you can channel all your focus on building the business and scaling it in the right direction. Raising every round of funding post Series A becomes significantly difficult and therefore is time consuming process and highly distracting. Additionally, there is a transaction cost every time you close an additional round.

B. Debt Financing

i. Loan from Banks & NBFCs

Loans from banks and NBFCs help finance the purchase of inventory and equipment, besides securing operating capital and funds for expansion. More importantly, unlike a VC or angels, which have an equity stake, banks do not seek ownership in your venture. However, there are several drawbacks of such funding option. Not only do you pay interest on loan but it also has to be done on time irrespective of how your business is faring. They require substantial collateral and a good track record, besides the fulfilment of other terms and conditions and a lot of documentation as follows:

a. Application for loan sanction by borrowers;

b. Issue of sanction letter by the Bank;

c. Agreement of Loan;

d. Security/collateral documentation, such as (i) Deed of Mortgage; (ii) Deed of Hypothecation; (iii) Deed of guarantee; (iv) Share pledge agreement; (v) Memorandum of Entry; etc.

ii. External Commercial Borrowings

External Commercial Borrowings (ECB) in form of bank loans, buyers' credit, suppliers' credit, securitized instruments (e.g. non-convertible, optionally convertible or partially convertible preference shares, floating rate notes and fixed rate bonds) can also be availed from non-resident lenders to fund the business requirement of a company. ECB can be accessed under two routes, viz., (i) Automatic Route; and (ii) Approval Route depending upon the category of eligible borrower and recognized lender, amount of ECB availed, average maturity period and other applicable factors.

ECB raised has also certain end use restrictions such as that it cannot be used for (a) on lending or investment in capital market; (b) acquiring a company in India; (c) real estate sector etc. Under ECB also the borrower needs to create certain charge on immovable assets, movable assets, financial securities and issue of corporate and / or personal guarantees in favour of overseas lender / security trustee, to secure the ECB raised by the borrower, subject to compliance of certain conditions as prescribed under ECB guidelines framed by Reserve Bank of India. The documentation on similar lines as mentioned under bank loan section above will need to be executed.

iii. CGTMSE Loans

Under the Credit Guarantee Trust for Micro and Small Enterprises scheme launched by Ministry of Micro, Small & Medium Enterprises (MSME), Government of India to encourage entrepreneurs, one can get loans of up to 1 crore without collateral or surety. Any new and existing micro and small enterprise can take the loan under the scheme from all scheduled commercial banks and specified Regional Rural Banks, NSIC, NEDFi, and SIDBI, which have signed an agreement with the Credit Guarantee Trust.

C. Once the startups achieve stable operations and revenue flows, it may consider an Initial Public Offering (IPO) to raise the funds or increase the magnitude of the business operations

During the IPO, the Company raises funds by offering and issuing equity shares to the public. An IPO allows a company to tap a wide pool of stock market investors to provide it with large volumes of capital for future growth. The existing shareholding will get diluted as a proportion of the company's shares. However, existing capital investment will make the existing shareholdings more valuable in absolute terms.

Companies can also issue of American Depository Receipts ("ADRs") or Global Depository Receipts ("GDRs") to raise funds from international stock investors. The promoter has certain obligations such as (a) meeting minimum contribution requirements; and (b) is generally subject to a 3 year lock-in once the IPO is concluded.

Various parties such as investment bankers, underwriters and lawyers need to be engaged as part of the procedure of IPO.

D. Unconventional modes of financing options which are now becoming popular in India

i. Crowd Funding

This is recent phenomena being practiced for getting seed funding through small amounts collected from a large number of people (crowd), usually through the Internet. Now we have companies existing in India which are specializing in "Crowd Funding".

The entrepreneur can get money for his venture by showcasing his idea before a large group of people and trying to convince people of its utility and success.

The entrepreneur needs to put up on a portal his profile and presentation, which should include the business idea, its impact, and the rewards and returns for investors. It should be supported by suitable images and videos of the project.

SEBI in 2014, even rolled out a 'Consultation Paper on Crowd funding in India' proposing a framework in the form of Crowd funding to allow startups and SMEs to raise early stage capital in relatively small sums from a broad investor base. The Consultation Paper defined Crowd funding as solicitation of funds (small amount) from multiple investors through a web-based platform or social networking site for a specific project, business venture or social cause. However SEBI not issued any further regulations in this regard.

ii. Incubators

These set-ups precede the seed funding stage and help the entrepreneur develop a business idea or make a prototype by providing resources and services in exchange for an equity stake ranging from 2-10%. Incubators offer office space, administrative support, legal compliances, management training, mentoring and access to industry experts as well as to funding through angel investors or VCs. These are usually government-supported institutes like the IIMs or IITs, technical institutes or private business incubators run by industry veterans or companies. The incubation period can be 2-3 years and admission is rigorous. Some of the top options in India include IIM-Bangalore NSRCEL, Microsoft Accelerator and IIT- Kanpur, SIIC and the Sriram College of Commerce (SRCC).

MUDRA BANKS

Micro Units Development and Refinance Agency Bank (or MUDRA Bank) is a public sector financial institution in India. It provides loans at low rates to micro-finance institutions and non-banking financial institutions which then provide credit to MSMEs. It was launched by Prime Minister Narendra Modi on 8 April 2015.

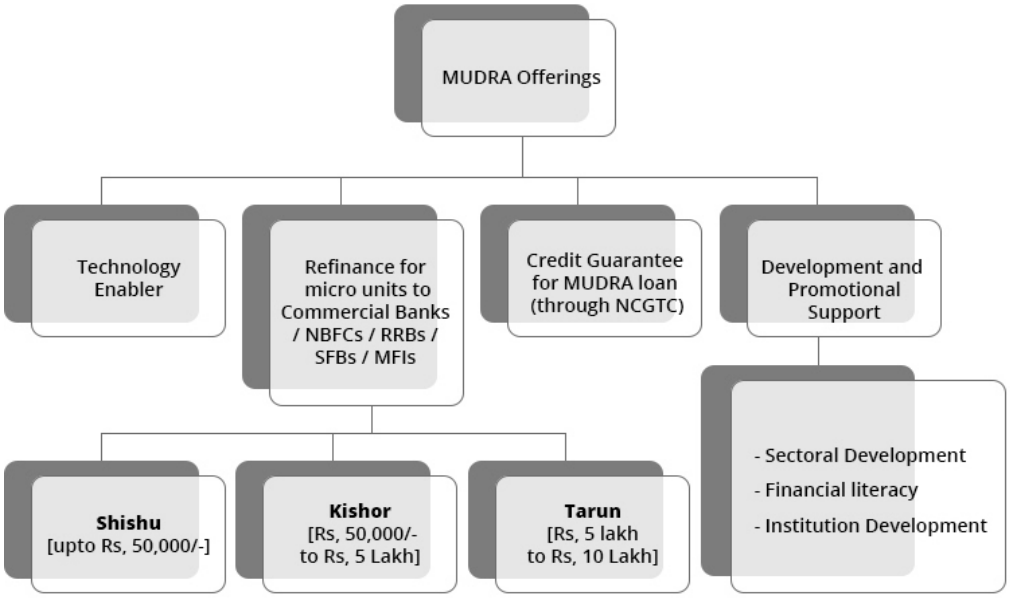
It will provide its services to small entrepreneurs outside the service area of regular banks, by using last mile agents. About 5.77crore (57.6million) small business have been identified as target clients using the NSSO survey of 2013. Only 4% of these businesses get finance from regular banks. The bank will also ensure that its clients do not fall into indebtedness and will lend responsibly.

The bank will classify its clients into three categories and the maximum allowed loan sums will be based on the category:

Shishu: Allowed loans up to Rs.50,000 (US$780) Kishore: Allowed loans up to Rs.5 lakh (US$7,800) Tarun: Allowed loans up to Rs.10 lakh (US$16,000) Those eligible to borrow from MUDRA bank are:

- Small manufacturing unit
- Shopkeepers
- Fruit and vegetable vendors
- Artisans

The basic criteria of age should be 18 years old. Loan under the scheme of the Pradhan Mantri Mudra Bank Loan will be available if and only if it is for commercial and business purposes and not for personal purposes. At the most, borrower can buy vehicle from mudra loan, given that it is used for commercial purposes. Lastly, this loan is for new business and is only applicable for small business owners.



Source: https://www.mudra.org.in/offerings

Procedure for loan

Once the beneficiary identifies an idea and comes up with a business plan, he is supposed to select the business category under which he wishes to avail the loan (Shishu, Kishor or Tarun).

The beneficiary can contact the nearest Public/ Private sector bank where he/ she can apply for business lo under PMMY. The list of institutions partnering in the MUDRA initiative is available on the MUDRA portal.

An application form under this scheme will be available with each of the above listed institutions. This application form has to be submitted along with the following documents for the approval of the loan:

- Proof of Identity (Self attested Voter ID/Driving License/PAN Card/ Aadhaar Card/Passport/any other Photo ID issued by Government)
- Proof of Residence(Recent Telephone Bill/Electricity Bill/Property Tax Receipt (not older than 2 months)/ Voter ID Card/Aadhaar Card/Passport/Domicile Certificate/Certificate Issued by a local authority)
- Applicant's recent photograph(not older than 6 months)
- Quotation of Machinery/other items to be purchases
- Name of the Supplier/Details of Machinery/Price of Machinery
- Proof of Identity/Address of the Business Enterprise(relevant licenses & certificates)
- Proof of Category(SC/ST/OBC/Minority etc.)

Apart from the above mentioned documents, individual banks could ask for other documents as needed. The Banks are not supposed to take any processing fee and are not supposed to ask for any collateral. The repayment period is also extended to 5 years. But it is also made clear that the applicant should not be a defaulter to any Bank or financial institution.

MUDRA Bank is not a separate bank (like SBI etc). It is a government financing scheme to provide business loan to new small businesses in India. To get business loan under PPMY the candidate has to contact the nearest Public/ Private sector bank. MUDRA will be operating as a refinancing institution through State / Regional level intermediaries.

MUDRA's delivery channel is conceived to be through the route of refinance primarily to NBFCs / MFIs, besides other intermediaries including Banks, Primary Lending Institutions etc. The rate of interest will be fixed by the institutions time to time based on guidelines from the RBI.

Mudra loan is extended for a variety of purposes which result in income generation and employment creation. The loans are extended mainly for:

- Business loan for Vendors, Traders, Shopkeepers and other Service Sector activities
- Working capital loan through MUDRA Cards
- Equipment Finance for Micro Units
- Transport Vehicle loans – for commercial use only
- Loans for agri-allied non-farm income generating activities, e.g. pisciculture. bee keeping, poultry farming, etc.
- Tractors, tillers as well as two wheelers used for commercial purposes only.

Following is an illustrative list of the activities that can be covered under MUDRA loans:

1) Transport Vehicle

Purchase of transport vehicles for transportation of goods and passengers such as auto rickshaws, small goods transport vehicles, 3 wheelers, e-rickshaws, taxis, etc. Tractors/Tractor Trolleys/Power Tillers used only for commercial purposes are also eligible for assistance under PMMY. Two Wheelers used for commercial purposes are also eligible for coverage under PMMY.

2) Community, Social & Personal Service Activities

Salons, beauty parlours, gymnasium, boutiques, tailoring shops, dry cleaning, cycle and motorcycle repair shops, DTP and Photocopying Facilities, Medicine Shops, Courier Agents, etc.

3) Food Products Sector

Activities such as papad making, achaar making, jam/jelly making, agricultural produce preservation at rural level, sweet shops, small service food stalls and day to day catering / canteen services, cold chain vehicles, cold storages, ice making units, ice cream making units, biscuit, bread and bun making, etc.

4) Textile Products Sector / Activity

Handloom, powerloom, khadi activity, chikan work, zari and zardozi work, traditional embroidery and hand work, traditional dyeing and printing, apparel design, knitting, cotton ginning, computerized embroidery, stitching and other textile non garment products such as bags, vehicle accessories, furnishing accessories, etc.

5) Business loans for Traders and Shopkeepers

Financial support for on lending to individuals for running their shops / trading & business activities / service enterprises and non-farm income generating activities with beneficiary loan size of up to 10 lakh per enterprise / borrower.

6) Equipment Finance Scheme for Micro Units

Setting up micro enterprises by purchasing necessary machinery / equipments with per beneficiary loan size of upto 10 lakh.

7) Activities allied to agriculture

'Activities allied to agriculture', e.g. pisciculture, bee keeping, poultry, livestock-rearing, grading, sorting, aggregation agro industries, diary, fishery, agri-clinics and agribusiness centres, food & agro-processing, etc.(excluding crop loans, land improvement such as canal, irrigation and wells) and services supporting these, which promote livelihood or are income generating shall be eligible for coverage under PMMY in 2016-17.

MUDRA Card

MUDRA Card is a debit card issued against the MUDRA loan account, for working capital portion of the loan. The borrower can make use of MUDRA Card in multiple drawals and credits, so as to manage the working capital limit in cost-efficient manner and keep the interest burden minimum. MUDRA Card also helps in digitalization of MUDRA transactions and creating credit history for the borrower. MUDRA Card can be operated across the country for withdrawal of cash from any ATM / micro ATM and also make payment through any 'Point of Sale' machines.

LESSON ROUND-UP

- A startup company(startup or start-up) is an entrepreneurial venture which is typically an emerging, fast-growing business that aims to solve an unmet need by developing a viable business model around an innovative product, service, processor a platform. A startup is usually a company designed to effectively develop and validate a scalable business model.
- A company may cease to be a startup as it passes various milestones, such as becoming publicly traded on the stock market in an Initial Public Offering(IPO), or ceasing to exist as an independent entity via a merger or acquisition.
- A number of organisation and/or organised activities exist with Startup activities. To name a few, Universities, Advisory and mentoring organizations Startup incubators, Startup accelerators, Co working spaces, Service providers(Consulting, Accounting, Legal, etc.), Event organizers, Start-up competitions, Startup Business Model Evaluators, Business Angel Networks, Venture capital companies, Equity Crowd funding portals, corporates (telcos, banking, health, food, etc.), other funding providers (loans, grants etc.), Start-up blogs and social networks and other facilitators.
- The Government of India has announced 'Startup India' initiative for creating a conducive environment for startups in India. The various Ministries of the Government of India have initiated a number of activities for the purpose.
- The process of recognition as a 'startup' shall be through mobile app/portal of the Department of Industrial Policy and Promotion.
- To promote growth and help Indian economy, many benefits are being given to entrepreneurs establishing startups.
- The tax exemptions for the startups had been introduced that was made effective from 2017-18.
- There are Exemptions to Start-ups under Companies Act, 2013
- There are different financing options available for Startups
- Financing is generally of two types i.e. (a) equity financing; or (b) debt-financing.
- It may consider an Initial Public Offering (IPO) to raise the funds or increase the magnitude of the business operations

- There are some Unconventional modes of financing options which are popular in India
- Micro Units Development and Refinance Agency Bank(or MUDRA Bank) is a public sector financial institution in India. It provides loans at low rates to micro-finance institutions and non-banking financial institutions which then provide credit to MSMEs. It was launched by Prime Minister Narendra Modi on 8 April 2015.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Define a Startup and trace the evolution of start-ups in India.
2. What are the highlights of the Startup Policy of the Government of India.
3. What are the tax exemptions available to Startups in India.
4. Describe the different forms of Debt and Equity Financing which can be raised by Startups.

Lesson 10

Business Collaborations

LESSON OUTLINE

- Joint Venture
- Advantages of forming Joint Venture
- Disadvantages of Joint Venture
- Strategies of Joint Venture
- Modes of formation of Joint Ventures
- Restrictions under FDI Policy of Government of India
- LLP firm as a Special Purpose Vehicle
- Essential Features of a Shareholders' Agreement(SHA) /Joint Venture Agreement / LLP Partnership Agreement (PA)
- Special Purpose Vehicle (SPV)
- Benefits and Purpose of Special Purpose
- Vehicles
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

A Joint Venture (JV) is generally short lived for conducting specific business activities. It is a business agreement in which the parties agree to develop, for a finite time, a new entity and new assets by contributing equity. A Special Purpose Vehicle (SPV) is formed for a specific purpose.

In this lesson, we will examine the Joint Venture and Special Purpose Vehicle, their advantages and disadvantages, their characteristics and the process for registering these entities.

BUSINESS COLLABORATION

Collaboration is when two or more entities work together through idea sharing and thinking to accomplish a common goal is known as Collaboration. Collaboration provide solutions, give a strong sense of purpose and also reinforce the objectives of coming together.

Types of Business Collaboration

Horizontal Collaboration: When the businesses in the same set of functional area agree to collaborate in a way to improve their competencies is known as Horizontal Collaboration. For example: conducting research toward new or improved products and services requires monetary investment, time, and worker capacity.

Vertical Collaboration: Vertical Collaboration is a collaboration where in the business collaborates with companies in its supply chain either upward and/or down wards (its suppliers and/or distributors). Vertical collaboration often allow businesses to minimize risk in the supply chain and obtain lower prices in exchange for long-term commitment. For example: Computers shipping with pre-installed third party software, discounted airport transfers offered by airlines etc.

Intersectional Collaboration: When the Businesses from different functional areas agree to share their special knowledge for the advancement of all partners in collaboration is known as Intersectional Collaboration. For example: Manufacturing and Marketing collaborations, Referral rewards, tie-ups.

Joint Venture : Two or more businesses form a new company. The new company is its own legal entity, and its profits are split according to terms spelled out in a formal contract is a Joint Venture. For example: One party in the joint venture provides technical support and another party provides manufacturing and marketing arrangements in joint venture.

Equity: A company acquires a minor equity stake in another business in exchange for a monetary investment. Such exchanges can accompany other types of collaboration and, to a certain extent, agreed-upon access to decision making. For example: Funding to start-ups on equity basis, equity partnership in technical know-how.

JOINT VENTURE

A simply dictionary meaning of the word ‘Joint Venture’ is a commercial enterprise undertaken jointly by two or more parties which otherwise retain their distinct identities.

It is an entity formed between two or more parties to undertake economic activity together. The parties agree to create a new entity to share in the revenues, expenses, and control of the enterprise. Joint Ventures are generally created for a single activity or project, and may have a limited time span. The use of a separate entity allows the parties to limit the liabilities associated with the relationship

In India till recently, almost all equity based ventures were structured in the form of a company. However, with the government permitting foreign investment in Limited Liability Partnership (LLP) Firms, there is significant interest in LLP firms.

Definition

A Joint ventures can be defined as “an enterprise in which two or more investors share ownership and control over property rights and operation”. The venture can be for one specific project only, or a continuing business relationship. Entering into a joint venture is a major decision. Businesses of any size can use joint ventures to strengthen long-term relationships or to collaborate on short-term projects.

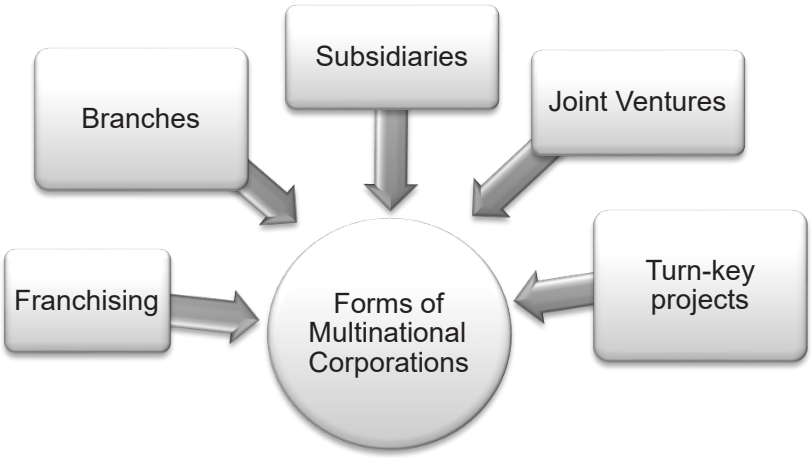
Alternatively, we can define a joint venture is an association of two or more individuals or business entities who combine and pool their respective expertise, financial resources, skills, experience, and knowledge in the furtherance of a particular project or undertaking.

Joint Venture commonly referred to as a "JV", are typically formed either by individuals, business entities, corporations or partnerships. The contributions to the joint ventures are either in the form of money [capital], services, or physical asset(s), i.e. equipment or intellectual property [software, patents], etc., or a combination of all. Business entities, who do not individually have the capacity, in terms of resources finances and technical know-how etc. can benefit with by forming Joint Venture for pooling of resources, sharing technical know-how and exploring larger markets for their goods and services.

JVs are also common in the manufacturing, mining, and service industries. A JV may be formed to conduct research and development work on a new product or technical application, to manufacture or produce various products, to market and distribute products and services in a specified geographic area, or to perform a combination of these functions.

Examples of Joint Venture Companies in India are Indian Oil Skytanking Ltd. (between Holders -Ruchi Soya and Indian Oil), Ratnagiri Gas & Power Private Ltd. (between NTPC Ltd. and GAIL India Ltd.), Mahanagar Gas Ltd. (BG Group of U.K. and GAIL India Ltd.) and Petronet LNG Ltd. (between PSU's, namely, BPCL, GAIL India Ltd., ONGC and IOCL).

MNC's in different forms including Joint Ventures



Advantages of forming Joint Venture

Various advantages of forming Joint Venture are as follows:

(i) **Risk Sharing**: Risk sharing is one of the biggest advantages of forming a Joint Venture, particularly, in those industries where the cost of product development and likelihood of failure of any particular product is very high.

(ii) **Economies of Scale**: Another advantage of forming a JV is for the industries which have high fixed costs, a JV with a larger company can provide the economies of scale necessary to compete locally or globally and can be an effective way by which two companies can pool resources and achieve critical mass.

(iii) **Market Access**: For companies that lack a basic understanding of customers and the relationship and infrastructure to distribute their products to customers, forming a JV with the right partner can provide instant access to established, efficient and effective distribution channels and receptive customer bases. This is important to a company because creating new distribution channels and identifying new customer bases can be extremely difficult, time consuming and expensive activities.

(iv) **Exploring the Global Market**: Formation of JV can be advantageous to those companies, which are foreseeing an attractive business opportunity in a foreign market. Partnering with foreign company would provide an ease to that Company for penetrating a foreign market, which can otherwise be difficult both because of a lack of experience in such market and local barriers to foreign-owned or foreign-controlled companies.

(v) **Easy acquisition of other entity or business**: When a company wants to acquire another, but cannot due to cost, size, or geographical restrictions or legal barriers, teaming up with a JV Partner can be an attractive option. The JV is substantially less costly and thus less risky than complete acquisitions, and is sometimes used as a first step to a complete acquisition with the JV Partner. Such an arrangement allows the purchaser the flexibility to cut its losses if the investment proves less fruitful than anticipated.

(vi) **Cost Efficiency**: For a small-scale company/ entity, sometimes it is difficult to set up the infrastructure and the machinery required product development. In the moment of need, joint venture is the perfect solution. For example, if a company has a plan for the perfect product, however, due to financial shortage there is not enough machinery or resources available. At such a time, if another company, which is equipped, lends a hand in the form of joint venture, by way of resource sharing and cost sharing it becomes easier to produce.

(vii) **Flexible nature**: The joint venture enterprises provide flexibility, each participant has the freedom to continue with their individual businesses. The joint venture participants can only interfere within the participated project. Thus, during the term of the contract participants can freely resume their business as long as they fulfil the needs mentioned in the agreement.

MODEL FOREIGN JOINT VENTURE COLLABORATION

Disadvantages of Joint Venture

Disadvantages of forming Joint Venture are as follows:

(i) **Restricted flexibility where full concentration is required for JV Project:** Flexibility is important however, some projects require full concentration and thus the simultaneous work may become impossible. In times like such the participants need to focus on the product of the joint venture and the individual businesses suffer in the process. For example, company A requires technological assets thus in joint venture company B avails the facility. In the same time, if the company B requires those technical assets then he has to postpone the individual project for the time being.

(ii) **Lack of equal involvement**: An equal involvement from all the Joint Venture partners may not be possible. It is extremely unlikely for all the companies working together to share the same involvement and responsibilities.

(iii) **Cultural Differences**: Different cultures and management styles may result in poor co-operation and integration. People with different beliefs, tastes, and preferences can create hurdles.

(iv) **Extensive Research and planning required**: Joint venture can result in a frustrating experience and ultimately a failure if it lacks adequate planning and research.

(v) **Lack of clear communication**: A joint venture involves different companies from different horizons with different goals, there is often a severe lack of communication between partners.

(vi) **Unreliable partners**: Because of the separate nature of a joint venture, it is possible that the partners do not devote 100% of their attention to the project and become unreliable.

(vii) **Creation of competitor**: Another potential disadvantage of a JV is the possibility of the creation of a competitor or a potential competitor in the form of one's own joint venture partner.

Strategies of Entering in to a Joint Venture

Joint ventures can be very effective for growth and success of a business. If formed strategically Joint Ventures can be extremely valuable and chances of their failure can be reduced to a greater extent: Following are the strategies for forming a successful Jointing Venture:

Strategies of Joint Venture

- Identification of Prospective JV Partners
- Reliable Partners
- Strong JV Relationship
- Equal Contribution
- Written Agreement
- Limiting Scope of JV
- Defined Business Model
- Flexibility
- Exit Routes

Identification of prospective Joint Venture Partner(s): The prospective partner should be strong in terms of business, technology and resources. One partner must be able to compliment the other partner specially in those areas where it lacks. For example, one entity's strength is economies of scale and another entity's strength is strong marketing and their brand value. Both the entities if formed into JV can compliment each other and they can have a larger market for their products.

(a) **Trustworthy**: Joint Venture Partner should never be weak or untrustworthy partner, as it would definitely lead to failure of the joint venture. On the other hand, a JV with strong and trustworthy partner would generate enormous benefits for both the partners and the Joint Venture entity.

(b) **Development of Strong Joint Venture Relationship**: Partners must strive to develop joint venture relationships that are easy to maintain, financially profitable, intellectually rewarding, and long-lasting. After a necessary period of negotiation and implementation, the Joint Venture relationship should grow well and quickly and painlessly.

(c) **Equal Contribution**: Joint Venture Partners must make sure that all the partners have equal contribution in the Joint Venture entity in terms of skills, intellectual resources, marketing resources, capital, and so on. Unbalanced or unequal contributions are never healthy for the success of a Joint Venture entity.

(d) **Written Agreement**: The agreement between two or more parties always be written and must clearly define all the terms, relates to rights and responsibilities of each partner. The language of the agreement must be simple and there should be no ambiguity, also there should be no clashing of interest.

(e) **Limiting the scope of Joint Venture**: It is essential that limits and scope of the venture should be defined in the beginning itself. At a later stage, once the trust amongst the partners is developed, the scope of Joint Venture can be increased with the mutual consent of all the partners.

(f) **Well defined Business Model**: The firms in a JV must clearly define the nature of the new venture including the proposition to the customer, the channels and relationship management, the value chain, the structure and roles, investments, income, costs and payments, success factors and the timetable for delivery. A well-defined business model provides a base for the legal and financial frameworks.

(g) **Flexibility**: The partners in JV should try to be flexible and favour partners who demonstrate the same level of flexibility.

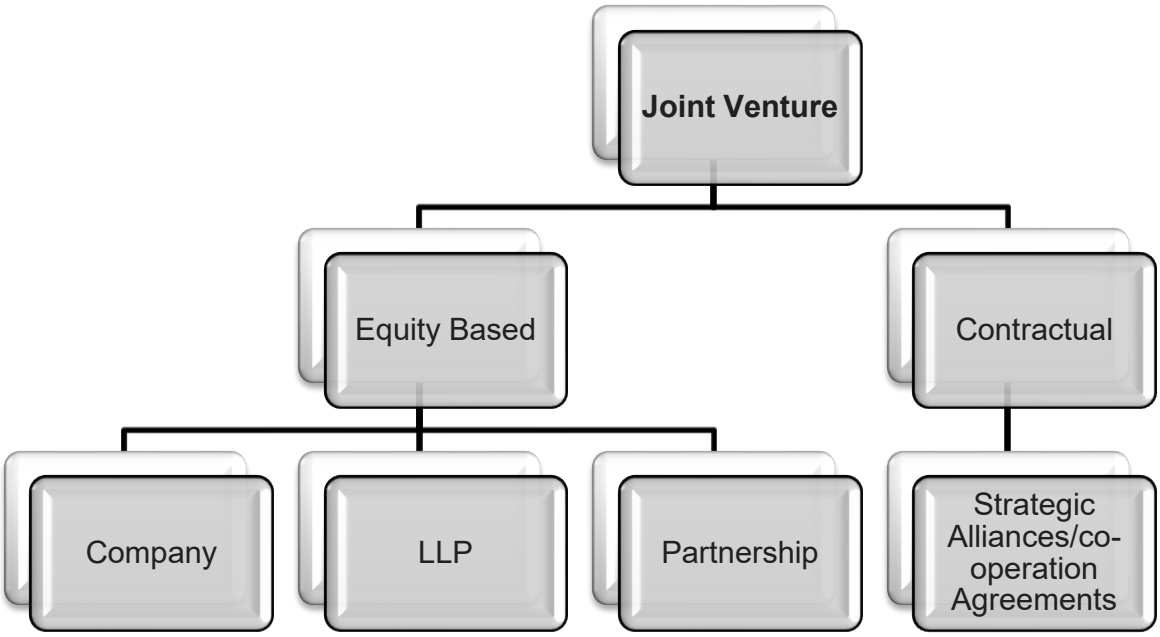
(h) **Establishment of Exit Routes**: JV Partners much establish clear protocols in the beginning itself for amending or unwinding the relation if it fails to meet the expectations or in case there arises any dispute.

FORMATION OF JOINT VENTURES

A Joint Venture can be of the following types :

(1) An Equity Joint Venture

(2) Contractual Joint Venture



(1) Equity Joint Venture

The equity joint venture is an arrangement whereby a separate legal entity is created in accordance with the agreement of two or more parties.

The parties undertake to provide money or other resources as their contribution to the assets or other capital of that legal entity. The entity is generally established as a limited liability company and is distinct from either of the parties which participate in its creation.

The newly created company, thus, becomes the owner of the resources contributed by the parties to the joint venture arrangement. Each of the parties in turn becomes the owner of the company having equity in the company.

The parties to a joint venture agreement agree on purposes and functions of the newly created entity, the proportion of capital contribution by each party and the share of each party in the profits of the company and on other matters such as its management, operation, duration and termination.

Generally speaking in an equity based joint venture, the profits and losses of the jointly owned entity are distributed among the parties according to the ratio of the capital contributions made by them. However, the division of profits and losses is not the only characteristic of an equity-based joint venture. The key characteristics of equity-based joint ventures are as following:

a. There is an agreement to either create a new entity or for one of the parties to join into ownership of an existing entity

b. Shared Ownership by the parties involved

c. Shared management of the jointly owned entity

d. Shared responsibilities regarding capital investment and other financing arrangements.

e. Shared profits and losses according to the JV Agreement.

Circumstances indicating SPV:

All the above five characteristics need not be fulfilled in every equity based joint venture. For example, one of the parties to the agreement may be providing investment but might not have any say in the management of the Joint Venture.

Again, a foreign company may want to exercise management control even though it is not investing in the JV company. Typically, if a foreign company is providing technology and other knowledge-based inputs, it may want to ensure that the JV company is managed as per its directions. In such cases, the foreign company may retain an option to invest in the JV Company on a later date. This may be done by a foreign company to create a foothold for itself in a sector where Foreign Direct Investment (FDI) is not allowed.

(2) Contractual Joint Venture

The contractual joint venture might be used where the establishment of a separate legal entity is not needed or the creation of such a separate legal entity is not feasible in view of one or the other reasons. The two parties do not share ownership of the business entity but each of the two parties exercises some elements of control in the joint venture.

The contractual joint venture agreement can be entered into in situations where the project involves a narrow task or a limited activity or is for a limited term or where the laws of the host country do not permit the ownership of property by foreign citizens.

For the purposes of contractual joint venture, the relationship between parties is set forth in the contract or agreement concluded between them.

The way joint venture company would carry out its operations is always based on the negotiations between the parties, the results of which reflect in the joint venture agreement entered into between the parties.

The licensing agreement, know-how agreement, technical services or technical assistance agreement, franchise agreement and agreement covering all other commercial matters might even form annexes to the main joint venture agreement. They can be signed once the joint venture company is established.

An example of a contractual joint venture is a franchisee relationship.

The key characteristics of such a relationship are:

(i) Two or more parties have a common intention – of running a business venture.

(ii) Each party will bring some inputs in the form of money or materials.

(iii) Both parties exercise some a certain degree of control on the venture.

(iv) The relationship is not a transaction to transaction relationship but has a character of relatively longer time duration.

The above four characteristics are the distinguishing features of a Contractual Joint Venture as opposed to an Equity based relationship.

It is important to note that a joint venture agreement, be it for the establishment of a limited liability company or not, and the different contracts must be concluded in accordance with laws and regulations applicable to such companies including tax laws concerning these companies or the laws relating to agency or partnership as well as other economic laws, in addition to laws relating to labour, sales of goods, insurance and foreign economic and trade contract.

Every equity based joint venture gives birth to a new entity. Government of India permits certain type of entities.

Different types of entities are summed up below:

(1) **Company** – A limited liability company is the most preferred structure for joint venture entities in India.

Government also encourages investment being in the form of equity capital of a company incorporated in India. Companies in India are mainly of two types – private limited and public limited. After the coming into force of Companies Amendment Act, 2015 there is no minimum share capital prescribed either for private limited company or public limited company.

A private limited company must have at least two shareholders, while a public limited company must have seven shareholders. The only exception to this is a one-person company. The shareholders may be foreign citizens or foreign companies. Companies Act 2013 makes it mandatory that at least one director of every company is resident of India.

(2) **Limited Liability Partnership (LLP) Firm** – LLP Firm structure is regulated in India by The Limited Liability Partnership Act, 2008. Foreign investment in LLP Firms was not permitted before November 2015. Government of India has now allowed foreign investments in LLP firms subject to certain restrictions.

LLP Firms are partnership firms with limited liability of partners. An LLP Firm combines the convenience of a partnership firm with the limited liability feature earlier found only in a company. An LLP Firm needs minimum two partners. It also requires minimum two Designated Partners out of which at least one should be resident of India. The two partners can also be appointed as Designated Partners. There is no requirement of minimum capital contribution to incorporate an LLP Firm.

(3) **Venture Capital Fund** – A duly registered Foreign Venture Capital Investor is allowed to contribute up to 100% in Indian Venture Capital Undertakings /Venture Capital Funds / other companies.

(4) **Trusts** – A foreign company is not allowed to use Trust as a form of a joint venture entity in India. • Investment Vehicle – SEBI has introduced regulations for some funds like Real Estate Investments Trusts, Infrastructure Investment Funds, Alternative Investment Funds. Such funds are now permitted to receive foreign investment from a person resident outside India.

(5) **Other Entities** – Foreign companies are not allowed to use any structures other than those mentioned above for the purpose of equity based joint venture entities.

Restrictions under FDI Policy of the Government of India

Typically, any non-resident entity can set up an equity based joint venture in India. However, some entities face restrictions under FDI Policy of Government of India. The restrictions are as follows:

1. A Citizen or entity from Pakistan can invest only after the approval of the Government of India. They cannot invest in defence, space, atomic energy and sectors prohibited for foreign investment.
2. A Citizen or entity from Bangladesh can invest only after the approval of the Government of India. However, there are specific sectors that are barred from investment as is in the case of entities from Pakistan.
3. NRI residents in Nepal and Bhutan as well as citizens of Nepal and Bhutan can invest on repatriation basis subject to investment coming in free foreign exchange (USD or EURO) through normal banking channels.
4. A Foreign Institutional Investor (FII) can invest only under the Portfolio Investment Scheme which limits the individual holding of an FII to 10% of the capital of the company and the aggregate limit for FII investment to 24% of the capital of the company. This aggregate limit of 24% can be increased to the sectoral cap / statutory ceiling, as applicable, by the Indian Company concerned through a resolution by its Board of Directors followed by a special resolution to that effect by its General Body and subject to prior intimation to Reserve Bank of India. The aggregate FII investment, in the FDI and Portfolio Investment Scheme, should be within the above caps.

5. A Foreign Venture Capital Investor (FVCI) duly registered in India may contribute up to 100% of the capital of an Indian Company under the automatic route and may also set up a domestic asset management company to manage the fund. Such investments are subject to the relevant regulations and FDI policy including sectoral caps, etc. SEBI registered FVCIs are also allowed to invest under the FDI Scheme, as non-resident entities, in other companies, subject to FDI Policy and other regulations.

LLP FIRM AS A SPECIAL PURPOSE VEHICLE

A Limited Liability Partnership (LLP) Firm combines the simplicity of a partnership firm with the advantage of limited liability as available in the case of a company.

Before the passing of The Limited Liability Partnership Act in 2008, a foreign company intending to participate in tender or some other project in consortium with an Indian company had only the option of setting up a company (whether private or public) as a Special Purpose Vehicle (SPV). The disadvantage was that winding up such a company is difficult.

Foreign companies are not permitted to invest in partnership firms.

Moreover, consortium members do not want to be saddled with unlimited liability as is the case in a partnership firm under The Indian Partnership Act, 1932. Till November 2015, foreign companies were not allowed to invest in any form of structure except a company. Foreign Investment in some LLP firms has been allowed now.

LLP firm as an SPV between a foreign company and an Indian company has the advantage of being easy to wind up after the purpose is over and the liability of the two partner companies is limited.

Key advantages of using an LLP firm as an SPV as compared to a company are as follows:

(a) Low cost of incorporation of an LLP

(b) Flexibility of rules of management and governance based on Agreement between the contracting Partners.

(c) Partners can be companies while management is by Designated Partners who are individuals. By this, there is divorce between ownership and management.

(d) Low annual maintenance cost

(e) There may not be any necessity of getting the accounts audited before the project takes off.

(f) An LLP firm does not have to pay Dividend Distribution Tax (DDT) on share of profits transferred to the Partners, which makes it tax efficient.

(g) Voluntary winding of an LLP firm which has no creditors is very easy and can be done without intervention of any court or tribunal.

(h) Investment in LLP Firms is permitted only in sectors in which 100% FDI is permitted through automatic route without any performance linked conditions.

Documents for Joint Ventures

Finalization of a joint venture goes through many stages. The first may be called the familiarisation stage when the two partners generally attempt to know each other.

The second may be called the engagement phase when there is a level of commitment but still it is not very firm or long-term. The final stage is when broad understanding has been reached on the terms of the Joint Venture.

At each stage, the documentation is different. The Indian companies preferred to have a Memorandum of Understanding (MOU) to define the relationship at the initial stage. The MOU is a brief document without much

legal jargon. The MOU states the duties of both parties and lays down a road map for the future. During the engagement phase, a contractual Joint Venture may be envisaged. The parties are putting in relatively higher amount of resources at this stage. Hence, it is customary to have well-drafted legally binding contracts.

The contracts are generally of a fixed duration or are related to specific events like getting an order or achieving certain sales volumes. At the concluding stage, the parties have developed higher confidence in each other. So, an equity-based joint venture is considered. The documentation for an equity Joint Venture must take into account all possibilities that may arise over a fairly long period of time.

Hence, the Joint Venture Agreement or Shareholders' Agreement or LLP Partnership Deed must be prepared carefully to avoid any confusion even many years down the line. Generally speaking, most equity Joint Ventures in India are structured in the form of private or public limited liability companies. In a company, Articles of Association is a very important document. Companies Act, 2013 gives the promoters freedom to draft the articles as per their requirements. It is hence, advisable to devote time and attention to the Articles and not depend on a standard off-the-shelf draft, especially in case of a joint venture company where one of the partners is a foreign national /company.

Essential Features of a Shareholders' Agreement (SHA) /Joint Venture Agreement / LLP Partnership Agreement (PA)

The SHA / PA is not a document for the government or the courts. SHA / PA is a working document and should be drafted with business essentials in focus. The key questions that an SHA / PA must address are common-sense ones that any entrepreneur is bound to ask when he / she joins hands with another entrepreneur.

Some of the key issues which must be kept in mind while drafting the SHA/PA are summarised below:

(i) The business of the new company/LLP

(ii) Manner and extent to which resources (financial, manpower, technology, etc) will be brought in.

(iii) Provisions relating to allotment and transfer of shares

(iv) Constitution of the Board of Directors/Designated Partners.

(v) Manner in which decision making will take place (majority vote or consensus?)

(vi) Decision regarding the Chairman and Managing Director of the entity; their rights, duties and responsibilities.

(vii) Persons responsible for managing finances, marketing, production, etc.

(viii) Dividend distribution policy.

(ix) Term of office of the nominated directors, the manner of their appointment and changes among them.

(x) Valuation of the company at the time of separation.

(xi) Dispute resolution mechanism.

The above examples are indicative and are not exhaustive.

Essential components of a Joint Venture Agreement

In India, there is no legally prescribed format of a Joint Venture Agreement. However, in actual practice, the Agreement contains the following components (illustrative and not exhaustive):

A. Description (Nature of the Agreement)

B. Parties (full description of the parties to the Agreement)

C. Recitals (states the situation as it existed prior to the execution of this Agreement; It is also used to convey the intention of the parties)

D. Operative Part(defines the rules for the future; typically consists of name and constitution of the new entity being set up, equity investments, rules relating to loans by either party, activities to be undertaken, role of each party, constitution of the Board, names of the Chairman and Managing Director and their powers, duties, etc, matters to be decided by consensus, managerial remuneration, milestones to be reached and plan of action)

E. Legal aspects:

(i) Amendments of the JV Agreement

(ii) Duration of the JV.

(iii) Termination

(iv) Dispute resolution by amicable consultation and/or Arbitration mechanism/Alternate form of Dispute Resolution

(v) Confidentiality and Non-Disclosure Agreement

(vi) Non- compete clause.

(vii) Indemnification

(vii) Procedure for execution

SPECIAL PURPOSE VEHICLE (SPV)

Meaning of Special Purpose Vehicle (SPV)

A Special Purpose Vehicle (SPV) or Special Purpose Entity (SPE) are generally formed for a special purpose. Scope of these kind of companies or entities are limited only to those activities which are required to be performed to attain that specific purpose. These companies/entities close their operations once the purpose is attained. The operations of these entities are limited to the acquisition and financing of specific assets. SPVs are generally a subsidiary company whose obligations are secured even if the parent company goes bankrupt.

An SPV can be formed for any lawful purpose. No SPV can be formed for an unlawful purpose, or for undertaking activities which are contrary to the provisions of law or public policy. An SPV is, primarily, a business association of persons or entities eligible to participate in the association.

A SPVs/SPEs may be formed through limited partnerships, trusts, corporations, limited liability corporations or other entities. An SPV/SPE may be designed for independent ownership, management and funding of a company or as protection of a project from operational or insolvency issues. SPVs help companies securitize assets, create joint ventures, isolate corporate assets or perform other financial transactions.

Thus, based on above meaning, we can conclude that a SPV is an entity which has distinct identity from its promoters or sponsors or constituents or shareholders.

To give an example, the implementation of the Mission (under the Smart Cities Mission Project of the Ministry of Housing & Urban Affairs, Government of India) at the City level will be done by a Special Purpose Vehicle (SPV) created for the purpose. The SPV will plan, appraise, approve, release funds, implement, manage, operate, monitor and evaluate the Smart City development projects. Each smart city will have a SPV which will be headed by a full time CEO and have nominees of Central Government, State Government and ULB on its Board. The SPV will be a limited company incorporated under the Companies Act, 2013 at the city-level.

Benefits of Special Purpose Vehicle

The biggest advantage of SPV is that it helps in separating the risk and freeing up the capital. As a result, the SPV and the sponsoring company are protected against risks like insolvency, which may arise during the course of operation. The SPV also allows securitisation of assets without disturbing the managerial relationship. Under the arrangement, any predictable income stream generated by secure assets can be securitised.

Model SPV:

(a) **Ownership of Assets** – An SPV allows the ownership of a single asset often by multiple parties and allows for ease of transfer between parties.

(b) **Minimum Statutory Requirement** – Depending on the choice of jurisdiction, it is relatively cheap and easy to set up an SPV.

(c) **Clarity of documentation** – It is easy to limit certain activities or to prohibit unauthorised transactions within the SPV documentation.

(d) **Tax benefits** – SPVs are often used to make a transaction tax efficient by choosing the most favourable tax residence for the vehicle. SPVs are method of financial engineering schemes which have as their main goal, the avoidance of tax. Some countries have different tax rates for capital gains and gains from property sales

(e) **Legal protection** – By structuring the SPV appropriately, the sponsor may limit legal liability in the event that the underlying project fails.

(f) **Accounting Reasons** – Debts raised through SPV are not reflected in the balance sheet of the sponsor. It reflects a pleasant picture and enhances the debt raising ability of the sponsor. Losses incurred by SPV are not shown in the balance sheet of the sponsor, so it helps to maintain the healthy picture of the sponsor in the eyes of its stakeholders.

(g) The key advantage is that it helps in separating the risk and freeing up the capital. As a result, the SPV and the sponsoring company are protected against risks like insolvency, which may arise during the course of operation.

(h) The SPV also allows securitization of assets without disturbing the managerial relationship. Under the arrangement, any predictable income stream generated by secured assets can be securitized.

Purpose of Special Purpose Vehicle

The main purpose of a Special Purpose Vehicle is to allow the parent company to make highly leveraged or speculative investments without endangering the entire company. If the SPV goes bankrupt, it will not affect the parent company. SPVs are mostly formed to raise funds from the market or when Government Regulations specify creation of a separate vehicle for carrying out any specified activity.

SPVs are created by a parent company to implement large-scale projects and operations of an SPV are legally limited to specific assets.

SPVS are also formed by banks and financial institution for Securitisation. The total assets of banks or financial institution mainly comprise of loans and receivables along with their future cash flow to a separate entity, which may be formed for a specific purpose. The SPV is allowed to raise debt which will be backed by these receivables and their future cash flows. The difference between the incomes received from these receivables and cost of servicing that debt will be profit/earning of the SPV. By securitization through SPV the risk involved in this activity is separated from the general business of the bank.

Indirect acquisition of assets - SPVs can be used for acquiring assets indirectly for the purpose of tax saving. In this method, the sponsor takes the assets on lease from its SPV. Expenses incurred as rent, is allowed as a

deduction to sponsor for income tax purpose. On the other hand, the SPV acquires the asset through raising debt, the interest on which is a deductible expense for tax purpose. This way the same asset can be used to claim deduction by both, which results in saving of tax.

Government also forms SPVs for special projects. Purpose behind formation of SPV is to get easy finance and various approvals from State and Central Government at many levels and on completion of projects, it provides easy exit route for Government.

Difference between a special purpose vehicle and a company

SPVs are mostly formed to raise funds from the market. Technically, an SPV is a company. It has to follow the rules of formation of a company laid down in the Companies Act. Like a company, the SPV is an artificial person. It has all the attributes of a legal person. It is independent of members subscribing to the shares of the SPV. The SPV has an existence of its own in the eyes of law. It can sue and be sued in its name. The SPV has to adhere to all the regulations laid down in the Companies Act. Members of an SPV are mostly the companies and individuals sponsoring the entity. An SPV can also be a partnership firm.

The company, as distinguished from an SPV, may be called a general purpose vehicle. A company may do many things which are mentioned in the memorandum of association (MoA) or permitted by the Companies Act. An SPV may also do the same, but its scope of operation is limited and focused. If it is not so, the SPV had better be called a company. The MoA is quite narrow in the case of an SPV. This is primarily to provide comfort to lenders who are concerned about their investment.

How is an SPV established

Like a company, an SPV must have promoter(s) or sponsor(s). Usually, a sponsoring corporation hives off assets or activities from the rest of the company into an SPV. This isolation of assets is important for providing comfort to investors. The assets or activities are distanced from the parent company, hence the performance of the new entity will not be affected by the ups and downs of the originating entity. The SPV will be subject to fewer risks and thus provide greater comfort to the lenders. What is important here is the distance between the sponsoring company and the SPV. In the absence of adequate distance between the sponsor and the new entity, the later will not be an SPV but only a subsidiary company.

A good SPV should be able to stand on its feet, independent of the sponsoring company. Unfortunately, this does not happen in practice. One of the reasons for the collapse of the Enron SPV was that it became a vehicle for furthering the ends of the parent company in violation of the prudential norms of corporate financing and accounting.

SPV as preferred vehicle for funds raising by Infrastructure Sector

The funds requirement for Infra structure sector are huge. There are different organisations, like the Infrastructure Development Finance Company (IDFC), Power Finance Corporation (PFC), Indian Rail Finance Corporation (IRFC) etc., which are engaged in raising funds for development of infrastructure sector projects for the sectors they are involved in. The proposed SPV, which is likely to be a government company, will add to the availability of long-term funds for infrastructure sector projects.

Further. The implementation of the Smart Cities Mission at the City level done by a Special Purpose Vehicle (SPV) created for the purpose. The SPV plan, appraise, approve, release funds, implement, manage, operate, monitor and evaluate the Smart City development projects. The execution of projects may be done through joint ventures, subsidiaries, Public-Private Partnership (PPP), turnkey contracts, etc suitably dovetailed with revenue streams.

LESSON ROUND-UP

- A simply dictionary meaning of the word 'Joint Venture' is a commercial enterprise undertaken jointly by two or more parties which otherwise retain their distinct identities.
- Examples of Joint Venture Companies in India are Indian Oil Skytanking Ltd.(between Holders -Ruchi Soya and Indian Oil), Ratnagiri Gas & Power Private Limited(between NTPC Ltd and GAIL India Ltd.), Mahanagar Gas Ltd.{ BG Group of U.K. and GAIL India Ltd.) and Petronet LNG Ltd.(between PSU's, namely, BPCL, GAIL India Ltd., ONGC and IOCL).
- There are various advantages of forming Joint Venture such as Risk Sharing, Economies of Scale, Market Access, Exploring the Global Market, Easy acquisition of other entity or business, Cost Efficiency, Flexible nature.
- There are disadvantages also of forming Joint Ventures as outlined in the Chapter.
- Joint ventures can be very effective for growth and success of a business. If formed strategically Joint Ventures can be extremely valuable and chances of their failure can be reduced to a greater extent. Some of the strategies are detailed in the chapter for forming a successful Jointing Venture.
- There are two modes of formation of Joint Ventures: Equity Joint Venture and Contractual Joint Venture.
- Some entities face restrictions under FDI Policy of Government of India.
- Government of India permits certain type of entities. Different types of entities are : company, Limited Liability Partnership, Venture Capital Fund, Trusts, other entities:
- A Limited Liability Partnership (LLP) Firm combines the simplicity of a partnership firm with the advantage of limited liability as available in the case of a company.
- Some of the key issues which must be kept in mind while drafting the Shareholders' Agreement(SHA)/ Joint Venture Agreement / LLP Partnership Agreement (PA) are specified in the chapter.
- A special Purpose Vehicle (SPV) or Special Purpose Entities (SPE) are generally formed for a special purpose. Scope of these kind of companies or entities are limited only to those activities which are required to be performed to attain that specific purpose.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Define a Joint Venture Company. What are its characteristics?
2. What are the advantages and disadvantages of a Joint Venture Company.
3. Distinguish between a Joint Venture Company and a Special Purpose Vehicle(SPV)
4. Explain, with reasons, why the concept of Special Purpose Vehicle(SPV) has gained prominence in India in recent times. Quote examples.

Lesson 11

Setting up of Business outside India and Issues Relating Thereto

LESSON OUTLINE

- Introduction
- Regulatory framework under Foreign Exchange Management Act, 1999
- Eligibility
- Prohibitions
- Automatic route
- Methods of funding
- Investments not under automatic route and that require approval of reserve bank
- Issues in choosing location outside India
- Geographical location
- Economical aspects
- Political aspects
- Social aspects
- Technological aspects
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

In this lesson, you will learn about the laws/ Authority governing setting up of Business outside India, The lesson highlights the regulatory framework under Foreign Exchange Management Act, 1999, eligibility, prohibitions, method of fundings, investment under automatic route and approval route, issues in choosing location outside India such as: Geographical location, economical aspects, political aspects, social aspects, technological aspects.

Further in this lesson you will also learn about setting up of business in various countries.

INTRODUCTION

The year 1991 was the golden year for Indian economy. The foreign investment policies of the country changed and opened gates for foreign investments to enter the Indian Territory. This also made Indians eligible to set up business abroad or make an investment abroad as the case may be.

Prior to 1991, exports were a predominant way of expanding business abroad and hence the emphasis was on export promotion strategies with restrictions on cash outflows so as to conserve our foreign exchange reserves.

Till 1991, India's economic integration with the rest of the world was very limited. Business houses across industries realised that for expansion and growth of Indian companies, it is necessary that they increase their share in the world market not only by exporting their products but also by acquiring overseas assets and establishing their presence abroad. This meant that business had to be set up outside India in order to ensure their presence in the concerned markets. This requirement, paved the way to formulate regulations to make investments abroad. Accordingly, the policy for outward capital flows has evolved.

The policy on Indian investments overseas was first liberalised in 1992. Under this policy, an Automatic Route for overseas investments was introduced and cash remittances were allowed for the first time with restrictions on the total value. The basic intent for opening up the regime of Indian investments overseas had been the need to provide Indian industry access to new markets and technologies with a view to increase their competitiveness globally and help the country's export efforts.

The introduction of FEMA (Foreign Exchange Management Act) in the year 2000 changed the entire perspective on foreign exchange particularly those relating to investment abroad. This new change brought in more of management of "Foreign Exchange" and not "Regulation" unlike the earlier Act. This Act made sweeping changes in relaxing the norms for most of the policies including the overseas investments. It aimed to facilitate external trade and payments as well as to promote an orderly development and maintenance of foreign exchange market in India.

According to the Reserve Bank of India, Overseas Direct Investment means investments, either under the Automatic Route or the Approval Route, by way of contribution to the capital or subscription to the Memorandum of a foreign entity or by way of purchase of existing shares of a foreign entity either by market purchase or private placement or through stock exchange, signifying a long-term interest in the foreign entity (JV or WOS). This is different from portfolio investment.

Some of the major overseas investments by Indian companies are:

- Indian conglomerate, Reliance Industries Ltd (RIL), is going to invest US$ 25 million in Israel-based Jerusalem Innovation Incubator (JII), which will focus on start-ups working in the field of big data, analytics, Internet of Things and other similar areas.
- Adani Enterprises Ltd has announced the final approval of the company's board to proceed with the US$ 16.5 billion worth Carmichael mine and rail projects in Central Queensland, Australia, which would be one of the largest single infrastructure and job creating developments in Australia's recent history.
- Intas Pharma has announced purchase of two companies in UK and Ireland, Actavis UK Ltd and Actavis Ireland Ltd, from Israeli pharma major Teva Pharmaceutical Industries Ltd, for an enterprise value of GBP 600 million (US$ 754.14 million).
- India-focused private equity firm Everstone Group, through its Singapore arm Everise Services, has agreed to buy C3, a US-based global CRM solutions provider, for an estimated deal value of US$ 150 million.
- India's third largest software services firm Wipro will be spending US$ 500 million to acquire US-based cloud services firm Appirio.

- Adani Enterprises has announced plan to develop 1,000 megawatt (MW) of solar power projects in Australia over the next five years.
- Sun Pharmaceutical Industries Ltd, India's largest drug maker, has entered into an agreement with Switzerland-based Novartis AG, to acquire the latter's branded cancer drug Odomzo for around US$ 175 million.
- WNS Global Services, the Mumbai-based business process management company, has announced its plans of acquiring Denali Sourcing Services, a US-based business process outsourcing company, for US$ 40 million.
- Aurobindo Pharma has bought Portugal based Generis Farmaceutica SA, a generic drug company, for EUR 135 million (US$ 146.67 million).
- Motherson Sumi Systems Ltd, an automobile components manufacturer, has acquired Finland-based truck wire maker PKC Group Pic for EUR 571 million (US$ 620.36 million).

Laws /Authority governing Setting up of Business out side India

Reserve bank of India

The Reserve Bank of India has started issuing Master Directions on all regulatory matters beginning January 2016. The Master Directions consolidate instructions on rules and regulations framed by the Reserve Bank under various Acts including banking issues and foreign exchange transactions. The process of issuing Master Directions involves issuing one Master Direction for each subject matter covering all instructions on that subject. Any change in the rules, regulation or policy is communicated during the year by way of circulars/press releases. The Master Directions will be updated suitably and simultaneously whenever there is a change in the rules/ regulations or there is a change in the policy. All the changes will get reflected in the Master Directions available on the RBI website along with the dates on which changes are made. Explanations of rules and regulations will be issued by way of Frequently Asked Questions (FAQs) after issue of the Master Directions in easy to understand language wherever necessary.

Master Direction – Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad

Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) have been recognised as important avenues for promoting global business by Indian entrepreneurs. Joint Ventures are perceived as a medium of economic and business co-operation between India and other countries. Transfer of technology and skill, sharing of results of R&D, access to wider global market, promotion of brand image, generation of employment and utilisation of raw materials available in India and in the host country are other significant benefits arising out of such overseas investments (or financial commitment). They are also important drivers of foreign trade through increased exports of plant and machinery and goods and services from India and also a source of foreign exchange earnings by way of dividend earnings, royalty, technical know-how fee and other entitlements on such investments (or financial commitment).

In keeping with the spirit of liberalisation, which has become the hallmark of economic policy in general, and Foreign Exchange regulations in particular, the Reserve Bank has been progressively relaxing the rules and simplifying the procedures both for current account as well as capital account transactions.

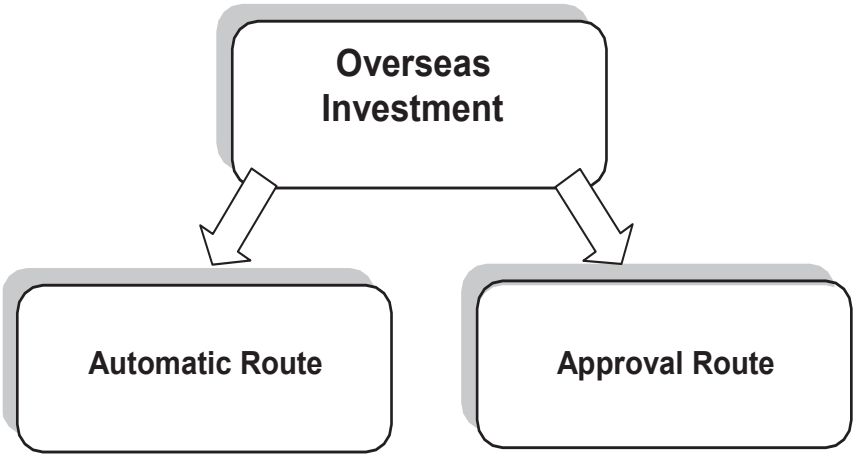
FOREIGN EXCHANGE MANAGEMENT ACT, 1999

Section 6 of the Foreign Exchange Management Act, 1999 provides powers to the Reserve Bank to specify, in consultation with the Government of India, the classes of permissible capital account transactions and limits up to which foreign exchange is admissible for such transactions. Section 6(3) of the aforesaid Act provides powers

to the Reserve Bank to prohibit, restrict or regulate various transactions referred to in the sub-clauses of that sub-section, by making Regulations.

In exercise of the above powers conferred under the Act, the Reserve Bank has in supersession of the earlier Notification No.FEMA19/RB-2000 dated 3rd May 2000 and subsequent amendments thereto, issued Foreign Exchange Management (Transfer or Issue of any Foreign Security) Regulations, 2004 vide Notification No. FEMA.120/RB-2004 dated July 7, 2004. The Notification seeks to regulate acquisition and transfer of a foreign security by a person resident in India i.e.

- Investment (or financial commitment) by Indian entities in overseas joint ventures and wholly owned subsidiaries as also investment by a person resident in India in shares and securities issued outside India.
- Overseas Investment (or financial commitment) can be made under two routes viz. (i) Automatic Route and (ii) Approval Route.



ELIGIBILITY (ENTITIES ARE REFERRED TO AS "INDIAN PARTY")

Legal Entities permitted to make investments:

- Company incorporated in India or a body created under an Act of Parliament,
- Limited Liability Partnership (LLP), registered under the Limited Liability Partnership Act, 2008,
- Partnership firm registered under the Indian Partnership Act, 1932,
- Any other entity in India as may be notified by the Reserve Bank.

PROHIBITIONS

(a) Indian Parties are prohibited from making investment (or financial commitment) in a foreign entity engaged in real estate (meaning buying and selling of real estate or trading in Transferable Development Rights (TDRs) but does not include development of townships, construction of residential/commercial premises, roads or bridges) or banking business, without the prior approval of the Reserve Bank.

(b) An overseas entity, having direct or indirect equity participation by an Indian Party, shall not offer financial products linked to Indian Rupee (e.g. non-deliverable trades involving foreign currency, rupee exchange rates, stock indices linked to Indian market, etc.) without the specific approval of the Reserve Bank of India. Any incidence of such product facilitation would be treated as a contravention of the extant FEMA regulations and would consequently attract action under the relevant provisions of FEMA, 1999.

AUTOMATIC ROUTE

(1) In terms of Regulation 6 of the Notification No. FEMA 120/RB-2004 dated July 7, 2004, as amended from time to time, an Indian Party has been permitted to make investment / undertake financial commitment in overseas Joint Ventures (JV) / Wholly Owned Subsidiaries (WOS), as per the ceiling prescribed by the Reserve Bank from time to time.

With effect from July 03, 2014, any financial commitment (FC) upto USD 1 (one) billion shall only come under the automatic approval. The eligible limit of investment under the automatic route is 400% of the net worth of the Indian Party as per the last audited balance sheet.

It has been decided that any financial commitment (FC) exceeding USD 1 (one) billion (or its equivalent) in a financial year would require prior approval of the Reserve Bank even when the total FC of the Indian Party is within the eligible limit under the automatic route (i.e., within 400% of the net worth as per the last audited balance sheet).

(2) For the purpose of making investment / undertaking financial commitment in overseas Joint Ventures (JV)/ Wholly Owned Subsidiaries (WOS), the Indian Party should approach an Authorised Dealer Category - I bank with an application in Form ODI (Master Document on Reporting) and prescribed enclosures / documents for effecting such remittances.

(3) The investments/financial commitments are subject to the following conditions:

(a) The Indian Party/entity may extend loan/guarantee only to an overseas JV/WOS in which it has equity participation. Proposals from the Indian Party for undertaking financial commitment without equity contribution in JV/WOS may be considered by the Reserve Bank under the approval route. AD banks may forward the proposals from their constituents after ensuring that the laws of the host country permit incorporation of a company without equity participation by the Indian Party.

Indian entities may offer any form of guarantee - corporate or personal (including the personal guarantee by the indirect resident individual promoters of the Indian Party)/ primary or collateral / guarantee by the promoter company / guarantee by group company, sister concern or associate company in India. Provided that :

- all the financial commitments are within the overall ceiling prescribed for the Indian party;
- no guarantee should be open ended;
- in cases where invocation of the performance guarantee breaches the ceiling for the financial commitment, the Indian party shall seek the prior approval of the Reserve Bank before remitting funds from India, on account of such invocation;
- in terms of Regulation 5 (b) of Notification No. FEMA 8/2000-RB dated May 3, 2000, an authorised dealer in India may also give a Bank guarantee/ issue SBLC to a joint venture company or a wholly-owned subsidiary of a company in India in connection with its business abroad provided that the terms and conditions stipulated in Foreign Exchange Management (Transfer and Issue of Foreign Security) Regulations, 2000 for promoting or setting up such company or subsidiary are continued to be complied with; and
- as in the case of corporate guarantees, all guarantees (including performance guarantees and Bank Guarantees / SBLC) are required to be reported to the Reserve Bank in Form ODI-Part II. Guarantees issued by banks in India in favour of WOS / JV outside India would be subject to prudential norms issued by the Reserve Bank of India (Department of Banking Regulation) from time to time.

(b) The Indian Party should not be on the Reserve Bank's Exporters' caution list / list of defaulters to the

banking system circulated by the Reserve Bank / Credit Information Bureau (India) Ltd. (CIBIL) / or any other credit information company as approved by the Reserve Bank or under investigation by any investigation / enforcement agency or regulatory body.

(c) All transactions relating to a JV / WOS should be routed through one branch of an Authorised Dealer bank to be designated by the Indian Party.

(d) In case of partial / full acquisition of an existing foreign company, where the investment is more than USD 5 million, valuation of the shares of the company shall be made by a Category I Merchant Banker registered with SEBI or an Investment Banker / Merchant Banker outside India registered with the appropriate regulatory authority in the host country; and, in all other cases by a Chartered Accountant or a Certified Public Accountant.

(e) In cases of investment by way of swap of shares, irrespective of the amount, valuation of the shares will have to be made by a Category I Merchant Banker registered with SEBI or an Investment Banker outside India registered with the appropriate regulatory authority in the host country.

(f) In case of investment in overseas JV / WOS abroad by a registered Partnership firm, where the entire funding for such investment is done by the firm, it will be in order for individual partners to hold shares for and on behalf of the firm in the overseas JV / WOS if the host country regulations or operational requirements warrant such holdings.

(g) An Indian Party may acquire shares of a foreign company engaged in a bonafide business activity, in exchange of ADRs/GDRs issued to the latter in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued there under from time to time by the Government of India. Provided that :

- ADRs/GDRs are listed on any stock exchange outside India;
- The ADR and/or GDR issued for the purpose of acquisition is backed by underlying fresh equity shares issued by the Indian Party; and
- The total holding in the Indian entity by persons resident outside India in the expanded capital base, after the new ADR and/or GDR issue, does not exceed the sectoral cap prescribed under the relevant regulations for such investment under FDI.

METHOD OF FUNDING

(1) Investment (or financial commitment) in an overseas JV / WOS may be funded out of one or more of the following sources:

(i) drawal of foreign exchange from an AD bank in India; capitalisation of exports;

(ii) capitalisation of exports and other dues and entitlements;

(iii) swap of shares;

(iv) proceeds of External Commercial Borrowings (ECBs) / Foreign Currency Convertible Bonds (FCCBs);

(v) in exchange of ADRs/GDRs issued in accordance with the Scheme for issue of Foreign Currency Convertible Bonds and Ordinary Shares (through Depository Receipt Mechanism) Scheme, 1993, and the guidelines issued thereunder from time to time by the Government of India;

(vi) balances held in EEFC (Exchange Earners Foreign Currency) account of the Indian Party maintained with an Authorised Dealer; and

(vii) proceeds of foreign currency funds raised through ADR / GDR issues.

In respect of (vi) and (vii) above, the limit of financial commitment vis-a-vis the net worth will not apply. However, all investments (or financial commitment) made in the financial sector will be subject to compliance with Regulation 7 of the Notification ibid, irrespective of the method of funding.

(2) General permission has been granted to persons resident in India for purchase/ acquisition of securities in the following manner:

(i) out of funds held in RFC account;

(ii) as bonus shares on existing holding of foreign currency shares; and

(iii) when not permanently resident in India, out of their foreign currency resources outside India

INVESTMENTS NOT UNDER AUTOMATIC ROUTE AND THAT REQUIRE APPROVAL OF THE RESERVE BANK

(i) Prior approval of the Reserve Bank would be required in all other cases of direct investment (or financial commitment) abroad. For this purpose, application together with necessary documents should be submitted in Form ODI through their Authorised Dealer Category – I banks with their specific recommendation.

(ii) The designated AD before forwarding the proposal should submit the Form ODI in the on-line OID application under approval route and the transaction number generated by the application should be mentioned in the letter.

(iii) In case the proposal is approved, the AD bank should effect the remittance under advice to Reserve Bank so that the UIN (Unique Identification Number) is allotted.

Some proposals which require prior approval of Reserve Bank of India are:

(i) Overseas Investments in the energy and natural resources sector exceeding the prescribed limit of the net worth of the Indian companies as on the date of the last audited balance sheet;

(ii) Investments in Overseas Unincorporated entities in the oil sector by resident corporates exceeding the prescribed limit of their net worth as on the date of the last audited balance sheet, provided the proposal has been approved by the competent authority and is duly supported by a certified copy of the Board Resolution approving such investment. However, Navaratna Public Sector Undertakings, ONGC Videsh Ltd and Oil India Ltd are allowed to invest in overseas unincorporated / incorporated entities in oil sector (i.e. for exploration and drilling for oil and natural gas, etc.), which are duly approved by the Government of India, without any limits, under the automatic route;

(iii) Overseas Investments by proprietorship concerns and unregistered partnership firms satisfying certain eligibility criteria;

(iv) Investments by Registered Trusts / Societies (satisfying certain eligibility criteria) engaged in the manufacturing / educational / hospital sector in the same sector in a JV / WOS outside India;

(v) Corporate guarantee by the Indian Party to second and subsequent level of Step Down Subsidiary (SDS);

(vi) All other forms of guarantee which is offered by the Indian Party to its first and subsequent level of SDS;

(vii) Restructuring of the balance sheet of JV/WOS involving write-off of capital and receivables in the books of listed/ unlisted Indian Company satisfying certain eligibility criteria.

(viii) Capitalization of export proceeds remaining unrealized beyond the prescribed period of realization will require the prior approval of the Reserve Bank; and

(ix) Proposals from the Indian party for undertaking financial commitment without equity contribution in

JV / WOS may be considered by the Reserve Bank under the approval route based on the business requirement of the Indian Party and legal requirement of the host country in which JV/WOS is located.

Reserve Bank would, inter alia, take into account the following factors while considering such applications:

a. Prima facie viability of the JV / WOS outside India;

b. Contribution to external trade and other benefits which will accrue to India through such investment (or financial commitment);

c. Financial position and business track record of the Indian Party and the foreign entity; and

d. Expertise and experience of the Indian Party in the same or related line of activity as of the JV / WOS outside India.

FOREIGN DIRECT INVESTMENT POLICY

The Department for Promotion of Industry and Internal Trade (DPIIT) is the nodal Department for formulation of the policy of the Government on Foreign Direct Investment (FDI). It is also responsible for maintenance and management of data on inward FDI into India, based upon the remittances reported by the Reserve Bank of India. The FDI policy is reviewed on an ongoing basis, with a view to making it more investor-friendly. With a view to attracting higher levels of FDI, Government has put in place a liberal policy on FDI, under which FDI up to 100% is permitted under the automatic route in most sectors/activities. Significant changes have been made in the FDI Policy regime in recent times to ensure that India remains an increasingly attractive investment destination. The DPIIT plays an active role in the liberalization and rationalization of the FDI policy and has been constructively engaged in extensive stakeholder consultations on various aspects of the FDI Policy.

Reporting requirement under Master Direction – Reporting under Foreign Exchange Management Act, 1999

Overseas Direct Investment (ODI) Overseas investments (or financial commitment) in Joint Ventures (JV) and Wholly Owned Subsidiaries (WOS) (Part VIII) have been recognised as important avenues for promoting global business by Indian entrepreneurs.

The reporting formalities are as provided in Master Direction – Reporting under Foreign Exchange Management Act, 1999 are as under:

1. Form ODI (Annex I): An Indian Party and a Resident Individual making an overseas investment is required to submit form ODI.

2. The structure of the Form ODI comprise the following parts:

   Part I – Application for allotment of Unique Identification Number (UIN) and reporting of Remittances / Transactions:

   Section A – Details of the IP / RI.

   Section B – Capital Structure and other details of JV/ WOS/ SDS.

   Section C - Details of Transaction/ Remittance/ Financial Commitment of IP/ RI.

   Section D – Declaration by the IP/ RI.

   Section E – Certificate by the statutory auditors of the IP/ self-certification by RI.

   Part II - Annual Performance Report (APR)

   Part III – Report on Disinvestment by way of

   a) Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of overseas JV / WOS;

b) Sale/ Transfer of the shares of the overseas JV/ WOS to another eligible resident or non-resident;

c) Closure / Voluntary Liquidation / Winding up/ Merger/ Amalgamation of IP; and

d) Buy back of shares by the overseas JV/ WOS of the IP / RI.

3. An annual return on Foreign Liabilities and Assets (FLA) is required to be submitted directly by all the Indian companies which have made FDI abroad (i.e. overseas investment) in the previous year(s) including the current year, to the Director, External Liabilities and Assets Statistics Division, Department of Statistics and Information Management (DSIM), Reserve Bank of India. The form can be duly filled-in, validated and sent by e-mail, by July 15 every year.

4. Further, a new reporting format has also been introduced for Venture Capital Fund (VCF) / Alternate Investment Fund (AIF), Portfolio Investment and overseas investment by Mutual Funds as per the format in Annex II and Annex III of the Master Direction.

5. In case of reporting purchase and repurchase of ESOPs, the AD banks may continue to report the same in the existing format (Annex IV).

   a) Annual Statement shares allotted to Indian employees/ Directors under ESOP Schemes : This statement is required to be submitted to the Central Office of the Reserve Bank of India by the Indian Company through its AD bank.

   b) Annual Statement of shares repurchased by the issuing foreign company from Indian employees/ Directors under ESOP Schemes : This statement is required to be submitted to the Central Office of the Reserve Bank of India by the Indian Company through its AD bank.

6. Any post investment changes subsequent to the allotment of the UIN are required to be reported as indicated in the operational instructions on submission of Form ODI Part I (Annex I).

7. In case of RI undertaking ODI, certification of Form ODI Part I by statutory auditor or chartered accountant need not be insisted upon. Self-certification by the Resident Individual concerned may be accepted.

ISSUES IN CHOOSING LOCATION OUTSIDE INDIA

Choosing business location is depends on the entry barriers in the governing law as some of the countries provide easy access to the businesses such as Property transfer, Reliability of electricity, Labor market regulation, Trade regulation and costs, Court efficiency, Creditors' rights, Credit information, Shareholders' rights, Tax regulation, Foreign direct investment, Overall business regulatory environment. However, the same can be categories as under:

Geographical Location of the business

- Infrastructure (ports, airports, storage, specific storage types – such as cold-storage, secure storage)
- Access (transportation of goods, materials and personnel)
- Relevance to supply-chain : raw material sourcing, processing, despatch of finished produce)
- Availability of talent pool for productions (labour), services and management

Economic aspects

- Ease of doing business : entering, establishing, restructuring and closing the business, visa availability
- Cost of doing business : return on investment computations vis-à-vis comparable locations
- Laws relating to labour

- Laws relating to taxation : investment allowances, subsidies, distribution of profits, repatriation of profits, withholding taxes, existence of double-taxation avoidance agreements, information sharing requirements such as FATCA, TRC,etc.

Political Aspects

- Friendly country, MFN status
- Long-standing and established legislative precedents with companies going through regulatory recourse
- Their relations with nearing countries and neighbours and your country

Social Aspects

- Trade bodies, interaction between commercial entities of both nations
- Expatriate-friendliness of the nation for relocating key employee personnel.

Technological aspects

- Intellectual property protection: create, maintain and extract IP at the location or provision thereof from another location to the nation with free entry and egress.
- Power, communication, telecom – availability, quality and cost issues like infrastructure, geography, time zone, political considerations/conditions, safety of investments, economic policy and stability of the country, culture and language have a critical bearing on the strategy for globalization. Value systems and institutions are also becoming increasingly important from a long term perspective, in order to have the support of stakeholders. Ultimately, any chosen business strategy has to be executed within the parameters of legal and regulatory compliances. At the same time it is necessary to factor in global tax costs and plan to the possible extent within the framework of law.

Setting up of a Business in New Zealand

Regulator: New Zealand Companies Office

Apply online for registration with the Companies Office (including IRD number application and registration for GST)

To reserve a company name online, entrepreneurs can visit the New Zealand Companies Office Web site (www.companies.govt.nz). A new company's name must be unique and can be reserved for up to 20 working days with the Companies Office. To be incorporated under the Companies Act 1993, a company must have a name reserved by the Registrar of Companies, at least one share, at least one shareholder, at least one director, a registered office, and an address for service.

The applicant(s) can apply for company registration online by completing forms on company details and paying the registration fee. When the application is processed, the founder(s) will receive a notification by email along with the appropriate director and shareholder consent forms, which are generated by the Companies Office. The applicant must then fax the signed director and shareholder consent forms within 20 working days, after which the application will expire. The certificate of incorporation will be issued via email in a few minutes when the last consent form is accepted.

Promoters can apply online for a company IRD (Inland Revenue Department) number and register for the GST (Good and Service Tax) at the same time as incorporating a company online with the New Zealand Companies Office. The list of the information needed when applying for a company IRD number and registering for GST is as follows:

- Contact details
- The date the company will begin employing

- The number of employees and contractors (including the number of employees that will have a student loan)
- IRD number – The IRD number of each Director and all individual shareholders that are NZ residents, Main Business Activity, Place of Business and Postal Address, Trading Name of the company (if different from the Business Name), Company Contact details, a Business Industry Description and Code, and whether or not the Fringe Benefit Tax for employees is applicable.
- GST number – GST accounting method, frequency of filing returns, business activity code, details of how you would like refunds to be paid, whether or not the company will be making tax exempt supplies, Business Industry Description and Code, and whether or not the company will be making imports/ exports and ACC uses the business activity code to calculate levies for personal injury cover and residual claims (see www.businessdescription.co.nz for more information).

Since July 1st, 2008, it has been mandatory to file most documents with the Companies Office online. Starting in November 2014, clients had the ability to pay the incorporation prescribed fees using internet banking.

Recent Initiative in New Zealand for Setting up of Business

2019:

Starting a Business: New Zealand made starting a business less expensive by reducing the fees for name search and company incorporation.

2018

Paying Taxes: New Zealand made paying taxes easier by improving the online portal for filing and paying general sales tax.

Enforcing Contracts: New Zealand made enforcing contracts more difficult by suspending the filing of new commercial cases before the Commercial List of the High Court of New Zealand during the establishment of a new Commercial Panel.

2017

Paying Taxes: New Zealand made paying taxes easier by abolishing the cheque levy. New Zealand made paying less costly by decreasing the rate of accident compensation levy paid by employers. At the same time, New Zealand made paying taxes more costly by raising property tax and road user levy rates.

2016

Getting Electricity: The utility in New Zealand reduced the time required for getting an electricity connection by improving its payment monitoring and confirmation process for the connection works.

2015

Getting Credit: New Zealand improved access to credit information by beginning to distribute both positive and negative credit information.

2014

Enforcing Contracts: New Zealand made enforcing contracts easier by improving its case management system to ensure a speedier and less costly adjudication of cases.

2013

Getting Credit: New Zealand improved access to credit information by allowing credit bureaus to collect positive information on individuals.

2012

Paying Taxes: New Zealand reduced its corporate income tax rate and fringe benefit tax rate.

2011

Enforcing Contracts: New Zealand enacted new district court rules that make the process for enforcing contracts user friendly.

2010

Dealing with Construction Permits: New Zealand made dealing with construction permits more costly by raising fees.

2009

Starting a Business: New Zealand made starting a business easier by making it possible to complete the process in one simple online registration in less than a day.

Paying Taxes: New Zealand made paying taxes less costly for companies by reducing the corporate income tax rate.

Resolving Insolvency: New Zealand introduced a reorganization procedure with the aim of providing an alternative to liquidation and receivership and maximizing a company's chances of continuing as a going concern.

Setting up of Business in Singapore

Regulator: Accounting and Corporate Regulatory Authority (ACRA)

Registration online with ACRA including company name search and filing the company incorporation and tax number (GST)

The Accounting and Corporate Regulatory Authority (ACRA) is the national regulator of business, public accountants and corporate service providers in Singapore. Incorporation is done through Bizfile+, an electronic filing system.

Since 2007, Bizfile platform (further enhanced to Bizfile+) has been providing one-stop business facilitation services to customers at the point of registration. These services include reserving domain names, goods and services tax (GST) registration, subscribing for the relevant e-newsletter and registering for e-service alerts on latest government procurement opportunities, activating Customs Account and application for a corporate bank account.

The process starts with new company name application. The application for approval and reservation of a company name is to be submitted online at bizfile.gov.sg. An application fee of SGD 15 is payable for each approved company name. Once the application is submitted, the applicant can select to either pay the fee and continue with the incorporation later, or to immediately proceed to incorporation application.

Name application can be approved within a few minutes from payment if the name is available. However, it may take between 14 working days to 2 months if the application needs to be referred to another agency for approval or review. The lodger can proceed to register the business immediately after the name application is approved.

Once a name has been approved, it will be reserved for 120 days.

As of 2 June 2017, every newly incorporated business receives a free copy of its Business Profile upon the successful filling up of the incorporation forms and paying the incorporation fee. The processing time is about 15 minutes from the time of successful submission of all documents and all information, and the registration fee payable is SGD 300. The ACRA will issue a notice of incorporation via electronic mail to the law firm or professional firm engaged for the purposes of incorporation upon the successful incorporation of the company together with the registration number of the company.

The registration with the Inland Revenue Authority of Singapore (IRAS) for the goods and services tax (GST) when (a) its annual taxable turnover exceeds SGD 1 million can be done using the same online forms.

Less than one day (online procedure) SGD 15 (company name fee) + SGD 300 (registration fee)

Sign up for Employee Compensation Insurance at an insurance agency

Agency: Insurance Agency

Under Section 23(1) of the Work Injury Compensation Act (WICA), Chapter 354, of Singapore, every employer shall insure and maintain insurance under one or more approved policies with an insurer against all liabilities which the company may incur under the provisions of this Act in respect of any employee employed by the company unless the Minister, by notification in the Gazette, waives the requirement of such insurance in relation to any employer. The purchase of Workman Injury Compensation Insurance (WICI) has been incorporated into ACRA's online registration process as of November 2017. Business owners can now apply for WICI from NTUC Income (via ACRA's online Bizfile+ system) immediately after completing the online registration process. Time and cost may depend on the arrangement between the company and the insurance agency.

Recent Initiatives in Singapore for Setting up of Business

2020

Dealing with Construction Permits: Singapore made dealing with construction permits easier by enhancing its risk-based approach to inspections, improving public access to soil information and streamlining the process to obtain a construction permit.

2019

Starting a Business: Singapore made starting a business easier by abolishing the corporate seals.

Enforcing Contracts: Singapore made enforcing contracts easier by introducing a consolidated law on voluntary mediation.

2018

Trading across Borders: Singapore made exporting and importing easier by improving infrastructure and electronic equipment at the port.

Resolving Insolvency: Singapore made resolving insolvency easier by establishing a new scheme of arrangement procedure with features of the debtor-in-possession reorganization regime and introducing provisions applicable to prepackaged restructurings.

Employing Workers: Singapore adopted legislation that requires employers with more than 10 employees to notify the Ministry of Manpower if five or more employees are retrenched within any six-month period.

2017

Dealing with Construction Permits: Singapore made dealing with construction permits easier by streamlining procedures and improving the online one-stop shop.

Registering Property: Singapore made it easier to transfer a property by introducing an independent mechanism for reporting errors on titles and maps.

Paying Taxes: Singapore made paying taxes easier by introducing improvements to the online system for filing corporate income tax returns and VAT returns. At the same, the social security contribution rate paid by employers increased and the rebate of 30% on vehicle tax expired.

2015

Enforcing Contracts: Singapore made enforcing contracts easier by introducing a new electronic litigation system that streamlines litigation proceedings.

2014

Registering Property: Singapore made transferring property easier by introducing an online procedure for property transfers.

Getting Credit: Singapore improved its credit information system by guaranteeing by law borrowers' right to inspect their own data.

2011

Getting Credit: Singapore improved its credit information system by collecting and distributing information on firms.

2010

Starting a Business: Singapore made starting a business easier by combining tax registration with business registration on a single online form.

Dealing with Construction Permits: Singapore made dealing with construction permits easier through new workplace safety and health regulations allowing companies in low-risk industries to submit documents online.

Registering Property: Singapore made registering property easier by upgrading electronic systems and streamlining the administrative procedures of the government agencies involved.

2009

Starting a Business: Singapore reduced the time and number of procedures to start a business by simplifying the online start-up process.

Dealing with Construction Permits: Singapore made dealing with construction permits easier by improving internal data management and processing at agencies involved in the permitting process.

Setting up of a Business in Hong Kong SAR, China

Agency : Companies Registry

Choose a company name and obtain a certificate of incorporation and a business registration certificate

A company name (which may be in English, traditional Chinese or both) can be searched online free of charge at the Companies Registry (www.icris.cr.gov.hk) or at the mobile website (www.mobile-cr.gov.hk). When an application is delivered online at the e-Registry, the applicant will be informed of the acceptability of the company name before he/she proceeds with the payment process.

If there is no existing company registered with the name chosen by the applicant, a certificate of incorporation and a business registration certificate will be issued upon the filing of an incorporation form signed by the founder member(s) (for companies limited by shares this is a Form NNC1), a copy of the articles of association and a Notice to Business Registration Office (IRBR1). The incorporation form contains comprehensive information on the address of the registered office and particulars of the first secretary and first directors of a company. Paper submissions for incorporation normally require approximately four working days for the certificates to be issued (excluding the day of submission of form NNC1).

With the implementation of the "e-Registry" in 2011, applicants can now complete the incorporation and business registration process by submitting electronic applications online to the Companies Registry (www.eregistry.gov.hk) or using the mobile application "CR eFiling". In straightforward cases, this enables registered users to complete the relevant procedures and download the electronic Certificate of Incorporation and Business Registration Certificate in less than a day. According to the performance pledge of the Companies Registry (at www.cr.gov.hk/en/about/performance.htm), the service standard for applications for registration of local companies which are submitted electronically is one hour.

At the moment of incorporation, the company will also be automatically registered with the Inland Revenue Department for registration for tax purposes.

Less than one day (online procedure) HKD 1,720 application fee + HKD 250 for business registration levy (business registration fee of HKD 2,000 is temporarily waived for the period of April 1, 2019 - March 31, 2020)

Sign up Employee's Compensation Insurance and Mandatory Provident Fund (MPF) Schemes with a private company or a bank

Agency : Compensation Insurance and Mandatory Provident Fund (MPF) providers (banks/insurance firms)

Pursuant to the Employees' Compensation Ordinance (Chapter 282 of the Laws of Hong Kong) ("ECO"), an employer must take out insurance to cover liabilities for his employees (both full- and part-time) who experience accidents arising out of and in the course of employment, and resulting in injuries or fatalities.

In addition, under the Mandatory Provident Fund Schemes Ordinance (Chapter 485 of the Laws of Hong Kong), employers must enroll their regular employees (i.e. employees who are at least 18 but under 65 years of age and employed for 60 days or more) and where applicable, their casual employees (i.e. employees are at least 18 but under 65 years of age and employed in the construction or catering industry on a day-to-day basis or for a fixed period of less than 60 days) in an MPF scheme administered by an MPF approved trustee in Hong Kong and make MPF contributions accordingly. Scheme enrollment can be arranged through MPF registered intermediaries, which include banks and insurance companies. This requirement does not apply for persons exempted from joining a Mandatory Provident Fund ("MPF") scheme.

The newly incorporated company can apply for setting up the Employee's Compensation Insurance and MPF Scheme anytime after incorporation.

The procedure can be done online via various private insurance/MPF providers' web portals. However, most businesses prefer to have advisory meeting with insurance/MPF provider rather than reviewing all information online by themselves.

Recent Initiatives of Hong Kong SAR, China

2020

Dealing with Construction Permits: Hong Kong SAR, China, made dealing with construction permits easier by enhancing its risk-based approach to inspections.

2019

Getting Electricity: Hong Kong SAR, China, made the process of getting an electricity connection faster by establishing a specialized task force to undertake the trenching, excavation and reinstatement of the underground cables.

2018

Starting a Business: Hong Kong SAR, China, made starting a business more expensive by reintroducing the business tax fee.

Registering Property: Hong Kong SAR, China, improved the quality of its land administration system by enhancing its reliability and establishing a complaints mechanism.

2017

Starting a Business: Hong Kong SAR, China, made starting a business less costly by reducing the business registration fee.

Getting Electricity: Hong Kong SAR, China, streamlined the processes of reviewing applications for new electrical connections and also reduced the time needed to issue an excavation permit.

2016

Starting a Business: Hong Kong SAR, China, made starting a business easier by eliminating the requirement for a company seal.

Getting Electricity: The utility in Hong Kong SAR, China, made getting electricity easier by streamlining the process for reviewing connection applications and for completing the connection works and meter installation. In addition, the time needed to issue an excavation permit was reduced.

Getting Credit: Hong Kong SAR, China, improved access to credit by implementing a modern collateral registry.

Paying Taxes: Hong Kong SAR, China, made paying taxes easier and less costly for companies by simplifying compliance with the mandatory provident fund obligations and increasing the allowance for profit tax. At the same time, it increased the maximum contribution to the mandatory provident fund and reduced the property tax waiver.

2015

Starting a Business: Hong Kong SAR, China, made starting a business more difficult by increasing the registration fee.

Protecting Minority Investors: Hong Kong SAR, China, strengthened minority investor protections by introducing requirements for directors to provide more detailed disclosure of conflicts of interest to the other board members.

2014

Starting a Business: Hong Kong SAR, China, made starting a business less costly by abolishing the capital duty levied on local companies.

Registering Property: Hong Kong SAR, China, made transferring property more costly by increasing the stamp duty.

2012

Starting a Business: Hong Kong SAR (China) made starting a business easier by introducing online electronic services for company and business registration.

Getting Electricity: Hong Kong SAR (China) made getting electricity easier by increasing the efficiency of public agencies and streamlining the utility's procedures with other government agencies.

Employing Workers: Hong Kong, China introduced a Minimum Wage.

2011

Paying Taxes: Hong Kong SAR (China) abolished the fuel tax on diesel.

Enforcing Contracts: Reforms implemented in the civil justice system of Hong Kong SAR (China) will help increase the efficiency and cost-effectiveness of commercial dispute resolution.

2010

Starting a Business: Hong Kong SAR, China, made starting a business easier by simplifying registration formalities and merging certain procedures.

Dealing with Construction Permits: Hong Kong SAR, China, reduced the time required to obtain a building permit by establishing a one-stop center that brings together 6 local departments and 2 private utility companies under the same roof.

Registering Property: Hong Kong SAR, China, made registering property easier by making it possible to submit the stamp duty for the sale act (property assignment) online.

2009

Dealing with Construction Permits: Hong Kong SAR, China, made dealing with construction permits easier through the "Be the Smart Regulator" Program addressing business licenses in multiple sectors, which eliminated some procedures related to building inspections and preapprovals.

Resolving Insolvency: Hong Kong SAR, China, improved its insolvency process by granting more power to trustees, a change expected to make the liquidation procedure more efficient.

Setting up of Business in New York City

Agency: New York State Department of State, Division of Corporations

Reserve the company's business name (optional), file the company's articles of organization and adopt the company's operating agreement

The company founders may reserve the name of the company with the New York State Department of State Division of Corporations prior to filing the company's articles of organization. To reserve a name, the founders should file an application for Reservation of Name and pay a fee of USD 20. The name reservation can be done online at the following: http://www.dos.ny.gov/corps/llccorp.html. The application holds the name for 60 days and may be extended twice for additional periods of 60 days. The fee to extend the reservation of name is also USD 20. The company name must contain the words "Limited Liability Company," "L.L.C.," or "LLC."

The founders must file the company's articles of organization with the New York Department of State Division of Corporations. Forms can be purchased at a legal supply store or downloaded from the department's website. The application processing time is about seven business days. However, optional expedited processing is available according to the following fee schedule:

- 2-hour turnaround: USD 150 (additional fee)
- Same-day service: USD 75 (additional fee)
- 24-hour turnaround: USD 25 (additional fee)

New York State requires an LLC to have a written operating agreement but such agreement does not have to be filed with the state. The business members may enter into an operating agreement before, at the time of, or within 90 days after the filing of the articles of organization. Regardless of when such an agreement was entered into, it may be effective upon the formation of the LLC or at a later date specified in the operating agreement (provided, however, that under no circumstances shall an operating agreement become effective prior to the formation of such company). Section 203(e) of NY LLC Law contains specific requirements as to what is required to be in the articles of incorporation.

Apply for federal identification number (EIN) for tax and employer purposes

Agency: US Internal Revenue Service

The company needs to apply for a federal Employer Identification Number ("EIN"), which is used for tax and employer purposes. Founders must file IRS Form SS-4 (available from the US Internal Revenue Service).

It is possible to apply online at http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Employer-ID-Numbers-EINs (processing time: immediate), by telephone (processing time: immediate), by fax (processing time: 4 business days), or by mail (processing time: 4 weeks). If applicants apply online, they do not need fill out IRS Form SS-4.

- Register to collect state sales tax

Agency: New York State Department of Taxation and Finance

Businesses that "sell taxable tangible personal property, perform taxable services, receive amusement charges, or operate a hotel or motel, and restaurants, taverns, or other establishments that sell food and drink" must register as a sales tax vendor and obtain a Certificate of Authority, as well as those businesses that buy and sell for resale (for example, a wholesale distributor). See the Department of Taxation and Finance's Official Publication 750, "A Guide to Sales Tax in New York State."

To register, the founders must file Form DTF-17 or register online at the website of the New York State Department of Taxation and Finance (http://www.tax.ny.gov/). After the company has registered, it generally must file quarterly sales and use tax returns regardless of whether it has started or done any business.

If the company expects to make taxable sales in the State of New York, it must register with the Tax Department at least 20 days before it begins business. New York State will then send to the company a Certificate of Authority which must be displayed at your place of business at all times.

- **Register as an employer with the Unemployment Insurance Division at the State Labor Department**

Agency : New York State Department of Labor

Founders must register as an employer by completing Form NYS-100 to determine whether or not the company is liable under the New York State Unemployment Insurance Law. If the company is determined liable, the Department of Labor will send the company quarterly combined withholding, wage reporting and unemployment insurance returns for reporting wages paid to the company's employees. General business employers may register online at the New York State Department of Labor website (https://applications.labor.ny.gov/eRegWeb/registerEmployer/uiEPMWelcomeMain.faces) or by completing Form NYS-100 and submitting it by mail or fax.

- **Arrange for workers' compensation and disability insurance**

Agency : New York State Workers' Compensation Board

As New York employers, the LLC founders must obtain and maintain workers' compensation insurance and disability insurance for its employees by purchasing a workers' compensation insurance policy and a disability benefits insurance policy from an authorized private insurance carrier or through the NYS Insurance Fund (or by self-insurance for workers' compensation).

The company's federal Employer Identification Number (""EIN"") is the company's primary identification with respect to communications with the Workers' Compensation Board or by becoming a member of a group self-insurer authorized by the board. The company must give its EIN to its insurance carrier when obtaining or maintaining its workers' compensation or disability coverage. Workers' compensation insurance floor is calculated using each employee's risk classification, salary, and total payoff.

Each "covered employer" must post and maintain at the place of business a prescribed form, Notice of Compliance, Form DB-120, stating that the provisions have been named for the payment of disability benefits to all eligible employees. An employer who has employed in New York State one or more employees at least 30 days in any calendar year is a "covered employer" subject to the Disability Benefits Law after the expiration of four weeks following the 30th day of such employment (WCL §202). These 30 days of employment need not be consecutive days.

Arrange for publication and submit certificate and affidavits of publication

Agency : New York State Department of State, Division of Corporations

Section 206 of the New York State Limited Liability Company Law requires that within 120 days (after the effectiveness of the initial articles of organization), a limited liability company (LLC) must publish in two newspapers a copy of the Articles of Organization or a notice related to the formation of the LLC once a week for six successive weeks. The newspapers must be designated by the county clerk of the county in which the

office of the LLC is located, as stated in the Articles of Organization. One newspaper must be "printed daily" and the other "printed weekly.

The State of New York website has a directory of all New York county websites (http://www.nysegov.com/citguide.cfm?context=citguide&content=munibycounty1), which entrepreneurs can use as a reference to find their relevant county for publishing. The cost of notice of publication varies by county.

After publication, the printer or publisher of each newspaper will provide the entrepreneur with a Certificate of Publication, with the affidavits of publication of the newspapers attached. It must be submitted to the New York Department of State, Division of Corporations, One Commerce Plaza, 99 Washington Avenue, Albany, NY 12231. The fee for filing the Certificate of Publication is USD 50.

Recent initiatives in New York City

2020

Starting a Business: The United States made starting a business easier in California by introducing online filing of the statement of information for limited liability companies. This reform applies to Los Angeles.

Paying Taxes: The United States made paying taxes less costly by decreasing the corporate income tax rate. This reform applies to both New York City and Los Angeles.

Enforcing Contracts: The United States (Los Angeles) made enforcing contracts easier by introducing electronic filing and electronic payment of court fees.

2019

Employing Workers: The United States (New York City) changed regulations pertaining to parental leave.

2018

Employing Workers: The United States – Los Angeles increased the maximum paid days of sick leave a year.

2015

Starting a Business: In the United States starting a business became easier in New York City thanks to faster online procedures.

2011

Paying Taxes: In the United States the introduction of a new tax on payroll increased taxes on companies operating within the New York City metropolitan commuter transportation district.

Setting up of a Business in United Kingdom

Agency : Companies House

Complete application form IN01 and file for registration with Companies House

Company founders have the option to check for unique company name and file for registration themselves, or to retain incorporation professionals to do so. The option to complete registration is through paper application or electronically.

In case the company chooses to file for incorporation itself online, model articles of incorporation and company memorandum are generated automatically by the registration website www.gov.uk/register-a-company-online. In addition the above forms, all companies must provide the following information to the relevant Registrar of Companies (i.e., for England and Wales, Scotland, or Northern Ireland):

- Statement of compliance with all requirements of the 2006 Companies Act;

- Application form IN01, which includes:
  - proposed company name;
  - country of registration office (e.g. England and Wales (or Wales), Scotland or Northern Ireland);
  - Whether the liability of the members is to be limited and if so whether by shares or guarantee; and;
  - Whether the company is public or private;
- In the case of a company with a share capital, the application must also include a statement of the capital and initial shareholdings, including the name and address of the subscriber.
- A statement of the proposed officers, being the first director and company secretary (unless in the case of a private company, where the appointment of a company secretary is optional);
- A statement of the intended registered office address.

On completing the online form if the company name provided cannot be used the website will alert you to this and you have the option of selecting another name. Fees for filing incorporation documents are as follows: GBP 12 for a Web filed incorporation and GBP 40 for paper filers (or GBP 100 for a same day service). The standard digital registration fee through a third party agent is GBP 10 (or GBP 30 for a same day service). There is no requirement for a company to use a third party agent. Third party agents may charge additional fees as well as the standard registration fee.

In case the company chooses to retain incorporation agents to file for registration, in addition to the above documents, the application file must include the agents' name and address. Note that in case the company wants to amend model articles of association or company memorandum it cannot file for registration online via www.gov.uk/register-a-company-online. Instead, the company must use professionals to compose incorporation documents and submit them via specialized software to Companies House.

From 30 June 2016, new companies have to provide their People with Significant Control information as part of the incorporation process. The data on beneficial ownership will be accessible and searchable from the database of Companies House.

Register for PAYE

Agency : HMRC

The company must contact the HMRC to set up a contribution scheme for national insurance and pay-as-you-earn (PAYE) tax, which deducts tax from employee wages or salary. The company will be issued with an activation PIN within 5 business days – typically less - and will have to activate this PIN within 28 days (or else request a new PIN). The company will use the PIN to register and enroll online. For security reasons, a check is run on the data provided. A small percentage of registrations who fail the security check can take longer. Otherwise, activation is instant.

Since 6 April 2013, companies have to report their PAYE in real time. This means that companies must either report online or require their accountants to submit reports every time they pay their employees.

Register for VAT

Agency : HMRC

A business will need to register for VAT if its taxable goods and services supplied within the UK for the previous 12 months is more than the current registration threshold of GBP 85,000 or the business expects it to go over that figure in the next 30 days alone, it must register for VAT. However, the business may also voluntarily choose to register for VAT if its VAT taxable goods fall under the GBP 85,000 threshold.

Most businesses, including Limited Companies, can register for VAT account online at: https://online.hmrc.gov.

uk/registration or send paper forms through the post. Most applications for VAT registration can be completed online but there are some circumstances where a business has to apply by post. To register online for VAT or use other VAT online services, a business will first need to sign up for HMRC Online Services or the Government Gateway.

Sign up for employer's liability insurance

Agency: Insurance company

The Employers' Liability (Compulsory Insurance) Act of 1969 requires all employers in the United Kingdom to maintain employers' liability insurance from an approved insurance company. The minimum legal requirement for employers' liability insurance is a limit of indemnity of GBP 5,000,000. In addition, a fine of GBP 2,500 per day can be imposed if employer's liability insurance is not taken out.

The Employers' Liability (Compulsory Insurance) Act of 1969 requires that proof of insurance be posted at the workplace. Since October 1, 2008, it is possible to display this information electronically, although a company that wishes to do this will need to ensure that its employees know how and where to find the certificate and have reasonable access to it.

Recent Initiatives in United Kingdom

2020

Paying Taxes: The United Kingdom made paying taxes more difficult by introducing a new pension scheme paid by the employer.

2019

Getting Electricity: The United Kingdom made getting electricity faster by implementing several initiatives to expedite the external connection works performed by sub-contractors.

2016

Paying Taxes: The United Kingdom made paying taxes less costly for companies by reducing the corporate income tax rate and increasing the wage amount per employee that is exempted from social security contributions paid by employers. On the other hand, the United Kingdom increased municipal tax rates and environment taxes.

Enforcing Contracts: The United Kingdom made enforcing contracts more costly by increasing the court fees for filing a claim.

2015

Starting a Business: The United Kingdom made starting a business easier by speeding up tax registration.

Paying Taxes: The United Kingdom made paying taxes less costly for companies by reducing the corporate income tax rate. On the other hand, it increased the landfill tax.

2014

Starting a Business: The United Kingdom made starting a business easier by providing model articles for use in preparing memorandums and articles of association.

Registering Property: The United Kingdom made transferring property easier by introducing electronic lodgment for property transfer applications.

Employing Workers: United Kingdom increased the cap on weekly wage provided to employees on the severance payment and the minimum wage.

2013

Paying Taxes: The United Kingdom made paying taxes less costly for companies by reducing the corporate income tax rate.

Employing Workers: The United Kingdom increased redundancy costs of the severance pay applicable in cases of redundancy dismissals.

2012

Dealing with Construction Permits: The United Kingdom made dealing with construction permits easier by increasing efficiency in the issuance of planning permits.

Employing Workers: United Kingdom increased the severance payment obligation applicable in cases of redundancy dismissals.

2011

Enforcing Contracts: The United Kingdom improved the process for enforcing contracts by modernizing civil procedures in the commercial court.

Resolving Insolvency: Amendments to the United Kingdom's insolvency rules streamline bankruptcy procedures, favor the sale of the firm as a whole and improve the calculation of administrators' fees.

2010

Dealing with Construction Permits: The United Kingdom made dealing with construction permits easier and less time consuming through wider use of approved inspectors.

Registering Property: The United Kingdom speeded up property registration by introducing automatic electronic processing of the land transaction return.

Employing Workers: The United Kingdom increased mandatory paid annual leave.

2009

Employing Workers: The United Kingdom increased the mandatory paid annual leave.

LESSON ROUND-UP

- Section 6 of the Foreign Exchange Management Act, 1999 provides powers to the Reserve Bank to specify, in consultation with the Government of India, the classes of permissible capital account transactions and limits up to which foreign exchange is admissible for such transactions.
- Overseas Investment (or financial commitment) can be made under two routes viz. (i) Automatic Route and (ii) Approval Route
- All transactions relating to a JV / WOS should be routed through one branch of an Authorised Dealer bank to be designated by the Indian Party.

LIST OF FURTHER READINGS

- Master Direction – Direct Investment by Residents in Joint Venture (JV) / Wholly Owned Subsidiary (WOS) Abroad.
- Consolidated FDI Policy.
- World Bank report on Doing Business

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. What are the different routes of overseas investment?
2. What are the major issues in choosing location outside India?
3. Explain how the political issue plays a vital role in taking the foreign investment decisions?

Lesson 12

Conversion of Business Entities

LESSON OUTLINE

- Conversion of a Private Company into a Public Company – Section 14
- Conversion of a Public Company into a Private Limited – Section 14
- Conversion of section 8 company into any other kind – Section 8
- Conversion of Company into LLP – LLP Act
- Conversion of LLP into Company – Section 366
- Conversion of One Person Company to Private Company/ Public company – Section 18
- Conversion of Private Company to One Person Company – Section 18
- Conversion of Unlimited Liability company in to a Limited Liability company By Share or Guarantee
- Conversion of a company limited by guarantee in to a company limited by shares
- Incorporation of part XXI Companies
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Companies Act, 2013 provides for conversion of public companies to private companies vice versa, conversion of one Person Company into public/private Company, conversion of Section 8 companies (companies for charitable purpose) into any other class of companies. Companies (Incorporation) Rules 2014 provides details of the procedural aspects.

In addition you will be able to understand the overall legal and procedural aspects relating to various conversions.

INTRODUCTION

The provisions of the Companies Act, 2013 read with rules made thereunder provides for the conversions of companies from one type of company to other another type of Company. However, in some case the company is mandatorily required for the conversion in to another type of Company.

The company can convert in to following type of companies:

- Conversion of a private company into a public company
- Conversion of a public company into a private company
- Conversion of one person company to private company/ public company
- Conversion of private company to one person company
- Conversion of section 8 company into any other kind
- Conversion of unlimited liability company in to a limited liability company by share or guarantee
- Conversion of a company limited by guarantee in to a company limited by shares
- Conversion of LLP into company
- Conversion from private company into limited liability partnership
- Conversion from unlisted public company into limited liability partnership
- Incorporation of part XXI companies

Section 18 of the Companies Act, 2013 deals with conversion of companies already registered and provided that a company already registered in a class may convert itself as a company of another class by alteration of memorandum (Section 13) and articles of the company (Section 14) in accordance with the provisions of the Chapter II of the Companies Act, 2013,

An application in this regard is required to be made to Registrar. The Registrar after being satisfied that all provisions have been complied with, shall close the former registration of the company. After registering the documents relating to conversion, the Registrar shall issue a certificate of incorporation. The conversion of a company shall not affect any debt, liabilities and obligations. Such debt, liabilities, obligation and contracts may be enforced as if there is no such conversion.

The Compliance requirement and the procedure for conversion of the various types of business entities are explained in this lesson.

CONVERSION OF A PRIVATE COMPANY INTO A PUBLIC COMPANY

The provisions related to conversion of private company into public company are provided under section 18 (conversion of companies already registered) and 14 (alteration of articles) of the Companies Act, 2013 read with Rule 33 of Companies (Incorporation) Rules, 2014.

Section 14 of Companies Act, 2013 plays an important role during conversion of a private company into a public company. Conversion of a private company into a public company involves alteration of article of association of private company, which cannot be done without passing special resolution by the company in general meeting. The company shall have minimum of 7 members in the company.

The alteration of the articles of the private company shall be made in such a manner that they no longer include the restrictions and limitations which are required to be included in the articles of a private company i.e. minimum and maximum number of members, transfer of shares, number of directors, quorum of the general meeting etc., the company shall, as from the date of such alteration, cease to be a private company.

Procedure for Conversion of a Private Company into a Public Company

1. **Calling of Board Meeting:** Issue notice in accordance with the provisions of section 173 of the Companies Act, 2013 and Secretarial Standards -1, for convening a meeting of the Board of Directors. Main agenda for this board meeting would be:
   a. To pass a board resolution to get in-principal approval of Directors for conversion of private company into a public company by altering the AOA.
   b. To fix date, time and place for holding general meeting to get approval of shareholders, by way of Special Resolution, for conversion of a Private company into a Public company.
   c. To approve notice of general meeting along with agenda and explanatory statement to be annexed to the notice of general meeting as per section 102(1) of the Companies Act, 2013;
   d. To authorize the Director or Company Secretary to issue notice of the general meeting as approved by the board.
   e. Pass Board resolution for increase in number of Directors, if Directors are less than 3 in the company.
2. **Issue of Notice of General Meeting :** Issue Notice of the General meeting to all Members, Directors and the Auditors of the company in accordance with the provisions of Section 101 of the Companies Act, 2013 and Secretarial Standards -2;
3. **Holding of General Meeting:** Hold the General meeting as scheduled and pass the necessary Special Resolution, to get shareholders' approval for Conversion of Private Company into a Public company along with alteration in articles of association under section 14 for such conversion.
4. **Filling of e-Forms:** For alteration in Article of Association for conversion of private Company into a public company under section 14, the following E-forms shall be filed with concerned Registrar of Companies at different stages as per the details given below:

A. E-form MGT-14

***For filing special resolution with ROC, passed for conversion of Private Company into a Public company*.**

In case of alteration in Article of Association for conversion of Private Company into a Public Company Special resolution is required to be passed under section 14. Accordingly as per section 117(3)(a), a copy of special resolution is required to be filed with concerned ROC through filing of E-form MGT-14 within 30 days of passing special resolution in the general meeting.

Attachments of E-form MGT-14:

i. Notice of general meeting along with copy of explanatory statement under section 102;
ii. Certified true copy of special resolution;
iii. Altered memorandum of association;
iv. Altered articles of association
v. Certified true copy of board resolution may be attached as an optional attachment.

B. E-form INC-27

Application for conversion of a private company into a public company

As per Rule 33 of Companies (Incorporation) Rules, 2014, for effecting the conversion of a private company

into a public company or vice versa, the application shall be filed in E-form No. INC-27 with fee. Accordingly an application for conversion of a private company into a public company is required to be filed in E-form INC-27 to the ROC concerned, with all the necessary annexures and with prescribed fee.

Attachments of E-form INC-27:

i. It is mandatory to attach minutes of the member's meeting where approval was given for conversion and altered articles of association.

ii. Altered articles of association.

iii. Certified true copy of board resolution may be attached as an optional attachment.

iv. Other information if any can be provided as an optional attachment(s)

Scrutiny of documents by ROC

As per Section 18, for conversion of a private company into a public company, the Registrar shall on an application made by the company, after satisfying himself that the provisions of Chapter II of the Companies Act, 2013 applicable for registration of companies have been complied with, close the former registration of the company and after registering the documents, issue a certificate of incorporation in the same manner as its first registration.

CONVERSION OF A PUBLIC COMPANY INTO A PRIVATE LIMITED

Conversion of status of company from public to private would become effective form the date of receipt of the approval of the Registrar by means of issuing a new certificate of Incorporation. Section 13, 14, 15 & 18 of Companies Act, 2013, Rule 33(2) Companies (Incorporation) Rules, 2014 regulate the conversion of public company into private company.

As per Section 13 and Section 14 of the Companies Act 2013 read with Rule 33 of Companies (Incorporation) Rules, 2014. A public company can be converted into the private company only after obtaining its shareholders' approval by way of passing of special resolution in general meeting.

For conversion of public company into private company foremost requirement is Alteration in Article of Association of Company. According to the Act, any alteration having the effect of conversion of a public company into a private company shall not be valid unless it is approved by an order of the Central Government on an application made in such form and manner as may be prescribed.

For effecting the conversion of a public company into a private company, a copy of order of the central government approving the alteration, shall be filled with the Registrar in Form No. INC -27 with fee together with the printed copy of altered articles within fifteen days from the date of receipt of the order from the Central Government.

Provided also that any application pending before the Tribunal, as on the date of commencement of the Companies (Amendment) Ordinance, 2019, shall be disposed of by the Tribunal in accordance with the provisions applicable to it before such commencement.

At the time of Conversion Company have to make several alterations. Some of them are mentioned below:

- Change of Name
- Alteration of Memorandum of Association
- Alteration of Article of Association
- New Certificate of Incorporation

- Alteration of Letter head, book & papers

Procedure for Conversion of a Public Limited Company into a Private Limited

First Step: Holding of Meetings

Holding of Board Meeting

Company will convey a Board Meeting as per provisions of Section 173 and Secretarial Standard 1 to meet with primary requirement for such conversion. General matters for discussion in board meeting are like:

- Approval of Conversion of Company subject to approval of Tribunal
- Authorize any Director, Company Secretary of the Company for completing the necessary compliances, formalities, Issue of Notice of General Meeting (As per SS 2) etc.
- Authorizing professional or legal practitioner/ advocate to appear before Tribunal
- To fix date, time and place for holding Extraordinary General meeting (EGM) to get approval of shareholders, by way of Special Resolution, for conversion of a public company into a private company

Holding of General Meeting

Company will convey the General meeting to pass special resolution for alteration in AOA & MOA of the Company for the purpose of conversion of the Company.

Filing of MGT-14 with ROC

As per Section 117(3) Copy of this special resolution is required to be filed with concerned ROC through filing of form MGT.14 within 30 days of passing special resolution in the EGM.

Second Step: Filing of form

An application in prescribed form needs to be filed for getting approval from Central Government.

Third Step: Filing of Form with ROC

After receiving of order Company will file Form INC-27 along with copy of the order of the Central Government along with below mentioned attachment within 15 days(from the date of receipt of order from Central Government..

- Copy of Order
- Altered copy of MOA & AOA

Fourth Step: New Certificate of Incorporation from ROC

On being satisfied that all the information and documents are submitted and all requirements under the Act are complied with, ROC shall issue a new certificate of incorporation of the Company after regarding all the documents and information.

Application under section 14 for conversion of public company into private company.

As per rules 41 of the Companies (Incorporation) Rule, 2014

(1) An application under the second proviso to sub-section (1) of section 14 for the conversion of a public company into a private company, shall, within sixty days from the date of passing of special resolution, be filed

with Regional Director in e-Form No. RD-I along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 and shall be accompanied by the following documents, namely:-

(a) a draft copy of Memorandum of Association and Articles of Association , with proposed alterations including the alterations pursuant to sub-section (68) of section 2;

(b) a copy of the minutes of the general meeting at which the special resolution authorising such alteration was passed together with details of votes cast in favour and or against with names of dissenters;

(c) a copy of Board resolution or Power of Attorney dated not earlier than thirty days, as the case may be, authorising to file application for such conversion;

(d) declaration by a key managerial personnel that pursuant to the provisions of sub-section (68) of section 2, the company limits the number of its members to two hundred and also stating that no deposit has been accepted by the company in violation of the Act and rules made thereunder;

(e) declaration by a key managerial personnel that there has been no non-compliance of sections 73 to 76A, 177, 178,185,186 and 188 of the Act and rules made thereunder;

(f) declaration by a key managerial personnel that no resolution is pending to be filed in terms of sub-section (3) of section 779 and also stating that the company was never listed in any of the Regional Stock Exchanges and if was so listed, all necessary procedures were complied with in full for complete delisting of the shares in accordance with the applicable rules and regulations laid down by Securities Exchange Board of India: Provided that in case of such companies where no key managerial personnel is required to be appointed, the aforesaid declarations shall be filed any of the director.

(2) Every application filed under sub-rule (1) shall set out the following particulars, namely:-

(a) the date of the Board meeting at which the proposal for alteration of Memorandum and Articles was approved;

(b) the date of the general meeting at which the proposed alteration was approved;

(c) reason for conversion into a private company, effect of such conversion on shareholders, creditors, debenture holders, deposit holders and other related parties;

(d) details of any conversion made within last five years and outcome thereof along with copy of order;

(e) details as to whether the company is registered under section 8.

(3) There shall be attached to the application, a list of creditors, debenture holders, drawn up to the latest practicable date preceding the date of filing of application by not more than thirty days, setting forth the following details, namely:-

(a) the names and address of every creditor and debenture holder of the company;

(b) the nature and respective amounts due to them in respect of debts, claims or liabilities;

(c) in respect of any contingent or unascertained debt, the value, so far as can be justly estimated of such debt: Provided that the company shall file an affidavit, signed by the Company Secretary of the company, if any, and not less than two directors of the company, one of whom shall be managing director, where there is one, to the effect that they have made a full enquiry into affairs of the company and, having done so, have formed an opinion that the list of creditors and debenture holders is correct, and that the estimated value as given in the list of the debts or claims payable on contingency or not

ascertained are proper estimates of the values of such debts and claims that there are no other debts, or claims against, the company to their knowledge.

(4) A duly authenticated copy of the list of creditors and debenture holders shall be kept at the registered office of the company and any person desirous of inspecting the same may, at any time during the ordinary hours of business, inspect, and take extracts from the same on payment of ten rupees per page to the company.

(5) The company shall, at least twenty-one days before the date of filing of the application

(a) advertise in the Form No.INC.25A, in a vernacular newspaper in the principal vernacular language in the district and in English language in an English newspaper, widely circulated in the State in which the registered office of the company is situated;

(b) serve, by registered post with acknowledgement due, individual notice on each debenture holder and creditor of the company; and

(c) serve, by registered post with acknowledgement due, a notice to the Regional Director and Registrar and to the regulatory body, if the company is regulated under any law for the time being in force

(6) (a) Where no objection has been received from any person in response to the advertisement or notice referred to in sub-rule (5) and the application is complete in all respects, the same may be put up for orders without hearing and the concerned Regional Director shall pass an order approving the application within thirty days from the date of receipt of the application.

(b) Where the Regional Director on examining the application finds it necessary to call for further information or finds such application to be defective or incomplete in any respect, he shall within thirty days from the date of receipt of the application, give intimation of such information called for or defects or incompleteness, on the last intimated e-mail address of the person or the company, which has filed such application, directing the person or the company to furnish such information, to rectify defects or incompleteness and to re-submit such application within a period of fifteen days in e-Form No. RD-GNL-5:

Provided that maximum of two re-submissions shall be allowed.

(c) In cases where such further information called for has not been provided or the defects or incompleteness has not been rectified to the satisfaction of the Regional Director within the period allowed under sub- rule (6), the Regional Director shall reject the application with reasons within thirty days from the date of filing application or within thirty days from the date of last re-submission made. as the case may be.

(d) Where no order for approval or re-submission or rejection has been explicitly made by the Regional Director within the stipulated period of thirty days, it shall be deemed that the application stands approved and an approval order shall be automatically issued to the applicant.

(9) (i) Where an objection has been received or Regional Director on examining the application has specific objection under the provisions of Act, the same shall be recorded in writing and the Regional Director shall hold a hearing or hearings within a period thirty days as required and direct the company to file an affidavit to record the consensus reached at the hearing, upon executing which, the Regional Director shall pass an order either approving or rejecting the application along with reasons within thirty days from the date of hearing, failing which it shall be deemed that application has been approved and approval order shall be automatically issued to the applicant.

(ii) In case where no consensus is received for conversion within sixty days of filing the application while hearing or otherwise, the Regional Director shall reject the application within stipulated period of sixty days: Provided

that the conversion shall not be allowed if any inquiry, inspection or investigation has been initiated against the company or any prosecution is pending against the company under the Act

(10) On completion of such inquiry inspection or investigation as a consequence of which no prosecution is envisaged or no prosecution is pending, conversion shall be allowed.

(11) The order conveyed by the Regional Director shall be filed by the company with the Registrar in Form No.INC-28 within fifteen days from the date of receipt of approval along with fee as provided in the Companies (Registration Offices and Fees) Rules, 2014.

CONVERSION OF ONE PERSON COMPANY TO PRIVATE COMPANY

The conversion of an One Person Company into Private Limited Company as per Section 18 of the Companies Act, 2013 and the rule 6 of Companies (Incorporation) Rules of 2014 should be discharged by a newly formed Private Limited Company. These rules will not affect the existing debts, liabilities, obligations or contracts of the OPC. There are two ways of converting an OPC into a private limited company either voluntarily or mandatorily.

When Conversion OPC is necessary in to a Private Company or Public Company

(1) Where the paid up share capital of an One Person Company exceeds fifty lakh rupees and its average annual turnover during the relevant period exceeds two crore rupees, it shall cease to be entitled to continue as a One Person Company.

(2) Such One Person Company shall be required to convert itself, within six months of the date on which its paid up share capital is increased beyond fifty lakh rupees or the last day of the relevant period during which its average annual turnover exceeds two crore rupees as the case may be, into either a private company with minimum of two members and two directors or a public company with at least of seven members and three directors in accordance with the provisions of section 18 of the Act.

(3) The One Person Company shall alter its memorandum and articles by passing a resolution in accordance with sub-section (3) of section 122 of the Act to give effect to the conversion and to make necessary changes incidental thereto.

(4) The One Person Company shall within period of sixty days from the date of applicability of sub-rule (1), give a notice to the Registrar in Form No.INC.5 informing that it has ceased to be a One Person Company and that it is now required to convert itself into a private company or a public company by virtue of its paid up share capital or average annual turnover, having exceeded the threshold limit laid down in sub-rule (1).

Explanation.-For the purposes of this rule,- “relevant period” means the period of immediately preceding three consecutive financial years;

(5) If One Person Company or any officer of the One Person Company contravenes the provisions of these rules, One Person Company or any officer of the One Person Company shall be punishable with fine which may extend to ten thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first during which such contravention continues.

(6) A One Person company can get itself converted into a Private or Public company after increasing the minimum number of members and directors to two or minimum of seven members and two or three directors as the case may be, and by maintaining the minimum paid-up capital as per requirements of the Act for such class of company and by making due compliance of section 18 of the Act for conversion.

S. No.	STEPS	ACTION
1	BOARD MEETING	*ISSUE NOTICE* in accordance with the provisions of section 173 of the Companies Act, 2013, for convening a meeting of the Board of Directors. Main agenda for this Board meeting would be: AGENDA : ● To discuss with directors that Company has crossed the Limits as given above and there is need to mandatory conversion of OPC into private or public Company. ● Pass Board resolution for increase in No. of Directors. (Minimum 2 or 3 Directors) ● Pass a board resolution to get in principal approval of Directors for increase shareholder of the Company. (Minimum 2 or 7 Shareholders) ● Pass Resolution to get shareholders' approval for Alteration in MOA & AOA of Company. ● to approve and issue notice of general meeting There is required to pass Shareholder resolution. But as per Section 122(1) there is no need to hold EGM by OPC, it shall be sufficient if, in case of OPC, the resolution is communicated by the member of the company and entered into the minutes books required to be maintained u/s 188 and signed and dated by member and such date shall be deemed to be the date of the meeting for all the purpose.
4	ROC FORM FILING E- Form INC-5	For conversion of OPC in Company few E-forms will be filed with concerned Registrar of Companies at different stages as per the details given below: As per Rule 6(4) The Companies (Incorporation) Rules, 2014: OPC within 60 days from the period when Condition as mentioned above attract give notice to ROC informing that it has ceased to be OPC and that it is now required to convert itself into a private company or public company. **Attachments:** ● Certified true copy of board resolution where person giving notice has been authorized ● Copy of the duly attested latest financial statements ● Certificate from a Chartered Accountant in practice for calculation of average annual turnover during the relevant period – This certificate is mandatory to attach if the threshold limit is exceeded on account of average annual turnover. ● Any other information can be provided as an optional attachment(s).

	E- Form DIR -12	For Appointment of Directors
	E-Form MGT-14	For filing of Special Resolution with Explanatory statement
	E- Form INC-6	This eForm is required to be filed in case of conversion of OPC into private or public or conversion of private into OPC. In case paid up share capital of an One Person Company exceeds fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, it shall make an application in Form INC-6 within 6 months from the effective date on which the above threshold limit was exceeded. However if any One Person Company wants to convert itself into private/public company then also it can voluntarily apply through Form INC-6 after two years of its incorporation. Attachments: ● Certified true copy of board resolution where person giving notice has been authorized ● Altered copy of MOA & AOA. ● Copy of the duly attested latest financial statements ● Certified true copy of Special resolution where person giving notice has been authorized ● Any other information can be provided as an optional attachment(s).
9	Duty of ROC: Concerned Registrar of Companies (ROC) will check the E-forms and attached documents filed by the Company for Conversion of Private Company into One Person Company (OPC). On being satisfied that Company has complied with prescribed requirements the Registrar shall issue the Certificate to the effect of Conversion of Private Company into One Person Company (OPC).	

CONVERSION OF PRIVATE COMPANY INTO ONE PERSON COMPANY

Legal Provisions related to Conversion of Private Company into OPC are given in Section 18 the Companies Act, 2013 read with Rule 7 of Companies (Incorporation) Rules, 2014 which are as under:

(1) A private company other than a company registered under section 8 of the Act having paid up share capital of fifty lakhs rupees or less and average annual turnover during the relevant period two crore rupees or less may convert itself into one person company by passing a special resolution in the general meeting.

(2) Before passing such resolution, the company shall obtain No objection in writing from members and creditors.

(3) The one person company shall file copy of the special resolution with the Registrar of Companies within thirty days from the date of passing such resolution in Form No. MGT.14.

(4) The company shall file an application in Form No.INC.6 for its conversion into One Person Company along with fees as provided in in the Companies (Registration offices and fees) Rules, 2014, by attaching the following documents, namely:-

(i) The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that

all members and creditors of the company have given their consent for conversion, the paid up share capital company is fifty lakhs rupees or less or average annual turnover is less than two crores rupees, as the case may be;

(ii) the list of members and list of creditors;

(iii) the latest Audited Balance Sheet and the Profit and Loss Account; and

(iv) the copy of No Objection letter of secured creditors.

(5) On being satisfied and complied with requirements stated herein the Registrar shall issue the Certificate.

A private Company other than a Company registered under Section 8 companies Act 2013, who having a paid up share capital of 50 lakhs rupees or those having an average annual turnover is 2 crore rupees during the relevant period, may convert their private Company into one person Company.

PROCEDURE/STEPS FOR CONVERSION OF PRIVATE COMPANY INTO ONE PERSON COMPANY

S. No.	STEPS	**ACTION**
1	BOARD MEETING	ISSUE NOTICE in accordance with the provisions of section 173(3) of the Companies Act, 2013, for convening a meeting of the Board of Directors. Main agenda for this Board meeting would be:
		AGENDA : To Get in-principal approval of Directors for Conversion of Private Company into One Person Company (OPC). Fix date, time and place for holding Extra-ordinary General meeting (EGM) to get approval of shareholders, by way of Special Resolution, for Conversion of Private Company into One Person Company (OPC). To approve notice of EGM along with Agenda and Explanatory Statement to be annexed to the notice of General Meeting as per section 102(1) of the Companies Act, 2013; To authorize the Director or Company Secretary to issue Notice of the Extra-ordinary General meeting (EGM) as approved by the board. ***Important Note: Before passing such special resolution, the Company shall obtain No Objection Certificate in writing from existing members and creditors.***
2	NOTICE OF GENERAL MEETING: Provisions of the Section 101 of the Companies Act 2013 provides for issue of notice of EGM in writing to below mentions at least 21 days before the actual date of the EGM : ➢ All the Directors. ➢ Members ➢ Auditors of Company	

3	CONVENE A GENERAL MEETING:	● Check the Quorum. ● Check whether auditor is present, if not. Then Leave of absence is Granted or Not. (As per Section- 146). ● Pass Special Resolution.[Section-114(2)] to get shareholders' approval for Conversion of Private Company into One Person Company (OPC). ● Approval of Alteration in MOA.
4	ROC FORM FILING	For conversion of private Company in OPC under section 18, few E-forms will be filed with concerned Registrar of Companies at different stages as per the details given below
5	E- Form MGT.14	As per Section 117(3) Copy of special resolution is required to be filed with concerned ROC through filing of form MGT.14 within 30 days of passing Special Resolution in the general meeting. ATTACHMENT: i. Notice of General Meeting along with copy of explanatory statement under section 102; ii. Certified True copy of Special Resolution; iii. Altered memorandum of association; iv. Altered Articles of association v. Certified True copy of Board Resolution may be attached as an optional attachment.
6	E- Form INC.6	Accordingly an Application for conversion of a Private Company into a OPC is required to be filed in e-Form INC.6 to the ROC concerned, with all the necessary annexure and with prescribed fee.
7		Attachment: The list of members and list of creditors. The latest Audited Balance Sheet and the Profit and Loss Account; and The copy of No Objection letter of secured creditors. NOC of Members and Creditors. The directors of the Company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the Company have given their consent for conversion, the paid up share capital Company is fifty lakhs rupees or less or average annual turnover is less than two crores rupees, as the case may be. Other information if any can be provided as an optional attachment
8	Duty of ROC: Concerned Registrar of Companies (ROC) will check the E-forms and attached documents filed by the Company for Conversion of Private Company into One Person Company (OPC). On being satisfied that Company has complied with prescribed requirements the Registrar shall issue the Certificate to the effect of Conversion of Private Company into One Person Company (OPC).	

Penalty

If a One Person Company (OPC) or any officer of such company contravenes any of the provisions of these Rules, the OPC or any other Officer of such company shall be punishable with fine which may extend to `5,000/- and with a further fine which may extend to `500/- per day after first offence, during which such contravention continues.

CONVERSION OF SECTION 8 COMPANY INTO ANY OTHER KIND

Section 8(4)(ii) of the Companies Act, 2013 provides that a company registered under Section 8 may convert itself into company of any other kind only after complying with such conditions as may be prescribed. Section 8 company cannot be converted to One Person Company.

Rule 21 of Companies (Incorporation) Rules, 2014

Conditions for conversion of a company registered under section 8 into a company of any other kind:-

(1) A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion.

(2) The explanatory statement annexed to the notice convening the general meeting shall set out in detail the reasons for opting for such conversion including the following, namely:-

  (a) the date of incorporation of the company;

  (b) the principal objects of the company as set out in the memorandum of association;

  (c) the reasons as to why the activities for achieving the objects of the company cannot be carried on in the current structure i.e. as a section 8company;

  (d) if the principal or main objects of the company are proposed to be altered, what would be the altered objects and the reasons for the alteration;

  (e) what are the privileges or concessions currently enjoyed by the company, such as tax exemptions, approvals for receiving donations or contributions including foreign contributions, land and other immovable properties, if any, that were acquired by the company at concessional rates or prices or gratuitously and, if so, the market prices prevalent at the time of acquisition and the price that was paid by the company, details of any donations or bequests received by the company with conditions attached to their utilization etc.

  (f) details of impact of the proposed conversion on the members of the company including details of any benefits that may accrue to the members as a result of the conversion.

(3) A certified true copy of the special resolution along with a copy of the Notice convening the meeting including the explanatory statement shall be filed with the Registrar in Form No.MGT.14 along with the fee

(4) The company shall file an application in Form No.INC.18 with the Regional Director with the fee along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for converting itself into a company of any other kind and the company shall also attach the proof of serving of the notice served to all the authorities mentioned in sub-rule (2) of rule 22.

(5) A copy of the application with annexures as filed with the Regional Director shall also be filed with the Registrar.

Rule 22 of Companies (Incorporation) Rules, 2014

It stipulates the following other conditions to be complied with by Section 8 company for conversion:

(1) The company shall, within a week from the date of submitting the application to the Regional Director, publish a notice at its own expense, and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in Form No. INC.19 and shall be published-

(a) at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated, and having a wide circulation in that district, and at least once in English language in an English newspaper having a wide circulation in that district; and

(b) on the website of the company, if any, and as may be notified or directed by the Central Government.

(2) The company shall send a copy of the notice, simultaneously with its publication, together with a copy of the application and all attachments by registered post or hand delivery, to the Chief Commissioner of Income Tax having jurisdiction over the company, Income Tax Officer who has jurisdiction over the company, the Charity Commissioner, the Chief Secretary of the State in which the registered office of the company is situated, any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating and if any of these authorities wish to make any representation to Regional Director, it shall do so within sixty days of the receipt of the notice, after giving an opportunity to the Company.

(3) The copy of proof of serving such notice shall be attached to the application.

(4) The Board of directors shall give a declaration to the effect that no portion of the income or property of the company has been or shall be paid or transferred directly or indirectly by way of dividend or bonus or otherwise to persons who are or have been members of the company or to any one or more of them or to any persons claiming through any one or more of them.

(5) Where the company has obtained any special status, privilege, exemption, benefit or grant(s) from any authority such as Income Tax Department, Charity Commissioner or any organisation or Department of Central Government, State Government, Municipal Body or any recognized authority, a “No Objection Certificate” must be obtained, if required under the terms of the said special status, privilege, exemption, benefit or grant(s) from the concerned authority and filed with the Regional Director, along with the application.

(6) The company should have filed all its financial statements and Annual Returns upto the financial year preceding the submission of the application to the Regional Director and all other returns required to be filed under the Act up to the date of submitting the application to the Regional Director and in the event the application is made after the expiry of three months from the date of preceding financial year to which the financial statement has been filed, a statement of the financial position duly certified by chartered accountant made up to a date not preceding thirty days of filing the application shall be attached.

(7) The company shall attach with the application a certificate from practicing Chartered Accountant or Company Secretary in practice or Cost Accountant in practice certifying that the conditions laid down in the Act and these rules relating to conversion of a company registered under section 8 into any other kind of company, have been complied with.

(8) The Regional Director may require the applicant to furnish the approval or concurrence of any particular authority for grant of his approval for the conversion and he may also obtain the report from the Registrar

(9) On receipt of the application, and on being satisfied , the Regional Director shall issue an order approving the conversion of the company into a company of any other kind subject to such terms and conditions as may be imposed in the facts and circumstances of each case including the following conditions, namely;-

(a) the company shall give up and shall not claim, with effect from the date its conversion takes effect, any special status, exemptions or privileges that it enjoyed by virtue of having been registered under the provisions of section 8;

(b) if the company had acquired any immovable property free of cost or at a concessional cost from any government or authority, it may be required to pay the difference between the cost at which it acquired such property and the market price of such property at the time of conversion either to the government or to the authority that provided the immovable property;

(c) any accumulated profit or unutilised income of the company brought forward from previous years shall be first utilized to settle all outstanding statutory dues, amounts due to lenders claims of creditors, suppliers, service providers and others including employees and lastly any loans advanced by the promoters or members or any other amounts due to them and the balance, if any, shall be transferred to the Investor Education and Protection Fund within thirty days of receiving the approval for conversion;

(10) Before imposing the conditions or rejecting the application, the company shall be given a reasonable opportunity of being heard by the Regional Director

(11) On receipt of the approval of the Regional Director,

(i) the company shall convene a general meeting of its members to pass a special resolution for amending its memorandum of association and articles of association as required under the Act consequent to the conversion of the section 8 company into a company of any other kind;

(ii) the Company shall thereafter file with the Registrar.-

(a) a certified copy of the approval of the Regional Director within thirty days from the date of receipt of the order in Form No.INC.20 along with the fee;

(b) amended memorandum of association and articles of association of the company.

(c) a declaration by the directors that the conditions, if any imposed by the Regional Director have been fully complied with.

(12) On receipt of the documents referred to in sub rule (10) above, the Registrar shall register the documents and issue the fresh Certificate of Incorporation.

CONVERSION OF COMPANY INTO LLP

Any existing private company or existing unlisted public company can be converted into LLP by complying with the Provisions of clause 58 and Schedule III and IV of the LLP Act. Form 18 needs to be filed with the registrar along with Form 2 for such conversion.

1. **Obtain Din**

   Obtain DIN for those designated partners who don't posses DIN already.

2. **Board Meeting**

   - Call meeting of board of Director.

- Pass Resolution for Conversion of Company into LLP.
- Pass Resolution to authorize any director to Apply for Name of LLP.

3. **Application for Name Availability**
   - File e-form LLP-1 with ROC.
   - Attachments: Board Resolution Board resolution passed by the Company approving the conversion into LLP shall be attached with the aforesaid form
4. **Obtain name Approval Certificate from ROC**
5. **Drafting of limited liability partnership agreement:**

   Contents of Agreement are:
   - Name of LLP
   - Name of Partners & Designated Partners
   - Form of contribution
   - Profit Sharing ratio
   - Rights & Duties of Partners
   - Proposed Business
   - Rules for governing the LLP

   It is not necessary to have the LLP Agreement signed at the time of incorporation, as the details of the same needs to field in e-form 3 within 30 days of incorporation but in order to avoid any dispute between the partners as to the terms & conditions of the agreement after the conversion into LLP.
6. **Filling of incorporation documents:** File FiLLip Form with ROC along with following

   ATTACHMENTS:
   - Proof of Address of Registered office of LLP.
   - Subscription sheet signed by the promoters. (Notice of Consent & Appointment of Designated Partners with their personal details)
   - Detail of LLP(s) and/ or company(s) in which partner/ designated partner is a director/ partner
7. **Filling of application for conversion:**

   File E-FORM- 18 with ROC along with following

   Attachments:
   - Statement of shareholders.
   - Incorporation Documents & Subscribers Statements in Form 2 filed electronically.
   - Statement of Assets and Liabilities of the company duly certified as true and correct by the auditor.
   - List of all the Secured creditors along with their consent to the conversion.
   - Approval of the governing council (In case of professional private limited companies)
   - NOC from Income Tax authorities and Copy of acknowledgement of latest income tax return.
   - Approval from any other body/authority as may be required.

- Particulars of pending proceedings from any court/Tribunal etc.

After all formalities and filings been complied with by the applicants and approved by the Ministry, REGISTRAR OF LLP TO ISSUE A CERTIFICATE OF REGISTRATION in form no. 19 as to conversion of the LLP. The Certificate of Registration issued shall be the conclusive evidence of conversion of the LLP.

Filling of E-Form-3:

This form provides information in respect to the LLP Agreement entered into between the partners.

ATTACHMENT: LLP Agreement

10. Certificate of incorporation as LLP form ROC.

CONVERSION OF A COMPANY LIMITED BY GUARANTEE INTO A COMPANY LIMITED BY SHARES

As per Rule 39 of the Companies (Incorporation) Rules, 2014

(1) A company other than a company registered under section 25 of the Companies Act, 1956 or section 8 of the Companies Act, 2013 may convert itself into a company limited by shares.

(2) The company seeking conversion shall have a share capital equivalent to the guarantee amount.

(3) A special resolution is passed by its members authorising such a conversion omitting the guarantee clause in its Memorandum of Association and altering the Articles of Association to provide for the articles as are applicable for a company limited by shares.

(4) A copy of the special resolution shall be filed with the Registrar of Companies in Form no. MGT-14 within thirty days from the date of passing of the same along with fee as prescribed in the Companies (Registration Offices and Fees) Rules, 2014.

(5) An application in Form No. INC-27 shall be filed with the Registrar of Companies within thirty days from date of the passing of the special resolution enclosing the altered Memorandum of Association and altered Articles of Association and a list of members with the number of shares held aggregating to a minimum paid up capital which is equivalent to the amount of guarantee hither to provided by its members.

(6) The Registrar of Companies shall take a decision on the application filed under these rules within thirty days from the date of receipt of application complete in all respects and upon approval of Form No. INC-27, the company shall be issued with a certificate of incorporation in Form No. INC-11B.]

CONVERSION OF UNLIMITED LIABILITY COMPANY INTO A LIMITED LIABILITY COMPANY BY SHARES OR GUARANTEE

As per Rule 37 of the Companies (Incorporation) Rules, 2014

(1) Without prejudice to any other provision in the Companies Act for effecting the conversion of an unlimited liability company with or without share capital into limited liability company by shares or guarantee, such a company shall pass a special resolution in a general meeting and thereafter, an application shall be filed in Form No. INC- 2 in the manner provided in sub-rules (2) and (3).

(2)The Company shall within seven days from the date of passing of the special resolution in a general meeting, publish a notice, in Form No. INC-27A of such proposed conversion in two newspapers (one in English and one in vernacular language) in the district in which the registered office of the company is situate and shall also place the same on the website of the Company, if any, indicating clearly the proposal of conversion of the company into a company limited by shares or guarantee, and seeking objections if any, from the persons interested in its affairs to such conversion and cause a copy of such notice to be dispatched to its creditors and

debentures holders made as on the date of notice of the general meeting by registered post or by speed post or through courier with proof of dispatch. The notice shall also state that the objections, if any, may be intimated to the Registrar and to the company within twenty-one days of the date of publication of the notice, duly indicating nature of interest and grounds of opposition.

(3)The Company shall within forty five days of passing of the special resolution file an application as prescribed in sub rule (1) for its conversion into a company limited by shares or guarantee alongwith the fees as provided in the Companies (Registration offices and Fees) Rules, 2014, by attaching the following documents, namely:-

(a) notice of the general meeting along with explanatory statement.

(b) copy of the resolution passed in the general meeting;

(c) copy of the newspaper publication;

(d) a copy of altered Memorandum of Association as well as Articles of Association duly certified by any one of the Directors duly authorised in this behalf or Company Secretary of the Company, if any.

(e) declaration signed by not less two Directors of the Company, including Managing Director, if any, that such conversion shall not affect any debts, liabilities, obligations or contracts incurred or entered into by or on behalf of the Company before conversion (except to the extent that the liability of the members shall become limited).

(f) a complete list of creditors and debenture holders, to whom individual notices have been sent under sub-rule (2) setting forth the following details, namely:-

  (i) the names and address of every creditor and debenture holder of the Company;

  (ii) the nature and respective amounts due to them in respect of debts, claims or liabilities:

  (iii) declaration by a Director of the Company that notice as required under sub-rule (2) has been dispatched to all the creditors and debenture holders with proof of dispatch.

(g) a declaration signed by not less than two Directors of the Company, one of whom shall be a Managing Director where there is one, to the effect that they have made a full enquiry into the affairs of the Company and, having done so, have formed an opinion that the list of creditors is correct, and that the estimated value as given in the list of the debts or claims payable on a contingency are proper estimates of the values of such debts and claims and that there are no other debts or claims against the company to their knowledge.

(h) a declaration of solvency signed by at least two Directors of the Company, one of whom shall be the Managing Director, where there is one to the effect that the Board of Directors of the Company have made a full inquiry into the affairs of the company, as a result of which they have formed an opinion that it is capable of meeting its liabilities and will not be rendered insolvent within a period of one year from the date of declaration, through a resolution, passed in a duly convened meeting or by circulation.

(i) The company shall also obtain a certificate from the Auditors that the company is solvent and that it is a going concern as on the date of passing of resolution by the Board certifying solvency as per clause (h) above.

(j) No Objection Certificate from sectoral regulator, if applicable.

(k) No Objection Certificate from all secured creditors, if any.

(4) Declaration signed by not less than two Directors including Managing Director, where there is one, that no complaints are pending against the company from the members or investors and no inquiry, inspection or investigation is pending against the company or its Directors or officers.

(5)The Registrar shall, after considering the application and objections if any, received by the Registrar and after ensuring that the company has satisfactorily addressed the objections received by the company, suitably decide whether the approval for conversion should or should not be granted.

(6)The certificate of incorporation consequent to conversion of unlimited liability company to into a company limited by shares or guarantee be in Form INC-11A issued to the company upon grant of approval for conversion.

(7) Conditions to be complied with, subsequent to conversion.-

(1) Company shall not change its name for a period of one year from the date of such conversion.

(2) The company shall not declare or distribute any dividend without satisfying past debts, liabilities, obligations or contracts incurred or entered into before conversion.

Explanation: For the purpose of this clause, past debts, liabilities, obligations or contracts does not include secured debts due to banks and financial institutions.

(8) An Unlimited Liability Company shall not be eligible for conversion into a company limited by shares or guarantee in case-

(a) its net worth is negative, or

(b) an application is pending under the provisions of the Companies Act 1956 or the Companies Act, 2013 for striking off its name, or

(c) the company is in default of any of its Annual Returns or financial statements under the provisions of the Companies Act, 1956 or the Companies Act,2013, or

(d) a petition for winding up is pending against the company, or

(e) the company has not received amount due on calls in arrears, from its directors, for a period of not less than six months from the due date; or

(f) an inquiry, inspection or investigation is pending against the company.

(9) The Registrar of Companies shall take a decision on the application filed under these rules within thirty days from the date of receipt of application complete in all respects.

COMPANIES AUTHORISED TO REGISTER UNDER THE COMPANIES ACT, 2013

(1) For the purposes of Part XXI Companies, the word “company” includes any partnership firm, limited liability partnership, cooperative society, society or any other business entity formed under any other law for the time being in force which applies for registration under this Part.

(2) With the exceptions and subject to the provisions contained in this section, any company formed, whether before or after the commencement of this Act, in pursuance of any Act of Parliament other than this Act or of any other law for the time being in force or being otherwise duly constituted according to law, and consisting of seven or more members, may at any time register under this Act as an unlimited company, or as a company limited by shares, or as a company limited by guarantee, in such manner as may be prescribed and the registration shall not be invalid by reason only that it has taken place with a view to the company’s being wound up:

Provided that—

(i) a company registered under the Indian Companies Act, 1882 or under the Indian Companies Act, 1913 or the Companies Act, 1956, shall not register in pursuance of this section;

(ii) a company having the liability of its members limited by any Act of Parliament other than this Act

or by any other law for the time being in force, shall not register in pursuance of this section as an unlimited company or as a company limited by guarantee;

(iii) a company shall be registered in pursuance of this section as a company limited by shares only if it has a permanent paid-up or nominal share capital of fixed amount divided into shares, also of fixed amount, or held and transferable as stock, or divided and held partly in the one way and partly in the other, and formed on the principle of having for its members the holders of those shares or that stock, and no other persons;

(iv) a company shall not register in pursuance of this section without the assent of a majority of such of its members as are present in person, or where proxies are allowed, by proxy, at a general meeting summoned for the purpose;

(v) where a company not having the liability of its members limited by any Act of Parliament or any other law for the time being in force is about to register as a limited company, the majority required to assent as aforesaid shall consist of not less than three-fourths of the members present in person, or where proxies are allowed, by proxy, at the meeting;

(vi) where a company is about to register as a company limited by guarantee, the assent to its being so registered shall be accompanied by a resolution declaring that each member undertakes to contribute to the assets of the company, in the event of its being wound up while he is a member, or within one year after he ceases to be a member, for payment of the debts and liabilities of the company or of such debts and liabilities as may have been contracted before he ceases to be a member, and of the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves, such amount as may be required, not exceeding a specified amount.

(vii) a company with less than seven members shall register as a private company.

(3) In computing any majority required for the purposes of sub-section (1), when a poll is demanded, regard shall be had to the number of votes to which each member is entitled according to the regulations of the company.

CONVERSION OF LLP INTO COMPANY

Several businesses started in India as Limited Liability Partnership (LLP), may now wish to convert into a private limited company for more growth in business or for infusing equity capital. An LLP can be converted into a Pvt. Ltd. company as per the provisions contained in Section 366 of the Companies Act, 2013 and Company (Authorised to Registered) Rules, 2014.

Corporatization is the need of the hour. The entire world is gradually drifting towards one global market without any trade barriers between the countries. With the emergence of corporate work culture and promotional startup benefits, a great chunk of entrepreneurs are looking forward to corporatization. This step can be initiated in 2 ways as enumerated below:

(i) Incorporation of a new corporate entity.

(ii) Conversion of existing entity (e.g. LLP/ Partnership Firm) into a Company.

The 2nd option of conversion of Limited Liability Partnership into a corporate entity might be practical for the existing entities to switch over from one mode of business to another. The process of conversion is a step by step procedure, which is a technical process but if handled with expert knowledge may be time and cost saving, as well.

There were no provisions under Companies act, 2013 regarding Conversion of Limited Liability Partnership into Company. Ministry of Corporate Affairs has passed a notification on 31st May, 2016 in such notification

its allowed conversion of LLP into Company. These rules called as “the Companies Authorized to register Amendment Rules, 2016.

However, there are various requirements which need to be satisfied for converting an LLP into a Private Limited Company, for instance, an LLP must have at least 7 partners (however as per Companies Amendment Act, 2017 LLP with 2 partners can be convert into Company), approval from all the partners is required, advertisement in newspaper is to be done in a local and a national newspaper, a No Objection Certificate (NOC) is required from the ROC where such LLP is registered and then all the incorporation process has to be undertaken which includes:

Process for Conversion

Approval of Name

Hold a meeting of the partners to take assent of majority of its members summoned for the purpose of registering the LLP under Section 366 of the Companies Act, 2013.To authorize one or more partners to take all steps necessary and to execute all papers, deeds, documents etc. pursuant to registration of the LLP as a Company.

One of the major advantages is that the business can be run under the same name as that of the LLP except that in addition to the name of the LLP the words ‘limited’ or ‘private limited’ has to be added. The name once accepted by the authority will be valid for 60 days.

Securing DSC and DIN

In case all 7 members, who are future directors of the company after conversion, do not have the Digital Signature Certificate (DSC) and Director Identification Number (DIN) for all the future directors of the company must be obtained. For obtaining the DIN, an application form must be filed on MCA portal. DIN application is processed & approved by central government via the office of regional director, the ministry of corporate affairs. The form must be accompanied by self-attested address proof and identity proof with 1 recent passport size color photo of the applicant. All the required documents should be attested by a practicing cost accountant or a practicing chartered accountant or a practicing company secretary.

Filing form no. URC – 1

After getting the approval of name from Registrar of Companies, the applicant must prepare & file the form No

URC-1 in addition to the following documents.

- List of the members with various details viz. names, address, shares held by them appropriately, etc.
- List of the first directors of the private company with various details viz. names, address, the DIN, passport number with an expiry date, etc.
- An affidavit from every person proposed as first directors, that he is not banned to be a director under section-164 and all the necessary documents filed with the registrar for the registration of firm must contain information which is complete and correct & true to be best of his belief and knowledge.
- A list including the names & addresses of partners of LLP and a copy of LLP agreement & certificate of registration duly verified by two designated partners of LLP must be enclosed.
- A statement indicating the following specifications
- the nominal share capital of firm & the number of shares into which it is separated
- the number of shares taken & the amount paid for every share
- the name of the firm, with the addition of word Limited or private limited is required.

- A written consent or No objection certificate from all creditors.
- Copy of newspaper advertisement, statement of accounts of the company which must not be 6 days preceding the date of the application and it must be duly certified by the auditor.
  - Written consent, from the majority of members whether present in person or by proxy at a general meeting, agreeing for such registration;
  - an undertaking that the proposed directors shall comply with the requirements of the Indian Stamp Act, 1899 (2 of 1899) as applicable;
  - a copy of the latest income tax return of the Limited Liability Partnership or firm, as the case may be.

In case of an application by a Limited Liability Partnership or firm for registration as a company limited by guarantee or as an unlimited company-

(i) a list showing the names, addresses and occupations of all persons, who on a day, not being more than six clear days before the day of seeking registration, were partners of the Limited Liability Partnership or firm, as the case may be with proof of membership;

(ii) a list showing the particulars of persons proposed as the first directors of the company, alongwith DIN, passport number, if any, with expiry date, residential addresses and their interests in other firm or body corporate along with their consent to act as directors of the company;

(iii) in case of a firm, deed of partnership, bye laws or other instrument constituting or regulating the company and in case the deed of partnership was revised at any time in the past, copies of the principal and all subsequent deeds including the latest deed, along with the certificate of the registration issued by the Registrar of Firms, in case the firm is registered;

(iv) in the case of a company intended to be registered as a company limited by guarantee, a copy of the resolution declaring the amount of guarantee;

(v) written consent or No Objection Certificate from all the secured creditors of the applicant;

(vi) written consent from the majority of members whether present in person or by proxy at a general meeting agreeing for such registration;

(vii) an undertaking that the proposed directors shall comply with the requirements of the Indian Stamp Act, 1899 (2 of 1899), as applicable;

(viii) a copy of the latest income tax return of the Limited Liability Partnership or firm, as the case may be.

Registration of society as a company limited by guarantee under section 8

In case of an application by a society for registration as a company limited by guarantee under section 8-

(i) a list showing the names, addresses and occupations of all persons, who on a day, not being more than six clear days before the day of seeking registration, were members of the society with proof of membership;

(ii) a list showing the particulars of persons proposed as the first directors of the company, alongwith DIN, passport number, if any, with expiry date, residential addresses and their interests in other firms or bodies corporate along with their consent to act as directors of the company;

(iii) a list containing the names and addresses of the members of the governing body of the society;

(iv) a certified copy of the certificate of registration of the society;

(v) written consent or No Objection Certificate from all the secured creditors of the applicant;

(vi) written consent .from the majority of members whether present in person or by proxy at a general meeting agreeing for such registration, and the resolution shall also provide for declaration of the amount of guarantee;

(vii) an undertaking that the proposed directors shall comply with the requirements of the Indian Stamp Act, 1899 (2 of 1899) as applicable;

(viii) a copy of the latest income tax return of the society;

(ix) details of the objects of the company alongwith a declaration from all the members that the restrictions and prohibitions as mentioned in clause (b) and clause (c) of sub-section (1) of section 8 of the Act shall be complied.

Registration of trust as a company limited by guarantee under section 8

In case of an application by a trust for registration as a company limited by guarantee under section 8-

(i) a list showing the names, addresses and occupations of all persons, who on a day, not being more than six clear days before the day of seeking registration, were trustees of the trust with proof thereof;

(ii) a list showing the particulars of persons proposed as the first directors of the company, alongwith DIN, passport number, if any, with expiry date, residential addresses and their interests in other firm or body corporate along with their consent to act as directors of the company;

(iii) a certified copy of the certificate of registration of the trust and the trust deed;

(iv) written consent or No Objection Certificate from all the secured creditors of the applicant;

(v) written consent from the majority of members whether present in person or by proxy at a general meeting agreeing for such registration, and the resolution shall also provide for declaration of the amount of guarantee;

(vi) an undertaking that the proposed directors shall comply with the requirements of the Indian Stamp Act, 1899 (2 of 1899) as applicable;

(vii) a copy of the latest income tax return of the trust;

(viii) details of the objects of the company alongwith a declaration from all the members that the restrictions and prohibitions as mentioned in clause (b) and clause (c) of sub-section (1) of section 8 of the Act shall be complied.

– Where an application is made by a society or trust for registration as a company limited by guarantee and it has been proved to the satisfaction of the Registrar that the proposed company has its objects in accordance with clause (a) of subsection (1) of section 8 of the Act and it intends to comply with the restrictions and prohibitions as mentioned respectively in clause (b) and clause (c) of that sub-section, the Registrar shall issue a license in Form No. INC. 16 to allow such society or trust to be registered as a limited company without the addition to its name of the word “Limited”,] or as the case may be, the words “Private Limited” and thereupon issue a certificate of incorporation in terms of sub-rule (4) of rule 4 on an application submitted under Chapter II of the Act for incorporation of a company:

Provided further that a society which has not filed the annual or other returns, statutorily required

to be filed with the Registrar of Societies, shall not be eligible to apply for registration under section 366 of the Act.

– An undertaking from all the members or partners or trustees providing that in the event of registration as a company under Part I of Chapter XXI of the Act, necessary documents or papers shall be submitted to the registering or other authority with which the company was earlier registered, for its dissolution:

  Provided that no such undertaking shall be required to be submitted in case the application for registration under Part I of Chapter XXI of the Act has been made by a Limited Liability Partnership registered under the Limited Liability Partnership Act, 2008 (6 of 2009).

– The list of members and directors and any other particulars relating to the company which are required to be delivered to the Registrar shall be duly verified by the declaration of any two or more proposed directors.

Memorandum of Association & Articles of Association

Memorandum of Association (MoA) & Articles of Association (AoA) is to be formulated and then filed with RoC after getting the name approval and sanction of form no. URC-1 – from the registrar.

E-form INC-32 (SPICE)

Company required to file e-form INC-32 **(SPICE)** along with URC-1 as linked form with all the attachment as required in normal Incorporation of Company like:

(i) MOA & AOA

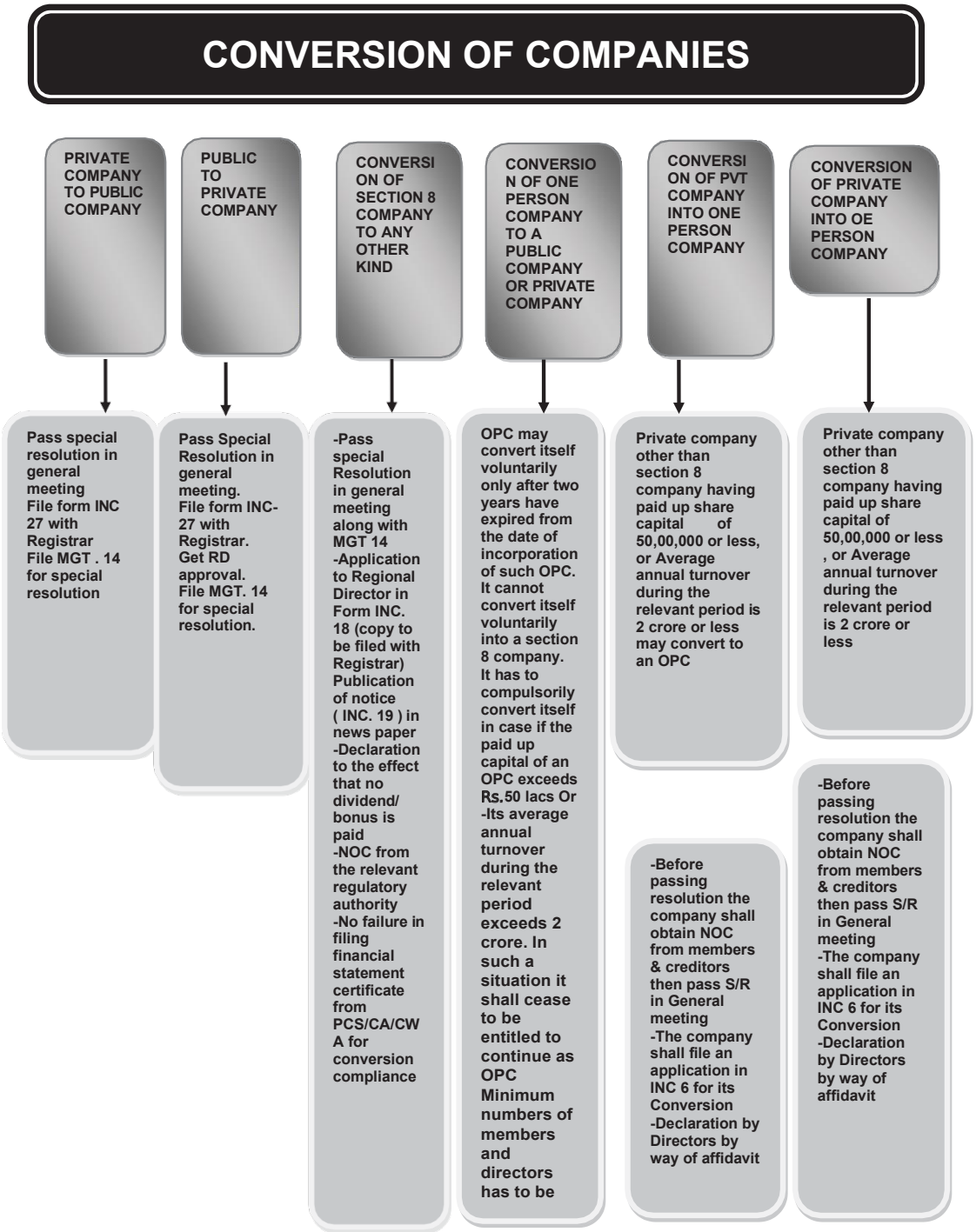
(ii) INC-9

(iii) INC-8

(iv) DIR-2 etc.

The conversion process provides certain tax benefits, however for availing the same several additional requirements needs to be met, for instance, maintaining the same shareholding by the partners as was in the previous LLP when the conversion takes place, for five years from conversion the former partners of such LLP who are now shareholders in the newly formed company cannot in total have shareholding less than 50 percent.

There is another option available for the LLP which is to establish a separate private limited company and after that get the whole business transferred to the private company with the help of a written agreement, in such case the restrictions mentioned above such as need for minimum 7 partners, newspaper publication, etc. are not needed to be met. However, in this situation, there is a levy of capital gain tax. Moreover, stamp duty implication is also applicable to such transfer.



LESSON ROUND-UP

- Under section 2(71), a subsidiary of public company shall be deemed to be public company even if it continues to be private company in its Articles.
- A public company can be converted into a private company only after the approval of the Tribunal.
- For commencement of new business by an existing company, the guiding criterion is whether the new activity is germane to the original business or not.

GLOSSARY

Preliminary Contract	When the company is being formed, the promoters, purporting to act on behalf of the company, enter into contracts for the purchase of property, or for securing the services of managers or other experts. Such contracts are obviously made before the incorporation of the company.
Provisional Contract	In the case of a company having a share capital, contracts made after incorporation but before the company becomes entitled to commence business are provisional. Such contracts are no more relevant as the requirement of commencement have been omitted.
Company Seal	An embossing press used to indicate the official signature of a company. A company under the new Act, may or may not have a common seal.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. (a) Discuss the legal effects of pre-incorporation contracts.

   (b) "A company cannot ratify a pre-incorporation contract though it is open to it to enter into fresh contract" — Discuss.

2. What are the requirements for conversion of a public company into a private company?
3. Can contracts before incorporation be enforced against the company?
4. State the provisions for conversion of a private company into a public company.
5. Write short notes on:
   (a) Pre-incorporation contracts;
   (b) Conversion by default under proviso to Section 14(1) of the Companies Act, 2013.

Lesson 13

Various Initial Registrations and Licenses

LESSON OUTLINE

- Introduction
- Mandatory Registration
- PAN
- TAN
- GST
- Registration under Shops & Establishments
- SSI/MSME
- Additional Registration/License
- ESI/PF
- FCRA Registration
- Pollution
- Other Registration as per requirement of sector
- IE Code
- Drug License
- FSSAI
- Trademark
- Copyright
- Patent
- Design
- RBI
- Banking
- IRDA
- Telecom
- I & B
- MSME Registration
- Udyog Aadhar Memorandum
- Industrial License
- Industrial Entrepreneurs Memorandum (IEM)
- State Level Approval from the respective State Industrial Department
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

A business entity is required to secure various registration and licenses for setting up its businesses in India. There are plethora of laws which require various registration and licences to be carried out and obtained before an individual decides to set up his business unit in India. Apart from the Central laws, there are laws also at the state level, wherein compliances are required to be ensured. In order to facilitate one spot understanding, this chapter deals with the list of Mandatory as well as Additional Registration and Licenses along with their detailed procedure.

INTRODUCTION

A business entity is required to secure various registration and licenses in order to set up its businesses in India. This chapter deals with the list of Mandatory as well as Additional Registration requirements and the Licenses along with their detailed procedures, in order to apprise the readers on the hassle free process of setting up of business in India.

Mandatory Registration

Mandatory registration and their detailed process for setting up business in India is discussed below:

PAN

A permanent account number (in short called as PAN) is a vital document for any taxpayer. It is a 10-character alphanumeric number consisting of letter and digits. PAN card requirements are detailed in the Income Tax Act of 1961. This number is unique to each cardholder and helps identify the income tax payer. It is required for individuals, partnerships and companies. It also serves as an identity proof from a large number of purposes.

Any corporate body doing business in India requires a PAN card whether it is registered in India or abroad. Equally, an individual or entity which is engaged in a business with an Indian firm/entity requires a PAN card. It is also required for anybody who is involved in generating money out of India whether the company is registered, or has a permanent establishment, or an office in India. Given below is a list of the bodies that are required to hold a PAN card in India.

- Body Corporate
- Companies
- Firms other than LLP
- One Person Company
- LLP Firm
- Sole proprietorship
- Trusts
- Corporations
- Limited Liability companies
- Other Associations
- Foreign Institutional Investors
- Hedge funds

Significance of PAN for Setting up of Business

Some of the reasons why holding a PAN is important for every business entity are listed below:

- It was made mandatory by the Government of India under the Income Tax Act, 1961. The Act was subsequently amended and Section 206AA, as inserted in 2009 by the Finance Act, now mandates all foreign parties that provide or generate payment to a counterpart in India to provide their PAN. This includes not only individuals but also incorporations, companies, limited companies and any other form of entity.

- In the absence of the PAN, the Government will charge withholding tax which can be at the rate of more than 30% of the total invoiced payment.
- It serves as a reference number of its holder for the Income Tax Department to track the financial transactions carried out by it. In respect of certain transactions, the person is now required to quote his PAN as also deposit certain income tax documents.
- Even if one is not required to pay income tax, it is mandatory for him to hold a PAN if he is earning money.
- Companies, regardless of whether they are registered abroad or in India, are required to pay tax for businesses carried out in India. Without the PAN, the government has the mandate to deduct tax at the highest possible rate.
- PAN helps an individual to pay for his invoices, remittances, and is also required to be mentioned in the income tax return.
- Just like individuals, companies are required to provide their Tax Registration Number (TRN) to whomever is paying them. A TRN can be obtained only when the company holds a PAN.

Application and Registration of PAN

The PAN (Permanent Account Number) card is an important document for conducting even the most simplest of financial transactions like opening a savings bank account or applying for a debit/credit card.

Earlier, to apply for a PAN, an individual had to fill up physical forms specified by the income tax department (i.e., form 49A for resident individual) and provide supporting documents as proof of identity, address and date of birth.

In the present times, the application for allotment of PAN can be made online. Further, requests for changes or correction in PAN data or request for reprint of PAN card (for an existing PAN) may also be made through internet.

Online application can be made either through the portal of NSDL (https://tin.tin.nsdl.com/pan/index.html) or the online portal of UTITSL (https://www.utiitsl.com/UTIITSL_SITE/pan/index.html). With effect from July 1, 2017, fees for PAN application (including Goods and Services Tax) for dispatch outside India has changed to 1020/- INR. However, PAN application fees for dispatch within India is 110/- INR.

Once the application and payment is accepted, the applicant is required to send the supporting documents through courier/post to NSDL/UTITSL. Only after the receipt of the documents, PAN application would be processed by NSDL/UTITSL.

With effect from April 08, 2012, PAN applications are required to be furnished in the new forms prescribed by ITD. Indian citizens will have to submit their 'Application for allotment of new PAN' in revised Form 49A only. Foreign citizens will have to submit their 'Application for allotment of new PAN' in newly notified Form 49AA only.

For New PAN applications, in case of Individual and HUF applicants, if address for Communication is selected as Office, then Proof of Office Address along with Proof of residential address is to be submitted with NSDL in respect of applications made on and after 1st November 2009.

As per RBI guidelines, the entities making e-commerce transactions are required to enter their PIN (Personal Identification Number) while carrying out an online transaction. Accordingly, before making payment for online PAN/TAN applications using credit/debit card, please ensure that the PIN is obtained from your respective Banks.

TAN

TAN or Tax Deduction and Collection Account Number is again a 10 digit alphanumeric number required to be obtained by all persons who are responsible for deducting or collecting tax. Under Section 203A of the Income Tax Act, 1961, it is mandatory to quote Tax Deduction and Collection Account Number (TAN) allotted by the Income Tax Department (ITD) on all TDS returns.

Since last few years ITD has revised the structure of TAN. It is a unique 10 digit alphanumeric code. Accordingly, they have issued TAN in this new format to all existing TAN holders.

To facilitate tax deductors find their new TAN, ITD has now introduced a search facility on their website (www.incometaxindia.gov.in). Through this facility, the tax deductors can search their name with their old TAN to find the new TAN. Deductors are advised to find their new TAN from this site before it is incorporated in their e-TDS return file to avoid any inconvenience at the time of furnishing e-TDS return.

Types of TAN Applications

There are two types of TAN applications:

- Application for issuance of new TAN (Form 49B): This application form can be used if the deductor/applicant has never applied for a TAN or does not have a TAN.
- Application for Change or Correction in TAN data for TAN Allotted.

Procedure to Apply

A deductor may either make an online application through this website or submit physical TAN Application to any TIN-Facilitation Center (TIN-FC) of NSDL.

Applicants should go through the instructions and guidelines provided in the application form before filling the form.

Where to get the Physical Application Forms

Applicants may obtain the application forms from TIN-FCs, any other vendors providing such forms or can freely download the same from the website.

Communication

These applications are digitized by NSDL and forwarded to ITD. ITD will issue the TAN which will be intimated to NSDL online. On the basis of this, NSDL will issue the TAN letter to the applicant.

Status track

The applicants may track the status of their TAN application using 14 digit unique Acknowledgment Number after three days of application using the status track facility. Alternatively, applicant may call TIN Call Centre on 020 – 2721 8080 to enquire about the status of their application. The status of the TAN application can also be tracked by sending an SMS - NSDLTAN to 57575.

Fee

The processing fee for both the applications (new TAN and change request) is 65/- INR (including Goods and Services Tax).

GST

Registration of any business entity under the GST Law implies obtaining a unique number from the concerned

tax authorities for the purpose of collecting tax on behalf of the Government and to avail Input Tax Credit for the taxes on his inward supplies. Section 22 of Central Goods & Services Tax Act, 2017 mandates that every person who has an aggregate turnover for sale of goods of more than Rs 40 Lacs in the relevant financial year, (Rs. 40 Lakhs with effect from 01/04/2019) is liable to be registered under the Act. It must be noted that for North-Eastern states, the threshold is Rs 20 Lacs.

For services, the limit for Normal category seats is 20 lacs & for special category seats is 10 lacs.

North-eastern states would include Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Sikkim, and Tripura along with hilly areas of Himachal Pradesh and Uttarakhand. If a person has his place of business in different states, and one of the branches is in any of the states mentioned above (Jammu & Kashmir/ North Eastern), then the threshold limit for GST registration would be reduced to Rs 10 Lacs.Since GST is an evolving registration, students should refer to the website of www.cbic.gov.in for the latest updates.

Aggregate Turnover under the Act includes all taxable supplies, exempt supplies, zero-rated supplies, interstate supplies, but doesn't include the inward taxable supplies under the Reverse Charge Mechanism. If the person has taxable and exempt supplies as a part of the turnover, example, machine oil and petrol, the turnover from both would be added to determine whether the aggregate exceeds the threshold, and if it does, then registration becomes mandatory for such supplier. The supplies by the agents on behalf of the principal would be included in the aggregate turnover of both, the principal and the agent. Registration is mandatory at every place of business from wherein a taxable supply has been made.

The registration under GST is Permanent Account Number (PAN) based and state-specific. GST Identification Number (GSTIN) is a 15-digit number and a certificate of registration, incorporating the GSTIN is made available to the applicant upon registration.

- The first two digits of this number will represent the state code
- The next ten digits will be the PAN number of the taxpayer
- The thirteenth digit will be assigned based on the number of registrations within a state
- The fourteenth digit will be Z by default
- The last digit will be for check code

Registration under GST is not tax specific, which means that there is a single registration for all the taxes viz., CGST, SGST/UTGST, IGST and cesses.

A given PAN based legal entity would have one GSTIN per State, that means a business entity having its branches in multiple States will have to take separate State wise registration for the branches in different States. But within a State, an entity with different branches would have single registration wherein it can declare one place as principal place of business and other branches as additional place of business. However, a business entity having separate business verticals (as defined in section 2 (18) of the CGST Act, 2017) in a state may obtain separate registration for each of its business verticals.

Compulsory Registration

In the following cases, registration is made compulsory, irrespective of the aggregate turnover:

- For a supplier who makes inter-state supplies
- Casual taxable person
- Non-resident taxable person
- E-commerce operators
- Persons discharging liabilities under reverse charge mechanism

Persons not liable to register

The following people are not liable to register under the Central Goods & Services Tax Act, 2017:

- Engaged exclusively in the supply of goods / services / both which are not liable to tax
- Engaged exclusively in the supply of goods / services / both which are wholly exempt from tax
- Agriculturalist to the extent of supply of produce from land cultivation
- Specified categories as may be notified by the Government

Procedure for Registration

Every person who is liable to register themselves under the CGST Act, 2017 must do so within thirty days from the date when he becomes first liable or five days prior to commencement of business in case of casual/non-resident taxable person.

If the proper officer doesn't take any action within three days of submission of application along with necessary details and documents, or within seven days of receiving the clarifications so solicited, the application for grant of registration is deemed to be approved.

The effective date of registration is:

- In case the application is submitted within 30 days of the person becoming liable to register, it shall be the date on which the person becomes liable.
- And if the application is submitted after 30 days of the person becoming liable to register, it shall be the date on which the registration is granted.

Section 2(20) of Central Goods & Services Tax Act, 2017 defines "casual taxable person" as a person who occasionally undertakes transactions involving supply of goods or services or both in the course or furtherance of business, whether as principal, agent or in any other capacity, in a State or a Union territory where he has no fixed place of business. Thus, a casual taxable person is someone who has a business in a different state, but comes to a different state for a business purpose temporarily. For example, a footwear dealer registered in Agra comes for an exhibition at Azad Maidan, Mumbai for participating in the exhibition, then such person would need to register as a casual taxable person at Mumbai and he will be granted registration for a maximum period of 90 days.

Section 2(77) of Central Goods & Services Tax Act, 2017 defines "non-resident taxable person" as any person who occasionally undertakes transactions involving supply of goods or services or both, whether as principal or agent or in any other capacity, but who has no fixed place of business or residence in India. Hence, a non-resident taxable person is someone who has a business outside India, but comes to a different state for a business purpose temporarily. For example, a person from Paris, comes to participate in an exhibition at Azad Maidan, Mumbai for participating in the exhibition, then such person would need to register as a non-resident taxable person at Mumbai and he will be granted registration for a maximum period of 90 days.

Registration must be taken state-wise. In case there are several branches within a single state, they can all operate under a single registration so long as one of the places are declared as Principle Place of Business (PPOB) and the remaining are Additional Places of Business (APOB). For composition levy, all businesses under a single PAN mandatorily either can be registered under composition levy or all of them under normal levy and there is no facility of choosing the Composition Scheme for only a few businesses under the Goods & Services Tax Act, 2017.

Cancellation of Registration

The proper officer may, either himself or on application filed by a registered person, or his legal heirs in case

of a death of a registered person, cancel / revoke the registration of such person. This cancellation could be from a prospective / retrospective date as the officer may deem fit. This cancellation would in no way interfere with the liabilities of the said person. A registered person whose registration is cancelled will have to debit the electronic cash ledger or electronic credit ledger, by an amount equal to Input Tax Credit (ITC) so availed or the output tax liability, whichever is higher.

Registration under Shops & Establishments

One of the important regulation to which most businesses in India are subject to is the Shop and Establishment Act, enacted by every state in India. The Act is designed to regulate payment of wages, hours of work, leave, holidays, terms of service and other work conditions of people employed in shop and commercial establishments.

Purpose of Shop and Establishment Act

The Shop and Establishment Act in India is promulgated by the state and may slightly differ from state to state. However, as per the Act, all shops and commercial establishments operating within each state are covered by the respective Shop & Establishments Act. Shops are defined as premises where goods are sold either by retail or wholesale or where services are rendered to customers, and includes an office, a store-room, godown, warehouse or workhouse or work place. Establishments are defined as shop, a commercial establishment, residential hotel, restaurant, eating-house, theatre or other places of public amusement or entertainment. Further, establishments as defined by the Act may also include such other establishments as defined by the Government by notification in the Official Gazette. However, factories are not covered by the shops & establishments Act and are regulated by the Factories Act, 1948.

Meaning of an Establishment for the Purpose of the Act

Establishments included in this Act are commercial establishments, residential hotels, restaurants, eating houses, theaters, or other places of public amusement or entertainment. Additionally, other establishments that the State Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act would then classify as establishments.

Meaning of a Shop for the Purpose of the Act

Shop means any premises:

- Where goods are sold, either by retail, wholesale, or
- Where services are rendered to customers.
- It includes an office a store-room, godown, warehouse or work place, whether in the same premises or otherwise, used in connection with such trade/ business.

A shop does not include a factory, a commercial establishment, residential hotel, restaurant, eating house, theater or other place of public amusement or entertainment;

License under Shop and Establishment Act, 1948

Any shop or commercial establishment that commences operation must apply to the Chief Inspector for a Shop and Establishment Act License within the prescribed time. The application for license in the prescribed form must contain the name of the employer, address of the establishment, name of the establishment, category of the establishment, number of employees and other relevant details as requested. On submission of the application and review by the Chief Inspector, the shop or commercial establishment will be registered and a registration certificate will be issued to the occupier. The registration certificate must be prominently displayed at the shop or commercial establishment and renewed periodically, as per the act.

Registration of Shops & Establishments

As a business owner of a shop or establishment, you are compulsorily required to get the same registered under the Shops and Establishment Act. Here are the specific rules:

1. Submit an application in the prescribed form to the Inspector of the area within 30 days of starting any work in your shop/establishment. The application is to be submitted along with the prescribed fees and should contain the following information:
    a. Your name as the employer and the name of a manager, if any;
    b. The postal address of your establishment;
    c. The name of your establishment;
    d. Such other particulars as may be prescribed.
2. Upon receiving the application for registration and the fees, the Inspector shall verify the accuracy and correctness of the application. Once suitably satisfied, he shall enter the details in the Register of Establishments and issue a registration certificate of your establishment to you. This certificate will be valid for 5 years and has to be renewed thereafter.

It is important that the registration certificate has to be prominently displayed at your establishment.

Communication of Change to the Inspector

In case of any change with respect to any of the information given during the application for registration, the same has to be notified to the Inspector's office within 15 days after the change has taken place. The Inspector will verify the correctness of the details furnished, make the related change in the Register of Establishments, amend the registration certificate or issue a fresh registration certificate, as he may deem fit.

Closing of Establishment to be communicated to Inspector

- In case the shop or establishment would like to close down the business, the occupier should notify the Chief Inspector in writing within fifteen days of the closing.
- The Chief Inspector after reviewing the request for closure can remove the name of the shop or commercial establishment from the register and cancel the registration certificate.

SSI/MSME

Small scale industries are those industries in which the manufacturing, production and rendering of services are done on a small or micro scale. These industries make a one-time investment in machinery, plants, and industries, but it does not exceed Rs 1 Crore. Essentially the small scale industries are generally comprised of those industries which manufacture, produce and render services with the help of small machines and less manpower. These enterprises must fall under the guidelines, set by the Government of India

Micro, Small and Medium Enterprises

The Government of India has enacted the Micro, Small and Medium Enterprises Development (MSMED) Act, 2006 in terms of which the definition of micro, small and medium enterprises is as under:

- Enterprises engaged in the manufacture or production, processing or preservation of goods as specified below:
    - A micro enterprise is an enterprise where investment in plant and machinery does not exceed Rs. 25 lakh;

- o A small enterprise is an enterprise where the investment in plant and machinery is more than Rs. 25 lakh but does not exceed Rs. 5 crore;
- o A medium enterprise is an enterprise where the investment in plant and machinery is more than Rs.5 crore but does not exceed Rs.10 crore.

In case of the above enterprises, investment in plant and machinery is the original cost excluding land and building and the items specified by the Ministry of Small Scale Industries vide its notification No.S.O.1722(E) dated October 5, 2006 .

- Enterprises engaged in providing or rendering of services and whose investment in equipment (original cost excluding land and building and furniture, fittings and other items not directly related to the service rendered or as may be notified under the MSMED Act, 2006 are specified below.
  - o A micro enterprise is an enterprise where the investment in equipment does not exceed Rs. 10 lakh;
  - o A small enterprise is an enterprise where the investment in equipment is more than Rs.10 lakh but does not exceed Rs. 2 crore;
  - o A medium enterprise is an enterprise where the investment in equipment is more than Rs. 2 crore but does not exceed Rs. 5 crore.

SSI registration is a registration provided by the Ministry of MSME Small Scale and ancillary units should seek registration with the Director of Industries of the concerned State Government. The main purpose of Registration is to maintain statistics and maintain a roll of such units for the purposes of providing incentives, subsidies and support services. States have generally adopted the uniform registration procedures as per the guidelines. However, there may be some modifications done by States. It must be noted that small industries is basically a state subject. States use the same registration scheme for implementing their own policies. It is possible that some states may have a 'SIDO registration scheme' and a 'State registration scheme'.

Eligibility apply for Udyog Aadhar/MSME registration

MSME registration or Udyog Aadhaar can be obtained by any type of business entity, namely, Proprietorships, Hindu Undivided Family, Partnership Firm, One Person Company, Limited Liability Partnership, Private Limited Company, Limited Company, Producer Company, any association of persons, co-operative societies or any other undertaking. Small businesses having MSME registration enjoy various benefits under the Micro, Small and Medium Enterprises Development Act, 2006. Obtaining MSME registration or Udyog Aadhaar is not mandatory and is at the sole discretion of the Entrepreneur. However, it is recommended that most businesses obtain MSME/SSI/Udhyog Aadhar registration right after its formation to enjoy various benefits like protection against delayed payments under the MSMED Act.

Criteria for applying for Udyog Aadhar/MSME Registration

The eligibility criteria for obtaining Udyog Aadhaar registration is based on the investment in plant & machinery made by a manufacturing concern or investment in equipment made by a service provider.Only those entities that can be classified as a micro, small or medium enterprise under the following criteria as per the MSMED Act, 2006 is eligible to obtain MSME/SSI/ Udyog Aadhaar/registration :

In case of entities engaged in manufacturing or production of goods:

- Micro enterprise: Any entity wherein the investment in plant and machinery does not exceed rupees twenty five lakhs.
- Small enterprise: Any entity wherein the investment in plant and machinery does not exceed rupees five crores but also more than rupees twenty five lakhs.

- Medium enterprise: Any entity wherein the investment in plant and machinery does not exceed rupees ten crores but also more than rupees five crores.

In case of entities engaged in providing or rendering of services:

- Micro enterprise: Any entity wherein the investment in equipment does not exceed rupees ten lakhs.
- Small enterprise: Any entity wherein the investment in equipment does not exceed rupees two crores but also more than rupees ten lakhs.
- Medium enterprise: Any entity wherein the investment in equipment does not exceed rupees five crores but also more than rupees two crores.

Stage to apply for MSME registration

UDYOG AADHAR MEMORANDUM

Once, Udyog Aadhaar registration is obtained for a business, it can enjoy various subsidies and schemes specially provided by the Government for helping small businesses in India.

Benefits of SSI/MSME Registration

Under this registration scheme, the units normally get registered to avail some benefits, incentives or support given either by the Central or State Govt. Benefits available under the MSMED Act Registration of Micro, Small and Medium (MSM) Enterprises under MSMED Act is a very powerful medium to enjoy the regime of incentives offered by the Centre generally contains the following:

Micro and Small Enterprises:

1. Easy finance availability from Banks, without collateral requirement
2. Assured payment within 45 days and protection against delay in payment from Buyers and right of interest on delayed payment
3. Preference in procuring Government tenders,
4. Stamp duty and Octroi benefits,
5. Concession in electricity bills
6. Reservation policies to manufacturing / production sector enterprises
7. Time-bound resolution of disputes with Buyers through conciliation and arbitration
8. Reimbursement of ISO Certification Expenses
9. Credit prescription (Priority sector lending), differential rates of interest, easy discounting of bills through online system of RBI, etc.
10. Excise Exemption Scheme
11. Exemption under Direct Tax Laws.
12. Financial Assistance for setting up testing facilities through NSIC
13. Statutory support such as reservation and the Interest on Delayed Payments Act.
14. Subsidy on ISO Certifications
15. Subsidy on NSIC Performance and Credit ratings
16. Participation in Government Purchase registrations

17. Registration with NSIC
18. Counter Guarantee from Government of India through CGSTI
19. Waiver in Earnest Money (Security Deposit) in Government tenders
20. 15% weightage in price Preference.
21. Reduction in rate of Interest from banks (Subject to ratings)
22. Free of cost government tenders

(It is to be noted that the Banking Laws, Excise Law and the Direct Taxes Law have incorporated the word SSI in their exemption notifications. Though in many cases they may define it differently. However, generally the registration certificate issued by the registering authority is seen as proof of being SSI).

States/UTs have their own package of facilities and incentives for small scale. They relate to development of industrial estates, tax subsidies, power tariff subsidies, capital investment subsidies and other support. Both the Centre and the State, whether under law or otherwise, target their incentives and support packages generally to units registered with them.

Medium Enterprises:

1. Easy finance availability from Banks, without collateral requirement
2. Preference in procuring Government tenders
3. Reservation policies to manufacturing / production sector enterprises
4. Time-bound resolution of disputes with Buyers through conciliation and arbitration

The Buyers have to ensure whether those suppliers of goods and services are under the purview of MSMED Act i.e. the Buyers have to confirm the registration of the suppliers under the MSMED ACT.

The Buyer should ensure the payment before the end of credit period decided else the interest would be payable.

In case of disputes, application to Micro and Small Enterprises Facilitation Council (MSEFC) would trigger the conciliation and arbitration process. Once the application is done under MSEFC, there is no provision to withdraw the proceedings. Therefore, the Buyer should ensure the best ways to resolve the disputes, if any, instead of approaching MSEFC in the initial stages of dispute.

The Buyers need to ensure that he does not owe any outstanding amount including interest due to MSME Enterprises for more than 45 days. Otherwise, he would be required to disclose this non-payment in his Annual Financial statements.

Registration Process

- Micro & Small Enterprises shall have to apply either online at the website of NSIC www.nsicspronline.com or on the prescribed application form (in duplicate) along-with requisite fee and documents to the Zonal/Branch/Sub Branch and Sub Office/Extension office of NSIC situated nearest to their location.
- Duplicate copy of the G.P. (GOVERNMENT STORES PURCHASE PROGRAMME) Registration Application Form submitted by the Micro & Small Enterprise will be forwarded to the concerned MSME-DI RITES / CDC along with copies of required documents and requisite Proofs/Draft/Pay Order of inspection charges in favor of concerned Inspection Agency requesting for carrying out the Technical Inspection of Micro & Small Enterprise and forward their recommendations in this regard.
- After receiving Inspection Report, NSIC will issue the GP Registration Certificate to Micro & Small Enterprise for items/stores as recommended.

Procedure for calculation & fixation of Monetary Limits of Micro & Small Enterprises.

Monetary limit of the company is fixed on the basis of the unit's net sales turnover during the last three years reflected in the Audited Balance Sheets.

Monetary limit will be fixed on the basis of highest turnover during the last three year which may or may not be of last year provided the units installed and operating capacity has not been reduced.

- In case there is no decrease in plant and machinery, then 50% of highest turnover during the last 3 years reflected in audited balance sheet will be the basis for fixation of monetary limit.
- In case there is decrease in plant and machinery for more than 10%, the following will be considered:
  - i. Where the turnover of the Enterprise has steadily increased over the last three years and the unit is in profit continuously, the Monetary Limit may be fixed at 50% of net sales turnover achieved in the last year.
  - ii. In case the Company/Partnership concern/Proprietorship unit is in loss for one year out of past three years, their monetary limit will be fixed at 40% of their average net sales turnover.
  - iii. Similarly, when the Micro & Small Enterprise is in loss for two years out of the past three years, the monetary limit will be accordingly fixed at 30% of their average net sales turnover of the past three years.
  - iv. In the event of Micro & Small Enterprise being in loss throughout past three years, the monetary limit of the Unit will be fixed at 20% of the average net sales turnover of the Unit during the past three years.

Validity Period of G. P. Registration

The G. P. Registration Certificate granted to the Micro & Small Enterprise under Single Point Registration Scheme (Revised), 2003 is valid for Two Years and will be reviewed and renewed after every two years by verifying continuous Commercial and Technical Competence of the registered Micro & Small Enterprise in manufacturing / producing the stores for which it has been registered by NSIC.

Documents to be submitted by the Micro & Small Enterprises at the Time of Fresh Registration

1. A copy of Acknowledgement of Entrepreneurs Memorandum Part-II;/UAM (Udyog Aadhaar Memorandum) (Ministry of Micro, Small and Medium Enterprises(MSME) has notified the Udyog Aadhaar Memorandum(UAM) under the MSMED Act, 2006 vide gazette notification [SO No. 2576(E)] dated 18-09-2015 in order to promote ease of doing business for MSMEs.)
2. Details of Plant & Machinery and Raw Material clearly showing date of purchase & original purchase value (NOT DEPRECIATED) of individual machinery (Format of application form).
3. Performance Statement as per format/Performa G of the application form.
4. Self-attested copy of ownership documents of the premises or copy of lease deed.
5. Declaration/Certificate from the Proprietor/Partner/Director whether or not they have any link with large scale unit(s). In case of their links with large scale unit(s), the details thereof to be specified.
6. Two copies of each of Declarations duly signed by the authorized person of the applicant SSI Unit accepting conditions of registration (Format D & E of application form).
7. List of raw materials and finished goods in stock.
8. Copy of BIS license, if applicable.

9. Copy of ISO 9000 (Optional).
10. Copy of Registration Certificate if registered with DGS&D or other Govt. Organizations.
11 List of places where after-sales service facilities (if applicable) are available.
12. List of technical personnel employed in production and services.
13. Item for which registration required with detailed specification(s)
14 Write-up on quality control measures adopted by the firm for ensuring quality of raw material, bought out item (s) for assembly and sub-assembly and for products/stores in process and the finished products quality control List of quality control equipment and testing facility available in factory
15. Copy of type test report from Independent lab, where applicable as mentioned in relevant standard.
16. Latest Electricity Bill Copy.
17. Audited Balance Sheet, Trading Account and Profit & Loss
18. Account for the last 3 years duly signed by the authorized person under his seal.
19. Statement showing the Results of Operation for the last 3 years duly signed by Chartered Accountant under his seal {in prescribed format of Annexure of application form (Manufacturing or service enterprises as applicable)}.
20. Bankers Report giving details of financial status of the applicant firm as per Performa F of application form.
21. Copy of Permanent Account No. (PAN)

Documentary Proof of the Status of the firm

Additional documents to be submitted in case of Partnership Concern

- General Power of Attorney in favor of one of the Partners.
- Partnership Deed.
- Form A from Registrar of Firms showing the names of the partners.

Additional documents to be submitted in case of Pvt./ Limited Companies

- Certificate of Incorporation duly authenticated.
- Memorandum and Articles of Association duly authenticated
- Names of sitting Directors, their addresses and their shareholdings.
- Board Resolution in favor of the Signatory of the application and documents.

Additional documents to be submitted in case of Cooperative Societies.

- Certificate of Registration of Societies.
- Society's Bye-Laws/Regulations etc.
- Names of Members, their addresses and shareholding.
- Current Certificate from Registrar of Societies that the Society is still functioning and its working is satisfactory.
- Details of authorized share capital and subscribed share Capital.
- Details of movable as well as immovable property owned by the Society.

- Resolution of Society for seeking registration under Government Purchase Program
- Resolution in favor of Signatory of the application & documents.

The firm manufacturing Paints shall approach to the General Manager, Integral Coach Factory, Perambur, Chennai for paints for Coaching Stock and the Director General, Research Design & Standards Organization, Alam Bagh, Lucknow for Paints for Wagon/bridges and other applications for registration as approved suppliers for supply of Paints to Railways, after the units have been registered with NSIC for general supplies.

Documents Required for Renewal of the Registration

1. Original GP Registration Certificate.
2. A copy of Acknowledgement of Entrepreneurs Memorandum Part-II/UAM;
3. List of major Govt. Orders executed during last 2 years on letter head as per format of Annexure 'G'.
4. Copies of Audited Balance sheet for last 3 years duly signed by the authorized person under his seal.
5. Annexure 'C' of GP Application form duly signed by Chartered Accountant (same as in fresh case).
6. List of addition/deletion in the plant and machinery after the initial registration/ preceding renewal in the letter head duly signed.
7. Annexure 'D' and 'E' duly signed by MSE.
8. For renewal of registration where monitory limit is more than Rs 10 Crores and inspection has not been carried out by Technical Inspecting Agency or NSIC during the last one year, such units will be inspected by the respective Branch Office of NSIC before issue of renewal Certificate.

NSIC Registration

The Government is the single largest buyer of a variety of goods. With a view to increase the share of purchases from the small-scale sector, the Government Stores Purchase Programme was launched in 1955-56. All Micro & Small Enterprises having EM Part-II (Optional)/ Udyog Aadhaar Memorandum (UAM) are eligible for registration with NSIC under its Single Point Registration Scheme (SPRS). for participation in Government Purchases

- NSIC Registration is required to be renewed on every two years
- The National Small Industries Corporation enlists small scale units as competent to undertake supply of various items to the Government.

The registered units are extended various facilities so as to promote their participation, and consequently enhance the share in Government purchases.

The rationale of this Scheme is to avoid multiplicity of registration with various Government agencies and to ensure that the units registered with NSIC are considered at par with those registered directly with the purchasing agency.

Bona-fide Directorate of Industries / District Industries Centres are enlisted under this Scheme.

Their technical and commercial competence is verified in advance and this makes their registration with NSIC more meaningful in relation to purchasing agencies.

Though, initially the Scheme was aimed at securing larger share of orders from DGS&D, effective recognition is given to the units registered with NSIC by the Railways, Defence, P&T, and several Public Sector Enterprises. Automatic registration is given to units which are enlisted with NSIC. The units registered under this scheme are manufacturing a broad spectrum of products involving high technology and sophisticated production processes

and have become a formidable source of supplies to the Government both at the Centre and States besides Public Sector Undertakings, etc.

Benefits of NSIC Registration

The units registered under Single Point Registration Scheme of NSIC are eligible to get the benefits under "Public Procurement Policy for Micro & Small Enterprises (MSEs) Order 2012" as notified by the Government of India, Ministry of Micro, Small & Medium Enterprises, New Delhi vide Gazette Notification dated 23.03.2012. and amendment vide order no. S.O. 5670(E) dated 9th November 2018.

- Issue of the Tender Sets free of cost;
- Exemption from payment of Earnest Money Deposit (EMD),
- In tender participating MSEs quoting price within price band of L1+15 per cent shall also be allowed to supply a portion upto 25% of requirement by bringing down their price to L1 Price where L1 is non MSEs.

  Central Ministries/Departments/PSUs shall set an annual goal of minimum 25 per cent of the total annual purchases of the products or services produced or rendered by MSEs. Out of annual requirement of 25% procurement from MSEs, 4% is earmarked for units owned by Schedule Caste / Schedule Tribes and 3% is earmarked for the units owned by Women entrepreneurs.
- In addition to the above, 358 items are also reserved for exclusive purchase from SSI Sector.

Eligibility

- All Micro & Small Enterprises which are registered with the Director of Industries (DI)/District Industries Centre (DIC) as manufacturing/service enterprises or having Acknowledgement of Entrepreneurs Memorandum [EM Part-II (Now Udhyog Aadhar Memorandum)] are eligible for registration with NSIC under its Single Point Registration Scheme (SPRS).
- Micro & Small Enterprises who have already commenced their commercial production but not completed one year of existence. The Provisional Registration Certificate can be issued to such Micro & Small Enterprises under Single Point Registration scheme with monitory limit of Rs. 5.00 Lacs which shall be valid for the period of one year only from the date of issue after levying the registration fee and obtaining the requisite documents.

Application

Micro & Small Enterprises shall have to apply either online on www.nsicspronline.com or on the prescribed application form in Duplicate and to be submitted to the concerned Zonal/Branch Office of NSIC located nearest to the unit. In case of any difficulty in filling the application form and completing the documentation, please consult any of the Zonal/ Branch office of NSIC. The application form containing Terms & conditions are available free of cost from all offices of the NSIC.

Registration Fee

The registration Fee is based on the Net Sales Turnover as per latest audited Balance Sheet of the Micro & Small Enterprise for the Registration, Renewal and any other amendment etc. The Registration Fee is exclusive of the Inspection charges as levied by the inspecting agency. Such charges as decided by the Inspecting Agency are borne by the unit.

Other Compliances

Other Compliances include:

- Factory Licences;
- Pollution Clearance Certificate
- Additional Registration/License
- ESI/PF

ESI Registration with Procedure & Benefits

Employee's State Insurance (ESI) is a self-financing scheme for Indian workers which covers health insurance and social security. ESI functions as an independent corporation and comes under Ministry of Labor and Employment in India. The ESI Corporation manages the funds which is regulated by the guidelines and regulations of the ESI Act. 1948. This act monitors the provision of cash and medical benefits to employees and their families through their comprehensive network of hospitals and dispensaries throughout India.

Benefits of ESI Registration for both Employer & Employee

Employees registered under the ESI scheme are entitled to a range of benefits. Employees and their families can avail medical treatment and attendance including not only medical but surgical and obstetric treatment as well. Supply of medicines, super specialty consultations, etc. can also be availed. Sick pay benefits also included. Thus, it advised for employees to register under ESI scheme.

ESI Registration Procedure for both Employer & Employee

Registration of Employer:

Any employer having more than 10 employees is mandatorily required to register under ESI.

Within 15 days of submission of Employer's registration form (Form-01), the company or firm is expected to obtain an Identification number or Code Number from the Regional office. This figure will be used in correspondence related to the scheme. Form3 accompanies Form 1.

Documents required:

- Documents about the establishment of the company.
- Evidence supporting date of commencement of production / business.
- List of partners, stakeholders, directors along with necessary information and proof of address.
- Copy of PAN
- Identity proof like voter id/passport
- List of employees

Registration of Employee:

On joining the organization, an employee required to fill the Declaration form i.e. Form-1 along with a copy of the family photo which the employer will be submitting at the ESI branch office.

Within 3 months a permanent photo ID is provided to the employee and he/she will be provided an insurance number for identification purpose under the scheme.

Once registered, the registration can be transferred if the employee switches the organization and takes up employment elsewhere.

Wage Limit under ESI Registration:

Employees earning 21,000 INR per month or less are applicable for ESI contribution. Employees with higher

wages are exempt.

Wage limit for Employees with 'Disability' is 25000 INR per month.

Employee contribution: 1.75% of total salaries. Employer Contribution: 4.75% of total wages.

Provident Fund Meaning and Registration Procedure

In order to provide financial stability and security to employees when they are temporarily or no longer fit to work, the Parliament enacted the Employee's Provident Fund Scheme (EPFS) 1952. The central government trust manages these funds, and employees are required to contribute a part of their salary to it every month during their employment tenure.

An establishment with less than 20 employees can voluntarily opt for PF registration to protect employee's benefits. However, Companies with more than 20 employees have to compulsorily register under EPFS.

PF Registration Process

- A detailed application form called 'Proforma for coverage' and form 5A with Annexure-1 has to be filed while registering the company online.
- After that, a temporary PF registration number allotted, and an employer has to submit all concerning documents online.
- After that, the PF authorities carry out an inspection of the premises and verify the documents submitted online.
- Once they are satisfied, a PF allotment letter will be granted.

Documents required to be submitted

The documents required to submit with the Proforma for coverage for EPF along with list of employees are listed below. It is to be noted that all the required forms are available at the site EPFO & for ESIC

Essential Document(s) to be submitted (For other than a proprietary concern)

1. A copy of Memorandum and Articles of Association and the certificate of incorporation issued by the Registrar of Companies, in the case of Public and Private Ltd. Companies.
2. A copy of partnership deed in the case of partnerships.
3. A copy of Registration certificate issued by the Registrar of Co-operative societies.
4. A copy of Registration certificate issued by Registrar in the case of societies registered under Societies Registration Act along with a copy of the objects and Rules of the Society.
5. Partition deeds creating HUF.
6. Any agreement or other legal documents in the case of Association of persons as defined in the Income Tax Act.

A list of documents which can be submitted as a proof of date of set up :- (Any one of these documents has to be submitted)

1. First Sales Invoice.
2. Any proof regarding date of trial production.
3. Incorporation Certificate issued by the Registrar of Companies together with the report of the Managing Director to the Shareholders in the Annual Report.

4. Commencement of Business Certificate issued by the Registrar of Companies.
5. Certificate of Registration issued by the Registrar of Co-operative Societies.
6. Certificate of Registration issued under Societies Registration Act.
7. Certificate issued by Reserve Bank of India registering newly set up and non-banking financial companies.
8. License issued by the Health Authorities.
9. License/permission issued by the Municipal/Corporation Authorities.
10. Permission/approval granted by the appropriate State Govt. Authorities in the case of Educational Institutions.
11 Certificate issued by the Fire Authorities in the case of establishments coming under Explosives Act.
12. First assessment order issued by the Sales Tax Authorities.
13. First assessment order issued by the Income Tax Authorities.
14. Certificate issued by the Small Scale Industries authorities registering the establishment.
15. Reports/returns to Central Excise authorities.
16. Sanction/connection of power like H.T. connection, L.T. connection etc.
17. Any other Certificate issued by any authority under any law for the time being in force prior to the commencement of business activity/manufacturing activity. The above list is not exhaustive and is only illustrative. Any one or more of the above documents may be submitted along with your application for allotment of a Code Number.

FCRA Registration

Charitable Trusts, Societies, Section 8 Company that receive foreign contribution or donation from foreign sources are required to obtain registration under Section 6(1) of Foreign Contribution Regulation Act, 2010. Such a registration under the Foreign Contribution Regulation Act, 2010 is called a FCRA registration.

Eligibility for obtaining FCRA Registration

Organizations seeking foreign contributions for definite cultural, social, economic, educational or religious programmes may obtain FCRA registration or receive foreign contribution through “prior permission” route. It is preferable for an FCRA applicant to be a Trust or Society or a Section 8 Company. The not-for-profit entity must have also been in existence for a minimum of five years while making the FCRA application and should not have received any foreign contribution prior to that without the Government’s approval. Additionally, the entity seeking registration should have spent at least Rs.10,00,000/- over the last three years on its aims and objects, excluding administrative expenditure. Statements of Income & Expenditure, duly audited by Chartered Accountant, for last three years are to be submitted to substantiate that it meets the financial parameter.

In case a newly registered entity would like to receive foreign contributions, then approval for a specific activity, specific purpose and from a specific source can be made to the Ministry of Home Affairs through the Prior Permission (PP) method.

Criteria for grant of FCRA Registration

Once, an FCRA application is made in the prescribed format, the following criteria are checked before providing registration.

(a) The 'person' or 'entity' making an application for registration or grant of prior permission-

- Is not fictitious or benami;
- Has not been prosecuted or convicted for indulging in activities aimed at conversion through inducement or force, either directly or indirectly, from one religious faith to another;
- Has not been prosecuted or convicted for creating communal tension or disharmony in any specified district or any other part of the country;
- Has not been found guilty of diversion or mis-utilisation of its funds;
- Is not engaged or likely to engage in propagation of sedition or advocate violent methods to achieve its ends;
- Is not likely to use the foreign contribution for personal gains or divert it for undesirable purposes;
- Has not contravened any of the provisions of this Act;
- Has not been prohibited from accepting foreign contribution;
- The person being an individual, such individual has neither been convicted under any law for the time being in force nor is any prosecution for any offence pending against him.
- The person being other than an individual, any of its directors or office bearers has neither been convicted under any law for the time being in force nor is any prosecution for any offence pending against him.

(b) The acceptance of foreign contribution by the entity / person is not likely to affect prejudicially

- The sovereignty and integrity of India;
- The security, strategic, scientific or economic interest of the State;
- The public interest;
- Freedom or fairness of election to any Legislature;
- Friendly relation with any foreign State;
- Harmony between religious, racial, social, linguistic, regional groups, castes or communities.

(c) The acceptance of foreign contribution

- Shall not lead to incitement of an offence;
- Shall not endanger the life or physical safety of any person.

Applying for FCRA Registration

Application for FCRA registration can be made using Form FC-3. Along with the application, the following documents must be submitted, there is a pre-requisite to this registration. To register under FCRA, the NGO must have a DARPAN ID. For this ID, it is required to register on DARPAN portal provided by NITI Ayog.

- Self-certified copy of registration certificate/Trust deed etc., of the association
- Self-certified copy of relevant pages of Memorandum of Association/ Article of Association showing aim and objects of the association.
- Activity Report indicating details of activities during the last three years;
- Copies of relevant audited statement of accounts for the past three years (Assets and Liabilities, Receipt and Payment, Income and Expenditure) clearly reflecting expenditure incurred on aims and objects of the association and on administrative expenditure

Once FCRA registration is granted, it is valid for a period of five years. An application for renewal of FCRA registration can be made 6 months prior to the date of expiry, to keep the registration valid.

Pollution

Entrepreneurs are required to obtain Statutory clearances relating to Pollution Control and Environment for setting up an industrial project, for 30 types of projects as listed, environmental clearance needs to be obtained from the Ministry of Environment, Government of India. This list includes industries like petrochemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilizers, dyes, paper etc.

However, if investment is less than Rs. 1000 million, such clearance is not necessary, unless it is for pesticides, bulk drugs and pharmaceuticals, asbestos and asbestos products, integrated paint complexes, mining projects, tourism projects of certain parameters, tarred roads in Himalayan areas, distilleries, dyes, foundries and electroplating industries.

Further, any item reserved for the small scale sector with investment of less than Rs 50 million is also exempt from obtaining environmental clearance from the Central Government under the Notification. Powers have been delegated to the State Governments for grant of environmental clearance for certain categories of thermal power plants.

Setting up industries in certain locations considered ecologically fragile (e.g. Aravalli Range, coastal areas, Doon valley, Dahanu, etc.) are guided by separate guidelines issued by the Ministry of Environment of the Government of India.

Other Registration as per requirement of sector

IE Code

IEC registration is required by a person for exporting or importing goods. It is a 10 digit code which is issued by the Directorate General of Foreign Trade (DGFT). All businesses which are engaged in Import and Export of goods require registering Import Export Code. IE code has lifetime validity. Importers are not allowed to proceed without this code and exporters can't take benefit of exports from DGFT, customs, Export Promotion Council, if they don't have this code.

The IE Code must be quoted by importers while clearing customs. Also, banks require the importers IE Code while sending money abroad. For exporters, IE Code must be quoted while sending shipments. And banks require the exporters IE Code while receiving money from abroad.

Requirement of IE Code

Now the first thing one require to start Export Import business is Import Export Code (IEC). It is same as the PAN, however, it is compulsory to apply for IEC and register the firm with DGFT. IEC is issued to any bonafide Individual or Company. As a Passport is mandatory for traveling abroad, similarly an IEC Code is mandatory to Export or Import anything from/into India.

IEC Certificate is issued by Directorate General of Foreign Trade (DGFT) which comes under Ministry of Commerce and Industry, Government of India. The main objective of DGFT is regulating and promoting Exports from India. It has a total of 36 branches across India. One have to make an application electronically and submit it to that particular DGFT office that falls under your jurisdiction.

Application for IE Registration

IEC can be obtained from any of the Zonal and Regional offices of Director General of Foreign

Trade depending on area/region where the individual/company is located. An application has to be submitted

online at DGFT web site http://dgft.gov.in duly filled in alongwith required documents and fees.

- First of all we have to prepare an application form in the prescribed format i.e.AayaatNiryaat form 2A format and filed with the proper DGFT Regional office.
- In the second step we have to prepare the necessary documents related to the applicant identity & address proof and legal entity proof with the bank details & certificate in respect of ANF2A.
- In the third step once application has been completed, we file with the DGFT through DSC of the applicant and pay the appropriate fee or cost of the IEC Registration.
- Once application has been approved then you will get the IEC Code in the soft copy from the government department.

Documents Required for Import Export Code (IEC) Registration

- IEC Code Registration required following things:
- Individual Person
- Personal or Company or Firm Pan Card Copy.
- Personal aadhar card or voter id or passport copy.
- Personal or company or firm current bank account cancel cheque copy.
- Electricity Bill Copy or Rent Agreement or Sale deed of the premise copy.

Features of the Import Export Code (IEC) Registration

- International Exposure: IEC Code helps you to grow your business from local market to international market and expand your product or service across the global.
- Government Benefits: Government of India always promote the export activity in India so through IEC Code Registration you can avail all the export scheme benefits from DGFT, Customs and Export Promotion Council.
- No Renewals : IEC Code issued by the DGFT for the lifetime validity so you have not required renew every year so it's a just one time cost of the registration.
- No Annual Compliance: IEC Code have no annual compliance like returns filings etc. Even you have not shown anywhere the transactions.
- Individual person: IEC Code can be obtain by the individual person also, they have not required to register the legal entity.

Drug License

To start a pharmacy business, a drug license is required. The Central Drugs Standard Control Organization and State Drugs Standard Control Organization control the issue of drug license in India. Drug license for setting up a pharmacy business is usually under the purview of the State Drugs Standard Control Organization and the list of State Drugs Standard Control Organization can be downloaded below:

List of State Drugs Control Organization

Normally, the Drug Control Organization issues two types of licences for operating a pharmacy business. One is the Retail Drug License (RDL) issued to run a general chemist shop. The other is the Wholesale Drug License (WDL) issued to persons or agencies engaged in drugs and medicines. In most states, a retail drug license is only issued to persons who possess a degree or diploma in pharmacy from a recognized institute or university after depositing the requisite fee But the above conditions are relaxed in case of procuring a Wholesale Drug

license (WDL).

Requirement for obtaining Drug License

The following are minimum requirements for obtaining drug license or starting a pharmacy in India:

- Area: The minimum area of 10 square meter is required to start a medical shop or pharmacy or wholesale outlet. In case, the pharmacy business combines retail and wholesale, a minimum of 15 square meter is required.
- Storage Facility: The store must have refrigerator & air conditioner in the premises. According to the labelling specifications certain drugs like vaccines, sera, insulin injections etc., are required to be stored in the refrigerator.
- Technical Staff:
  - (a) Wholesale – The sale of drug by wholesale shall be made either in the presence of registered pharmacist or in the presence of a competent person who shall be a graduate with 1 year experience in dealing in drugs or a person who has passed S.S.L.C with 4years experience in dealing in drugs, specially approved by the department of drug control for the purpose.
  - (b) Retail – The sale of drug by retail must be made in the presence of registered pharmacist approved by the department, registered pharmacist is required throughout the working hours.

Documents required for obtaining Drug License

The documents required for starting a pharmacy business varies from state to state. However, the following is an indicative list of documents required for obtaining drug license in India:

a. Application form in the prescribed format

b. Covering Letter with the intent of the application signed with name and designation of the applicant

c. Challan of fee deposited for obtaining drug license

d. Declaration form in the format prescribed

e. Key plan(Blue print) for the premises

f. Site plan (Blue print) for the premises

g. Basis of possession of the premises

h. Proof of ownership of the premises, if rented

i. Proof of constitution of the business (Incorporation Certificate / MOA / AOA / Partnership Deed)

j. Affidavit of non-conviction of proprietor / partners/ directors under Drugs and Cosmetics Act, 1940

k. Affidavit of registered pharmacist or competent person working full time

l. Appointment letter of registered pharmacist/competent person, if employed person.

FSSAI

FSSAI is an abbreviation used for Food Safety and Standards Authority of India. FSSAI license is mandatory before starting any food business. All the manufacturers, traders, restaurants who are involved in food business must obtain a 14-digit registration or a license number which must be printed on food packages.

This step is taken by government's food licensing & registration system to ensure that food products undergo certain quality checks, thereby reducing the instances of adulteration, substandard products and improve

accountability of manufacturers by issuing food service license. FSSAI Online Registration is done through office website of FSSAI for basic and central level. For state, the FSSAI registration is also done through offline mode.

The registration and licensing of food business in India is governed by the Food safety and Standards (Licensing and Registration of Food businesses) Regulation, 2011. As per the regulation, all food business operator in India must have a FSSAI registration or license if they are involved in the manufacturing, storage, transportation or distribution of food products. Based on the size a nature of business, FSSAI registration or FSSAI license may be required.

FSSAI Registration

FSSAI registration is required for all petty food business operator. Petty food business operator is any person or entity who:

a. Manufactures or sells any article of food himself or a petty retailer, hawker, itinerant vendor or temporary stall holder; or

b. Distributes foods including in any religious or social gathering except a caterer; or

c. Other food businesses including small scale or cottage or such other industries relating to food business or tiny food businesses with an annual turnover not exceeding Rs 12 lakhs and whose:

- Production capacity of food (other than milk and milk products and meat and meat products) does not exceed 100 kg/ltr per day or
- Procurement or handling and collection of milk is up to 500 litres of milk per day or
- Slaughtering capacity is 2 large animals or 10 small animals or 50 poultry birds per day or less.

Petty food business operators are required to obtain a FSSAI registration by submitting an application for registration in Form A. On submission of a FSSAI registration application, the registration should be provided or application rejected in writing within 7 days of receipt of an application by authority.

FSSAI registration certificate contains the details of registration and a photo of the applicant. The certificate must be prominently displayed at the place of food business, at all times while carrying on the food business.

FSSAI License

Any person or entity that is not classified as a petty food business operator is required to obtain a FSSAI license for operating a food business in India. FSSAI license is of two types, State FSSAI License and Central FSSAI License. FSSAI State License is needed for small to medium sized Food Companies which has an annual turnover of Rs 12 Lakhs – Rs 20 Crores. FSSAI Central License is mandated for Food giants with an annual turnover of more than Rs 20 Crores.Based on the size and nature of the business, the licensing authority would change. Large food manufacturer/processors/transporters and importers of food products require central FSSAI license; state FSSAI license is required for medium sized food manufacturers, processor and transporters.

The fee and procedure for obtaining a FSSAI license is more extensive when compared to a FSSAI registration. FSSAI license application should be made in Form B to the appropriate Licensing Authority along with the necessary self-attested declaration, affidavit and annexures, as applicable. Fee for the State is dependent on respective state rules.

FSSAI license is granted for a period of 1 to 5 years as request by the food business operator. Higher fee would be applicable for obtaining FSSAI license for more years. If registration is obtained for one or two years, then the license can be renewed by making an application, no later than 30 days prior to the expiry date of the FSSAI license.

Recently, Food Safety and Security Authority of India has notified a list of mandatory documents, required to be

submitted for Registration and Licensing under FSSAI. This is list is placed as below:

List of Mandatory Documents – Required for Registration and Licencing under FSSAI

DAIRY UNITS INCLUDING MILK CHILLING UNITS EQUIPPED TO HANDLE OR PROCESS	
1.	Upload Production unit photograph
2.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
3.	List of Directors with full address and contact details (mandatory for companies only)
4.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
5.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
6.	Food Safety Management System plan or certificate (if any)
7.	Declaration Form
8.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
9.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.)
10.	Copy of certificate obtained under Coop Act-1861/ Multi State Coop Act-2002 in case of Cooperative (wherever applicable)
11.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
12.	Source of milk or procurement plan for milk including location of milk collection centre etc. in case of Milk and Products processing units (wherever applicable)
13.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

SLAUGHTERING UNITS	
1.	Upload Production unit photograph
2.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
3.	List of Directors with full address and contact details (mandatory for companies only)
4.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)

5.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
6.	Food Safety Management System plan or certificate (if any)
7.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
8.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.)
9.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
10.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.
11.	Declaration Form
12.	NOCs from Municipality or local body.

Note: In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

MEAT PROCESSING UNIT	
1.	Upload Production unit photograph
2.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
3.	List of Directors with full address and contact details (mandatory for companies only)
4.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
5.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
6.	Food Safety Management System plan or certificate (if any)
7.	NOCs from Municipality or local body.
8.	Declaration Form
9.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
10.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.)
11.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
12.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.
13.	Source of raw material for meat and meat processing plants (wherever applicable)

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly

(As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

VEGETABLE OIL PROCESSING	
1.	Upload Production unit photograph
2.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
3.	List of Directors with full address and contact details (mandatory for companies only)
4.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
5.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
6.	Food Safety Management System plan or certificate (if any)
7.	Declaration Form
8.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
9.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
10.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
11.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly
(As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

PACKER/REPACKER	
1.	List of Directors with full address and contact details (mandatory for companies only)
2.	Food Safety Management System plan or certificate (if any)
3.	Declaration Form
4.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
6.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
7.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
8.	List of food category desired to be manufactured. (In case of manufacturers)- Not Required as already captured in Form B

9.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
10.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

RELABELLER	
1.	Proof of Expected Annual Turnover(self-attested)
2.	List of Directors with full address and contact details
3.	Food Safety Management System plan or certificate (if any)
4.	Declaration Form
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
6.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.
9.	NOC & Copy of License from manufacturer (mandatory for relabellers and repackers only)

ALL FOOD PROCESSING UNITS OTHER THAN MENTIONED ABOVE	
1.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
4.	List of food category desired to be manufactured. (In case of manufacturers)
5.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
6.	Food Safety Management System plan or certificate (if any)
7.	Declaration Form
8.	Upload Production unit photograph
9.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
10.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
11.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
12.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

PROPRIETARY FOOD	
1.	Undertaking from FBO on letterhead (Only for Proprietary Foods).
2.	Upload Production unit photograph
3.	Declaration Form
4.	Food Safety Management System plan or certificate (if any)
5.	List of Directors with full address and contact details (mandatory for companies only)
6.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
7.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
8.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
9.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.)
10.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
11.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.
12.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

Storage	
1.	Proof of Expected Annual Turnover(self-attested)
2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Food Safety Management System plan or certificate (if any)
4.	Declaration Form
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
6.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

TRANSPORTER	
1.	For Transporters- Supporting documentary proof for turnover or self-declaration of no. of vehicles.
2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Food Safety Management System plan or certificate (if any)
4.	Declaration Form
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
6.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
7.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

HOTEL	
1.	Proof of Expected Annual Turnover(self-attested)
2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Food Safety Management System plan or certificate (if any)
4.	Declaration Form
5.	Certificate provided by Ministry of Tourism (HRACC) (Applicable for Hotels only)
6.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.
9.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

CATERER, FOOD CATERING SERVICES, MID DAY MEAT CANTEEN, MID DAY MEAL CATERER, RESTAURANT	
1.	Proof of Expected Annual Turnover(self-attested)
2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Food Safety Management System plan or certificate (if any)
4.	Declaration Form
5.	Photo I.D and address proof issued by Government authority of proprietor/Partner/Director(s)/ Authorised Signatory. .

6.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

DISTRIBUTOR, MARKETER, RETAILER OF SNACKS/TEA, RETAILER, SUPPLIER, WHOLESALER	
1.	Proof of Expected Annual Turnover(self-attested)
2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Food Safety Management System plan or certificate (if any)
4.	Declaration Form
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
6.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Food business operators manufacturing any article of food containing ingredients or substances or using technologies or processes or combination thereof whose safety has not been established through these regulations or which do not have a history of safe use or food containing ingredients which are being introduced for the first time into the country. (They need to apply for product approval at FSSAI (HQ) separately before applying for license)	
1.	Proof of Expected Annual Turnover(self-attested)
2.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
3.	List of Directors with full address and contact details (mandatory for companies only)
4.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
5.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
6.	Food Safety Management System plan or certificate (if any)

7.	Declaration Form
8.	Upload Production unit photograph
9.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
10.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
11.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
12.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

2. Product Approval NoC from Standards Division, FSSAI Hq

FOOD VENDING AGENCIES, FOOD VENDING ESTABLISHMENTS, HAWKER (ITINERANT/MOBILE FOOD VENDOR)	
1.	Food Safety Management System plan or certificate (if any)
2.	Declaration Form
3.	Proof of Expected Annual Turnover(self-attested)
4.	List of Directors with full address and contact details (mandatory for companies only)
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
6.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

IMPORTER	
1.	List of Directors with full address and contact details (mandatory for companies only)
2.	Food Safety Management System plan or certificate (if any)
3.	IE CODE document issued by DGFT
4.	Declaration Form
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
6.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
7.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

MANUFACTURER/EXPORTER	
1.	List of Directors with full address and contact details (mandatory for companies only)
2.	Food Safety Management System plan or certificate (if any)
3.	IE CODE document issued by DGFT
4.	Declaration Form
5.	Upload Production unit photograph
6.	Undertaking for Exporting FBO
7.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
8.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
9.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
10.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
11.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
12.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in).

2. As per FSSAI order dated 20.06.2018, the Exporting FBO shall have to provide the information for each product.

MERCHANT EXPORTER	
1.	List of Directors with full address and contact details (mandatory for companies only)
2.	IE CODE document issued by DGFT
3.	Declaration Form
4.	Undertaking for Exporting FBO(Merchant Exporter)
5.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
6.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
7.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
8.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

100 % Export Oriented Unit	
1.	Upload Production unit photograph

2.	List of Directors with full address and contact details (mandatory for companies only)
3.	Food Safety Management System plan or certificate (if any);
4.	Ministry of Commerce Certificate for 100% EOU
5.	Declaration Form
6.	Blueprint/layout plan of the processing unit showing the dimensions in metres/square metres and operation-wise area allocation (mandatory for manufacturing and processing units only)
7.	Name and List of Equipments and Machinery along with the number, installed capacity and horse power used (mandatory for manufacturing and processing units only)
8.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory. .
9.	Analysis report (Chemical & Bacteriological) of water to be used as ingredient in food from a recognized/ public health laboratory to confirm the potable (mandatory only for manufacturing and processing units only)
10.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
11.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firm
12.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

Note : In case of water is ground water then NOC from CGWA is necessary to be submitted accordingly (As per office order dated 02.01.2018 as available on official website of FSSAI i.e www.fssai.gov.in)

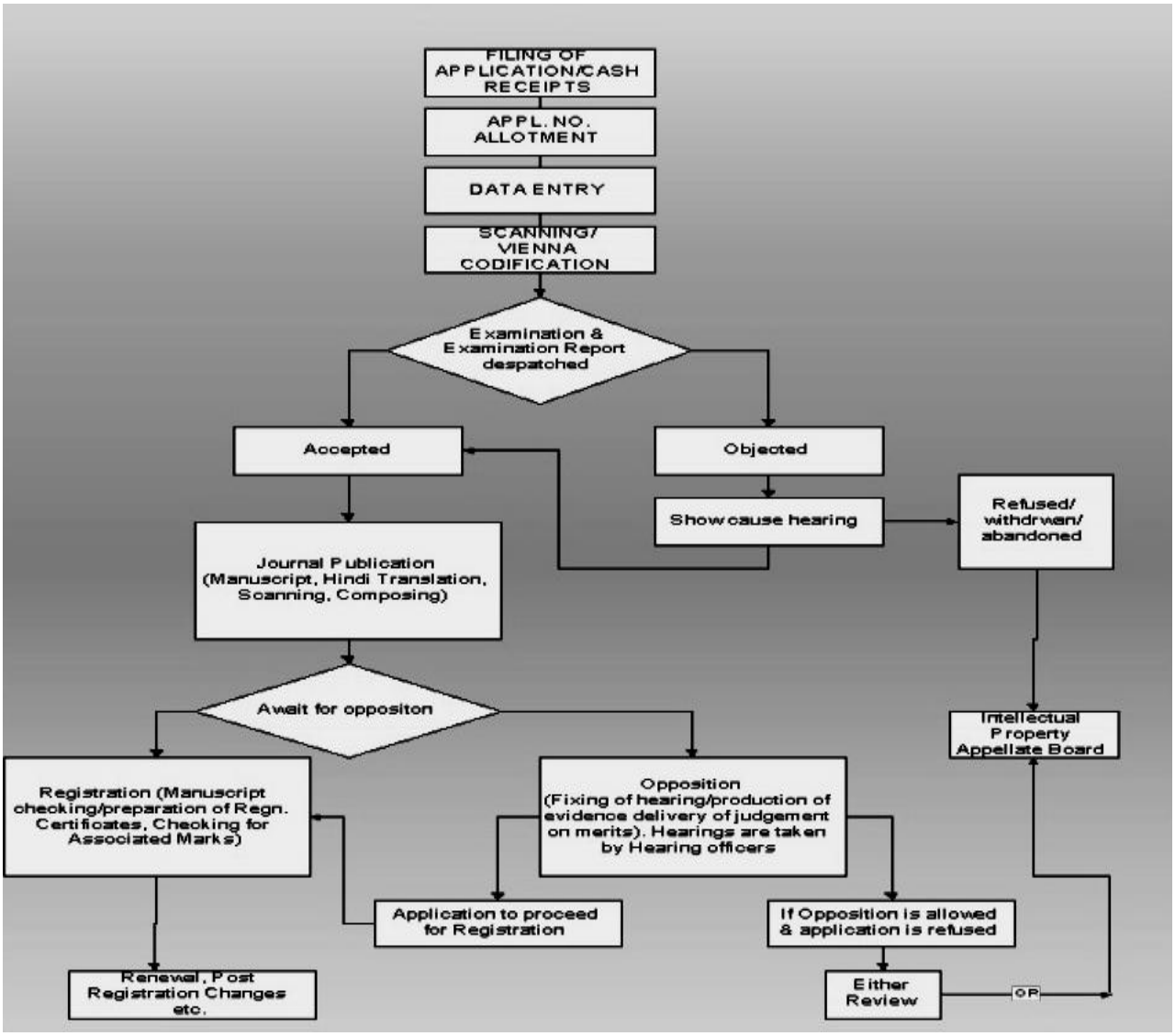
HEAD OFFICE/REGISTERED OFFICE	
1.	List of Directors with full address and contact details (mandatory for companies only)
2.	Photo I.D and address proof issued by Government authority of Proprietor/Partner/Director(s)/ Authorised Signatory.
3.	Proof of possession of premises. (Sale deed/ Rent agreement/ Electricity bill, etc.) .
4.	Partnership Deed/Self Declaration for Proprietorship/Memorandum & Articles of Association towards the constitution of the firmhe firm. . – For MoA - Three pages need to be uploaded (First page - Certification of incorporation, Second page - Authorization of food business activity and Third page - list of directors with addresses)
5.	Recall plan wherever applicable, with details on whom the product is distributed. .
6.	Declaration Form
7.	Form IX: Nomination of Persons by a Company alongwith the Board Resolution.

TRADEMARK

The Trade Marks Registry was established in India in, 1940 and presently, it administers the Trade Marks Act, 1999 and the rules framed thereunder. It acts as a resource and information Centre and is a facilitator in matters relating to trade marks in the country. The objective of the Trade Marks Act, 1999 is to register trademarks applied for in the country and to provide for better protection of trade mark for goods and services and also to

prevent fraudulent use of the mark. The main function of the Registry is to register trademarks which qualify for registration under the Act and Rules.

Steps of Registration



Source: Department of Industrial Policy and Promotion, Ministry of Commerce and Industry, GOI

Form and Fees

Prescribed forms are required to be filed in cases of various events, such as application for registration of trademark, renewal, application for registration of a person as a trade mark agent, etc. Details of the Form Numbers and fees payable are contained in the First Scfhedule of Trade Mark Rules, 2017.

(As per First Schedule of Trade Mark Rules 2017)

COPYRIGHT

The Copyright Act, 1957 came into effect from January 1958. This Act has been amended five times since then, i.e., in 1983, 1984, 1992, 1994, 1999 and 2012. The Copyright (Amendment) Act, 2012 is the most substantial. The main reasons for amendments to the Copyright Act, 1957 include to bring the Act in conformity

with WCT and WPPT; to protect the Music and Film Industry and address its concerns; to address the concerns of the physically disabled and to protect the interests of the author of any work; Incidental changes; to remove operational facilities; and enforcement of rights. Some of the important amendments to the Copyright Act in 2012 are extension of copyright protection in the digital environment such as penalties for circumvention of technological protection measures and rights management information, and liability of internet service provider and introduction of statutory licences for cover versions and broadcasting organizations; ensuring right to receive royalties for authors, and music composers, exclusive economic and moral rights to performers, equal membership rights in copyright societies for authors and other right owners and exception of copyrights for physically disabled to access any works.

Prior to the Act of 1957, the Law of Copyrights in the country was governed by the Copyright Act of 1914. This Act was essentially the extension of the British Copyright Act, 1911 to India. Even the Copyright Act, 1957 borrowed extensively from the new Copyright Act of the United Kingdom of 1956. The Copyright Act, 1957 continues with the common law traditions. Developments elsewhere have brought about certain degree of convergence in copyright regimes in the developed world.

The Indian Copyright Act today is compliant with most international conventions and treaties in the field of copyrights. India is a member of the Berne Convention of 1886 (as modified at Paris in 1971), the Universal Copyright Convention of 1951 and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement of 1995. Though India is not a member of the Rome Convention of 1961, the Copyright Act, 1957 is fully compliant with the Rome Convention provisions.

The two Internet Treaties were negotiated in 1996 under the auspices of the World Intellectual Property Organization (WIPO). These treaties are called the 'WIPO Copyrights Treaty (WCT)' and the 'WIPO Performances and Phonograms Treaty (WPPT)'. These treaties were negotiated essentially to provide for protection of the rights of copyright holders, performers and producers of phonograms in the Internet and digital era. India is not a member of these treaties; amendments are being mooted to make Act in compliant with the above treaties in order to provide protection to copyright in the digital era. Though India is not a member of the WCT and the WPPT, the Copyright Act, 1957 is fully compliant with the Rome Convention provisions. The provisions of the Act is also in harmony with two other new WIPO treaties namely, the Beijing Audiovisual Performers treaty, 2012 and the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired or Otherwise Print Disabled Persons, 2013.

The Copyright Rules, 2013 was notified on 14 March, 2013 replacing the old Copyright Rules, 1958. The Rules, inter alia, provide for procedure for relinquishment of Copyright; grant of compulsory licences in the matter of work withheld from public; to publish or republish works (in certain circumstances); to produce and publish a translation of a literary or dramatic work in any language; licence for benefit of disabled; grant statutory licence for cover versions; grant of statutory licence for broadcasting literary and musical works and sound recordings; registration of copyright societies and copyright registration.

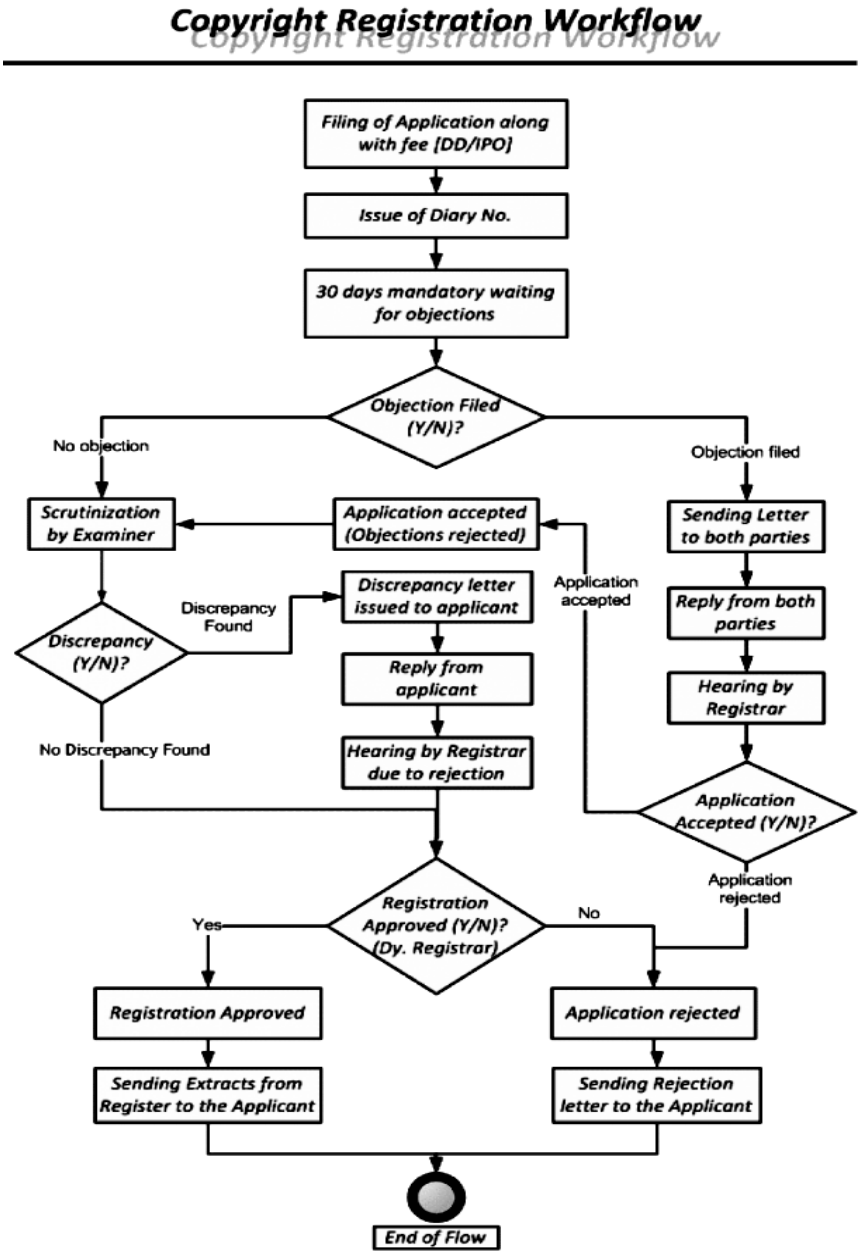
Copyright Registration Procedure

The procedure for registration is as follows:

- Application for registration is to be made on as prescribed in the first schedule to the Rules;
- Separate applications should be made for registration of each work;
- Each application should be accompanied by the requisite fee prescribed in the second schedule to the Rules ; and
- The applications should be signed by the applicant or the advocate in whose favor a Vakalatnama or Power of Attorney has been executed. The Power of Attorney signed by the party and accepted by the advocate should also be enclosed.

Time for Processing Application

- After one files the application and receives diary number, one has to wait for a mandatory period of 30 days so that no objection is filed in the Copyright office against the claim that particular work is created by applicant.



Source: India Filings

Scope and Extent of Copyright Registration

Both published and unpublished works can be registered. Copyright in works published before January 21, 1958, i.e., before the Copyright Act, 1957 came in force, can also be registered, provided the works still enjoy copyright. Three copies of published work may be sent along with the application.

If the work to be registered is unpublished, a copy of the manuscript has to be sent along with the application for affixing the stamp of the Copyright Office in proof of the work having been registered. In case two copies of

the manuscript are sent, one copy of the same duly stamped will be returned, while the other will be retained, as far as possible, in the Copyright Office for record and will be kept confidential. It would also be open to the applicant to send only extracts from the unpublished work instead of the whole manuscript and ask for the return of the extracts after being stamped with the seal of the Copyright Office. When a work has been registered as unpublished and subsequently it is published, the applicant may apply for changes in particulars entered in the Register of Copyright in Form V with prescribed fee.

All kinds of literary and artistic works can be copyrighted, one can also file a copyright application for the website or other computer program. Computer Software or programme can be registered as a 'literary work'. As per Section 2 (o) of the Copyright Act, 1957 "literary work" includes computer programmes, tables and compilations, including computer databases. 'Source Code' has also to be supplied along with the application for registration of copyright for software products. Copyright protection prevents undue proliferation of private products or works, and ensures the individual owner retains significant rights over his creation.

Fees

In respect of various events, the forms to be be filed and the fees to be paid are contained in the Second Schedule to the Coypright Rules, 2013. Fee can be paid by postal order /demand draft/online payment payable to "Registrar of Copyrights, New Delhi":

PATENT

Patent filing has become increasingly popular in India due to the rising intellectual property rights awareness and Startup India Action Plan. In the Startup India Action Plan, eligible startups would receive an 80% rebate in patent filing fee to provide a boost to patent registered by Indian companies. Hence, there is tremendous interest amongst startups for obtaining patent registration and in this article, we look at the documents required for patent registration in India.

Filing Patent Application

While filing a patent application, provisional specifications or complete specifications can be filed by the applicant. The following is a list containing all documents that must be filed for obtaining patent registration:

- Patent application in Form-1.
- Proof of right to file application from the inventor. The proof of cite can either be an endorsement at the end of the application or a separate agreement attached with the patent application.
- Provisional specifications, if complete specifications are not available.
- Complete specification in Form-2 within 12 months of filing of provisional specification.
- Statement and undertaking under Section 8 in Form- 3, if applicable. Form 3 can be filed along with the application or within 6 months from the date of application.
- Declaration as to inventorship in Form 5 for applications with complete specification or a convention application or a PCT application designating India. Form-5 or Declaration as to inventorship can be filed within one month from the date of filing of application, if a request is made to the Controller in Form-4.
- Power of authority in Form-26, if patent application is being filed by a Patent Agent. In case a general power of authority, then a self-attested copy of the same can be filed by the Patent Agent or Patent Attorney.
- Priority document must be filed in the following cases:
    (i) Convention Application (under Paris Convention).

(ii) PCT National Phase Application wherein requirements of Rule 17.1(a or b) of has not been fulfilled.

(iii) Note: Priority document must be filed along with the application or before the expiry of eighteen months from the date of priority, to enable early publication of the application.

- If the Application pertains to a biological material obtained from India, the applicant is required to submit the permission from the National Biodiversity Authority any time before the grant of the patent. However, it is sufficient if the permission from the National Biodiversity Authority is submitted before the grant of the patent.
- The Application form should also indicate clearly the source of geographical origin of any biological material used in the specification.
- All patent applications must bear the signature of the applicant or authorized person or Patent Attorney along with name and date.
- Provisional or complete specification must be signed by the agent/applicant with date on the last page of the specification. The drawing sheets attached should also contain the signature of an applicant or his agent in the right hand bottom corner.

DESIGN

The objective of The Designs Rules, 2001 is to enable protection of newly created designs applying to particular articles manufactured by the industrial process. It refers in legal definition to:

- Any mode or principle of construction or anything which is in substance merely mechanical device;
- Any trademark which is a registered trade mark indicating connection in course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark;
- Any trademark which denotes the ownership of moveable property belonging to particular person; and
- Any trademark which is a painting, sculpture, drawing, an engraving or photograph or any work of architecture or any other work of artistic craftsmanship.

Design Registration

An application for the registration of design should be submitted along with four specimen copies of the design. A statement of novelty should too be submitted which refers to a statement of how the design is unique. Additional copies of the specimen design may be included. The design so represented in the 'representation of the design' submitted should be precisely similar to the design or exact copies of the design. The reciprocity application submitted in the UK or a convention country or group of countries or an intergovernmental organization means can be made with additional copies of the design according to rule 30. The Controller may or may not accept the registration of design. A statement of objections may be made by the controller to the applicant with necessary amendments. The date on which the controller's decision is dispatched is deemed as the date of appeal. Any applicant not completely and verifiably filed will be abandoned by the Controller. The particulars of the application and the representation of the article may be published in the Official Gazette.

Documents Required for Design Registration

- A certified copy of the original or certified copies of extracts from disclaimers
- Affidavits
- Declarations and

- Other public documents can be made available on payment of a fee.

The affidavits should be in paragraph form and should contain a declaration of truth and verifiability. The costs involved in the design registration process may be regulated by the Controller according to the Fourth Schedule.

GENERAL GUIDELINES

The design should be registered with all essential documents including reciprocity date and maintained on diskette and floppy or any other master folder. Any request for alteration of address should be made in Form 22. Under the Rule 33, details of the name, address and nationality of the person entitled should be recorded. The evidence of the transmission of copyright in a registered design or that affecting the proprietorship should be presented to Controller either in original, or notary certified true copy together with the application and may require any other proofs. The form of entry of the design registration application is a prescribed one and should conform to the relevant standards. The register of design can be made visible to the public except for during the time it requires office inspection. A note for rectification of design may be made to persons concerned and published in the Official Gazette. A notification of opposition to rectification of design can too be made by opponent.

RBI

A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act that is engaged in the business of loans and advances, receiving deposits (some NBFC's only), acquisition of stocks or shares, leasing, hire-purchase, insurance business, chit business. Therefore, NBFCs lend and take deposits similar to banks; however there are a few differences a) NBFC cannot accept demand deposits, NBFCs cannot issue cheques drawn on itself and NBFC depositors are not covered by the Deposit Insurance and Credit Guarantee Corporation.

Requirement of NBFC License with RBI

The Reserve Bank of India regulates and supervises Non-Banking Financial Companies which are into the principal business of lending or acquisition of shares, stocks, bonds, etc., or financial leasing or hire purchase or accepting deposits. Principal business of financial activity is when a company's financial assets constitute more than 50 per cent of the total assets and income from financial assets constitute more than 50 percent of the gross income. A company which fulfills both these criteria must have NBFC license. This test for NBFC license is popularly known as the 50-50 test.

Therefore, companies engaged in agricultural operations, industrial activity, purchase and sale of goods, providing services or purchase, sale or construction of immovable property as their principal business and are doing some financial activity in a small way, will not require NBFC registration.

Financial Companies exempt NBFC License

The following types of entities that are involved in the principal business of financial activity do not require NBFC License:

- Housing Finance Companies – Regulated by the National Housing Bank;
- Insurance Companies – Regulated by Insurance Regulatory and Development Authority of India (IRDA);
- Stock Broking – Regulated by Securities and Exchange Board of India;
- Merchant Banking Companies – Regulated by Securities and Exchange Board of India;
- Venture Capital Companies – Regulated by Securities and Exchange Board of India;
- Companies that run Collective Investment Schemes – Regulated by Securities and Exchange Board of

India;

- Mutual Funds – Regulated by Securities and Exchange Board of India;
- Nidhi Companies – Regulated by the Ministry of Corporate Affairs (MCA);
- Chit Fund Companies – Regulated by the respective State Governments.

The above types of companies have been exempted from NBFC registration requirements and NBFC regulations of RBI as they are regulated by other financial sector regulators.

Requirement for Obtaining NBFC License

To apply and obtain NBFC License, the following are the basic requirements:

- A Company Registered in India (Private Limited Company or Limited Company);
- The company must have minimum Net Owned Fund of Rs.200 lakhs.

Calculating Net Owned Funds as per RBI Definition

Net Owned Funds Formula

The Net Owned Funds would be calculated based on the last audited balance sheet of the Company. Net owned Fund will consist of paid up equity capital, free reserves, balance in share premium account and capital reserves representing surplus arising out of sale proceeds of assets but not reserves created by revaluation of assets. From the aggregate of items will be deducted accumulated loss balance and book value of intangible assets, if any, to arrive at owned funds. Further, investments in shares of other NBFCs and in shares, debentures of subsidiaries and group companies in excess of ten percent of the owned fund mentioned above will be deducted to arrive at the Net Owned Fund.

TYPES OF NBFC LICENSE

Before applying for NBFC License, the type and category of NBFC license must first be determined. The following are the categories of NBFC Companies:

Asset Finance Company(AFC): An Asset Finance Company is a company which is a financial institution carrying on as its principal business the financing of physical assets such as automobiles, tractors, lathe machines, generator sets, earth moving and material handling equipment's, moving on own power and general purpose industrial machines.

Investment Company: An Investment Company is any company which is a financial institution carrying on as its principal business the acquisition of securities (shares / stocks / bonds / other financial securities).

Loan Company: Loan Company is any company which is a financial institution carrying on as its principal business the providing of finance whether by making loans or advances or otherwise for any activity other than its own but does not include an Asset Finance Company.

Infrastructure Finance Company: Infrastructure Finance Company is a non-banking finance company that deploys at least 75 per cent of its total assets in infrastructure loans, has a minimum Net Owned Funds of Rs. 300 crore, maintains a minimum credit rating of 'A 'or equivalent with a Capital to Risk Assets Ratio of 15%.

Systemically Important Core Investment Company: Systemically Important Core Investment Company is an NBFC with an asset size of over Rs.100 crores and accepts deposits, involved in the business of acquisition of shares and securities which satisfies certain conditions.

Infrastructure Debt Fund: Infrastructure Debt Fund is a company registered as NBFC to facilitate the flow of long term debt into infrastructure projects. Infrastructure Debt Funds raise resources through issue of Rupee or

Dollar denominated bonds of minimum 5 year maturity.

Non-Banking Financial Company – Micro Finance Institution: Micro Finance Institution is a non-deposit taking NBFC that is engaged in micro finance activities.

NBFC Factor: NBFC Factor is a non-deposit taking NBFC engaged in the principal business of factoring.

Applying for NBFC License

The application for NBFC License must be submitted online and offline with the necessary documents to the Regional Office of the Reserve Bank of India. The following are the documents that need to be submitted for NBFC License:

- Information about the management
- Certified copies of Certificate of Incorporation and Certificate of Commencement of Business in case of public limited companies.
- Certified copies of up-to-date Memorandum and Articles of Association of the company. Details of clauses in the memorandum relating to financial business.
- Copy of PAN/CIN allotted to the company.
- Directors' profile, separately filled up and signed by each director.
- Certificate from the respective NBFC/s where the Directors have gained NBFC experience.
- CIBIL Data pertaining to Directors of the company
- Financial Statements of the last 2 years of Unincorporated Bodies, if any, in the group where the directors may be holding directorship with/without substantial interest.
- Board Resolution specifically approving the submission of the application and its contents and authorizing signatory.
- Board Resolution to the effect that the company has not accepted any public deposit, in the past (specify period)/does not hold any public deposit as on the date and will not accept the same in future without the prior approval of Reserve Bank of India in writing.
- Board resolution stating that the company is not carrying on any NBFC activity/stopped NBFC activity and will not carry on/commence the same before getting registration from RBI.
- Certified copy of Board resolution for formulation of "Fair Practices Code".
- Statutory Auditors Certificate certifying that the company is/does not accept/is not holding Public Deposit.
- Statutory Auditors Certificate certifying that the company is not carrying on any NBFC activity.
- Statutory Auditors Certificate certifying net owned fund as on date of the application.
- Details of Authorized Share Capital and latest shareholding pattern of the company including the percentages.
- Copy of Fixed Deposit receipt & bankers certificate of no lien indicating balances in support of Net Owned Funds.
- Details of the bank balances/bank accounts/complete postal address of the branch/bank, loan/credit facilities etc. availed.

- Last three years Audited balance sheet and Profit & Loss account along with directors & auditors report or for such shorter period as are available (for companies already in existence).
- Business plan of the company for the next three years giving details of its (a) thrust of business, (b) market segment and (c) projected balance sheets, cash flow statement, asset/income pattern statement without any element of public deposits.
- Source of the startup capital of the company substantiated with documentary evidence.
- Self attested Bank Statement/IT returns etc.
- In addition to the above documents, more documents may be required as per the RBIs requirement for NBFC License.

Banking

Licensing of Banking Companies is governed by Banking Regulation Act, 1949. Section 22 of the Act details on Licensing of Banking Companies which states as below:

(1) Save as hereinafter provided, no company shall carry on banking business in India unless it holds a license issued in that behalf by the Reserve Bank and any such license may be issued subject to such conditions as the Reserve Bank may think fit to impose.

(2) Every banking company in existence on the commencement of this Act, before the expiry of six months from such commencement, and every other company before commencing banking business 11 [in India], shall apply in writing to the Reserve Bank for a license under this section:

Provided that in the case of a banking company in existence on the commencement of this Act, nothing in sub-section (1) shall be deemed to prohibit the company from carrying on banking business until it is granted a license in pursuance of 55[this section] or is by notice in writing informed by the Reserve Bank that a license cannot be granted to it:

Provided further that the Reserve Bank shall not give a notice as aforesaid to be a banking company in existence on the commencement of this Act before the expiry of the three years referred to in sub-section (1) of section 11 or of such further period as the Reserve Bank may under that sub-section think fit to allow.

(3) Before granting any license under this section, the Reserve Bank may require to be satisfied by an inspection of the books of the company or otherwise that the following conditions are fulfilled, namely:-

(a) That the company is or will be in a position to pay its present or future depositors in full as their claims accrue;

(b) that the affairs of the company are not being, or are not likely to be, conducted in a manner detrimental to the interests of its present or future depositors;

(c) That the general character of the proposed management of the company will not be prejudicial to the public interest of its present or future depositors;

(d) That the company has adequate capital structure and earning prospects;

(e) That the public interest will be served by the grant of a license to the company to carry on banking business in India;

(f) That having regard to the banking facilities available in the proposed principal area of operations of the company, the potential scope for expansion of banks already in existence in the area and other relevant factors the grant of the license would not be prejudicial to the operation and consolidation of the banking system consistent with monetary stability and economic growth;

(g) any other condition, the fulfillment of which would, in the opinion of the Reserve Bank, be necessary to

ensure that the carrying on of banking business in India by the company will not be prejudicial to the public interest or the interests of the depositors.

(3A) Before granting any license under this section to a company incorporated outside India, the Reserve Bank may require to be satisfied by an inspection of the books of the company or otherwise that the conditions specified in sub-section (3) are fulfilled and that the carrying on of banking business by such company in India will be in the public interest and that the government or law of the country in which it is incorporated does not discriminate in any way against banking companies registered in India and that the company complies with all the provisions of this Act applicable to banking companies incorporated outside India.]

(4) The Reserve Bank may cancel a license granted to a banking company under this section:

I. if the company ceases to carry on banking business in India; or

II. if the company at any time fails to comply with any of the conditions imposed upon it under sub-section (1); or

III. if at any time, any of the conditions referred to in sub-section (3) 15 [and sub-section (3A)] is not fulfilled:

Provided that before cancelling a license under clause (ii) or clause (iii) of this sub-section on the ground that the banking company has failed to comply with or has failed to fulfil any of the conditions referred to therein, the Reserve Bank, unless it is of opinion that the delay will be prejudicial to the interests of the company's depositors or the public, shall grant to the company on such terms as it may specify, and opportunity of taking the necessary steps for complying with or fulfilling such condition.

(5) Any banking company aggrieved by the decision of the Reserve Bank canceling a license under this section may, within thirty days from the date on which such decision is communicated to it, appeal to the Central Government.

(6) The decision of the Central Government where an appeal has been preferred to it under sub-section (5) or of the Reserve Bank where no such appeal has been preferred shall be final.

IRDA (INSURANCE REGULATORY AND DEVELOPMENT AUTHORITY)

Introduction

Till 1999 the insurance sector was controlled by Controller of Insurance as per the provisions of Insurance Act 1938 but after formation of the IRDA it is felt by the Authority that the most of the provisions of this Act were irrelevant in the present scenario of the country. Therefore the Authority issued various regulations, as deemed fit, to develop the insurance sector in the country.

Functions and Duties of IRDAI

Section 14 of the IRDA Act, 1999 lays down the duties, powers and functions of IRDA.

- Registering and regulating insurance companies
- Protecting policyholders' interests
- Licensing and establishing norms for insurance intermediaries
- Promoting professional organisations in insurance
- Regulating and overseeing premium rates and terms of non-life insurance covers
- Specifying financial reporting norms of insurance companies
- Regulating investment of policyholders' funds by insurance companies

- Ensuring the maintenance of solvency margin by insurance companies
- Ensuring insurance coverage in rural areas and of vulnerable sections of society

To facilitate the regulatory regime of insurance business in India, IRDA is authorized to grant some licenses and issue registration for setting up insurance business in India. This procedure of grant of licenses and registrations is listed in following functionalities of IRDA

1. Granting of license to companies to start insurance business.
2. Approval of insurance product.
3. Appointment of different insurance intermediary.
4. Investing the insurance premium.
5. Accounting & audit.
6. Miscellaneous important provisions of Insurance Act.

These regulations were not issued in the above sequence but a logic has to be followed that- firstly the insurance company will come into existence, secondly the insurance product will be design and developed, thirdly the manpower is required to sell the product, fourthly the premium received by the insurance companies is to be invested, fifthly the accounts are to be maintained and lastly, various provisions.

Procedure of Granting of License to Companies to Start Insurance Business (Read with Amendments of 2015)

No person can carry on Insurance business unless & until he has obtained a certificate from the Authority for a particular class of Insurance business. For e.g. A person can start life Insurance, marine Insurance, fire Insurance, health Insurance etc. But a life Insurance business cannot be combined with other type of Insurance business. Those who are already in Insurance Business like General Insurance Corporation, National Insurance, New India Assurance, Oriental Insurance and United India Insurance have to obtain a fresh certificate within 3 months from the date of commencement of this Act or before such date as fixed by the Govt.

Even those insurers for whom the registration was not necessary before the commencement of this Act will require the registration certificate.

To get the registration certificate the following procedure is to be followed:

Every application in the prescribed form (IRDA/R1) for registration shall be made with the following enclosures:—

1. A certified copy of Memorandum and Articles of association, if the applicant is a company.
2. The name, address & the occupation of the directors of the company.
3. A statement of the class of insurance business proposed to be carried on.
4. A statement indicating the sources that will contribute the share capital.

On receiving the above documents IRDA will verify the contents and may ask for additional information if any. The Authority may ask the Principal Officer to appear to their office for any information or clarification.

If the Authority is satisfied with the information and documents provide with the application form (IRDA/R1), the Authority may ask for an additional application in the prescribed form (IRDA/R2) which should be accompanied with then following documents:—

1. Every Insurance shall deposit in cash or in approved securities or partially in cash or partially in approved securities as per details given below: -

(i) In case of Life Insurance business, a sum equivalent to 1% of his total gross premium written in India

in any financial year commencing after the 31st day of March 2000 not exceeding rupees ten crores (Rs.10 crores).

(ii) In the case of General Insurance business a sum equivalent to 3% of his total gross premium written in India in any financial year commencing after 31/3/ 2000 not exceeding rupees ten crores (Rs.10 crores).

(iii) In case of reinsurance business, a sum of rupees twenty crores (Rs.20 crores).

(iv) If the business is to be done in marine Insurance only & relates exclusively to country craft or its cargo or both the amount to be deposited Rs.1,00,000/- (Rs.1 lakh) only.

(v) A certificate from the Reserve Bank of India showing the amount deposited.

2. A declaration verified by an affidavit from the "Principal Officer" that the equity capital of the company has been complied with.

The paid up equity excluding preliminary expenses and registration charges should be Rs.100 crores for life or General Insurance business and Rs.200 crores for the Reinsurance business.

If any insurer is carrying on business of insurance already then within 6 months from the commencement of the Act the paid up capital should be as per prescribed limits in the Act.

3. A certified copy of the published prospects and of the standard policy forms of the insurer.

4. Statement of assured rate, advantages, terms & conditions to be offered in connection with Insurance policies.

5. In the case of the business the certificate from the actuary that such rates are workable & sound.

6. In the case of marine accident & miscellaneous Insurance business other than workmen's compensation & motor car Insurance the available forms, prospects and statements to be submitted.

7. The receipt of deposit of Rs. 50,000/- for each class of business.

8. If there is any foreign partner, a certified copy of Memorandum of understanding between Indian promoter and foreign promoter including details of support comfort letters exchanged between the parties.

9. Any other document as desired by the Authority after scrutiny the application.

2A) If on the receipt of an application for registration and the authority is satisfied that

(a) The financial condition & the general character of management of the applicant are sound.

(b) The volume of business likely to be available to & the capital structure & earning prospects of the applicant will be adequate.

(c) The interest of the general public will be served if the certificate of registration is granted to the applicant then the certificate of registration is granted.

IRDAI (Registration of Indian Insurance Companies) (Seventh Amendment) Regulations 2016 (Registration Amendment Regulations)

The Indian insurance sector has witnessed various reforms since the notification of the Insurance Laws (Amendment) Act 2015 (Amendment Act). The latest addition to the long list of regulatory changes that have been introduced post the Amendment Act is the IRDAI (Registration of Indian Insurance Companies) (Seventh Amendment) Regulations 2016 (Registration Amendment Regulations). Although the Registration Amendment Regulations were notified on 22nd February 2016 (and have come into force on 22nd March 2016), they were released on the official website of the Insurance Regulatory and Development Authority of India (IRDAI) only on 1st April 2016.

The Registration Amendment Regulations have introduced a number of key changes to the existing IRDA (Registration of Indian Insurance Companies) Regulations 2000 (Registration Regulations). The primary amendments introduced by the Registration Amendment Regulations include the following:

1. An applicant whose IRDAI/R1 has been rejected by the IRDAI will now be able appeal to the Securities Appellate Tribunal.
2. A requisition for registration application may now be made for the Life insurance business; General insurance business; Health insurance business (exclusively); or Reinsurance business.
3. An applicant whose requisition has been accepted may make an application in Form IRDAI/R2 for grant of certificate of registration. In cases where the foreign direct investment in the applicant entity is more than 26%, the Form IRDAI/R2 is required to be accompanied by, inter alia, a certified copy of the approval given by the Foreign Investment Promotion Board (FIPB) in accordance with the Indian Insurance Companies (Foreign Investment) Rules 2015.
4. The manner of calculation of equity capital held by foreign investors prescribed by R11 of the Registration Regulations has been amended to state that the calculation of the holding of equity shares by one or more foreign investors in an applicant company, shall be the aggregate of:

- The quantum of paid up equity share capital held by the foreign investors including foreign venture capital investors, in the applicant company; and
- The proportion of the paid up equity share capital held or controlled by such foreign investor(s) either by itself or through its subsidiary companies in the Indian promoter(s) or Indian investor(s) as mentioned above.

  Provided that this shall not be applicable to an Indian promoter or Indian investors which is a banking company or a public financial institution.

5. Every Insurer being an Indian insurance company and who has already been granted certificate of registration for carrying on insurance business in India must ensure compliance with norms pertaining to “Indian owned and controlled” as specified in 2(7A) of the Insurance Act 1938, within such period as may be specified by the IRDAI.
6. New formats for Form IRDAI/R1 and IRDAI/R2 have now been introduced.

Although all the changes introduced by the Registration Amendment Regulations will have an impact on any entity proposing to operate as an Insurer in India, the amendments made to R11 will, in all probability, have the most lasting impact. It is interesting to note that even prior to the amendments, the approach of the regulator in calculating the foreign investment in an Indian Insurance Company was to not include any foreign investment in the Indian promoter of an Indian insurance company, in the event that such foreign investment was not made by any entity that was a shareholder of the Indian Insurance Company.

If the followed approach was now varied, it would result in the existing structures of some of the major Indian Insurance Companies coming under scrutiny. However, R11 has been amended to provide that the total foreign investment in an Indian Insurance Company will be the sum total of the quantum of paid up equity share capital held by the foreign investors (including foreign venture capital investors), in the applicant company and the proportion of the paid up equity share capital held or controlled by such foreign investor(s) either by itself or through its subsidiary companies in the Indian promoter(s) or Indian investor(s) of the applicant entity.

From a plain reading of the amended R11 it appears that the IRDAI has adopted the approach that only if the foreign investor which is a shareholder of the Indian insurance company is also a shareholder of the Indian promoter(s) or Indian investor(s) of such applicant entity, will the shareholding of the foreign investor in the Indian promoter(s) or Indian investor(s) be taken into consideration for calculating the total foreign investment in the Indian Insurance Company. This amendment will undoubtedly be welcomed by the Indian insurance

industry.

The Registration Amendment Regulations have also introduced the requirement of providing a copy of the FIPB approval if the quantum of foreign investment in the applicant entity is more than 26%. However, post notification of the Registration Amendment Regulations the Ministry of Commerce and Industry, Department of Industrial Policy and Promotion has amended the Consolidated FDI Policy 2015, pursuant to which foreign investment in Indian Insurance Companies and insurance intermediaries up to 49% has been brought under the automatic route. In view of these changes, it is anticipated that the Registration Amendment Regulations to be amended further in order to bring them in conformity with the Consolidated FDI Policy 2015.

Refusal of Registration

- If the Authority refuses the registration the reason of such decision will be intimated to the applicant.
- The Applicant whose application has been rejected can file an appeal before the Central Government within 30 days from the date on which a copy of the decision is received.
- The decision of the Government shall be final and shall not be questioned before any court.

Suspension of Registration

The registration of an Indian insurance company or insurer may be suspended for a class or classes of insurance business, in addition to any penalty that may be imposed or any action that may be taken, for such period as may be specified by the Authority, in the following cases:

- Conducts its business in a manner prejudicial to the interests of the policy-holders;
- Fails to furnish any information as required by the Authority relating to its insurance business;
- Does not submit periodical returns as required under the Act or by the Authority;
- Does not co-operate in any inquiry conducted by the Authority;
- Indulges in manipulating the insurance business;
- Fails to make investment in the infrastructure or social sector as specified under the Insurance Act.

Cancellation of Certificate of Registration

The Authority, in case of repeated defaults of the grounds for suspension of a certificate of registration, may impose a penalty in the form of cancellation of the certificate. The Authority is compulsorily required to cancel the registration of an insurer either wholly or in so far as it relates to a particular class of insurance business, as the case may be:

- If the insurer fails to comply with the provisions relating to deposits; or
- If the insurer fails, at any time, to comply with the provisions relating to the excess of the value of his assets over the amount of his liabilities; or
- If the insurer is in liquidation or is adjudged an insolvent; or
- If the business or a class of the business of the insurer has been transferred to any person or has been transferred to or amalgamated with the business of any other insurer; or
- If the whole of the deposit made in respect of the insurance business has been returned to the insurer;
- If, in the case of an insurer, the standing contract is cancelled or is suspended and continues to be suspended for a period of six months, or
- If the Central Government of India so directs.

In addition to the above, the Authority has the discretion to cancel the registration of an insurer

- If the insurer makes default in complying with, or acts in contravention of , any requirement of the Insurance Act or of any rule or any regulation or order made or, any direction issued thereunder, or
- If the Authority has reason to believe that any claim upon the insurer arising in India under any policy of insurance remains unpaid for three months after final judgment in regular course of law, or
- If the insurer carries on any business other than insurance business or any prescribed business, or
- If the insurer makes a default in complying with any direction issued or order made, as the case may be, by the Authority under the IRDA Act, 1999.
- If the insurer makes a default in complying with, or acts in contravention of, any requirement of the Companies Act, or the LIC Act, or the GIC Act or the Foreign Exchange Management Act, 2000.

The order of cancellation shall take effect on the date on which notice of the order of cancellation is served on the insurer. Thereafter, the insurer would be prohibited from entering into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by him before the cancellation takes effect shall continue as if the cancellation had not taken place.

The Authority may, after the expiry of six months from the date on which the cancellation order takes effect, apply to the Court for an order to wind up the insurance company, or to wind up the affairs of the company in respect of a class of insurance business, unless the registration of the insurance company has been revived or an application for winding up has already been presented to the Court.

Revival of Registration

The Authority has discretion, where the registration of an insurer has been cancelled, to revive the registration, if the insurer within six months from the date on which the cancellation took effect:

- Makes the deposits, or
- Complies with the provisions as to the excess of the value of his assets over the amount of his liabilities, or
- Has his standing contract restored, or
- Has the application accepted, or
- Satisfies the Authority that no claim upon him remains unpaid, or
- Has complied with any requirements of the Insurance Act or the IRDA Act, or any rule or regulation, or any order made thereunder or any direction issued under these Acts, or
- That he has ceased to carry on any business other than insurance business or any prescribed business.

Telecom

In India, the telecom market and business thereunder are governed and regulated by the Telecom Regulatory Authority of India (TRAI), which is a statutory body set up for regulating the Telecom and Broadcasting Sectors.

The entry of private service providers brought with it the inevitable need for independent regulation. The Telecom Regulatory Authority of India (TRAI) was, thus, established with effect from 20th February 1997 by an Act of Parliament, called the Telecom Regulatory Authority of India Act, 1997, to regulate telecom services, including fixation/revision of tariffs for telecom services which were earlier vested in the Central Government.

- TRAI's mission is to create and nurture conditions for growth of telecommunications in the country in a manner and at a pace which will enable India to play a leading role in emerging global information society.
- One of the main objectives of TRAI is to provide a fair and transparent policy environment which promotes a level playing field and facilitates fair competition.

In pursuance of the above objective, TRAI has issued from time to time a large number of regulations, orders and directives to deal with issues coming before it and provided the required direction to the evolution of Indian telecom market from a Government owned monopoly to a multi operator multi service open competitive market.

The directions, orders and regulations issued cover a wide range of subjects including tariff, interconnection and quality of service as well as governance of the Authority.

The TRAI Act was amended by an ordinance, effective from 24th January 2000, establishing a Telecommunications Dispute Settlement and Appellate Tribunal (TDSAT) to take over the adjudicatory and disputes functions from TRAI. TDSAT was set up to adjudicate any dispute between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers, and to hear and dispose of appeals against any direction, decision or order of TRAI.

TRAI SCOPE AND FUNCTIONS

This Act, along with the notification of the Government dated 9th January 2004, empowers TRAI to recommend conditions for entry of new telecom service providers as well as terms and conditions of license and ensure compliance of the terms and conditions of the license.

The Act also empowers TRAI to lay down the standards of quality of service and ensure compliance, specify the tariff policy and make recommendations regarding terms and conditions on which Addressable Systems of TV shall be provided to customers and parameters for regulating maximum time for advertisements in pay as well as other TV channels.

TRAI's scope of work also includes issues relating to telecom and cable tariff policy, commercial and technical aspects of interconnection, free choice and equal ease of access for the public to different telecom services, resolution of conflicts that may arise due to market developments and diverse network structures for various telecom services. TRAI also facilitates development of forums for interaction amongst service providers and interaction of the Authority with consumer organizations to further the consumer interest.

OSP Registration in India

As per the New Telecom Policy (NTP) 1999, service providers in India involved in providing services like tele-banking, tele-medicine, tele-education, tele-trading, e-commerce, call center, network operation center and other IT Enabled Services, using telecom resources are termed as "Other Service Providers" (OSP). These Other Service Providers or OSP's are required to obtain an OSP Registration from the Department of Telecommunication (DOT). Here we are looking at the process and procedure for obtaining OSP Registration in India.

Overview

As per the Terms and Conditions formulated by the Telecom Commission in February 2000, OSP's can take telecom resources from authorized Telecom Service Providers only and should not provide switched telephony. Further, the Department of Telecommunication must register OSPs using telecom resources for providing an array of services like call center, tele-banking and other IT enabled services. Therefore, the Department of Telecommunication (DOT) now registers OSPs in India and has registered over 2500 cases since inception.

OSP Registration Applicability

Service providers in India involved in providing services like tele-banking, tele-medicine, tele-education, tele-trading, e-commerce, call center, network operation center and other IT Enabled Services, using telecom resources are required to obtain OSP Registration. Telecom Resources are telecom facilities used by an OSP including, but not limited to Public Switched Telecom Network, Public Land Mobile Network, Integrated Services Digital Network (ISDN) and /or the telecom bandwidth provided by authorized telecom service provider.

OSP Registration Requirement

To obtain an OSP Registration in India, it is mandatory for the entity to be a Private Limited Company. Therefore, Entrepreneurs having plans for starting a call center or BPO or e-commerce or other IT Enabled Services must incorporate a Private Limited Company. The following are the documents necessary for OSP Registration in addition to the application in the prescribed format:

- Certificate of Incorporation of Private Limited Company
- Memorandum of Association (MOA) and Articles of Association (AOA)
- Board of Resolution or Power of Attorney authorizing the authorized signatory
- Name of Business and Activities Proposed
- List of Directors
- Present Shareholding

The above documents must be certified with seal by a Company Secretary or Director of the Company or Statutory Auditor or Public Notary.

OSP Registration Compliance

Once an OSP Registration is approved, the license is valid for a period of 20 years – unless otherwise expressly mentioned. To maintain compliance, each of the OSPs are required to submit an “Annual Return” to the DOT mentioning the activities undertaken and the present status of the OSP. The annual return for OSP License renewal must be submitted with 6 months of completion of financial year.

In addition to the above, OSPs must maintain compliance with the Terms and Conditions prescribed by the Department of Telecommunication for OSPs. The detailed terms and conditions for OSP Registration and OSP Operation to be maintained are available at the website of Department of Telecommunications, Government of India.

I & B

The mass communication media such as radio, television, films, press and print publications, advertising and traditional modes of communication plays an important role in helping people to access free flow of information. In India the mass communication media emphasizes on facilitating entertainment needs of various age groups and focus attention of people on issues of national integrity, environmental protection, health care, family welfare, eradication of illiteracy etc

The Ministry of Information and Broadcasting (Ministry of I&B) is a branch of the Government of India which is apex body for formulation and administration of the rules and regulations and laws relating to information, broadcasting, the press and films in India.

The Ministry is responsible for the administration of Prasar Bharati - the broadcasting arm of the Indian Government. The Central Board of Film Certification is the other important functionary under this ministry being responsible for the regulation of motion pictures broadcast in India.

Mandate of I & B

The mandate of the Ministry of Information & Broadcasting are:

- News Services through All India Radio (AIR) and Doordarshan (DD) for the people
- Development of broadcasting and television.
- Import and export of films.
- Development and promotion of film industry.
- Organisation of film festivals and cultural exchanges for the purpose.
- Directorate of Advertising and visual publicity DAVP
- Handling of press relations to present the policies of Government of India and to get feed-back on the Government policies.
- Administration of the Press and Registration of Books Act, 1867 in respect of newspapers.
- Dissemination of information about India within and outside the country through publications on matters of national importance.
- Research, Reference and Training to assist the media units of the Ministry to meet their responsibilities.
- Use of interpersonal communication and traditional folk art forms for information/ publicity campaigns on public interest issues.
- International co-operation in the field of information & mass media.

Regulatory Regime of I & B

1. The Criminal Law Amendment Act, 1961 - Penal Provisions for publishing wrong Map of India
2. Penal Provision for Publishing Wrong Map of India
3. Press Council Act, 1978
4. Registration of Newspapers (Central) Rules 1956
5. Press & Registration of Books Act 1867
6. The Parliamentary Proceedings (Protection of Publication) Act, 1977

Regulating and Certification Head under I & B

1. Broadcasting

- Conditional Access System (CAS)
- Community Radio Stations
- Prasar Bharati
- Doordarshan
- Akashvani (All India Radio)
- Broadcast Engineering Consultants India Limited
- Uplinking/Downlinking of TV Channels
- Content Regulation on Private TV Channels

- Direct to Home (DTH)
- Internet Protocol Television (IPTV)
- Headend-in-the-Sky (HITS)
- Digital television transition
- Radio And Television Licence Around The World
- Broadcasting Authority of India 1977
- Information
- Directorate of Advertising and Visual Publicity (DAVP)
- Directorate of Field Publicity
- Photo Division
- Publications Division
- Research Reference & Training Division
- Song & Drama Division
- Office of the Registrar of Newspapers for India (RNI)
- Press Council of India
- Press Information Bureau (PIB)
- Indian Institute of Mass Communication (IIMC)

Films

- Directorate of Film Festivals (DFAI)
- Films Division (FD)
- Central Board of Film Certification
- Children's Film Society, India
- Film and Television Institute of India, Pune (FTII)
- Film Certification Appellate Tribunal
- National Film Archive of India (NFAI)
- Satyajit Ray Film and Television Institute (SRFTI)
- National Film Development Corporation

INDUSTRIAL LICENSE

The Industrial (Development and Regulations) Act 1951, popularly called as the IDRA, entitles the manufacturing sectors to observe certain formalities. Post-1991, liberalization of the economy led to opening up of various sectors progressively. The government issued a series of notifications from time to time, progressively abolishing the applicability of the licensing regime.

At present, most of the industries are exempted from having a licence; instead, they are only required to file an Industrial Entrepreneur Memorandum.

There are a few sectors which ought to have a license before commencing operations or before starting

productions as such.

Industrial licenses are regulated under the Industries (Development and Regulation) Act 1951 made by the Central Government. At present, industrial license is required only for the following:

1. Industries retained under compulsory licensing
2. Manufacture of items reserved for small scale sector by larger units
3. When the proposed location attracts locational restriction

COMPULSORY LICENSING

Industrial Licensing was also abolished for all except short list of 18 industries in New Industrial Policy 1991. This number was further pruned to six industries. As in 2015, only five industries were under compulsory licensing mainly on account of environmental, safety and strategic considerations. They are:

1. Distillation and brewing of alcoholic drinks
2. Cigars and cigarettes of tobacco and manufactured tobacco substitutes.
3. Electronic Aerospace and defense equipment: all types.
4. Industrial explosives including detonating fuses, safety fuses, gun powder, nitrocellulose and matches.
5. Specified Hazardous chemicals i.e. (i) Hydrocyanic acid and its derivatives, (ii) Phosgene and its derivatives and (iii) Isocyanates & diisocyanates of hydrocarbon, not elsewhere specified (example Methyl isocyanate)

Regarding Alcoholic products production of rectified spirit exclusively for industrial use falls under the Centre's purview while in the case of potable alcohol, states have the last word. {This is as per Supreme Court decision in "Bihar Distillery Case"}. So, DIPP is not the licensing authority in case of potable alcohol.

SMALL SCALE SECTOR

Setting up a manufacturing industry in certain sectors is reserved for micro or small enterprises (as defined under the Micro, Small and Medium Enterprises Act, 2006). If any other entity intends to set up a manufacturing unit in such a sector, it will be required to obtain an industrial license.

POLICY RELATING TO SMALL SCALE UNDERTAKINGS

- An industrial undertaking is defined as a small scale unit if the investment in fixed assets in plant and machinery is not less than Rs. 25 Lakhs and not exceeding Rs 50 million(for services: not less than Rs. 10 Lakhs and not exceeding Rs. 2 Crore). The small scale units can get registered with the Directorate of Industries/District Industries Centre in the State Government concerned. Such units can manufacture any item including those notified as exclusively reserved for manufacture in the small scale sector. Small scale units are also free from locational restrictions. However, a small scale unit is not permitted more than 24 per cent equity in its paid up capital from any industrial undertaking either foreign or domestic.
- Manufacturing of items reserved for the small scale sector can also be taken up by non-small scale units, if they obtain an industrial license. In such cases, it is mandatory for the non-small scale unit to undertake minimum export obligation of 50 per cent. This will not apply to non-small scale EOUs that are engaged in the manufacture of items reserved for the SSI sector, as they already have a minimum export obligation of 66 per cent of their production. In addition, if the equity holding from another company (including foreign equity) exceeds 24 per cent, even if the investment in plant and machinery in the unit does not exceed Rs 10 million, the unit loses its small scale status.

- A small scale unit manufacturing small scale reserved item(s), on exceeding the small scale investment ceiling in plant and machinery by virtue of natural growth, needs to apply for and obtain a Carry-on-Business (COB) License. No export obligation is fixed on the capacity for which the COB license is granted. However, if the unit expands its capacity for the small scale reserved item(s) further, it needs to apply for and obtain a separate industrial license
- It is possible that a chemical or a by-product recoverable through pollution control measures is reserved for the small scale sector. With a view to adopting pollution control measures, Government have decided that an application needs to be made for grant of an industrial licence for such reserved items which would be considered for approval without necessarily imposing the mandatory export obligation.

Recent amendment to Industrial Licensing Rule

Earlier, large industries that manufactured items that were exclusively reserved for Micro, Small, and Medium Enterprises (MSME) also needed to obtain an industrial license. MSMEs were previously known as Small Scale Industry (SSI). The provision was aimed at protecting indigenous manufacturers from unequal competition with large scale industries.

However, in April 2015, the government de-reserved these items to encourage greater investment, incorporate better technologies, and enhance competition in the Indian and global market for the products.

Large industries are now permitted to manufacture items such as – bread, wood, firework, pickles and chutneys, mustard oil, groundnut oil, steel chairs and tables, padlocks, stainless steel and aluminum utensils, without obtaining an industrial license.

Locational Restrictions

Setting up any industry within 25 kilometers of a city which has a population of 10 lakhs requires an industrial license, unless:

(a) if the unit is located in an area specifically designated as an “industrial area”,

(b) or in the case of industries in the electronics sector, computer software, printing or any other Industry which is notified as a “non-polluting industry” by the government.

Industrial Entrepreneurs Memorandum (IEM)

The Government’s liberalization and economic reforms program aims at rapid and substantial economic growth which is integrated with global economy in a harmonized manner. The industrial policy reforms have reduced the industrial licensing requirements, removed restrictions on investment and expansion and facilitated easy access to foreign technology and foreign direct investment.

All industrial undertakings exempted from the requirements of industrial licensing under I (D&R) Act, 1951 and having an investment of Rs 10 Crore or above in the ‘manufacturing sector’ and Rs. 5 Crore or above in the ‘services sector’, including Existing Units, New undertaking (NU) and New Article (NA), are required to file an IEM, i.e. “Form IEM” in the prescribed format ‘Part A’with the Secretariat of Industrial Assistance (SIA), Department of Industrial Policy and Promotion (DIPP), Government of India, and obtain an acknowledgement. No further approval is required.

All Industrial undertakings also need to file information online in Part ‘B’ of the Memorandum at the time of commencement of commercial production.

Meaning of IEM

Industrial Entrepreneurs Memorandum (IEM) is an application for acknowledgment of unit.

Cases requiring IEM/ LOI

The promoter can file IEM in the following categories:

- To set up a new industrial undertaking,
- To effect substantial expansion of the industrial undertaking,
- To manufacture a new article
- To carry on business of existing SSI units after graduating into large scale industry.

Procedure for filling of IEM

The promoter has to make an application to Government. of India in prescribed format along with Demand Draft of Rs. 1000/- in the name of Secretariat for Industrial Assistance (SIA), New Delhi with six copies.

Steps Post-Filling IEM

After filling IEM to Govt. of India, Govt. of India gives acknowledgment receipt to the applicant and informs the Directorate of Industries. After receipt of acknowledgment, applicant can take further initiatives step to set up the unit.

Role of Directorate of Industries

Secretariat for Industrial Assistance (SIA), New Delhi circulates office memorandum enclosing one copy of application for the necessary comments from Directorate of Industries. The Directorate of Industries offers the comments to the GOI in respect of location after getting appropriate documents/ certificate from the promoters. Those industrial promoters who have obtained IEM and gone into commercial production or implemented the project have to submit PART B with Government of India or Directorate of Industries with seven copies for the record.

State Level Approval from the respective State Industrial Department

Apart from the registration and licences listed above, one has to seek state level approval(s) whatever is applicable on one's business from the respective State Industries Department.

For example, for environmental clearance of MSMEs in West Bengal, General Manager, District Industries Centre, will issue certificate for "Consent to Establish" (NOC) and "Consent to Operate" in respect of "Green" category of enterprises at the issuance of acknowledgement of Udhyog Aadhar Memorandum. Pollution clearance towards "Consent to Establish" for "Orange" Category will be issued by GM, DIC. But for 'Red' Category of pollution the clearance certificates for 'Consent to Establish' and 'Consent to Operate' will be issued by WBPCB. The 'Consent to Operate' for 'Orange' will be issued by WBPCB. The list of 'Green', 'Orange' & 'Red' and 'Special Red ' is released by WBPCB from time to time depending on extent of pollution in the specific areas of importance (other than industrial zone) so as to promote enterprise difficulty areas,

As per WBPCB guidelines, industrial units are classified under 5 categories, *viz.* special red, red, orange, green and exempted category.

For Exempted Category - no pollution clearance certificate is needed.

For other categories - details are given below –

CATEGORY	CERTIFICATE	ISSUING AUTHORITY
Special Red	CEO & COO	WBPCB
Red	CEO	WBPCB

Red	COO	WBPCB
Orange	CEO	DICs/Sub DICs
Orange	COO	DICs/Sub DICs/WBPCB
Green	COE & COO	DICs/Sub DICs

As regards pollution control, the Directorate has been regularly monitoring collection, compilation, tabulation of data, as well as dissemination of reports to the authorities concerned as and when required and maintaining of liaison with W.B.P.C.B. and D.I.Cs.

Green category of polluting industries

The industries can be permitted in any area with adequate pollution control measures subject to site clearance by local body authority.

Orange category of polluting industries

The industries can be permitted in all municipal areas other than CMC or HMC but within Industrial Estates in CMC or HMC area with adequate pollution control measures subject to condition that the site clearance should be obtained from Municipal authorities for setting up of new units.

Ordinary Red category of polluting industries

The industries can be permitted in Municipal areas falling under Calcutta Metropolitan area(CMA) These can however be set up beyond CMA with adequate pollution abatement system subject to site clearance by local bodies.

Special Red category of polluting industries

The industries can be permitted in Municipal areas falling under Calcutta Metropolitan Area (CMA). These are however be set up beyond CMA with adequate pollution abatement system subject to site clearance by local bodies.

The application forms of 'Consent to Establish' and 'Consent to Operate' for Micro & Small Scale Green Category industries will be available from District Industries Centres. The Micro & Small Scale Green Category industries will submit consent application forms for 'Consent to Establish' and 'Consent to Operate' to the DIC along with the specific payment challan or counter foil of Consent fees (payment to be made to Nationalized Bank Branches). For 'Red' and 'Orange' Categories, the consent application forms will be available from the specified Bank Branches and to be submitted to WBPCB offices.

LESSON ROUND-UP

- A permanent account number known as PAN is a vital document for any taxpayer. It is a 10-character alphanumeric number consisting of letter and digits.
- Any entity corporate body doing business in India requires a PAN card whether it is registered in India or abroad.
- PAN Card is significant for Setting up of Business.
- Registration of any business entity under the GST Law implies obtaining a unique number from the concerned tax authorities for the purpose of collecting tax on behalf of the Government and to avail Input Tax Credit for the taxes on his inward supplies. Section 22 of Central Goods & Services Tax Act, 2017 mandates that every person who has an aggregate turnover of more than Rs 20 Lacs (Rs. 40 Lakhs with effect from 01/04/2019) in the relevant financial year, is liable to be registered under the

Act. It must be noted that for the state of Jammu & Kashmir and North-Eastern states, the threshold limit is Rs 10 Lacs.

- One of the important regulations/statutes to which most businesses in India are subject to is the Shops and Establishment Act, enacted by every state in India. The Act is designed to regulate payment of wages, hours of work, leave, holidays, terms of service and other work conditions of people employed in shops and commercial establishments.
- Any shop or commercial establishment that commences operation must apply to the Chief Inspector for a Shops and Establishment Act License within the prescribed time. The application for license in the prescribed form must contain the name of the employer, address of the establishment, name of the establishment, category of the establishment, number of employees and other relevant details as requested.
- Small Scale and ancillary units should seek registration with the Director of Industries of the concerned State Government.
- The main purpose of Registration is to maintain statistics and maintain a roll of such units for the purposes of providing incentives and support services. States have generally adopted the uniform registration procedures as per the guidelines.
- With a view to increase the share of purchases from the small-scale sector, the Government Stores Purchase Programme was launched in 1955-56. NSIC registers Micro & small Enterprises (MSEs) under Single Point Registration scheme (SPRS) for participation in Government Purchases.
- Employee's State Insurance (ESI) is a self-financing scheme for Indian workers which covers health insurance and social security. ESI functions as an independent corporation and comes under Ministry of Labor and Employment in India. The ESI Corporation thus manages the funds which is regulated by the guidelines and regulations of the ESI Act. 1948.
- Charitable Trusts, Societies, a Section 8 Company that receive foreign contribution or donation from foreign sources are required to obtain registration under Section 6(1) of Foreign Contribution Regulation Act, 2010. Such a registration under the Foreign Contribution Regulation Act, 2010 is called a FCRA registration.
- Entrepreneurs are required to obtain Statutory clearances relating to Pollution Control and Environment for setting up an industrial project. For 30 types of projects as listed, environmental clearance needs to be obtained from the Ministry of Environment, Government of India. This list includes industries like petrochemical complexes, petroleum refineries, cement, thermal power plants, bulk drugs, fertilizers, dyes, paper etc.
- IEC registration is required by a person for exporting or importing goods. It is a 10 digit code which is issued by the Directorate General of Foreign Trade (DGFT). All businesses which are engaged in Import and Export of goods are required to obtain the Import Export Code. IE code has a lifetime validity. Importers are not allowed to operate without obtaining this code and exporters cannot take benefit of exports from DGFT, customs, Export Promotion Council, if they do not have this code.
- To start a pharmacy business, a drug license is required. The Central Drugs Standard Control Organization and State Drugs Standard Control Organization control the issue of drug license in India. Drug license for setting up a pharmacy business is usually under the purview of the State Drugs Standard Control Organization.
- FSSAI is an abbreviation used for Food Safety and Standards Authority of India. FSSAI license is mandatory before starting any food business. All the manufacturers, traders, restaurants who are involved in food business must obtain a 14-digit registration or a license number which must be printed on food packages.

- The objective of the Trade Marks Act, 1999 is to register trademarks applied for in the country and to provide for better protection of trade mark for goods and services and also to prevent fraudulent use of the mark. The main function of the Registry is to register trademarks which qualify for registration under the Act and Rules.
- The Copyright Act and the Rules framed thereunder, inter alia, provide for procedure for relinquishment of Copyright; grant of compulsory licences in the matter of work withheld from public; to publish or republish works (in certain circumstances); to produce and publish a translation of a literary or dramatic work in any language; licence for benefit of disabled; grant statutory licence for cover versions; grant of statutory licence for broadcasting literary and musical works and sound recordings; registration of copyright societies and copyright registration.
- The objective of The Designs Rules, 2001 is to enable protection of newly created designs applying to particular articles manufactured by the industrial process.
- A Non-Banking Financial Company (NBFC) is a company registered under the Companies Act that is engaged in the business of loans and advances, receiving deposits (some NBFC's only), acquisition of stocks or shares, leasing, hire-purchase, insurance business, chit business. Therefore, NBFCs lend and take deposits similar to banks; however there are a few differences a) NBFC cannot accept demand deposits, NBFCs cannot issue cheques drawn on itself and NBFC depositors are not covered by the Deposit Insurance and Credit Guarantee Corporation.
- Licensing of Banking Companies is governed by Banking Regulation Act, 1949. Section 22 of the Act details the requirements for Licensing of Banking Companies.
- To facilitate the regulatory regime of insurance business in India, IRDA is authorized to grant licenses and issue registration for setting up insurance business in India.
- In India, the telecom market and business thereunder are governed and regulated by the Telecom Regulatory Authority of India (TRAI), which is a statutory body set up for regulating the Telecom and Broadcasting Sectors.
- As per the New Telecom Policy (NTP) 1999, service providers in India involved in providing services like tele-banking, tele-medicine, tele-education, tele-trading, e-commerce, call center, network operation center and other IT Enabled Services, using telecom resources are termed as "Other Service Providers" (OSP).
- The Ministry of Information and Broadcasting (Ministry of I & B) is a branch of the Government of India which is apex body for formulation and administration of the rules and regulations and laws relating to information, broadcasting, the press and films in India.
- The Ministry is responsible for the administration of Prasar Bharati - the broadcasting arm of the Indian Government. The Central Board of Film Certification is the other important functionary under this ministry being responsible for the regulation of motion pictures broadcast in India.
- MSME registration or Udyog Aadhaar can be obtained by any type of business entity, namely. Proprietorships, Hindu Undivided Family, Partnership Firm, One Person Company, Limited Liability Partnership, Private Limited Company, Limited Company, Producer Company, any association of persons, co-operative societies or any other undertaking..
- The eligibility criteria for obtaining Udyog Aadhaar registration is based on the investment in plant & machinery made by a manufacturing concern or investment in equipment made by a service provider.
- The Industrial (Development and Regulations) Act 1951, popularly called as the IDRA, brings under Central control the regulation and development of certain important industries in India.
- Industrial Entrepreneurs Memorandum (IEM) is an application for acknowledgment of unit.

– Apart from the registration and licences listed above, one has to seek state level approval (s) wherever it is applicable to one's business from the respective State Industries Department.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Discuss the process of acquiring PAN and TAN in India.
2: What is ESI and PF? What are the benefits served under ESI/PF to ensure their mandatory registration? Discuss.
3: Discuss Udyog Aadhar Memorendum.
4. What is the process of registering Patents in India?
5. What is IE Code? Discuss its purpose and registration process in detail.

Lesson 14

Maintenance of Registers and Records

LESSON OUTLINE

- Introduction
- List of Register and Records required to be maintained by an enterprise
- Statutory Registers to be maintained under Companies Act, 2013
- Other Important Books and Registers
- Financial Records required to be maintained by Enterprises
- Income Records
- Expenses and Purchase Records
- Banking Records
- Cash Records
- Place of Keeping the Records and Registers
- Inspection of Statutory Registers
- Suggested Method of Keeping Statutory Registers
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

The Companies Act, 2013 (the Act) and the rules framed thereunder (the Rules) lays down that every Company incorporated under the Act has to maintain Statutory Registers (the Registers). With various provisions incorporated in Company Act, 2013, it is made clear that every company governed by the Companies Act, 2013 is required to maintain a statutory register at its registered office until the dissolution of the company. Henceforth, this chapter specifies a list of various registers and records required to be maintained by an enterprise.

MAINTENANCE OF REGISTERS AND RECORDS

Register and Records required to be maintained by an enterprise

Introduction

The Companies Act, 2013 (the Act) and the rules framed there under ("the Rules") lays down that every Company incorporated under the Act has to maintain Statutory Registers ("the Registers").

With various provisions incorporated in Companies Act, 2013, it is made clear that every company governed under Companies Act, 2013 is required to maintain statutory registersat its registered office until the dissolution of the company. Some important requirements relating to registers and records are as below:

- The Registers need to maintained and kept updated and should be kept at the Registered Office of the Company.
- Some of the Registers are required to be kept open for inspection by Directors, Members, Creditors and by other persons.
- A Company is also required to provide the extracts of the Registers, if demanded by Directors, Members, Creditors and by other persons on payment of specified fees.
- Hence, it is important for all the companies (including one person company incorporated in India to maintain statutory registers.

List of Register and Records required to be maintained by an enterprise

Statutory Registers to be maintained under Companies Act, 2013			
S.No.	**Form**	**Name of the Register**	**Relevant Section and Rule**
1	MGT-1	Register of Members	Section 88 (1) and Rule 3 (1) of the Companies (Management and Administration) Rules, 2014
2	MGT-2	Register of Debenture Holders/ Other Securities Holders	Section 88 (1) and Rule 4 of the Companies (Management and Administration) Rules, 2014
3	MGT-3	Foreign Register of Members, Debenture holders, other security holders or beneficial owners residing outside India	Section 88(4) and Rule 7 of the Companies (Management and Administration) Rules, 2014
4	Register	Register of Directors and Key Managerial Personnel and Their Shareholding	Section 170 & Rule 17 Of COS (Appointment & Qualification Of Director) Rules, 2014
5	Register	Index of Members	Section 88 (2) and Rule 6 of the Companies (Management and Administration) Rules, 2014
6	Register	Index of Debenture Holders	Section 88 (2)
7	Register	Register and Index of Beneficial Owner	Section 88(3)

8.	SH-2	Register of Renewed and Duplicate Share Certificate	Rule 6 of the Companies (Share Capital and Debentures) Rules, 2014
9.	SH-3	Register of Sweat Equity Shares	Section 54 and Rule 8 (14) of the Companies (Share Capital and Debentures) Rules, 2014
10.	SH-6	Register of Employee Stock Option	Section 62 and Rule 12 (10)
11.	SH-10	Register of Shares/Other Securities Bought Back	Section 68 and Rule 17 (12) of the Companies (Share Capital and Debentures) Rules, 2014
12.	Register	Register of Deposits	Section 73 and Rule 14 of the Companies (Acceptance of Deposits) Rules, 2014
13.	CHG-7	Register of Charges	Section 85 and Rule 7 of the Companies (Registration of Charges) Rules, 2014
14.	MBP-2	Register of Loans, Guarantee, Security And Acquisition Made By Company	Section 186 and Rule 12 of the Companies (Meeting of Board and its Powers) Rules, 2014
15.	MBP-3	Register of Investment Not Held In Its Own Name By The Company	Section 187 and Rule 14 of the Companies (Meeting of Board and its Powers) Rules, 2014
16.	MBP-4	Register of Contracts With Related Party And Contracts And Bodies Etc. In Which Directors Are Interested	Section 189 and Rule 16 of the Companies (Meeting of Board and its Powers) Rules, 2014
Other Important Books and Registers			
	Minutes Book • Board Meeting Minutes Book • General Meeting Minutes Book (i.e. AGM, EGM, Postal Ballot, Creditors Meetings, Debenture holders Meetings)		
	Books of Accounts/Financial Statements		
	Register of Directors Attendance at Board/Committee Meetings.		
	Attendance record of members at general meetings		
	In case of postal ballot, postal ballot forms received		
Financial Records required to be maintained by Enterprises			
	Records to be maintained by businesses can be broken up into four broad heads :		
	Income Records	Purchase Records	Cash Records	Banking Records

	Income Records To be able to accurately state income is important due to several reasons. Not only is it important to be able to assess the viability and strength of the business but it is also important that financial records neither overstate nor understate the incomes earned by the business. Overstating revenues subjects the business to additional tax costs whilst understatement of income can attract penalties on account of tax evasion. Ordinarily invoices must contain the following information heads : • Name of issuing business • Address of business • Date of issue • Serial No • CIN (company identification no) if business is being run by a company • Service tax, VAT registration numbers (if applicable) • Description of goods, services as well as prices • Details of taxes levied, if any • Total invoice Value
22	Expenses and Purchase Records To be able to determine your business's profitability it is important that you should record and retain details of expenses and purchases made by your business. Documents that contain such details include: • Invoices received • Credit card statements • Receipts/ counterfoils • Cheque book counterfoils • Cash vouchers • Salary information • Credit Documents Collectively, these will represent the sum total of monies expended by the business in the pursuit of its main activities. Retaining and filing this data shall lead to meaningful information on the expense patterns of the company which can then be used to make informed decisions by the business owners. This data is also useful in a tax context as it will form the basis for the justification of profitability figures as reflected by the business in its returns of incomes during scrutiny proceedings undertaken by the income tax department.

23.	**Banking Records** Bank records offer great insight into the transaction undertaken by a business. To be able to correctly ascertain the financial strength of an enterprise it is necessary that the bank balances as per records be in sync with the reality. To accomplish this a business must maintain up to date records of : • Bank account statements along with reconciliations • Cheque books, with completed counterfoils • Cheque/ Cash Deposit Counterfoils The aforementioned data sets allow one to determine the exact deposits and withdrawals from the bank as well as identify the nature and purpose of such withdrawals along with the identity of the person to whom such payments have been made.
24.	**Cash Records** Despite all advances in banking technology and facilities, businesses must still undertake a large number of transactions in cash. Due to the very sensitive nature of cash holdings and transactions, It is important from a business as well as reporting perspective to have a tight handle on the cash in circulation within the enterprise. To be able to actively ascertain the exact amount of cash available, a business must maintain two principle documents : • Cash collection register, to record and reconcile all collections made by the business in cash, and; • Day books / Cash book to map the inward and outward movement of cash from the business

Place of Keeping the Records and Registers

Unless otherwise notified, it is assumed that statutory registers are kept at the address of the registered office of the company. Such registers may also be kept at any other place in India in which more than one-tenth of the total number of members entered in the register of members reside, if approved by a special resolution passed at a general meeting of the company.

Inspection of Statutory Registers

Companies are required by law to make their statutory registers available for public inspection at their registered office or the address as notified to the Registrar during business hours . The registers shall be open for inspection by any member, debenture-holder, other security holder or beneficial owner without payment of any fees and by any other person on payment of prescribed fees.

Suggested Method of Keeping Statutory Registers

The companies have an option to keep all of their statutory registers together in a bound or loose-leaf folder or book. This ensures all important company documents are filed together and easily accessible for inspection purposes. Furthermore one may also keep digital copies instead of, or in addition to the paper registers.

LESSON ROUND-UP

- The Registers need to maintained and updated eventually and should be kept at the Registered Office of the Company.
- Some of the Registers are required to be kept open for inspection by Directors, Members, Creditors and by other persons.
- A Company is also required to provide the extracts from the Registers, if demanded by Directors, Members, Creditors and by other persons on payment of specified fees.
- Failure of the company to maintain statutory register could result in a fine of not less than Rs.1 lakh, which may extend to Rs.10 lakh. Further, the Officers of the company may also be punishable with imprisonment for a term which may extend to six months or with a fine not less than Rs.25 thousand which may extend to Rs.1 lakh.
- Hence, it is important for all the companies including private limited company or limited company or one person company incorporated in India to maintain statutory register.
- To be able to accurately state income is important due to several reasons. Not only is it important to be able to assess the viability and strength of the business but it is also important that financial records neither overstate nor understate the incomes earned by the business.
- To be able to determine your business's profitability it is important that you should record and retain details of expenses and purchases made by your business.
- Bank records offer great insight into the transaction undertaken by a business. To be able to correctly ascertain the financial strength of an enterprise it is necessary that the bank balances as per records be in sync with the reality.
- Despite all advances in banking technology and facilities, businesses must still undertake a large number of transactions in cash. Due to the very sensitive nature of cash holdings and transactions, it is important from a business as well as reporting perspective to have a tight handle on the cash in circulation within the enterprise.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Discuss the Statutory Registers required to be maintained under Companies Act, 2013.
2. What Financial Records are required to be maintained by Enterprises? Discuss.

Lesson 15

Identifying Laws applicable to Various Industries and their Initial Compliances

LESSON OUTLINE

- Introduction
- Formalizing and Deciding the Business Structure
- Procedure for Setting up a Company
- Incorporation
- Form of a Company
- Charter Documents of a Company
- Legal Formalities for Incorporation of a Company
- How to Register a Company under Companies Act, 2013
- Procedure for Registration
- Check–List of Document before Submission of a Company
- Formalities to be followed while Incorporating a company
- Check List After Incorporation
- Check List Of Annual Compliances Depending On The Formation Of Company
- Applying for Business Licenses
- Understanding Taxation and Accounting Laws
- Adhering to Labour Laws
- Adherence to Laws relating to Intellectual Property
- Ensuring Effective Contract Management
- Details about winding down the business
- Laws relating to Industries and Industries in Specific
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Keeping in pace with the contemporary global market and emerging stand of Indian economy, government initiated various flagship programs to boost the entrepreneurship environment in the country. Few of the major flagships including Make in India" coupled with "Ease of Doing Business in India", "Skill India", "Digital India", etc., have been starred to build an interest and ease among various domestic and overseas stake holders, to set up and advance the entrepreneurship in India. Indeed, when the entrance and advancement to Indian business market would be of ultimate fortune, there are various laws which need to be abided for successfully setting up and taking forward an enterprise in India. In this perspective, this chapter aims at providing a quick understanding of laws applicable to various industries, their setting up along with the thorough details of their initial compliances.

COMPLIANCE OF INDUSTRY SPECIFIC LAWS APPLICABLE TO AN ENTITY AT THE TIME OF SETTING UP OF THE ENTERPRISE

Introduction

Under the transforming move of vision New India 2022, India is venerating an emerging market, registering itself as one of the biggest and fastest growing economies in the world. According to a various reports, India is cited as having the potential to become the third largest economy in the world in coming 30 years, behind only China and the USA. Keeping in pace with the contemporary global market and emerging stand of Indian economy, government initiated various flagship programs to boost the entrepreneurship environment in the country. Few of the major flagships including Make in India" coupled with "Ease of Doing Business in India", "Skill India", "Digital India", etc., are started to build the interest and ease among various domestic and overseas stake holders to set up and advance the entrepreneurship in India.

Indeed, when the entrance and advancement to Indian business market would be of ultimate fortune, there are various laws which need to be abided for successfully setting up and taking forward an enterprise in India.

A quick understanding of setting up the enterprise along with the laws applicable to them could be learnt at below:

Formalizing and Deciding the Business Structure

The foremost requirement for setting up this business is to understand and decide what kind of business venture it would be. For example, if it's a company, it would be governed under Companies Act, 2013, in case of Partnership, the Partnership Act, 1932 would be applicable, if it is an MSME, the MSME Act, 2006 would come into picture. It shows that there is a plethora of laws which need to be complied with the respective form of businesses.

Therefore, the first thing for starting any business is to determine the nature and type of the business. Founders need to incorporate the business as a specific business type - sole proprietorship, private limited, public limited, partnership, limited liability partnership etc. It is very essential to have this clarity at the very beginning as this will be integral to the business' overall vision and goals, both short term and long term.

Each business type comes with its own set of legal requirements and regulations and businesses should pay special attention to them before incorporating the business.

Here is a quick look into the legal implications for the major business types in India

Legal Details	Business Types				
	Proprietorship	Partnership	Limited Liability Company (LLP)	Public / Private Limited Company	One Person Company
Registration	No formal registration required	Registration is optional	Has to be registered with the Ministry of Corporate Affairs under the LLP Act 2008	Has to be registered with the Ministry of Corporate Affairs under the Companies Act 2013	Has to be registered with the Ministry of Corporate Affairs under the Companies Act, 2013

Legal Status	Not recognised as a separate entity and promoter is personally responsible for all liabilities	Not recognised as a separate entity and promoters are personally responsible for all liabilities	Is a separate legal entity. The promoters of the LLP are not personally liable towards the LLP	Is a separate legal entity. The promoters of the company are not personally liable towards the company	
Member Liability	Unlimited liability	Unlimited liability	Limited liability to the extent of contribution towards to the LLP	Limited Liability to the extent of share capital or the amount of guarantee undertaken, unless the company is an unlimited company.	Limited Liability to the extent of share capital or the amount of guarantee undertaken, unless the company is an unlimited company
Number of Members Required	Can only have one person	Minimum of two persons required to start a Partnership	Minimum of two persons required to start a LLP	Minimum of two persons required to start a Private Limited Company, seven persons for a public limited company	One person is required to start a One Person Company
Transferability	Not transferable	Not transferable	Ownership can be transferred	Ownership can be transferred by means of share transfer	Ownership can be transferred by means of share transfer.
Taxation	Taxed as individual, based on total income of proprietor	Partnership profits are taxed as per the slabs provided under Income Tax Act, 1961 plus surcharge and cess as applicable	LLP profits are taxed as per the slabs provided under Income Tax Act, 1961 plus surcharge and cess as applicable	Profits of both public limited company and Private Limited Company are taxed as per the slabs provided under Income Tax Act, 1961 plus surcharge and cess as applicable	Profits of One Person Company are taxed as per the provisions of the Income Tax Act, 1961.
Annual Statutory Meetings	No requirement for annual statutory meetings	No requirement for annual statutory meetings	No requirement for annual statutory meetings	Board and General Meetings should be conducted periodically	

Annual Filings	No requirement to file annual report with the Registrar of Companies. Income tax to be filed on the income of the proprietorship	No requirement to file annual report with the Registrar of Companies. Income tax to be filed for the partnership	Must file Annual Statement of Returns & Solvency and Annual Return with the Registrar every year. Tax returns must also be filed annually	Must file Annual Statement of Returns and Annual Return with the Registrar every year. Tax returns must also be filed annually	
Existence or Survivability	Proprietorship existence is dependent on proprietor	Partnership existence is dependent on partners. Can be dissolved at will or upon on the death of partner(s)	Existence not dependent on partners. Can be dissolved voluntarily or by order of the Company Law Board	Existence not dependent on directors or shareholders. Can be dissolved voluntarily or by Regulatory Authorities	
Foreign Ownership	Foreigners are not allowed to be sole proprietors	Foreigners are not allowed to be part of a partnership	Foreigners are allowed in invest with/without the approval of the Reserve Bank of India (RBI) and other applicable permissions for the relevant Government of India authorities depending on the category of business they are interested to invest.	Foreigners are allowed to invest with/without the approval of RBI and other applicable permissions for the relevant Government of India authorities depending on the category of business they are interested to invest.	

PROCEDURE FOR SETTING UP A COMPANY

Among others one important form of business is the Company which is governed under the Companies Act, 2013. The procedure for setting up an enterprise in the form of company could be seen as below:

Incorporation

Formation of companies in India is governed by the Indian Companies Act, 2013 (“companies act”) which is a comprehensive legislation, in relation to the erstwhile Companies Act, 1956, and provides for provisions relating to all phases of a company’s life, i.e. incorporation, management, mergers, winding up.

A Registrar of Companies (“RoC”) is appointed under the Act for designated regions, who is the nodal authority for affairs related to companies in that particular region.

Form of a Company

Before formation and registration of the enterprise, the entrepreneur should consider the form, and the liability pattern, before starting the registration pattern of the Companies in India.

Any person can choose to incorporate either a company with unlimited liability or one with liability limited either by shares or guarantee. An incorporated company may take one of the following three forms:

Private Company

With restrictions on transfer of shares, and limited number of members a private limited company enjoys greater flexibility, less legal formalities, and the small shareholders body facilitates prompt decisions. A private company must have a minimum of two directors. A private company may be converted into a public company for raising capital from the public, if need arises, by completing certain legal formalities as specified in the companies act.

Public Company

Public companies are subject to stricter legal formalities. However, the free transferability of the shares of a public company and unlimited membership provides a larger base for raising of capital. Shares of a listed public company can be traded on stock exchange, which may open it to the scrutiny and watch of Securities and Exchange Board of India. A public company must have a minimum of seven members and three directors, Public limited companies must have at least one third of the total number of directors as independent directors out of which one director has to be a woman.

Minimum authorized and paid up share capital requirement of a private and public company: The criteria of having minimum paid up share capital for both private public company, as stated in the erstwhile Companies Act, 1956, has been omitted in the revised companies act. This is a significant advantage to new businesses with respect to the requirement of maintaining minimum share capital under the Companies Act since inception.

One Person Company

This concept has been brought by the new companies act and states that one person company is in the nature of a private company which has only one person as its member/director

At the time of incorporation, the memorandum of association must name a nominee for the sole member of an OPC. The minimum number of directors for an OPC is also one, OPC provides the option of limited personal liability of proprietors (as opposed to unlimited liability in sole proprietorship).

Businesses which currently run under the proprietorship model could get converted into OPC's without any difficulty. The questions of consensus or majority opinions do not arise in case of OPCs, and is suitable for small entrepreneurs with low risk taking capacity.

Charter Documents of a Company

Before the registration of the company under the Companies Act 2013, the company should comply with the various charter documents made essential under the concerned law. These are:

Memorandum of Association

The MoA sets out the objects for which the company is proposed to be incorporated in the manner provided hereunder:

- The first and foremost clause in MoA shall be the name of the proposed company suffixed with the words limited or private limited, as the case may be;
- The second is the Registered Office Clause, stating the place where the registered office of the company shall be situated.
- The third clause contains the main objects for which the company is going to be formed/incorporated.

The MoA binds the area of operation of the company in respect to the objects mentioned therein and any decision or actions taken in contravention of the MoA shall be void. A company cannot run any business contrary to the main objects mentioned in their MoA.

The MoA and AoA of a company can be modified post incorporation in accordance with the applicable provisions of the Companies Act.

Articles of Association

The articles of a company contain regulations for the management of the company. This document is confined to the applicability of the provisions of the companies act, on private or public limited company, as the case may be.

APPLYING FOR BUSINESS LICENSES

Licenses are integral to run any business. Depending on the nature and size of business, several licenses are applicable in India. Knowing the applicable licenses for the enterprises and obtaining them is always the best way to start at business. The lack of relevant licenses can lead to costly lawsuits and unwanted legal battles. Business licenses are the legal documents that allow a business to operate while business registration is the official process of listing a business (along with relevant information) with the official registrar.

The common license that is applicable to all businesses is the Shop and Establishment Act which is applicable to all premises where trade, business or profession is carried out. Other business licenses vary from industry to industry. For instance an e-commerce company may require additional licenses like GST Registration, Professional Tax etc. while a restaurant may require licenses like Food Safety License, Certificate of Environmental Clearance, Prevention of Food Adulteration Act, Health Trade License etc. along with the above mentioned licenses.

Understanding Taxation and Accounting Laws

Taxes are part and parcel of every business. There are a broad variety of taxes, such as, central tax, state tax and even local taxes that may be applicable for certain businesses. Different business and operating sectors attract different taxes and knowing this beforehand can prove to be useful. For instance, recently, the Government of India launched the 'Start-up India' initiative to promote start-ups, and introduced many exemptions and tax holidays for start-ups and new businesses. According to this initiative, a start-up can avail income tax exemption for a period of 3 years as well as tax exemptions from capital gains and investments above Fair Market Value. The conditions that start-ups need to qualify in order to leverage these exemptions are:

- The start-up should not be more than 7 years old (or 10 years for biotech) from the date of incorporation.
- Is incorporated as a Registered Partnership, Limited Liability Company or Private Limited Company.
- Turnover in any year should not have exceeded 25 crores.
- The start-up should not have been formed by splitting or reconstructing an existing business.

As far as business accounting is concerned, it is good hygiene to maintain proper books of accounts and audit them from time to time in order to ensure that relevant accounting and taxation rules are adhered to. Given the small size of business, many start-ups initially do not pay close attention to accounting requirements. However, this situation cannot be ignored for long as it can lead to serious accounting discrepancies. Having a sound payment and invoicing system for customers is one part of ensuring a clear accounting system.

Adhering to Labour Laws

Adhering to labour laws are integral to every organization, small or big. When you are established as a company and have hired people to work for your organization, you are subject to several labour laws regardless of the size of the organization. Laws with regards to minimum wages, gratuity, PF payment, weekly holidays, maternity benefits, sexual harassment, payment of bonus among others will need to be complied with.

Some major labour laws applicable under this scheme are:

- The Industrial Disputes Act, 1947
- The Trade Union Act, 1926
- Building and Other Constructions Workers' (Regulation of Employment and Conditions of Service) Act, 1996
- The Industrial Employment (Standing Orders) Act, 1946
- The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979
- The Payment of Gratuity Act, 1972
- The Contract Labour (Regulation and Abolition) Act, 1970
- The Employees' Provident Funds and Miscellaneous Provisions Act, 1952
- The Employees' State Insurance Act, 1948.

Having a well-designed employee policy can be a major differentiator for new companies to set up and advance well. An attractive employee policy can be the key to attract and retain good talent. Employee policies can also prove to be the starting point for boosting employee morale and increasing productivity.

Adherence to Laws relating to Intellectual Property

Intellectual property vital for most businesses in the contemporary regime of knowledge and innovation, especially for tech centric businesses. Codes, algorithms and research findings among others are some of the most common intellectual property owned by organizations. Therefore, one has to ensure strict adherence to the Laws relating to Intellectual Property in India as well as of International Application to which India is a signatory. For the effective implementation of the IP Laws, facilitators have been empanelled by the Controller General of Patents, Trademarks and Design. Such facilitators help the new enterprises in setting up their business under the vigil of IPRs by providing advisory services, assisting in patent filing and disposal of patent application among other services at a minimum charge.

The Office of the Controller General of Patents, Designs and Trademarks controls all patents in India

Ensuring Effective Contract Management

Contracts lie at the crux of running any business. A contract is required to ensure the smooth functioning of work and is a great mechanism to ensure recourse in case of non-fulfilment of work. Having basic knowledge about various aspects of contract management can prove to be useful for entrepreneurs. As per the Indian Contract Act, 1872, all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration with a lawful object, and are not expressly declared to be void.

Employee contracts are one of the most crucial aspects to be looked into while starting a venture. Founders many a time collaborate with their own trusted circle of friends in the beginning and while this ensures a certain ease and efficiency to business operations, outlining and formalizing employee contracts with details about salary, scope of work and stock options (if any) with even your first few employees is always recommended. Having this clarity from the very beginning helps the new businesses to reduce risks at a later point in time.

In the early stage of operations and post operation too, there are various contacts that a company has to abode, therefore, the adherence to contact law is one of the most important requirement for the company per se.

Details about winding down the business

Closing a company is a difficult call to make for any entrepreneur. When a company decides to shut down, all the stakeholders from vendors to employees to customers and investors need to informed in advance and the whole process must be properly planned and executed in order to make the exit easy on everyone.

It is the last stage of company in which its existence for past several years is dissolved and all its assets are used to pay off the creditors, shareholders and other liabilities.

As per section 270 of the Companies Act 2013, the procedure for winding up of a company can be initiated either[1] –

(a) By the Tribunal or,

(b) Voluntary.

Winding Up of a Company by a Tribunal

As per Companies Act 2013, a company can be wound up by a tribunal in the below mentioned circumstances:

1. When the company is unable to pay its debts
2. If the company has by special resolution resolved that the company be wound up by the tribunal.
3. If the company has acted against the interest of the integrity or morality of India, security of the state, or has spoiled any kind of friendly relations with foreign or neighboring countries.
4. If the company has not filled its financial statements or annual returns for preceding 5 consecutive financial years.
5. If the tribunal by any means finds that it is just & equitable that the company should be wound up.
6. If the company in any way is indulged in fraudulent activities or any other unlawful business, or any person or management connected with the formation of company is found guilty of fraud, or any kind of misconduct.

Filing of Winding up Petition

Section 272 provides that a winding up petition is to be filed in the prescribed form no 1, 2 or 3 whichever is applicable and it is to be submitted in 3 sets. The petition for compulsory winding up can be presented by the following persons:

- The company
- The creditors ; or
- Any contributory or contributories
- By the central or state govt.
- By the registrar of any person authorized by central govt. for that purpose

At the time of filing petition, it shall be accompanied with the statement of Affairs in form no 4. That petition shall state the facts up to a specific date which shall not more than 15 days prior to the date of making the statement. After preparing the statement it shall be certified by a Practicing Professional. This petition shall be advertised in not less than 14 days before the date fixed for hearing in both of the newspapers English and any other regional language.

Final Order and its Content

The tribunal after hearing the petition has the power to dismiss it or to make an interim order as it think appropriate or it can appoint the provisional liquidator of the company till the passing of winding up order. An order for winding up is given in form 11.

Voluntary Winding Up of a Company

The company can be wound up voluntarily by the mutual decision of members of the company, if:

1. *See, https://taxguru.in/company-law/winding-company-ca-2013.html*

- The Company passes a Special Resolution stating about the winding up of the company.
- The Company in its general meeting passes a resolution for winding up as a result of expiry of the period of its duration as fixed by its Articles of Association or at the occurrence of any such event where the articles provide for dissolution of company.

Procedure for Voluntary Winding Up

1. Conduct a board meeting with 2 Directors and thereby pass a resolution with a declaration given by directors that they are of the opinion that company has no debt or it will be able to pay its debt after utilizing all the proceeds from sale of its assets.

2. Issues notices in writing for calling of a General Meeting proposing the resolution along with the explanatory statement.

3. In General Meeting pass the ordinary resolution for the purpose of winding up by ordinary majority or special resolution by 3/4th majority. The winding up shall be started from the date of passing the resolution.

4. Conduct a meeting of creditors after passing the resolution, if majority creditors are of the opinion that winding up of the company is beneficial for all parties then company can be wound up voluntarily.

5. Within 10 days of passing the resolution, file a notice with the registrar for appointment of liquidator.

6. Within 14 days of passing such resolution, give a notice of the resolution in the official gazette and also advertise in a newspaper.

7. Within 30 days of General meeting, file certified copies of ordinary or special resolution passed in general meeting.

8. Wind up the affairs of the company and prepare the liquidators account and get the same audited.

9. Conduct a General Meeting of the company.

10. In that General Meeting pass a special resolution for disposal of books and all necessary documents of the company, when the affairs of the company are totally wound up and it is about to dissolve.

11. Within 15 days of final General Meeting of the company, submit a copy of accounts and file an application to the tribunal for passing an order for dissolution.

12. If the tribunal is of the opinion that the accounts are in order and all the necessary compliances have been fulfilled, the tribunal shall pass an order for dissolving the company within 60 days of receiving such application.

13. The appointed liquidator would then file a copy of order with the registrar.

14. After receiving the order passed by tribunal, the registrar then publish a notice in the official Gazette declaring that the company is dissolved.

LAWS RELATING TO INDUSTRIES AND INDUSTRIES IN SPECIFIC

In India, there are several Acts and legislations enacted by the Government of India for regulation of industries in the country. These enactments play a very important role in the country's overall progress and economic development. These legislations are amended from time to time in accordance with the changing circumstances and environment. The most important Act is the Companies Act, 1956 which relates to setting up and operation of companies in India. It empowers the Central Government to regulate the formation, financing, functioning and winding up of companies. It contains the mechanism regarding organizational, financial, and managerial and all the relevant aspects of a company.

In order to provide the Central Government with the means to implement its industrial policies, several legislations have been enacted. The most important being the Industries (Development and Regulation) Act,

1951 (IDRA). The main objectives of the Act is to empower the Government to take necessary steps for the development of industries; to regulate the pattern and direction of industrial development; and to control the activities, performance and results of industrial undertakings in the public interest.

The bulk of the transactions in trade, commerce and industry are based on contracts. In India, the Indian Contract Act, 1872 is the governing legislation for contracts, which lays down the general principles relating to formation, performance and enforceability of contracts and the rules relating to certain special types of contracts like Indemnity and Guarantee; Bailment and Pledge; as well as Agency.

Another important aspect of legislations is the industrial relations, which involves various aspects of interactions between the employer and the employees; among the employees as well as between the employers. In such relations whenever there is a clash of interest, it may result in dissatisfaction for either of the parties involved and hence lead to industrial disputes or conflicts. The Industrial Disputes Act, 1947 is the main legislation for investigation and settlement of all industrial disputes. The Act enumerates the contingencies when a strike or lock-out can be lawfully resorted to, when they can be declared illegal or unlawful, conditions for laying off, retrenching, discharging or dismissing a workman, circumstances under which an industrial unit can be closed down and several other matters related to industrial employees and employers.

Trade unions are also an important part of an industrial set up. The legislation regulating these trade unions is the Indian Trade Unions Act, 1926. The Act deals with the registration of trade unions, their rights, their liabilities and responsibilities as well as ensures that their funds are utilized properly. It gives legal and corporate status to the registered trade unions. It also seeks to protect them from civil or criminal prosecution so that they could carry on their legitimate activities for the benefit of the working class.

There are several legislations which regulate the conditions of employment, work environment and other welfare requirements of certain specific industries. These enactments deal with factories and workshops; mines and minerals; plantations; shops and establishments as well as transportation. Some of the major legislations indicating the laws applicable to the Industries in specific are as below:

THE FACTORIES ACT, 1948

This law is the umbrella legislation enacted to regulate the working conditions in factories. According to the Act, a ‘factory’ means “any premises including the precincts thereof:-

(i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on; or

(ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on; but this does not include a mine subject to the operation of the Mines Act, 1952, or a mobile unit belonging to the armed forces of the union, a railway running shed or a hotel, restaurant or eating place.”

The Act is administered by the Ministry of Labour and Employment through its Directorate General Factory Advice Service & Labour Institutes (DGFASLI) and by the State Governments through their factory inspectorates. This Institute also serves as a technical arm to assist the Ministry in formulating national policies on occupational safety and health in factories and docks.

THE PLANTATION LABOUR ACT, 1951

This Act is enacted to provide for the welfare of plantation labour and regulates the conditions of work in plantations. According to the Act, the term ‘plantation’ means “any plantation to which this Act, whether wholly or in part, applies and includes offices, hospitals, dispensaries, schools, and any other premises used for

any purpose connected with such plantation, but does not include any factory on the premises to which the provisions of the Factories Act,1948 apply".

The Act is administered by the Ministry of Labour through its Industrial Relations Division. The Division is concerned with improving the institutional framework for dispute settlement and amending labour laws relating to industrial relations. It works in close co-ordination with the Central Industrial Relations Machinery (CIRM) in an effort to ensure that the country gets a stable, dignified and efficient workforce, free from exploitation and capable of generating higher levels of output.

THE MINES ACT, 1952

The Mines Act, 1952 contains provisions for measures relating to the health, safety and welfare of workers in the coal, metalliferous and oil mines. According to the Act, the term 'mine' means "any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes all borings, bore holes, oil wells and accessory crude conditioning plants, shafts, opencast workings, conveyors or aerial ropeways, planes, machinery works, railways, tramways, slidings, workshops, power stations, etc. or any premises connected with mining operations and near or in the mining area".

The Act is administered by the Ministry of Labour and Employment through the Directorate General of Mines Safety (DGMS). DGMS is the Indian Government regulatory agency for safety in mines and oil-fields. It conducts inspections and inquiries, issues competency tests for the purpose of appointment to various posts in the mines, organises seminars/conferences on various aspects of safety of workers.

THE SHOPS AND ESTABLISHMENTS ACT, 1953

The Shops and Establishments Act, 1953 was enacted to provide statutory obligation and rights to employees and employers in the unorganised sector of employment, i.e. shops and establishments. It is applicable to all persons employed in an establishment with or without wages, except the members of the employer's family. It is a State legislation and each State has framed its own rules for the Act. The State Government can exempt, either permanently or for a specified period, any establishments from all or any provisions of this Act. The Act provides for compulsory registration of shop/ establishment within thirty days of commencement of work and all communications of closure of an establishment within 15 days from its closing. It also lays down the hours of work per day and week as well as the guidelines for spread-over, rest interval, opening and closing hours, closed days, national and religious holidays, overtime work, etc.

THE MOTOR TRANSPORT WORKERS ACT, 1961

The Act was enacted to provide for the welfare of motor transport workers and to regulate the conditions of their work. It applies to every motor transport undertaking employing five or more motor transport workers. The State Government may, after giving notification in the Official Gazette, apply all or any of the provisions of this Act to any motor transport undertaking employing less than five motor transport workers. According to the Act, 'motor transport undertaking' means "an undertaking engaged in carrying passengers or goods or both by road for hire or reward and includes a private carrier".

Every employer of a motor transport undertaking to which this Act applies shall have the undertaking registered under this Act. No adult motor transport worker shall be required or allowed to work for more than eight hours in any day and forty-eight hours in any week. Also, no adolescent shall be employed or required to work as a motor transport worker in any motor transport undertaking for more than six hours a day including rest interval of half-an-hour; and between the hours of 10 P.M. and 6 A.M.

THE CONTRACT LABOUR (REGULATION & ABOLITION) ACT, 1970

This Act is enacted to regulate employment of contract labour so as to place it at par with labour employed

directly, with regard to the working conditions and certain other benefits. Contract labour refers to "the workers engaged by a contractor for the user enterprises". These workers are generally engaged in agricultural operations, plantation, construction industry, ports & docks, oil fields, factories, railways, shipping, airlines, road transport, etc.

The Act is implemented both by the Centre and the State Governments. The Central Government has jurisdiction over establishments like railways, banks, mines etc. and the State Governments have jurisdiction over units located in that state. In the Central sphere, the Central Industrial Relations Machinery (CIRM) headed by Chief Labour Commissioner (Central) and his officers have been entrusted with the responsibility of enforcing the provisions of the Act and the rules made thereunder.

The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979 was enacted to protect the rights and safeguard the interest of migrant workers. The Act intends to regulate the employment of inter-state migrant workmen and to provide their conditions of service. It applies to every establishment and the contractor, who employ five or more inter-state migrant workmen. The Act has provision for issue of Pass-Book to every inter-state migrant workman with full details, payment of displacement allowance, payment of journey allowance including payment of wage during the period of journey, suitable residential accommodation, medical facilities and protective clothing, payment of wages, equal pay for equal work irrespective of sex etc.

The responsibility for enforcement of the Act in establishments where the Central Government is the appropriate Government lies with the office of the Chief Labour Commissioner (Central) and for the establishments located under the States sphere lies with the respective State Governments.

LABOUR WELFARE FUNDS FOR SOCIAL ASSISTANCE TO WORKERS

Also, to extend a measure of social assistance to workers in the unorganised sector, the concept of 'Labour Welfare Fund' was evolved and five welfare funds were set up under the Ministry of Labour and Employment. These funds are aimed to provide housing, medical care, educational and recreational facilities to workers employed in beedi industry, certain non-coal mines and cine workers. Such funds are financed out of the proceeds of cess levied under respective Cess/Fund Acts. The various legislation so enacted include:-

- The Mica Mines Labour Welfare Fund Act, 1946 - was enacted to provide for constitution of a fund for financing the activities which promote welfare of labour employed in the mica mining industry.
- The Limestone and Dolomite Mines Labour Welfare Fund Act, 1972 - was enacted to provide for the levy and collection of a cess on limestone and dolomite for financing the activities which promote the welfare of persons employed in the limestone and dolomite mines.
- The Iron Ore Mines, Manganese Ore Mines & Chrome Ore Mines Labour Welfare Fund Act, 1976 - was enacted to provide for financing the activities which promote the welfare of persons employed in the iron ore mines, manganese ore mines and chrome ore mines.
- The Beedi Workers Welfare Fund Act, 1976 - was enacted to provide for financing the measures which promote the welfare of persons engaged in beedi establishments.
- The Cine Workers Welfare Fund Act, 1981 - was enacted to provide for financing the activities which promote the welfare of certain cine-workers.

THE BUILDING & OTHER CONSTRUCTION WORKERS (REGULATION OF EMPLOYMENT & CONDITIONS OF SERVICE) ACT, 1996

This law was enacted to regulate the employment and conditions of service of building and other construction workers and to provide for their safety, health and welfare measures. The Act is applicable to every establishment which employs ten or more workers in any building or other construction work and to the projects costing more

than `10 lakh. The Act contains provision for immediate assistance to the workers in case of accidents; old age pension; loans for construction of house; premium for group insurance; financial assistance for education, medical expenses and maternity benefits, etc.

The Sales Promotion Employees (Conditions of Service) Act, 1976 was enacted to regulate certain conditions of service of sales promotion employees in certain establishments. According to the Act, the term 'sales promotion employees' means, "any person by whatever name called (including an apprentice) employed or engaged in any establishment for hire or reward to do include any such person:- (i) who, being employed or engaged in a supervisory capacity, draws wages exceeding sixteen hundred rupees per mensem; or (ii) who is employed or engaged mainly in a managerial or administrative capacity".

The Act shall apply to every establishment engaged in the pharmaceutical industry. The Central Government may, by notification in the Official Gazette, apply the provisions of this Act, to any other establishment engaged in any notified industry. Every employer in relation to an establishment shall keep and maintain such registers and other documents and in such manner as may be prescribed.

LESSON ROUND-UP

- The foremost requirement for setting up this business is to understand and decide what kind of business venture it would be. For example, if it's a company, it would be governed under Companies Act, 2013, in case of Partnership, the Partnership Act, 1932 would be applicable, if it is an MSME, the MSME Act, 2006 would come into picture.
- Each business type comes with its own set of legal requirements and regulations and businesses should pay special attention to them before incorporating the business.
- Among others one important form of business is the Company which is governed under the Companies Act, 2013.
- It is necessary to get registered yourself to run your business without any legal problem. These are four major steps:
  - Acquiring Digital Signature Certificate (DSC)
  - Acquiring Director Identification Number (DIN)
  - Filing an e-form or New user registration
  - Incorporate the company
- Licenses are integral to run any business. Depending on the nature and size of business, several licenses are applicable in India. Knowing the applicable licenses for the enterprises and obtaining them is always the best way to start at business. The lack of relevant licenses can lead to costly lawsuits and unwanted legal battles. Business licenses are the legal documents that allow a business to operate while business registration is the official process of listing a business (along with relevant information) with the official registrar.
- Taxes are part and parcel of every business. There are a broad variety of taxes, such as, central tax, state tax and even local taxes that may be applicable for certain businesses.
- Adherence to labour laws is integral to every organization, small or big. When you are established as a company and have hired people to work for your organization, you are subject to several labour laws regardless of the size of the organization.
- Intellectual property is vital for most businesses in the contemporary regime of knowledge and innovation, especially for tech centric businesses. Codes, algorithms and research findings among

others are some of the most common intellectual properties owned by the organizations. Therefore, one has to ensure strict adherence to the Laws relating to Intellectual Property in India as well as of International Application to which India is a signatory.

– There are several legislations which regulate the conditions of employment, work environment and other welfare requirements of certain specific industries. These enactments deal with factories and workshops; mines and minerals; plantations; shops and establishments as well as transportation.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Discuss Various Forms of Business in India
2. Discuss the laws applicable for the registration of Company in India along with process of their registrations.
3. What are the taxation provisions applicable on Public Company in India?
4. Discuss labour laws in brief applicable to Pharmaceutical Industries in India.

Lesson 16

Intellectual Property Laws (Provisions applicable for Setting up of Business)

LESSON OUTLINE

- Introduction
- Intellectual Property vis-a-vis Business: A Rationale of Relativity
- Intellectual Property Regime in India
- IP Protection for Businesses: A Snapshot
- Trademarks
- Geographical indication of Goods (Registration and Protection) Act; 1999
- Designs Act; 2000
- Copyrights
- Patents
- Lesson Round up
- Self-Test Questions

LEARNING OBJECTIVES

In today's world, the abundant supply of goods and services in the markets has made life very challenging for any business, big or small. In its on-going quest to remain ahead of its competitors in this environment, every business strives to create new and improved products (goods and services) that will deliver greater value to users and customers than the products offered by competitors. To differentiate their products - a prerequisite for success in today's markets - businesses rely on innovations that reduce production costs and/or improve product quality. In a crowded marketplace, businesses have to make an on-going effort to communicate the specific value offered by their product through effective marketing that relies on well thought-out branding strategies. In the current knowledge-driven, private sector oriented economic development paradigm, the different types of intangible assets of a business are often more important and valuable than its tangible assets. A key subset of intangible assets is protected by what are labelled collectively as intellectual property rights (IPRs). These include trade secrets protection, copyright, design and trademark rights, and patents, as well as other types of rights. IPRs create tradable assets out of products of human intellect, and provide a large array of IPR tools on which businesses can rely to help drive their success through innovative business models. Under this background, this chapter aims to address various provisions of Intellectual Property Rights applicable for setting up business in India.

INTRODUCTION

Intellectual property (IP) refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce. Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs. Intellectual property rights protect the interests of creators by giving them property rights over their creations.

The most noticeable difference between intellectual property and other forms of property, however, is that intellectual property is intangible, that is, it cannot be defined or identified by its own physical parameters. It must be expressed in some discernible way to be protectable. Generally, it encompasses four separate and distinct types of intangible property namely — patents, trademarks, copyrights, and trade secrets, which collectively are referred to as "intellectual property." However, the scope and definition of intellectual property is constantly evolving with the inclusion of newer forms under the gambit of intellectual property. In recent times, geographical indications, protection of plant varieties, protection for semi-conductors and integrated circuits, and undisclosed information have been brought under the umbrella of intellectual property.

INTELLECTUAL PROPERTY VIS-À-VIS BUSINESS: A RATIONALE OF RELATIVITY

In today's world, the abundant supply of goods and services on the markets has made life very challenging for any business, big or small. In its on-going quest to remain ahead of competitors in this environment, every business strives to create new and improved products (goods and services) that will deliver greater value to users and customers than the products offered by competitors. To differentiate their products - a prerequisite for success in today's markets - businesses rely on innovations that reduce production costs and/or improve product quality. In a crowded marketplace, businesses have to make an on-going effort to communicate the specific value offered by their product through effective marketing that relies on well thought-out branding strategies. In the current knowledge-driven, private sector oriented economic development paradigm, the different types of intangible assets of a business are often more important and valuable than its tangible assets. A key subset of intangible assets is protected by what are labelled collectively as intellectual property rights (IPRs). These include trade secrets protection, copyright, design and trademark rights, and patents, as well as other types of rights. IPRs create tradable assets out of products of human intellect, and provide a large array of IPR tools on which businesses can rely to help drive their success through innovative business models. All businesses, especially those which are already successful, nowadays have to rely on the effective use of one or more types of intellectual property (IP) to gain and maintain a substantial competitive edge in the marketplace. Business leaders and managers, therefore, require a much better understanding of the tools of the IP system to protect and exploit the IP assets they own, or wish to use, for their business models and competitive strategies in domestic and international markets.

INTELLECTUAL PROPERTY REGIME IN INDIA

India remains one of the world's most growing economies in past 20 years and the ballgame of entrepreneurship and industries is a key element for contribution outstanding growth of Indian economy. On one hand, where businesses and their successful run is vital to the growth of economy; on the same hand, a structured set of IP protection helps in the advancement and development of businesses under a hassle free environs. Henceforth, aligning the International practices, India too is having a systemized legal system to take care of IP protection. Historically the first system of protection of intellectual property came in the form of (Venetian Ordinance) in 1485. This was followed by Statute of Monopolies in England in 1623, which extended patent rights for Technology Inventions. In the United States, patent laws were introduced in 1760. Most European countries

developed their Patent Laws between 1880 to 1889. In India Patent Act was introduced in the year 1856 which remained in force for over 50 years, which was subsequently modified and amended and was called "The Indian Patents and Designs Act, 1911". After Independence a comprehensive bill on patent rights was enacted in the year 1970 and was called "The Patents Act, 1970".

Specific statutes protected only certain type of Intellectual output; till recently only four forms were protected. The protection was in the form of grant of copyrights, patents, designs and trademarks. In India, copyrights were regulated under the Copyright Act, 1957; patents under Patents Act, 1970; trademarks under Trade and Merchandise Marks Act 1958; and designs under Designs Act, 1911. With the establishment of WTO and India being signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), several new legislations were passed for the protection of intellectual property rights to meet the international obligations. These included: Trade Marks, called the Trade Mark Act, 1999; Designs Act, 1911 was replaced by the Designs Act, 2000; the Copyright Act, 1957 amended a number of times, the latest is called Copyright (Amendment) Act, 2012; and the latest amendments made to the Patents Act, 1970 in 2005. Besides, new legislations on geographical indications and plant varieties were also enacted. These are called Geographical Indications of Goods (Registration and Protection) Act, 1999, and Protection of Plant Varieties and Farmers' Rights Act, 2001 respectively.

Over the past fifteen years, intellectual property rights have grown to a stature from where it plays a major role in the development of global economy. In 1990s, many countries unilaterally strengthened their laws and regulations in this area, and many others were poised to do likewise. At the multilateral level, the successful conclusion of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in the World Trade Organization elevates the protection and enforcement of IPRs to the level of solemn international commitment. It is strongly felt that under the global competitive environment, stronger IPR protection increases incentives for innovation and raises returns to international technology transfer.

Engagement with India on Intellectual Property Rights (IPR) continues, primarily through the Trade Policy Forum's Working Group on Intellectual Property. In 2016, India released its comprehensive National IP Policy, with its primary focus being on awareness and building administrative capacity. The portfolio of Copyright and Semi-Conductors shifted to the Department of Industrial Policy and Promotion, Ministry of Commerce. The Cell of IP Promotion and Management (CIPAM) was set up and is tasked with implementing the IP Policy and interagency coordination. In 2016, the state of Telangana set up India's first IP Crime Unit, to combat the menace of internet piracy. The Commercial Courts of two states became functional and industry saw some positives decisions coming on the patent front. The US Government enhanced its engagement and conducted two workshops with Government of India, one on Copyright and one on Trade Secrets. In addition, the Patent Rules as well as the Trademark Rules were amended. The Copyright Board was merged with the IP Appellate Board. The Indian Patent Office hired 458 examiners to address the issue of patent and trademark backlog.

IP PROTECTION FOR BUSINESSES: A SNAPSHOT

The Following types of IP Protection for Setting up and advancing the Businesses. They are discussed as below:

Trademarks

A trademark is a word, phrase, symbol, or design that distinguishes the source of products (trademarks) or services (service marks) of one business from its competitors. In order to qualify for patent protection, the mark must be distinctive. For example, the Nike "swoosh" design identifies athletic footwear made by Nike.

Although rights in trademarks are acquired by use, registration with the Trademark Office under the Trademark Act, 1999 allows you to more easily enforce those rights. Before registering your trademark, conduct a search of federal and state databases to make sure a similar trademark doesn't already exist. This trademark search can help you reduce the amount of time and money you could spend on using a mark that is already registered

and trademarked.

The Trade Marks Act 1999 ("TM Act") provides, inter alia, for registration of marks, filing of multiclass applications, the renewable term of registration of a trademark as ten years as well as recognition of the concept of well-known marks, etc. It is pertinent to note that the letter "R" in a circle i.e. ® with a trademark can only be used after the registration of the trademark under the TM Act.

Trademarks mean any words, symbols, logos, slogans, product packaging or design that identify the goods or services from a particular source. As per the definition provided under Section 2 (zb) of the TM Act, "trade mark" means a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.

The definition of the trademark provided under the TM Act is wide enough to include non-conventional marks like color marks, sound marks, etc. As per the definition provided under Section 2 (m) of the TM Act, "mark" includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof.

Accordingly, any mark used by the startup in the trade or business in any form, for distinguishing itself from other, can qualify as trademark. It is quite significant to note that the Indian judiciary has been proactive in the protection of trademarks, and it has extended the protection under the trademarks law to Domain Names as demonstrated in landmark cases of Tata Sons Ltd v Manu Kosuri & Ors [90 (2001) DLT 659] and Yahoo Inc. v Akash Arora [1999 PTC 201].

Points To Consider While Adopting A Trademark

Any startup needs to be cautious in selecting its trade name, brands, logos, packaging for products, domain names and any other mark which it proposes to use. You must do a proper due diligence before adopting a trademark. The trademarks can be broadly classified into following five categories:

- Generic
- Descriptive
- Suggestive
- Arbitrary
- Invented/Coined

    1. Generic marks means using the name of the product for the product, like "Salt" for salt.
    2. Descriptive marks mean the mark describing the characteristic of the products, like using the mark "Fair" for the fairness creams.
    3. Suggestive marks mean the mark suggesting the characteristic of the products, like "Habitat" for home furnishings products.
    4. Arbitrary marks means mark which exist in popular vocabulary, but have no logical relationship to the goods or services for which they are used, like "Blackberry" for phones.
    5. The invented/ coined marks means coining a new word which has no dictionary meaning, like "Adidas". The strongest marks, and thus the easiest to protect, are invented or arbitrary marks. The weaker marks are descriptive or suggestive marks which are very hard to protect. The weakest marks are generic marks which can never function as trademarks.

India follows the NICE Classification of Goods and Services for the purpose of registration of trademarks. The NICE Classification groups products into 45 classes (classes 1-34 include goods and classes 35-45 include

services). The NICE Classification is recognized in majority of the countries and makes applying for trademarks internationally a streamlined process. Every startup, seeking to trademark a good or service, has to choose from the appropriate classes, out of the 45 classes.

While adopting any mark, the startup should also keep in mind and ensure that the mark is not being used by any other person in India or abroad, especially if the mark is well-known. It is important to note that India recognizes the concept of the "Well-known Trademark" and the principle of "Trans-border Reputation".

Examples of well-known trademarks are Google, Tata, Yahoo, Pepsi, Reliance, etc. Further, under the principle of "Trans-border Reputation", India has afforded protection to trademarks like Apple, Gillette, Whirlpool, Volvo, which despite having no physical presence in India, are protected on the basis of their trans-border reputation in India.

ENFORCEMENT OF TRADEMARK RIGHTS

Trademarks can be protected under the statutory law, i.e., under the TM Act and the common law, i.e., under the remedy of passing off. If a person is using a similar mark for similar or related goods or services or is using a well-known mark, the other person can file a suit against that person for violation of the IP rights irrespective of the fact that the trademark is registered or not.

Registration of a trademark is not a pre-requisite in order to sustain a civil or criminal action against violation of trademarks in India. The prior adoption and use of the trademark is of utmost importance under trademark laws.

The relief which a court may usually grant in a suit for infringement or passing off includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings. It is pertinent to note that infringement of a trademark is also a cognizable offence and criminal proceedings can also be initiated against the infringers.

Geographical indication of Goods (Registration and Protection) Act; 1999

Until recently, Geographical indications were not registrable in India and in the absence of statutory protection; Indian geographical indications had been misused by persons outside India to indicate goods not originating from the named locality in India. Patenting turmeric, neem and basmati are the instances which drew a lot of attention towards this aspect of the Intellectual property. Mention should be made that under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), there is no obligation for other countries to extend reciprocal protection unless a geographical indication is protected in the country of its origin. India did not have such a specific law governing geographical indications of goods which could adequately protect the interest of producers of such goods.

To cover up such situations it became necessary to have a comprehensive legislation for registration and for providing adequate protection to geographical indications and accordingly the Parliament has passed a legislation, namely, the Geographical indication of Goods (Registration and Protection) Act, 1999. The legislation is administered through the Geographical Indication Registry under the overall charge of the Controller General of Patents, Designs and Trade Marks.

The salient features of this legislation are as under:

(a) Provision of definition of several important terms like "geographical indication", "goods", "producers", "packages", "registered proprietor", "authorized user" etc.

(b) Provision for the maintenance of a Register of Geographical Indications in two parts-Part A and Part B and use of computers etc. for maintenance of such Register. While Part A will contain all registered geographical indications, Part B will contain particulars of registered authorized users.

(c) Registration of geographical indications of goods in specified classes.

(d) Prohibition of registration of certain geographical indications.

(e) Provisions for framing of rules by Central Government for filing of application, its contents and matters relating to substantive examination of geographical indication applications.

(f) Compulsory advertisement of all accepted geographical indication applications and for inviting objections.

(g) Registration of authorized users of registered geographical indications and providing provisions for taking infringement action either by a registered proprietor or an authorized user.

(h) Provisions for higher level of protection for notified goods.

(i) Prohibition of assignment etc. of a geographical indication as it is public property.

(j) Prohibition of registration of geographical indication as a trademark.

(k) Appeal against Registrar's decision would be to the Intellectual Property Board established under the Trade Mark legislation.

(l) Provision relating to offences and penalties.

(m) Provision detailing the effects of registration and the rights conferred by registration.

(n) Provision for reciprocity powers of the registrar, maintenance of Index, protection of homonymous geographical indications etc.

DESIGNS ACT, 2000

In view of considerable progress made in the field of science and technology, a need was felt to provide more efficient legal system for the protection of industrial designs in order to ensure effective protection to registered designs, and to encourage design activity to promote the design element in an article of production. In this backdrop, The Designs Act of 1911 has been replaced by the Designs Act, 2000. The Designs Act, 2000 has been enacted essentially to balance these interests and to ensure that the law does not unnecessarily extend protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs.

The new Act complies with the requirements of TRIPS and hence is directly relevant for international trade.

Industrial Design law deals with the aesthetics or the original design of an industrial product. An industrial product usually contains elements of both art and craft, that is to say artistic as well as functional elements.

The design law excludes from its purview the functioning features of an article and grants protection only to those which have an aesthetic appeal. For example, the design of a teacup must have a hollow receptacle for holding tea and a handle to hold the cup. These are functional features that cannot be registered. But a fancy shape or ornamentation on it would be registrable. Similarly, a table, for example, would have a flat surface on which other objects can be placed. This is its functional element. But its shape, colour or the way it is supported by legs or otherwise, are all elements of design or artistic elements and therefore, registrable if unique and novel.

Today, industrial design has become an integral part of consumer culture where rival articles compete for consumer's attention. It has become important therefore, to grant to an original industrial design adequate protection. It is not always easy to separate aesthetics of a finished article from its function. Law, however, requires that it is only the aesthetics or the design element which can be registered and protected. For example, while designing furniture whether for export or otherwise, when one copies designs from a catalogue, one has to ascertain that somebody else does not have a design right in that particular design.

Particularly, while exporting furniture, it is necessary to be sure that the design of the furniture is not registered either as a patent or design in the country of export. Otherwise, the exporter may get involved in unnecessary

litigation and may face claims for damages. Conversely, if furniture of ethnic design is being exported, and the design is an original design complying with the requirements of the definition of 'design' under the Designs Act, it would be worthwhile having it registered in the country to which the product is being exported so that others may not imitate it and deprive the inventor of that design of the commercial benefits of his design.

The salient features of the Design Act, 2000 are as under:

(a) Enlarging the scope of definition of the terms "article", "design" and introduction of definition of "original".

(b) Amplifying the scope of "prior publication".

(c) Introduction of provision for delegation of powers of the Controller to other officers and stipulating statutory duties of examiners.

(d) Provision of identification of non-registrable designs.

(e) Provision for substitution of applicant before registration of a design.

(f) Substitution of Indian classification by internationally followed system of classification.

(g) Provision for inclusion of a register to be maintained on computer as a Register of Designs.

(h) Provision for restoration of lapsed designs.

(i) Provisions for appeal against orders of the Controller before the High Court instead of Central Government.

(j) Revoking of period of secrecy of two years of a registered design.

(k) Providing for compulsory registration of any document for transfer of right in the registered design.

(l) Introduction of additional grounds in cancellation proceedings and provision for initiating the cancellation proceedings before the Controller in place of High Court.

(m) Enhancement of quantum of penalty imposed for infringement of a registered design.

(n) Provision for grounds of cancellation to be taken as defense in the infringement proceedings to be in any court not below the Court of District Judge.

(o) Enhancing initial period of registration from 5 to 10 years, to be followed by a further extension of five years.

(p) Provision for allowance of priority to other convention countries and countries belonging to the group of countries or inter-governmental organizations apart from United Kingdom and other Commonwealth Countries.

(q) Provision for avoidance of certain restrictive conditions for the control of anticompetitive practices in contractual licenses.

Copyrights

Copyrights protect original works of authorship, such as literary works, music, dramatic works, pantomimes and choreographic works, sculptural, pictorial, and graphic works, sound recordings, artistic works, architectural works, and computer software. With copyright protection, the holder has the exclusive rights to modify, distribute, perform, create, display, and copy the work.

In order to qualify under copyright laws, the work must be fixed in a tangible medium of expression, such as words on a piece of paper or music notes written on a sheet. A copyright exists from the moment the work gets created, so registration is required to provide proper protection to one's work and also to prevent the chances of its misuse and unauthorized use.

Copyright in India is governed by Copyright Act, 1957. This Act has been amended several times to keep pace with the changing times. As per this Act, copyright grants author's lifetime coverage plus 60 years after death. Copyright and related rights on cultural goods, products and services, arise from individual or collective creativity. All original intellectual creations expressed in a reproducible form will be connected as "works eligible for copyright protections". Copyright laws distinguish between different classes of works such as literary, artistic, musical works and sound recordings and cinematograph films. The work is protected irrespective of the quality thereof and also when it may have very little in common with accepted forms of literature or art.

Copyright protection also includes novel rights which involve the right to claim authorship of a work, and the right to oppose changes to it that could harm the creator's reputation. The creator or the owner of the copyright in a work, can enforce his right administratively and in the courts by inspection of premises for evidence of production or possession of illegally made "pirated" goods related to protected works. The owner may obtain court orders to stop such activities, as well as seek damages for loss of financial rewards and recognition.

A vital field which gets copyright protection is the computer industry. The Copyright Act, 1957, was amended in 1984 and computer programming was included with the definition of "literary work.' The new definition of "computer programme" introduced in 1994, means a set of instructions expressed in works, codes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result.

The greatest fear and challenges to the copyright industry is the piracy of works whether, books, musical works, films, television programmes or computer software or computer database. The special nature of infringement of copyrights in computer programmes has again been taken note of by the Copyright (Amendment) Act, 1994 by inserting a new section 63 B. The new section provides that any person who knowingly makes use on a computer of an infringed copy of a computer programme will be punishable with imprisonment for a term of not less than seven days, which may extend to three years and with a fine of not less than ` 50,000/- and which may extend to ` 2,00,000/-. Proviso to section 63 B, however, provides that where computer programme has not been used for gain or in the course of trade or business, the court may at its discretion and for reasons mentioned in the judgement not impose any sentence of imprisonment and impose only fine up to ` 50,000/-.

The Copyright (Amendment) Act, 1999 makes it free for purchaser of a gadget/equipment to sell it onwards if the item being transacted is not the main item covered under the Copyright Act. This means computer software which is built in the integral part of a gadget/equipment can be freely transacted without permission of copyright owner. This amendment also ensures fair dealing of 'broadcasting' gaining popularity with the growth of the Internet. With this amendment India has updated the Act to meet the concerns of the copyright industries mainly consisting of Book Industry, Music Industry, Film and Television Industry, Computer Industry and Database Industry.

The Copyright Act, 1957 amended in 2012 with the object of making certain changes for clarity, to remove operational difficulties and also to address certain newer issues that have emerged in the context of digital technologies and the Internet. Moreover, the main object to amendments the Act is that in the knowledge society in which we live today, it is imperative to encourage creativity for promotion of culture of enterprise and innovation so that creative people realize their potential and it is necessary to keep pace with the challenges for a fast growing knowledge and modern society.

Classes of work for which Copyright protection is applicable

Copyright subsists throughout India in the following classes of works:

- Original literary,
- dramatic,
- musical work (consists of music and also graphic notation of such works but excludes any words or action intended to be sung, spoken or performed with music)

- artistic works (painting, sculpture, drawing, engraving, photograph, architecture or any other work of artistic craftsmanship (whether or not any such work poses artistic work)
- Cinematograph films (work of visual recording on any medium produced through a process from which a moving image may be produced by any means and includes a sound recording accompanying such visual recording); and
- Sound recordings (recording of sounds from which sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced).

Protection to Authors

Copyright protects the rights of authors, i.e., creators of intellectual property in the form of literary, musical, dramatic and artistic works and cinematograph films and sound recordings.

The following rights are protected:

- reproduce the work
- issue copies of the work to the public
- perform the work in public
- communicate the work to the public.
- make cinematograph film or sound recording in respect of the work
- make any translation of the work
- make any adaptation of the work (conversion of dramatic work into non dramatic work, literary work into dramatic work, re-arrangement of literary or dramatic work, depiction in comic form or through pictures of a literary or dramatic work, transcription of musical work or any act involving rearrangement or alteration of an existing work and the making of a cinematograph film of literary or dramatic or musical work)

In addition to all the rights applicable to a literary work, owner of the copyright in a computer programme enjoys the rights to sell or give on hire or offer for sale or hire, regardless of whether such a copy has been sold or given on hire on earlier occasion.

Owners of copyrights

The following are the owners of the copyrights:

- In musical sound recordings: lyricist, composer, singer, musician and the person or company who produced the sound recording
- In works by journalists during their employment: in the absence of any agreement to the contrary, the proprietor
- In works produced for valuable consideration at the instance of another person: in the absence of any agreement to the contrary, the person at whose instance the work is produced

Assignment of Copyright

The owner of the copyright in an existing work or the prospective owner of the copyright in a future work may assign to any person the copyright either wholly or partially and either generally or subject to limitations and either for the whole term of the copyright or any part thereof. The assignment mention the rights, duration, the territorial limits of the assignment and the royalty payable thereon and should be in writing signed by the assignor or by his duly authorized agent.

If the assignment of Copyright does not contain any provision mentioned below	Then the following provisions prescribed by the Act will prevail
Where the assignee does not exercise the rights assigned to him within a period of one year from the date of assignment	Shall lapse after the expiry of the said period unless otherwise specified in the assignment
If the period of assignment is not stated	it shall be deemed to be five years from the date of assignment.
If the territorial extent of assignment of the rights is not specified	it shall be presumed to extend within the whole of India.

Term of the protection of Copyright

The general rule is that copyright lasts for 60 years. In the case of original literary, dramatic, musical and artistic works the 60-year period is counted from the year following the death of the author. In the case of cinematograph films, sound recordings, photographs, posthumous publications, anonymous and pseudonymous publications, works of government and works of international organisations, the 60-year period is counted from the date of publication.

Exceptions to the use Copyright

In order to protect the interests of users, some exemptions have been prescribed in respect of specific uses of works enjoying copyright. Some of the exemptions are the uses of the work:

- for the purpose of research or private study,
- for criticism or review,
- for reporting current events,
- in connection with judicial proceeding,
- performance by an amateur club or society if the performance is given to a non-paying audience, and
- the making of sound recordings of literary, dramatic or musical works under certain conditions.
- for the purpose of education and religious ceremonies

Application for registration of copyright

The procedure for registration is as follows:

- Application for registration is to be made in Form IV as prescribed in the first schedule to the Rules accompanied by the requisite fees prescribed in the second schedule to the Rules ;
- Separate applications should be made for registration of each work;
- The applications should be signed by the applicant or the advocate in whose favor a Vakalatnama or Power of Attorney has been executed, and the same has to be annexed to the application form.

Administration of the Copyright Law

The Copyright Act provides for a quasi-judicial body called the Copyright Board consisting of a Chairman and two or more, but not exceeding fourteen, other members for adjudicating certain kinds of copyright cases. The Chairman of the Board is of the level of a judge of a High Court. The Board has the power to:

- hear appeals against the orders of the Registrar of Copyright;
- hear applications for rectification of entries in the Register of Copyrights;

- adjudicate upon disputes on assignment of copyright;
- grant compulsory licence to publish or republish works (in certain circumstances);
- grant compulsory licence to produce and publish a translation of a literary or dramatic work in any language after a period of seven years from the first publication of the work;
- hear and decide disputes as to whether a work has been published or about the date of publication or about the term of copyright of a work in another country;
- fix rates of royalties in respect of sound recordings under the cover-version provision; and
- fix the resale share right in original copies of a painting, a sculpture or a drawing and of original manuscripts of a literary or dramatic or musical work.

Rights of the Registrar of Copyrights

The Registrar of Copyrights has the powers of a civil court when trying a suit under the Code of Civil Procedure in respect of the following matters, namely,

- summoning and enforcing the attendance of any person and examining him on oath;
- requiring the discovery and production of any document;
- receiving evidence on affidavit;
- issuing commissions for the examination of witnesses or documents;
- requisitioning any public record or copy thereof from any court or office;
- any other matters which may be prescribed.

Infringement of Copyright

Copyright in a work is considered as infringed only if a substantial part is made use of unauthorized. What is 'substantial' varies from case to case. More often than not, it is a matter of quality rather than quantity.

For example, if a lyricist copy a very catching phrase from another lyricist's song, there is likely to be infringement even if that phrase is very short.

The following are some of the commonly known acts involving infringement of copyright:

- Making infringing copies for sale or hire or selling or letting them for hire;
- Permitting any place for the performance of works in public where such performance constitutes infringement of copyright;
- Distributing infringing copies for the purpose of trade or to such an extent so as to affect prejudicially the interest of the owner of copyright ;
- Public exhibition of infringing copies by way of trade; and
- Importation of infringing copies into India.

A copyright owner can take legal action against any person who infringes the copyright and is entitled to remedies by way of injunctions, damages and accounts.

Penalty for infringement and the status of the infringing copies

The minimum punishment for infringement of copyright is imprisonment for six months with the minimum fine of `50,000/-. In the case of a second and subsequent conviction the minimum punishment is imprisonment for one year and fine of Rs. one lakh.

All infringing copies of any work in which copyright subsists and all plates used or intended to be used for the production of such infringing copies shall be deemed to be the property of the owner of the copyright.

Patents

A patent grants property rights on an invention, allowing the patent holder to exclude others from making, selling, or using the invention. Inventions allow many businesses to be successful because they develop new or better processes or products that offer competitive advantage on the marketplace. One could get a patent by filing a patent application with the Patent Office in India.

Patent, in general parlance means, a monopoly given to the inventor on his invention to commercial use and exploit that invention in the market, to the exclusion of other, for a certain period. As per Section 2(1) (j) of the Patents Act, 1970, "invention" includes any new and useful;

- art, process, method or manner of manufacture;
- machine, apparatus or other article;
- substance produced by manufacture, and includes any new and useful improvement of any of them, and an alleged invention;

The definition of the word "Invention" in the Patents Act, 1970 includes the new product as well as new process. Therefore, a patent can be applied for the "Product" as well as "Process" which is new, involving inventive step and capable of industrial application can be patented in India.

The invention will not be considered new if it has been disclosed to the public in India or anywhere else in the world by a written or oral description or by use or in any other way before the filing date of the patent application. The information appearing in magazines, technical journals, books etc, will also constitute the prior knowledge. If the invention is already a part of the state of the art, a patent cannot be granted. Examples of such disclosure are displaying of products in exhibitions, trade fairs, etc. explaining its working, and similar disclosures in an article or a publication.

It is important to note that any invention which falls into the following categories, is not patentable: (a) frivolous, (b) obvious, (c) contrary to well established natural laws, (d) contrary to law, (e) morality, (f) injurious to public health, (g) a mere discovery of a scientific principle, (h) the formulation of an abstract theory, (i) a mere discovery of any new property or new use for a known substance or process, machine or apparatus, (j) a substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance, (k) a mere arrangement or rearrangement or duplication of known devices, (l) a method of agriculture or horticulture, and (m) inventions relating to atomic energy or the inventions which are known or used by any other person, or used or sold to any person in India or outside India. The application for the grant of patent can be made by either the inventor or by the assignee or legal representative of the inventor. In India, the term of the patent is for 20 years. The patent is renewed every year from the date of patent.

Use of Technology or Invention

While using any technology or invention, the startup should check and confirm that it does not violate any patent right of the patentee. If the startup desires to use any patented invention or technology, the startup is required to obtain a license from the patentee.

Enforcement of Patent Rights

It is pertinent to note that the patent infringement proceedings can only be initiated after grant of patent in India but may include a claim retrospectively from the date of publication of the application for grant of the patent. Infringement of a patent consists of the unauthorized making, importing, using, offering for sale or selling any

patented invention within the India. Under the (Indian) Patents Act, 1970 only a civil action can be initiated in a Court of Law. Like trademarks, the relief which a court may usually grant in a suit for infringement of patent includes permanent and interim injunction, damages or account of profits, delivery of the infringing goods for destruction and cost of the legal proceedings.

LESSON ROUND-UP

- Intellectual property (IP) refers to the creations of the human mind like inventions, literary and artistic works, and symbols, names, images and designs used in commerce.
- Intellectual property is divided into two categories: Industrial property, which includes inventions (patents), trademarks, industrial designs, and geographic indications of source; and Copyright, which includes literary and artistic works, such as, novels, poems and plays, films, musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs.
- Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.
- Intellectual property rights protect the interests of creators by giving them property rights over their creations.
- Over the past fifteen years, intellectual property rights have grown to a stature from where it plays a major role in the development of the global economy.
- It is strongly felt that under the global competitive environment, stronger IPR protection increases incentives for innovation and raises returns to international technology transfer.
- Engagement with India on Intellectual Property Rights (IPR) continues, primarily through the Trade Policy Forum's Working Group on Intellectual Property.
- In 2016, India released its comprehensive National IP Policy, with its primary focus being on awareness and building administrative capacity.
- A trademark is a word, phrase, symbol, or design that distinguishes the source of products (trademarks) or services (service marks) of one business from its competitors. In order to qualify for patent protection, the mark must be distinctive. For example, the Nike "swoosh" design identifies athletic footwear made by Nike.
- The Trade Marks Act 1999 ("TM Act") provides, inter alia, for registration of marks, filing of multiclass applications, the renewable term of registration of a trademark as ten years as well as recognition of the concept of well-known marks, etc. It is pertinent to note that the letter "R" in a circle i.e. ® with a trademark can only be used after the registration of the trademark under the TM Act.
- Mention should be made that under the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), there is no obligation for other countries to extend reciprocal protection unless a geographical indication is protected in the country of its origin. India did not have such a specific law governing geographical indications of goods which could adequately protect the interest of producers of such goods.
- To cover up such situations it became necessary to have a comprehensive legislation for registration and for providing adequate protection to geographical indications and accordingly the Parliament has passed a legislation, namely, the Geographical indication of Goods (Registration and Protection) Act, 1999. The legislation is administered through the Geographical Indication Registry under the overall charge of the Controller General of Patents, Designs and Trade Marks.
- In view of considerable progress made in the field of science and technology, a need was felt to

provide more efficient legal system for the protection of industrial designs in order to ensure effective protection to registered designs, and to encourage design activity to promote the design element in an article of production.

- The Designs Act, 2000 has been enacted essentially to balance these interests and to ensure that the law does not unnecessarily extend protection beyond what is necessary to create the required incentive for design activity while removing impediments to the free use of available designs.
- The new Act complies with the requirements of TRIPS and hence is directly relevant for international trade.
- Industrial Design law deals with the aesthetics or the original design of an industrial product. An industrial product usually contains elements of both art and craft, that is to say artistic as well as functional elements.
- In order to qualify under copyright laws, the work must be fixed in a tangible medium of expression, such as words on a piece of paper or music notes written on a sheet. A copyright exists from the moment the work gets created, so registration is required to provide proper protection to one's work and also to prevent the chances of its misuse and unauthorized use.
- Copyright in India is governed by Copyright Act, 1957.
- Patent, in general parlance means, a monopoly given to the inventor on his invention to commercial use and exploit that invention in the market, to the exclusion of other, for a certain period.

SELF-TEST QUESTIONS

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss the Provisions of Copyright Act, 1957 applicable for setting up business in India.
2. What is a Patent? How to Register Patents in India.
3. What is Trademark? Discuss the process to register trademarks in India.
4. Discuss the Provisions for registering a Geographical Indication in India.

Lesson 17

Compliances under Labour Laws*
(Provisions applicable for Setting up of Business)

LESSON OUTLINE

- Factories Act, 1948
- Safety Measures
- Check List - Factories Act, 1948
- Minimum Wages Act, 1948
- Check List - The Minimum Wages Act, 1948
- Payment of Wages Act, 1936
- Object of the Act
- Applicability of Act
- Deduction made from wages (Sec. 7)
- Check List - Payment Of Wages Act, 1936
- Employees' State Insurance Act, 1948
- Check List - Employees State Insurance Act, 1948
- Employees' Provident Funds and Miscellaneous Provisions Act; 1952
- Check List - Employees' Provident Fund & Miscellaneous Provisions Act, 1952 & The Schemes Provided Thereunder
- Payment of Bonus Act, 1965
- Check List - Payment Of Bonus Act, 1965
- Payment of Gratuity Act; 1972 (Payment of Gratuity in Consonance with State Rules)
- Check List - Payment of Gratuity Act, 1972
- Employees Compensation Act; 1923
- Contract Labour (Regulation and Abolition) Act, 1970
- Check List - The Contract Labour (Regulation & Abolition) Act, 1970 & Its Central Rules, 1971

LEARNING OBJECTIVES

Labour laws are an important set of welfare legislations for the employees and labourers in India. They ensure that industrial relations are maintained at a balance and employees are protected at their social, economic and political welfare. This has made various labour laws being enacted in India to be complied with by business entities in India. This chapter deals briefly with the provisions of various labour laws applicable for setting up of a business in India.

** Note for Students : Proposed Code on Wages, 2019 is yet to be notified. Rest three Codes are introduced in Lok Sabha.*

- Industrial Disputes Act, 1947
- Committing unfair labour practices
- Check List - Industrial Dispute Act, 1947
- Trade Unions Act, 1926
- Maternity Relief Act, 1961 along with Maternity Benefit (Amendment) Act, 2017
- Maternity Benefit (Amendment) Act, 2017
- Child and Adolescent Labour (Prohibition and Regulation) Act; 1986
- Persons with Disabilities (Equal Opportunities; Protection of Rights and Full Participation) Act, 1995
- Prevention of Sexual Harassment of Women at Workplace (Prevention; Prohibition and Redressal) Act, 2013
- LESSON ROUND UP
- SELF-TEST QUESTIONS

FACTORIES ACT, 1948

Applicability of the Act

Any premises wherein 10 or more persons with the aid of power or 20 or more workers are/were without aid of power are working on any day in the preceding 12 months, wherein Manufacturing process is being carried on.

Employer to ensure health of workers pertaining to – (Section 11 to 20)

- Cleanliness Disposal of wastes and effluents
- Ventilation and temperature dust and fume
- Overcrowding Artificial humidification Lighting
- Drinking Water Spittoons.

Registration & Renewal of Factories (Section 6)

To be granted by Chief Inspector of Factories on submission of prescribed form, fee and plan.

Safety Measures

Facing of machinery

- Work on near machinery in motion.
- Employment prohibition of young persons on dangerous machines.
- Striking gear and devices for cutting off power.
- Self-acting machines.
- Casing of new machinery.
- Prohibition of employment of women and children near cotton-openers.
- Hoists and lifts.

Working Hours, Spread Over & Overtime of Adults (Section 51, 54 to 56, 59 & 60)

- Weekly hours not more than 48.
- Daily hours, not more than 9 hours.
- Intervals for rest at least ½ hour on working for 5 hours.
- Spread over not more than 10½ hours.
- Overlapping shifts prohibited.
- Extra wages for overtime double than normal rate of wages.
- Restrictions on employment of women before 6 AM and beyond 7 PM.

Welfare Measures

- Washing facilities
- Facilities for storing and drying clothing
- Facilities for sitting
- First-aid appliances – one first aid box not less than one for every 150 workers.
- Canteens when there are 250 or more workers.

- Shelters, rest rooms and lunch rooms when there are 150 or more workers.
- Creches when there are 30 or more women workers.
- Welfare office when there are 500 or more workers.

Employment of Young Persons (Section 51, 54 to 56, 59 & 60)

- Prohibition of employment of young children e.g. 14 years.
- Non-adult workers to carry tokens e.g. certificate of fitness.
- Working hours for children not more than 4 ½ hrs. And not permitted to work during night shift.

Annual Leave with Wages (Section 79)

- A worker having worked for 240 days @ one day for every 20 days and for a child one day for working of 15 days.
- Accumulation of leave for 30 days.

Offence	**Penalties**
For contravention of the Provisions of the Act or Rules	Imprisonment upto 2 years or fine upto Rs.1,00,000 or both
On Continuation of contravention	Rs.1000 per day
On contravention of Chapter IV pertaining to safety or dangerous operations.	Not less than ₹25000 in case of death. Not less than ₹5000 in case of serious injuries.
Subsequent contravention of some provisions	Imprisonment upto 3 years or fine not less than ₹10, 000 which may extend to ₹2, 00,000.
Obstructing Inspectors	Imprisonment upto 6 months or fine upto ₹10, 000 or both.
Wrongful disclosing result pertaining to results of analysis.	Imprisonment upto 6 months or fine upto ₹10, 000 or both.
For contravention of the provisions of Sec.41B, 41C and 41H pertaining to compulsory disclosure of information by occupier, specific responsibility of occupier or right of workers to work imminent danger.	Imprisonment upto 7 years with fine upto ₹2,00,000 and on continuation fine @ ₹5, 000 per day. Imprisonment of 10 years when contravention continues for one year.

Below is the checklist under the Factories Act, 1948: (There are quite a lot differences, hence being appended for your review please.

Form 1 (Prescribed Under Rule 3)	Application For Permission To Construct, Extend Or Take Into Use Any Building As A Factory
Form 2 (Prescribed Under Rule 4 And 12)	Application For Registration And Grant Of Amendment Of Licence And Notice Of Occupation
Form 3 (Prescribed Under Rule No. 3 (4))	Certificate Of Stability
Form 4 (Prescribed Under Rule 5)	Licence To Work A Factory
Form 5 (Prescribed Under Rule 14)	Certificate Of Fitness For Young Person
Form 6 (Prescribed Under Rule 22)	Humidity Register

Form 7 (Prescribed Under Rule 15)	Record Of Lime Washing, Painting, Etc
Form 8 (Prescribed Under Rule 74)	Report Of Examination Or Test Of Pressure Vessels Or Plant
Form 9(Prescribed Under Rule 103)	Register Of Compensatory Holidays
Form No. 10 (Prescribed Under Rule 10)	Overtime, Register For Exempted Workers
Form No. 11(Prescribed Under Rule 106)	Notice Of Periods Of Work For Adult Workers
Form No. 12 (Specified Under Rule 107)	Register Of Adult Workers
Form No. 13(Prescribed Under Rule 112)	Notice Of Periods Of Work For Child Workers
Form No. 14 (Prescribed Under Rule 113)	Register Of Child Workers
Form No. 15(Prescribed Under Rule 114)	Register Of Leave With Wages
Form No. 16(Prescribed Under Rule 115)	Leave Book
Form No. 17 (Prescribed Under Rule 14)	Health Register
Form No. 18 (Prescribed Under Rule 123)	Report Of Accident Including Dangerous Occurrence Resulting In Death Or Bodily Injury
Form No. 18 A(Prescribed Under Rule 123 (4))	Report Of Dangerous Occurrence Which Does Not Result In Bodily Injury
Form No. 19	Notice Of Poisoning Or Disease
Form No. 20 (Prescribed Under Rule 126)	ABSTRACT OF THE FACTORIES ACT, 1948 AND THE KERALA FACTORIES RULES, 1957
Form No. 21 (Prescribed Under Rule 127)	Annual Return
Form No. 22 (Prescribed Under Rule 127)	Half Yearly Return
Form No. 23 (Prescribed Under Rule 12A)	Notice Of Change Of Manager
Form No. 25 (Prescribed Under Rule 130)	Muster Roll
Form No. 26 (Prescribed Under Rule 131)	Register Of Accidents, Major Accidents Dangerous Occurrences
Form 27 (Prescribed Under Rule 122)	Certificate Of Fitness For Employment In Hazardous Processes/ Dangerous Operations

Form No. 28(Prescribed Under Rule 115 (3))	Attendance Card
Form No. 29(Prescribed Under Rule 81 A)	Certificate Of Fitness For Employment In Hazardous Processes And Operations
Form No. 31(Prescribed Under Rule 129 A Schedule)	Register Containing Particulars Of Monitoring Of Working Environment Required Under Section 7-A (2) (E)
Form No. 32(Prescribed Under Rule 127 93(3))	Details Of Closure
Form No. 33 (Prescribed Under Rule 132)	Form No. 33 (Prescribed Under Rule 132)
Form No. 34 (Prescribed Under Rule 22 (1))	Register Of Workers Employed For Work On Or Near Moving Machine
Form No. 35(Prescribed Under Rule 132 And 133)	Particulars Of Rooms In The Factory
Form No. 36 (Prescribed Under Rule 119)	Nomination For Payment Of Wages In Lieu Of The Quantum Of Leave To Which He Was Entitled In The Event Of Death Of Worker.
Form No. 37 (Prescribed Under Rule 74 – A)	Register Of Examination Of Gasholders
Form No. 38(Prescribed Under Rule 74 – A)	Report Of Examination Of Water-Sealed Gasholder
Form No. 39 (Prescribed Under Rule 122)	Certificate Of Fitness For Dangerous Operations
Form No. 40 (Prescribed Under Rule 122)	Test Report …….. Dust Extraction System
Form No. 41(Prescribed Under Rule 72)	Report Of Examination Of Hoists And Lift
Form No. 42 (Prescribed Under Rule 122)	Certificate Of Fitness
Form No. 43 (Prescribed Under Sub-Rule (4) Of Rules 81G)	Form No. 43 (Prescribed Under Sub-Rule (4) Of Rules 81G)

MINIMUM WAGES ACT, 1948

Object of the Act

- To provide for fixing minimum rates of wages in certain employments

Fixation of Minimum Rates of Wages (Section 3)

- The appropriate government to fix minimum rates of wages. The employees employed in para 1 or B of Schedule either at 2 or either part of notification u/s 27.
- To make review at such intervals not exceeding five years the minimum rates or so fixed and revised the minimum rates.

Government can also fix Minimum Wages for

- Time work
- Piece work at piece rate
- Piece work for the purpose of securing to such employees on a time work basis
- Overtime work done by employees for piece work or time rate workers.

Minimum Rates of Wages (Section 4)

- Such as Basic rates of wages etc. Variable DA and Value of other concessions etc.

Procedure for fixing and revising Minimum Rates of Wages

- Appointing Committee issue of Notification etc.

Overtime (Section 5)

- To be fixed by the hour, by the day or by such a longer wage-period works on any day in excess of the number of hours constituting normal working day.
- Payment for every hour or for part of an hour so worked in excess at the overtime rate double of the ordinary rate of (1½ times or for agriculture labour)

Composition of Committee (Section 9)

- Representation of employer and employee in schedule employer in equal number and independent persons not exceeding 1/3rd or its total number one such person to be appointed by the Chairman.

Payment of Minimum Rates of Wages (Section 12)

- Employer to pay to every employee engaged in schedule employment at a rate not less than minimum rates of wages as fixed by Notification by not making deduction other than prescribed.

Fixing Hours for Normal Working (Section 13)

- Shall constitute a normal working day inclusive of one or more specified intervals.
- To provide for a day of rest in every period of seven days with remuneration.
- To provide for payment for work on a day of rest at a rate not less than the overtime rate.

Wages of workers who works for less than normal working days (Section 15)

- Save as otherwise hereinafter provided, be entitled to receive wages in respect of work done by him on that day as if he had worked for a full normal working day.

Wages for two class of work (Section 16)

- Where an employee does two or more classes of work to each of which a different minimum rate of wages is applicable, wages at not less than the minimum rate in respect of each such class.

Minimum time rate wages for piece work (Section 17)

- Not less than minimum rates wages as fixed.

Claims by employees (Section 20)

- To be filed by before authority constituted under the Act within 6 months.
- Compensation upto 10 times on under or non-payment of wages

Maintenance of registers and records (Section 18)

- Register of Fines – Form I Rule 21(4)
- Annual Returns – Form III Rule 21 (4-A)
- Register for Overtime – Form IV Rule 25
- Register of Wages–Form X, Wages slip–Form XI, Muster Roll–Form V Rule 26
- Representation of register – for three year Rule 26-A.

Offence	Punishment
For paying less than minimum rates of wages	Imprisonment upto 6 months or with fine upto ₹500/-
For contravention of any provisions pertaining to fixing hours for normal working day etc.	Imprisonment upto 6 months or with fine upto ₹500/-

Check List - The Minimum Wages Act, 1948						
S.No	**Type & Nature Of Document**	**Description Of the Form**	**Relevant Clause**	**Schedule Of Submission/ Maintenance**	**Submitting Authority**	**Remarks**
1	Form I	Rule 21(4)	Register Of Fines	Ought to be up to date		
2	Form II	Rule 21(4)	Register of deductions for damage or loss caused to the employer, by the neglect or default of the employed persons	Ought to be up to date		
3	Form III	Rule 21(4-A)	Annual Return	By Ist February each year		
4	Form IV	Rule 25(2)	Register Of Overtime	Ought to be up to date		
5	Form V	Rule 26(5)	Muster Roll	Ought to be up to date		
6	Form VI	Section 20(2)	Form Of Application by an employee regarding any claim preferred by the employee/ inspector/official of registered trade union/legal practitioner may apply			
7	Form VI- A	Section 21(1)	Form for a single application in respect of any number of employees, employed in scheduled employment.			

8	Form VII	Section 20(2)	Form of application by an Inspector or person acting with the permission of authority	to be presented within 6 months from the date of payment of minimum wages	Authority appointed under the act.	
9	Form VIII	Section 20(2)	Form in authority in favour of a legal practitioner/official of a registered trade union	to be presented within 6 months from the date of payment of minimum wages	Authority appointed under the act.	
10	Form IX	Section 20(3)	Form of Summons to the opponent to appear before the authority	When an application under section 20 is entertained, the authority shall hear the applicant & the employer.		
11	Form IX-A	Rule 22	Abstracts of the Minimum Wages Act, 1948 & the Minimum Wages (Central) Rules, 1950	To be displayed at the factory premises		
12	Form X	Rule 26(1)	Register Of Wages	Ought to be up to date for every wage period		
13	Form XI	Rule 26(2)	Wage Slip	Ought to be issued every wage period		

PAYMENT OF WAGES ACT, 1936

Object of the Act

To regulate the payment of wages of certain classes of employed persons

Applicability of Act

- It applies in the first instance to the payment of wages to persons employed in any factory to persons employed (otherwise than in a factory) upon any railway by a railway administration or either directly or through a sub-contractor by a person fulfilling a contract with a railway administration and to persons

employed in an industrial or other establishment specified in sub-clauses (a) to (g) of clause (ii) of section 2.

- The State Government may after giving three months' notice of its intention of so doing by notification in the Official Gazette extend the provisions of this Act or any of them to the payment of wages to any class of persons employed in any establishment of class of establishments specified by the Central Government or a State Government under sub-clause (h) of clause (ii) of section 2:
- Provided that in relation to any such establishment owned by the Central Government no such notification shall be issued except with the concurrence of that government.
- Nothing in this Act shall apply to wages payable in respect of a wage-period which over such wage-period average one thousand six hundred rupees a month or more.

Time of payment of wages (Section 5)

- The wages of every person employed is paid.
- When less than 1000 persons are employed shall be paid before the expiry of the 7th day of the following month.
- When more than 1000 workers, before the expiry of the 10th day of the following month.
- Equal Remuneration Act, 1976

Wages to be paid in current coins or currency notes (Section 6) (As Amended in 2017)

- All wages shall be paid in current coin or currency notes or
- By cheque or by crediting the wages in the bank account of the employee.

Provided that the appropriate Government may, by notification in the Official Gazette, specify the industrial or other establishment, the employer of which shall pay to every person employed in such industrial or other establishment, the wages only by cheque or by crediting the wages in his bank account.".

Deduction made from wages (Sec. 7)

Deductions such as, fine, deduction for amenities and services supplied by the employer, advances paid, over payment of wages, loan, granted for house-building or other purposes, income tax payable, in pursuance of the order of the Court, PF contributions, cooperative societies, premium for Life Insurance, contribution to any fund constituted by employer or a trade union, recovery of losses, ESI contributions etc.

Fines as prescribed by Competent Authority (Section 8)

- Not to imposed unless the employer is given an opportunity to show cause
- To record in the register

Deduction for absence from duties for unauthorized absence

- Absence for whole or any part of the day
- If ten or more persons absent without reasonable cause, deduction of wages up to 8 days.

Deduction for damage or loss

- For default or negligence of an employee resulting into loss. Show cause notice has to be given to the employee.

Deductions for service rendered

When accommodation amenity or service has been accepted by the employee.

Offences	Penalty
On contravention of S.5 (except sub-sec.4), S.7, S.8 (except Ss.8), S.9, S.10 (except Ss.2) and Secs.11 to 13.	Fine not less than Rs.1000, which may extend to Rs.5000. On subsequent conviction fine not less than Rs.5000, may extend to Rs.10, 000. On contravention S.4, S.5 (4), S6, S.8 (8), S.10 (2) or S.25 fine not less than Rs.1,000 may extend to Rs.5000. On subsequent On conviction fine not less.
For failing to maintain registers or records; or Wilfully refusing or without lawful excuse neglecting to furnish information or return; or Wilfully furnishing or causing to be furnished any information or return which he knows to be false or Refusing to answer or wilfully giving a false answer to any question necessary for obtaining any information required to be furnished under this Act.	Fine which shall not be less than Rs.1000 but may extend to Rs.5000 – On record conviction fine not less than Rs.5000, may extend to Rs.10, 000. For second or subsequent conviction, fine not less than Rs.5000 but may extend to Rs.10,000
Wilfully obstructing an Inspector in the discharge of his duties under this Act; or Refusing or wilfully neglecting to afford an Inspector any reasonable facility for making any entry, inspection etc. Wilfully refusing to produce on the demand of an inspector any register or other document kept in pursuance of this Act; or preventing any person for appearance etc.	Fine not less than Rs.1000 extendable Up to Rs.5000 – On subsequent conviction fine not less than Rs.5000 – may extent to Rs.10,000
On conviction for any offence and again guilty of Contravention of same provision. Failing or neglecting to pay wages to any employee	Imprisonment not less than one month extendable up to six months and fine not less than Rs.2000 extendable up to ₹15000. Additional fine up to ₹100 for each day.

Check List - Payment of Wages Act, 1936						
S.No	**Type & Nature Of Document**	**Description Of the Form**	**Relevant Clause**	**Schedule Of Submission/ Maintenance**	**Submitting Authority**	**Remarks**
1	Form A	Form of Individual Application	Section 15(2)	Within 12 months from the date on which deductions were made or the date on which payment was due, as the case may be.	Inspector Of Factories	

2	Form B	Form of Group application	Section 15(2) and Section 16	Within 12 months from the date on which deductions were made or the date on which payment was due, as the case may be.	Inspector Of Factories	
3	Form C	Form of application by an inspector or person permitted by the authority or authorised to act	Section 15(2) & Section 16	Within 12 months from the date on which deductions were made or the date on which payment was due, as the case may be.	Inspector Of Factories	
4	Form D	Certificate Of Authorisation	Section 15(2)	Within 12 months from the date on which deductions were made or the date on which payment was due, as the case may be.	Inspector Of Factories	
5	Form E	Notice for disposal of application	Section 15(3)	When an application is entertained under section 15(2), the authority shall hear the applicant & the employer and direct the employer for refund of deductions made or payment of delayed wages or make no directions if the application is found to be *malafide*.		
6	Form F	Record of order or direction	Section 15(3)	Record of order of direction to be made by the authority under the act		
7	Form G	Notice to respondent of the day fixed for the hearing of appeal under section 17 of the act	Section 17	Within 30 days of the date on which order or direction was made, an appeal could be made by the employer/ employee or his legal practitioner and the judge of the district court to issue the notice to the respondent of the day fixed for hearing of appeal.		

EMPLOYEES' STATE INSURANCE ACT, 1948

Applicability of the Act

It is extended in area-wise to factories using power and employing 10 or more persons and to non-power using manufacturing units and establishments employing 20 or more person up to Rs.7500/- per month with effect

from 1.4.2004. It has also been extended upon shops, hotels, restaurants, roads motor transport undertakings, equipment maintenance staff in the hospitals

Registration under ESIC Act

Registration is the process by which every employer of an establishment/ company/ organization and its every employee who are employed for wage purposes are identified for the purpose of this ESIC Scheme and their individual records are set up for them.

- The first stage in this process is to obtain the particulars about each factory/shop/establishment that can be covered under ESIC Act.
- Thereafter to identifying such an organization, allotment of a number i.e. Code No. is carried out by the Regional Office.
- The above mentioned process helps in maintaining track of contributions/assistance payable/paid and the associated obligations of the employers.
- Consequent step is the registration of employees of covered factories by the Regional Office and identifying such individuals by allotment of a number i.e., insurance number.

This procedure facilitates in setting up essential records for documenting the benefits for which the insured employee may be entitled under this ESIC Scheme based on the eligibility criteria.

An individual record of every employer/employee will facilitate smooth conversion in future from time to time. It will operate as a regulator and keep a proper track for maintaining the records for the purpose of obtaining compliance from the employers and providing benefits to concerned insured persons.

Registration of Employers

Section 2A of the ESI Act states as under:

- 2A. Registration of factories and establishments-Every factory or establishment to which this Act applies shall be registered within such time and in such manner as may be specified in the regulations made in this behalf.

As a follow-up of this provision in the Act, Regulation 10B has been inserted in the ESI (General) Regulations, 1950. This regulation is as follows:

10B – Registration of factories or establishments

- The employer in respect of a factory or establishment to which the Act applies for the first time and to which an Employers' Code No. is not yet allotted and the employer in respect of a factory or an establishment to which the Act previously applied but has ceased to apply for the time being, shall furnish to the appropriate Regional Officer not later than 15 days after the Act becomes applicable, as the case may be, to the factory or establishment, a declaration of registration in writing in form 01(hereinafter referred to as employers' registration form).
- The employer shall be responsible for the correctness of all the particulars and information required to be furnished on the employer's registration form.
- The appropriate Regional Office may direct the employer who fails to comply with the requirements of paragraph (a) of this regulation within the time stated therein, to furnish to that office employer's registration form duly completed within such further time as may be specified and such employer shall, thereupon, comply with the instructions issued by that office in this behalf.
- Upon receipt of the completed employer's registration form, the appropriate Regional Office shall, if satisfied that the factory or the establishment is one to which the Act applies, allot to it an employer's code number (unless the factory or the establishment has already been allotted an employer's code

number) and shall inform the employer of that number.

- The employer shall enter the employer's code number on all documents prepared or completed by him/her in connection with the Act the rules and these regulations and in all correspondence with the appropriate office.

Advantages for employers

- Employers are absolved of all their liabilities of providing medical benefits to their employees and their family members or dependants in kind or in the form of fixed cash allowance, lump-sum grant, reimbursement of actual expenses, or opting for any other medical insurance policy of limited scope unless it is a contractual obligation of the employer.
- Employers are granted exemption pertaining to the applicability of Maternity Benefit Act, Workmens' Compensation Act etc. in respect of employees covered under the ESIC Scheme.
- This results in employers possessing a productive and well-secured workforce, at their disposal which is an essential ingredient for better productivity of an organization.
- Employers are absolved of any responsibility in times of physical distress of their employees or workers such as employment injury, sickness or physical disablement thereby resulting in loss of wages since the responsibility of paying cash benefits shifts from the employer to the ESIC Corporation in respect of insured employees.
- Any amount or sum paid by way of contribution under the ESIC Act is deducted in computing 'Income' under the Income Tax Act.

Coverage of factory/establishment

In the first instance, this Act is applicable to all non-seasonal factories utilizing power and employing ten or more individuals, as well as is applicable to non-power using manufacturing organizations and establishments employing 20 or more persons for wages and falling under the ambit of an implemented geographical area. As of now, employees of establishments, companies or factories that fall within the ambit of coverage and earning wages not exceeding Rs. 10,000/- per month are covered under this ESIC Scheme.

Under Section 1(5) of the Act, the provisions of ESIC Act have been extended to the following classes of establishments:

- Shops and Commercial establishments
- Cinemas, including preview theatres
- Hotels & Restaurants
- Clubs
- Newspaper establishments
- Road Motor Transport establishments

Under Section 1(5) of the ESIC Act, the Indian Government is empowered to extend the Scheme to any other establishment or class of establishments, commercial, industrial, agricultural or otherwise, with the passage of time. A State Government may extend the provisions of this Act in consultation with the ESIC and with the prior approval of the Central Government, after submitting six months' notice of its intention in the official gazette; provided that where the provisions of this Act have been brought into force or implemented in any part of State, the said provisions shall stand extended to any such establishment or class of establishments within that part,

if such provisions have already been extended to similar establishments or class of establishments in another part of that same State.

Finances

This ECIS Scheme is primarily funded by contributions raised from insured employees and their employers in the implemented areas across India as a small but specified percentage of wages payable to such employees.

Employees in receipt of an average daily wage of Rs 40/- or less are exempted from payment of their share of contribution but are entitled to all social security benefits under this scheme.

The contribution rates are as follows:

- Employees' contribution – 1.75 % of wages
- Employers' contribution – 4.75 % of wages

Under the provisions of this Act, the State Governments contribute 12.5 percent of expenditure on medical expenses incurred on ESIC beneficiaries in their respective States within the per capita ceiling. Any expenditure exceeding this ceiling is borne entirely by the respective state governments.

The contributions made by employees and their employers are deposited in a common pool known as the ESIC Fund that is utilized for payment of cash benefits to the insured persons and their family members including dependants in addition to providing medical facilities to the beneficiaries under this scheme. The administrative and other expenses of the Corporation are also met from this pool fund.

Exemptions

The provisions of the ESIC Act are not applicable to factories or establishments under the control of Central Government / State Governments because such employees working with PSUs are in receipt of social security benefits that are substantially similar or superior to the benefits provided under the ESIC Act. The case of each such Public Sector Undertaking (PSU), is decided on merit by comparing the quality and quantity of benefits being provided to the employees by the concerned managements with those being conferred and admissible under the ESIC Act.

Contributions

The amount payable to the Corporation by the Principal Employer in respect of an employee is termed as Contribution. It comprises the amount payable by the employee and the employer.

It is obligatory on the part of the employer to calculate and remit ESIC contribution that comprises of employers' share 4.75% plus employees' share of 1.75% that needs to be paid on or before 21st of the following month to the month to which the salary is related. For example suppose if an employee who draws up to Rs.70/- as daily average wage, then such an employee is granted exemption from payment of his/her share of contribution. The employer is however required to pay employer's share of 4.75% of the salary receivable by the employee.

Contribution period

1st April to 30th September.

1st October to 31st March

E.g. If the person joined insurance employment for the first time, say on 5th January, his first contribution period will be from 5th January to 31st March and his corresponding first benefit will be from 5th October to 31st December.

Recovery of contribution

In the first instance the Principal Employer is required to pay employers' share of contribution in respect of every employee whether employed directly or through immediate employer. The employees' share may thereafter,

be recovered by making deduction from their wages for the wage period for which their contribution is made, however is payable. No such deduction may be made from any wages to their employees other than those relating to the period in respect in which contribution is payable.

Medical Benefit

The ESIC Scheme provides wide-ranging variety of medical treatment to insured individual and their dependents (including their family members). This is made possible through a network of ESIC Dispensaries & Panel Clinics, Diagnostic Centers and ESIC Hospitals etc. Super-specialty medical facilities are provided to the beneficiaries through advanced super-specialty medical institutions that are recognized and empaneled for the purpose on referral basis. The ESIC has set up a Revolving Fund in most of the States across India for ensuring smooth flow of funds for facilitating super-specialty treatments of ESIC beneficiaries.

All the insured individuals and their dependents including their family members under ESIC scheme are entitled to free, full and comprehensive medical care under the ECIS Scheme. The Medical benefit package covers all aspects of healthcare ranging from primary to super-specialty facilities.

Sickness Benefit

Sickness Benefit represents cash payments made to an insured person periodically during the period of certified sickness occurring in a benefit period when insured person undergoes medical treatment and attendance with abstention from work on valid medical grounds.

The maximum duration of Sickness Benefit is 91 days in two consecutive benefit periods. However, there is a waiting period of 2 days which is waived if the insured person is certified sick within 15 days of the spell for which sickness benefit was last paid. The sickness benefit rate is approximately equivalent to 50% of the average daily wages of the insured person.

Extended Sickness Benefit

After exhausting the Sickness Benefit payable up to 91 days, an insured person if suffering from Cancer, Tuberculosis, Leprosy, Mental or malignant diseases or any other specified long-term ailment, then such an employee is entitled to Extended Sickness Benefit at a higher cash benefit rate of about 70% of average daily wage for a period of two years.

Enhanced Sickness Benefit

For undergoing sterilization operations for the purpose of family planning, insured persons are eligible to Enhanced Sickness Benefit which is double the rate of sickness benefit.

Maternity Benefit (Section 50 of ESI Act)

Maternity benefit comprises of periodical cash payments to an insured woman as certified by a duly appointed medical officer or mid wife in cases such as confinement or miscarriage or sickness arising on account of pregnancy, confinement, premature birth of child or miscarriage.

Disablement Benefit

Disablement benefit is admissible for disablement that is caused by employment injury. At the first instance, Temporary Disablement Benefit (TDB) is payable as long as the temporary disability lasts. If the employment injury results in partial or total/permanent disability, then Permanent Disablement Benefit (PDB) is payable till the death of the insured individual.

No contributory conditions have been prescribed for this benefit.

Dependent Benefit

Dependents' benefit consists of periodical payments to dependents or family members of an insured individual

who dies on account of an employment injury sustained as an employee under the ESIC Act. There are no contributory conditions or any criteria in order to qualify for such benefits. Thus, in case in an unfortunate or unforeseen incident suppose even if an individual dies of employment injury even on the first day of his employment, his dependants or family members are entitled to the aforesaid benefit.

Funeral Expenses

The funeral expenses are made to meet the expenditure incurred on the funeral of deceased insured individual. This amount is paid either to the eldest surviving member of the family or in his/her absence to that individual who actually incurs the funeral expenses.

Penalties

Different punishment have been prescribed for different types of offences in terms of Section 85: (I) (six months imprisonment and fine ₹5000), (ii) (one year imprisonment and fine), and 85-A: (five years imprisonment and not less to 2 years) and 85-C (2) of the ESI Act, which are self-explanatory. Besides these provisions, action also can be taken under section 406 of the IPC in cases where an employer deducts contributions from the wages of his employees but does not pay the same to the corporation which amounts to criminal breach of trust.

Check List - Employees State Insurance Act, 1948					
S.No	**Type & Nature Of Document**	**Description Of the Form**	**Relevant Clause**	**Schedule Of Submission/ Maintenance**	**Submitting Authority**
1	Form I	Declaration Form	Regulation 11 & 12	to be filled in by the employee with his signature or thumb impression and submit it to the employer	
2	Form I-A	Family Declaration Form	Regulation 15-A	to be filled in by the employee and submitted back to the employer , who shall forward the same to the appropriate office within 10 days from the date of submission by the employee	
3	Form I-B	Changes in family declaration form	Regulation 15-B	to be submitted by the insured person to the employer within 15 days of such changes occurring and the employer in turn would forward the same to the appropriate office within 10 days of receipt.	
4	Form 3	Return of declaration forms	Regulation 14	to be sent by the employer to the appropriate office within 10 days of receipt of the filled up forms	
5	Form 4	Identity Card	Regulation 17	to be issued by the appropriate office in respect of all insured employees, and send the same to the employer, who shall issue the same to the concerned employee after obtaining the signature in the card	
6	Form 4-A	Family Identity Card	Regulation 95-A	to be arranged by the appropriate office and necessary family particulars added in Form 4	
7	Form 6	ESIC-Return of Contributions	Regulation 26	to be sent by the employer in qua duplicate along with receipt copies of challans to the appropriate office within 42 days of termination of related contribution period; within 21 days of permanent closure of the factory; within 7 days of the date of receipt of requisition from the appropriate office	

8	Form 7	Register Of Employees	Regulation 32	to be maintained by the employer in respect of every employee of his factory or establishment
9	Form 8	First Certificate	Regulation 57 & 89-B	this medical certificate is to be issued by the insurance medical officer during the first examination in respect of a spell of sickness or a spell of temporary disablement
10	Form 9	Final Certificate	Regulation 58 & 89-B	to be issued by the insurance medical officer, when he feels that not later than 3 days of the date of examination(other than a first certificate) the insured employee would be fit to resume duties
11	Form 10	Intermediate Certificate	Regulation 59 & 89-B	to be submitted by the insured person within 7 days (commencing from the date of first certificate) in cases wherein the final certificate is not issued within 7 days of issue of first certificate
12	Form 11	Special Intermediate Certificate	Regulation 61 & 89-B	to be furnished by the insured person in cases wherein the insurance medical officer feels that temporary disablement has continued for not less than 28 days and such disablement is likely to continue for a longer period
13	Form 12	Sickness or Temporary Disablement Benefit	Regulation 63	to be submitted by the insured person desirous of claiming sickness or temporary disablement benefit to the appropriate local office by post or otherwise along with appropriate medical certificates
14	Form 12-A	Maternity Benefit for sickness	Regulation 89-B	to be submitted by every insured woman claiming maternity benefit in case of sickness arising out of pregnancy, confinement, premature birth of child or miscarriage to the local appropriate office by post or otherwise
15	Form 13	Sickness or Temporary Disablement Benefit or Maternity Benefit for sickness	Regulation 63 & 89-B	to be submitted by the insured person or insured woman desirous of claiming sickness or temporary disablement benefit to the appropriate local office by post or otherwise along with appropriate medical certificates
16	Form 13-A	Maternity Benefit for sickness	Regulation 89-B	to be submitted by every insured woman claiming maternity benefit in case of sickness arising out of pregnancy, confinement, premature birth of child or miscarriage to the local appropriate office by post or otherwise

17	Form 14	Sickness or Temporary Disablement Benefit or Maternity Benefit for sickness	Regulation 63	to be submitted by the insured person or insured woman desirous of claiming sickness or temporary disablement benefit to the appropriate local office by post or otherwise along with appropriate medical certificates
18	Form 14-A	Maternity Benefit for sickness	Regulation 89-B	to be submitted by every insured woman claiming maternity benefit in case of sickness arising out of pregnancy, confinement, premature birth of child or miscarriage to the local appropriate office by post or otherwise
19	Form 15	Accident Book	Regulation 66	To be maintained by the employer in which appropriate particulars of any accident causing personal injury to an insured person may be entered and preserved every such book for a period of five years.
20	Form 16	Accident Report from Employer	Regulation 68	to be furnished by the employer to the nearest local office and to the nearest insurance medical officer immediately if the injury is serious
21	Form 17	Dependant's benefit - Death Certificate	Regulations 79 & 95-C	To be issued free of charge by the Insurance Medical Officer attending the disabled person at the time of his death
22	Form 18	Dependant's benefit - Claim Form	Regulation 80	To be submitted by the dependant or dependants concerned or by the legal representative of the insured member with all supporting documents to the appropriate local office by post or otherwise
23	Form 18-A	Dependant's Benefit - Claim Form for periodical Payments	Regulation 83-A	To be submitted by the dependant whose claim for dependant's benefit is admitted, to the local appropriate office except in the case of first and final payments
24	Form 19	Maternity Benefit - Notice of Pregnancy	Regulation - 87	To be submitted by an insured woman before confinement to the local appropriate office
25	Form 20	Maternity Benefit - Certificate of Pregnancy	Regulation - 87	To be submitted by an insured woman before confinement to the local appropriate office

26	Form 21	Maternity Benefit - Certificate of Expected Confinement	Regulation - 88	To be submitted by every insured woman claiming maternity benefit before confinement not earlier than 15 days before the expected date of confinement
27	Form 22	Maternity Benefit - Claim Form	Regulation 88 & 89	To be submitted by every insured woman to the local appropriate office stating therein the date on which she ceases to work for remuneration and if the insured woman is claiming maternity benefit for miscarriage the claim form ought to be submitted within 30 days of the date of miscarriage.
28	Form 23	Maternity Benefit - Certificate of Confinement or Miscarriage	Regulation 88 & 89	To be submitted by every insured woman within 30 days of the date on which her confinement takes place to the local appropriate office
29	Form 24	Maternity Benefit - Notice Of Work	Regulation 91	To be furnished by an insured woman who has claimed maternity benefit, if she does work for remuneration on any day during the period for which maternity benefit would be payable to her.
30	Form 24-A & 24-B	Maternity Benefit after the death of an insured woman leaving behind the child / Maternity Benefit- Death Certificate	Regulation 89-A	To be submitted by the nominee or legal representative of the insured woman to the local appropriate office, a claim for maternity benefit within 30 days of the death of the insured woman, together with a death certificate in 24-B
31	Form 25	Claim for Permanent Disablement Benefit	Regulation 76-A	To be submitted by an insured person declared as permanently disabled by a Medical Board to the local appropriate office by post or otherwise
32	Form 25-A	Funeral Expenses Claim Form	Regulation 95-E	To be submitted by the claimant entitled, to the local appropriate office and in case of a minor, by his guardian and the form ought to be submitted with all supporting documents
33	Form 26	Certificate for permanent disablement benefit	Regulation 107	To be submitted by every person whose claim for permanent disablement has been admitted at six monthly intervals, a certificate attested by such authority as may be specified by the director general

34	Form 27	Declaration & Certificate for Dependant's Benefit	Regulation 107-A	To be submitted by every person whose claim for dependant's benefit has been admitted at six monthly intervals , duly attested by such authority as may be specified by the director general
35	Form 28	Abstention Verification	Regulation 52-A	To be furnished by every employer to the appropriate office, such particulars & information in respect of abstention of an insured person from work for which sickness benefit or disablement benefit for temporary disablement have been claimed or paid
36	Form 28-A	Abstention Verification	Regulation 52-A	To be furnished by every employer to the appropriate office, such particulars & information in respect of abstention of an insured woman from work for which maternity benefit has been claimed or paid

EMPLOYEES' PROVIDENT FUNDS AND MISCELLANEOUS PROVISIONS ACT, 1952

Applicability

- Applies to entire India (except Jammu & Kashmir)
- Applies to every establishment which is a factory engaged in any industry specified in Schedule 1 & in which 20 or more persons are employed
- Any other establishment employing 20 or more persons which Central Government may, by notification, specify in this behalf.
- Any establishment employing even less than 20 persons can be covered voluntarily u/s 1(4) of the Act

Eligibility

Any person who is employed for work of an establishment or employed through contractor in or in connection with the work of an establishment.

Applicability

- Every establishment which is factory engaged in any industry specified in Schedule 1 and in which 20 or more persons are employed.
- Any other establishment employing 20 or more persons which Central Government may, by notification, specify in this behalf.
- Any establishment employing even less than 20 persons can be covered voluntarily u/s 1(4) of the Act.

Payment of Contribution

- The employer shall pay the contribution payable to the EPF, DLI and Employees' Pension Fund in respect of the member of the Employees' Pension Fund employed by him directly by or through a contractor.
- It shall be the responsibility of the principal employer to pay the contributions payable to the EPF, DLI and Employees' Pension Fund by himself in respect of the employees directly employed by him and also in respect of the employees directly employed by him and also in respect of the employees employed by or through a contractor.

Rates of Contribution

Equal contribution of 12% (10% in certain cases) of Wages (Basic wages, dearness allowance and retaining

allowance, if any) is required to be paid by employer and employee (Whether employed directly or through contractor).

Employees can opt to contribute more than 12% of their wages (Voluntary contribution)

Option of Voluntary Provident Fund (VPF) to be provided to employees/workers – in writing (although Employer not obliged to contribute equal amount)

Rate of 10 % is applicable for following industries

- For establishments having less than 20 employees, or
- Sick Industrial Company declared by Board for Industrial and Financial Reconstruction, or – Establishment which has at the end of any financial year, accumulated losses equal to or exceeding its entire net worth or
- Any establishment in following industries:- (a) Jute (b) Beedi (c) Brick (d) Coir and (e) Guar gum Factories

Threshold and Procedures

- Contribution by employer is subject to present threshold of Rs. 15,000/- per month, beyond which there is no obligation by employer to contribute.
- Establishment will include all department and branches in any location.
- In respect of employees employed through Contractor, Contractor shall recover the contribution payable by such employee and pay to Principal Employer amount of contribution along with administrative charges or Contractor may deposit such contribution directly to EPFO – after taking a separate EPF Code No.
- Employer needs to deposit its statutory contribution by 15th of every month. (With respect to wages of immediate preceding month).
- If the employee leaves the existing establishment and obtains re-employment to the establishment in which this act is applicable, it is the duty of the employer to transfer the accumulations to the credit of such employee's account in the fund in which he is re-employed.

Benefits

Employees covered enjoy a benefit of Social Security in the form of a non-attachable and non-withdrawable (except in severely restricted circumstances like buying house, marriage/education, etc.) financial nest egg to which employees and employers contribute equally throughout the covered persons' employment.

This sum is payable normally on retirement or death. Other Benefits include Employees' Pension Scheme and Employees' Deposit Linked Insurance Scheme.

Penalty

In case the employer has made default in transferring of the accumulated amount, he is required to pay damages as follows:

- If period of default is less than 2 months- 5 % of arrears per annum
- If period of default is 2 -4 months- 10 % of arrears per annum
- If period of default is 4 -6 months- 15 % of arrears per annum
- If period of default is more than 6 months- 25 % of arrears per annum.

With Effect from 01.04.2012, employers need to make remittance only after generating challan (ECR) from the

Employer Portal of EPFO.

Other Requirements

- No requirement to submit paper returns viz. Form 5/10/12A/3A and 6A
- Salary for PF calculation should not be less than the 'Minimum Wages' – as per directions issued by Central Provident Fund Commissioner to all Regional Provident Fund Commissioners (to be checked particularly in case of 'Contract Labour' deployed through Contractors).
- Once a PF Member in any organization, cannot be left out of coverage, merely because he draws remuneration above the prescribed wage/salary ceiling (presently Rs. 15,000/- per month).
- Principal Employer statutorily responsible for default of Contractor, w.r.t. statutory payments of PF contribution of Contract Labour (this is however subject to judicial review). In Madurai District Central Co-operative Bank Ltd. rep. by its Special Officer vs. Employees' Provident Fund Organisation, (2012 LLR 702), the Madras High Court has held that when a separate code number was allotted, the employees of the contractor, by no stretch of imagination can be treated to be employees of the principal employer.

Check List - Employees' Provident Fund & Miscellaneous Provisions Act, 1952 & The Schemes Provided Thereunder					
S. No	**Type & Nature of Document**	**Description of the Form**	**Relevant Clause**	**Schedule of Submission/ Maintenance**	**Submitting Authority**
1	Form 2	Declaration & Form of nomination for EPF / Pension/ IF to be filled in by the eligible employee	33(EPF);18(EPS);10(EDLI)	As & when a new entrant joins the scheme	Concerned RPFC
2	Form 3A/ Form 7 (PS)	Members' Annual Contribution Cards	35,42,43,44(EPF); 19(EPS)	By 30th April every year for the year ending 31st March	Concerned RPFC
3	Form 9/Form 3(PS)/ Form 1(IF)	Consolidated return of employees entitled to become members of the funds on the date of application of the scheme	36(EPF); 20(EPS); 10(EDLI)	within 15 days of the commencement of the scheme	Concerned RPFC
4	Form 5 / Form 4(PS)/ Form 2 (IF)	Return of employees qualifying for membership under PF, Pension & Insurance Fund for the first time during the month	36(EPF); 20(EPS); 10(EDLI)	within 15 days of the close of month	Concerned RPFC

5	Form 10 / Form 5(PS)	Return of employees leaving the service of the employer during the month	36(EPF) ; 20(EPS)	within 15 days of the close of month	Concerned RPFC
6	Form 5-A	Return of ownership in duplicate	36A(EPF); 21(EPS); 1(EDLI)	Immediately on coverage & within 15 days of making any change in the establishment	Concerned RPFC
7	Form 12-A/ Form 6 (PS)/ Form 4 (IF)	Consolidated Statement Of Dues and Remittance	38(EPF) ; 20(EPS) ; 10(EDLI)	within 20 days of the close of the month	Concerned RPFC
8	Form 6-A/ Form 8 (PS)	Consolidated Annual Contribution statement	43(EPF) ; 20(EPS)	By 30th April every year for the year ending 31st March	Concerned RPFC
9	Form 13	Form concerning transfer of previous accumulation dues from existing PF	28(EPF)	As and when required	Concerned RPFC
10	Form 11	Details of past employment / membership of employee		As and when required	Concerned RPFC
11	Challan (there is one consolidated challan of accounts 1,2,10,21 & 22)	Remittance of PF contribution, Pension fund, Administration & Inspection Charges, EDLI & its admin. Charges		within 15 days of the close of month	Concerned RPFC
12	Form- 10 C	Form to be used by a member of EPS 1995 for claiming withdrawal benefit / Scheme Certificate		As and when required	Concerned RPFC

13	Form- 10 D	Form to be used for claiming superannuation pension, Retirement pension, Short Service Pension, Disablement pension, Widow Pension, Children Pension, Orphan Pension		As and when required	Concerned RPFC
14	Form- 19	Claim form to be used by a major member of the EPF scheme		As and when required	Concerned RPFC
15	Form- 20	Claim form to be used by a nominee/ or a legal heir in case of death of a member of the EPF scheme		As and when required	Concerned RPFC

PAYMENT OF BONUS ACT, 1965

Applicability

- Every factory (as defined under Factories Act, 1948)
- Establishment in which 20 or more persons are employed on any day during an accounting year. (CG may specify lesser no. of employees)

Eligibility of Bonus

- Employees/workers who have worked for more than 30 days in a month and drawing salary/remuneration of Rs. 21,000/- per month.
- Salary or wage means all remuneration (other than remuneration in respect of overtime work) capable of being expressed in terms of money, and Dearness allowance (that is to say, all cash payments, by whatever name called, paid to an employee on account of a rise in the cost of living)

(i) As per Payment of Bonus Amendment Act, 2015, eligibility limit was enhanced from Rs 10,000/- per month to Rs 21,000/- per month &Calculation ceiling from Rs. 3,500/- to Rs. 7,000/- per month (with retrospective effect from 1st April, 2014)

(ii) As per the orders passed by Bombay High Court, Karnataka High Court, Allahabad High Court, Kerala High Court, Gujarat High Court, Punjab & Haryana High Court - the retrospective effect of the notification stands stayed throughout India and no coercive steps to be taken against any corporate for recovery of amounts due prior to 31st March, 2016)

Responsibility and Amount of Bonus

- Mandatory for employer to pay Minimum Bonus of 8.33% of Salary & Maximum Bonus of 20% of Salary from the accounting year in which establishment has profits (excluding First 5 years of existence)
- Payment of statutory bonus- within statutory time limit of 8 months of close of financial year

- Company is entitled to adjust any customary or interim bonus/puja bonus, against bonus payable under this Act.

Statutory Registers and Records

- Form A-Showing the computation of the allocable surplus.
- Form B-Showing the set-on and set-off of the allocable surplus.
- Form C -Showing the amount of bonus due to each of the employees and the amount actually disbursed.
- Form D- Annual Return.

Check List - Payment Of Bonus Act, 1965						
S.No	**Type & Nature Of Document**	**Description Of the Form**	**Relevant Clause**	**Schedule Of Submission/ Maintenance**	**Submitting Authority**	**Remarks**
1	Form A	Register showing the computation of allocable surplus	Rule 4(a)	To be maintained by the employer	---	
2	Form B	Register showing the set on & set off of the allocable surplus	Rule 4(b)	To be maintained by the employer	---	
3	Form C	Register showing the details of amount of bonus due to each of the employees, the deductions under section 17 & 18 and the amount actually disbursed	Rule 4(c)	To be maintained by the employer	---	
4	Form D	Annual Return stating the amount of bonus paid to employees for the accounting year ending on 31st March	Rule 5	Within 30 days after the expiry of time limit specified for payment of bonus	Inspector	Time limit for the said purpose is within a period of eight months from the close of account-ing year

PAYMENT OF GRATUITY ACT, 1972 (PAYMENT OF GRATUITY IN CONSONANCE WITH STATE RULES)

Applicability

It is applicable to

- Factories (as registered under Factories Act, 1948)
- Company (As registered under Companies Act, 1956/2013),
- Shop & Establishment (As registered under State Shops & Establishment Act),
- Education institution, employing 10 or more employees
- Registration of establishment

Wages for Calculation

- Payment of Gratuity (15 days salary for every completed year of service) to be payable to an employee after rendering services of 5 years on his:

— Superannuation

— Retirement or resignation

— Death or disablement due to accident or disease.

Display of Notice

- On conspicuous place at the main entrance in English language or the language understood by majority of employees of the factory, etc.

Compliance and Procedure

- Intimation in prescribed Form for any change in the name, address of employer or nature of business - within 30 days of such change.

Nomination

Employee to submit his nomination in Form F - within 30 days of appointment.

Recovery of Gratuity

To apply within 30 days in Form I when not paid within 30 days.

Forfeiture of Gratuity

- On termination of an employee for moral turpitude or riotous or disorderly behavior.
- Wholly or partially for willfully causing loss, destruction of property etc.

Protection of Gratuity

It can't be attached in execution of any decree.

Penalties

Imprisonment for 6 months or fine up to Rs.10, 000 for avoiding to make payment by making false statement or representation.

Imprisonment not less than 3 months and up to one year with fine on default in complying with the provisions of Act or Rules.

Check List - Payment of Gratuity Act, 1972						
S.No	**Type & Nature Of Document**	**Description Of the Form**	**Relevant Clause**	**Schedule Of Submission/ Maintenance**	**Submitting Authority**	**Remarks**
1	Form A	Notice Of Opening	Rule 3 (1)	Within 30 days from which the rules become applicable	Concerned controlling authority of the area	
2	Form B	Notice Of Change	Rule 3 (2)	Within 30 days of any change in the particulars of the establishment like name, address or nature of business	Concerned controlling authority of the area	
3	Form C	Notice Of Closure	Rule 3 (3)	Atleast 60 days before the intended closure of the business	Concerned controlling authority of the area	
4	Form D	Notice for excluding husband from family	Rule 5 (1)	To be submitted by the employee to the employer in triplicate. The employer after receipt forwards a copy to the concerned controlling authority of the area.		
5	Form E	Notice of withdrawal of notice for excluding husband from family	Rule 5 (2)	To be submitted by the employee withdrawing the notice in form D to the employer in triplicate. The employer after receipt forwards a copy to the concerned controlling authority of the area.		
6	Form F	Nomination	Rule 6 (1)	To be submitted by the employee to the employer in duplicate. The employer within 30 days of the receipt of nomination , verify with the service particulars and after attestation return back a copy to the employee.		
7	Form G	Fresh Nomination	Rule 6 (3)	To be submitted by the employee within 90 days of acquiring a family to the employer		
8	Form H	Modification Of Nomination	Rule 6 (4)	To be submitted by the employee to the employer , in cases including where a nominee predeceases an employee		
9	Form I	Application for gratuity by an employee	Rule 7 (1)	To be submitted by the employee, eligible for payment of gratuity to the employer , within 30 days from which the gratuity becomes payable.		

10	Form J	Application for gratuity by a nominee	Rule 7 (2)	To be submitted by the nominee of an employee to the employer within 30 days from the date of gratuity payable to him/her. For this purpose an application in plain paper may also be accepted
11	Form K	Application for gratuity by a legal heir	Rule 7 (3)	To be submitted by the legal heir of an employee, eligible for payment of gratuity , to the employer, within 1 year from the date of gratuity payable to him/her
12	Form L	Notice for payment of gratuity	Rule 8 (1)	On verification of claims made for payment of gratuity, the employer , within 15 days of receipt of an application, issue a notice to the applicant employee , his nominee or legal heir, specifying the amount of gratuity payable and fixing a date of payment not later than the 30th day of receipt of the application.
13	Form M	Notice rejecting payment of gratuity	Rule 8 (1)	On verification of claims made for payment of gratuity, if the claim is found inadmissible, the employer may issue a notice to the applicant employee, his nominee or legal heir , specifying the reasons why the claim is found inadmissible
14	Form N	Application for direction	Rule 10 (1)	In cases wherein the employer refuses to accept a claim application or issues a notice specifying a amount of gratuity which is considered less by the applicant or fails to issue a notice under rule 8, the claimant employee/ his nominee/ legal heir may within 90 days of occurrence of cause for application, apply in form N to the concerned controlling authority of the area for issuing a direction
15	Form O	Notice for appearance before the controlling authority	Rule 11 (1)	On receipt of form N , the concerned controlling authority of the area may call upon the applicant and the employer to appear before him on a specified date, time and place.
16	Form P	Summons	Rule 14	The controlling authority may , at any stage of proceedings, issue summons to the applicant or the employer to produce evidences, documents etc.
17	Form Q	Particulars of application under Section 7	Rule 16(1)	The controlling authority to record the particulars of each case in form Q
18	Form R	Notice for payment of Gratuity	Rule 17	on subsequent verification of the genuineness of the claims made, the controlling authority to issue a notice, specifying to the employer , the amount of gratuity payable and directing the employer for payment of gratuity within 30 days of receipt of notice.

19	Form S	Notice for payment of Gratuity as determined by appellate authority	Rule 18(8)	The controlling authority on receipt of the decision of the appellate authority, modify his direction for payment of gratuity and issue a notice to the employer, specifying the modified amount of gratuity and directing payment within 15 days of receipt of notice by the employer.
20	Form T	Application for recovery of gratuity	Rule 19	In situations wherein, the employer fails to pay the gratuity due under the act in accordance with the notice of the controlling authority , the employee/ his nominee/legal heir may apply to the controlling authority in duplicate for recovery
21	Form U	Display of abstract of the act and rules	Rule 20	The employer to display an abstract of the act and rules framed there under in English and a language understood by the majority of employees at a conspicuous place or near the main entrance of the establishment

EMPLOYEES COMPENSATION ACT, 1923

Applicability (Section 1)

It is applicable all over India.

Coverage of Workmen

All workers irrespective of their status or salaries either directly or through contractor or a person recruited to work abroad.

Employer's liability to pay compensation to a workman

On death or personal injury resulting into total or partial disablement or occupational disease caused to a workman arising out of and during the course of employment.

Amount of compensation

- Where death of a workman results from the injury
  - i. An amount equal to fifty per cent of the monthly wages of the deceased workman multiplied by the relevant factor on an amount of eighty thousand rupees, whichever is more.
- Where permanent total disablement results from the injury.
  - ii. An amount equal to sixty per cent of the monthly wages of the injured workman multiplied by the relevant factor or an amount of ninety thousand rupees, whichever is more

Procedure for calculation

Higher the age – Lower the compensation

- Relevant factor specified in second column of Schedule IV giving slabs depending upon the age of the concerned workman.

When an employee is not liable for compensation

- In respect of any injury which does result in the total or partial disablement of the workman for a period exceeding three days.

- In respect of any injury, not resulting in death or permanent total disablement caused by an accident which is directly attributable to-
- The workman having been at the time thereof under the influence of drink or drugs, or
- Willful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or
- Willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workman.

Report of accident (Rule 11 Form EE)

- Report of fatal Accident and Serious Injury within 7 days to the Commissioner (not application when ESI Act applies).

Offences	Penalty
In case of default by employer	50% of the compensation amount + interest to be paid to the workman or his dependents as the case may be.
Deposit of Compensation	Within one month with the Compensation Commissioner

CONTRACT LABOUR (REGULATION AND ABOLITION) ACT, 1970

Applicability

- Every establishment in which 20 or more workmen are employed or were employed on any day of the preceding 12 months as contract labor.
- Every contractor who employs or who employed on any day of the preceding twelve months 20 or more workmen.

Object of the Act

To regulate the employment of contract labor in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.

Registration of Establishment

Principal employer employing 20 or more workers through the contractor or the contractor(s) on deposit of required fee in Form 1.

Prohibition of Employment of Contract Labour

Only by the appropriate Government through issue of notification after consultation with the Board (and not Courts) can order the prohibition of employment of contract labor.

Revocation of Registration

When obtained by

- Misrepresentation or suppression
- Of material facts etc. after opportunity to the principal Employer.

Licensing of Contractor

- Engaging 20 or more than 20 workers and on deposit of required fee in Form IV.
- Valid for specified period.

Revocation or Suspension & Amendment of Licences

- When obtained by misrepresentation or suppression of material facts.
- Failure of the contractor to comply with the conditions or contravention of Act or the Rules.

Welfare measures to be taken by the Contractor

- Contract labor either one hundred or more employed by a contractor for one or more canteens shall be provided and maintained.
- First Aid facilities.
- Number of rest-rooms as required under the Act.
- Drinking water, latrines and washing facilities.

Laws, Agreement or standing orders inconsistent with the Act-Not Permissible

Unless the privileges in the contract between the parties or more favorable than the prescribed in the Act, such contract will be invalid and the workers will continue to get more favorable benefits.

Liability of Principal Employer

- To ensure provision for canteen, restrooms, sufficient supply of drinking water, latrines and urinals, washing facilities.
- Principal employer entitled to recover from the contractor for providing such amenities or to make deductions from amount payable.

Registers of Contractors

Principal employer

- To maintain a register of contractor in respect of every establishment in Form XII.

Contractor

- To maintain register of workers for each registered establishment in Form XIII.
- To issue an employment card to each worker in Form XIV.
- To issue service certificate to every workman on his termination in Form XV.

Muster Roll, Wages Register, Deduction Register and Overtime Register by Contractor

Every contractor shall:

- Maintain Muster Roll and a Register of Wages in Form XVI and Form XVII respectively when combined.
- Register or wage-cum-Muster Roll in Form XVII where the wage period is a fortnight or less.
- Maintain a Register of Deductions for damage or loss, Register or Fines and Register of Avances in Form XX, from XXI and Form XXII respectively.
- Maintain a Register of Overtime in Form XXIII.
- To issue wage slips in Form XIX, to the workmen at least a day prior to the disbursement of wages.
- Obtain the signature or thumb impression of the worker concerned against the entries relating to him on the Register of wages or Muster Roll-Cum-Wages Register.
- When covered by Payment of Wages Act, register and records to be maintained under the rules.
- Muster Roll, Register of wages, Register of Deductions, Register of Overtime, Register of Fines, Register of Advances, Wage slip.

- To display an abstract of the act and Rules in English and Hindi and in the language spoken by the Majority of workers in such forms as may be approved by appropriate authority.
- To display notices showing rates of wages, hours of work, wage period, dates of payment, names and addresses of the inspector and to send copy to the inspector and any change forthwith.

Offence	Punishment
Obstructions: For obstructing the inspector or failing to produce registers etc.	3 months' imprisonment or fine up to ₹500, or both.
Violation - For violation of the provisions of Act or the Rules	Imprisonment of 3 Months or fine up to ₹1000. On continuing contravention, additional fine up to ₹100 per day

Check List - The Contract Labour (Regulation & Abolition) Act, 1970 & Its Central Rules, 1971

S.No	Forms	Description of the Form	Section/ Clause/Sub-clause	Schedule of Submission/ Maintenance	Submitting Authority	Remarks
1	Form I	Application for Registration of Establishments employing contract labour	Rule 17(1)	As & when required	Registering Officer of the area in which the establishment sought to be registered is located	application to be accompanied by a DD showing payment of fees for registration; application shall be personally delivered or sent by registered post
2	Form II	Certificate of Registration	Rule 18(1)	To be granted by the registering officer to the Principal Employer		
3	Form III	Register of Establishments	Rule 18(3)	To be maintained by the Registering Officer showing particulars of establishments in relation to which certificates of registration have been issued		
4	Form IV	Application For Licence	Rule 21(1)	To be submitted by the contractor for grant of a licence to the licensing officer of the area in which the establishment, in relation to which he is the contractor, is located		
5	Form V	Form of Certificate By Principal Employer	Rule 21(2)	As & when required	Issued by the Principal Employer to the contractor	

6	Form V-A	Application for the adjustment of security deposit	Rule 24(1-A)	Application to be made by the Contractor to the licensing Officer		
7	Form VI	Form of licence granted by the Office of the licensing officer	Rule 25(1)	To be granted by the licensing officer to the Contractor		
8	Form VI-A	Notice of Commencement/ Completion of Contract Work by the licence	Rule 25(2) (viii)	Within 15 days of commence-ment & comple-tion of contract work	Inspector appointed under Sec. 28	To be submitted by the contractor
9	Form VI-B	Notice of Commencement/ Completion of contract work by the employer for each contractor	Rule 81(3)	Within 15 days of commence-ment & comple-tion of contract work under each contractor	Inspector appointed under Sec. 28	To be submitted by the Principal Employer
10	Form VII	Application for renewal of licences	Rule 29(2)	To be applied to the licensing officer by the contractor within 30 days before the date on which licence expires		
11	Form VIII	Application for temporary registration of establishments employing contract labour	Rule 32(2)	When conditions arise requiring the employment of contract labour immediately and estimated to last not more than 15 days	Registering Officer of the area in which the establishment sought to be registered is located	application to be accompanied by a DD showing payment of fees for registration; application shall be personally delivered or sent by registered post
12	Form IX	Temporary Certificate of Registration	Rule 32(3)	To be granted by the registering officer to the Principal Employer		
13	Form X	Application for temporary Licence	Rule 32(2)	To be submitted by the contractor for grant of a licence to the licensing officer of the area in which the establishment, in relation to which he is the contractor, is located		
14	Form XI	Temporary Licence	Rule 32(3)	To be granted by the licensing officer to the Contractor		

15	Form XII	Register of Contractors	Rule 74	To be maintained By the Principal Employer
16	Form XIII	Register of Workmen employed by the contractor	Rule 75	To be maintained by the contractor in respect of each registered establishment where he employs contract labour
17	Form XIV	Employment Card	Rule 76	To be issued by the contractor to each worker within 3 days of employment of worker
18	Form XV	Service Certificate	Rule 77	To be issued by the contractor to the workman whose services have been terminated for any reason whatsoever
19	Form XVI	Muster Roll	Rule 78(1)(a)(i)	To be maintained by the contractor in respect of each work on which he engages contract labour
20	Form XVII	Register of Wages	Rule 78(1)(a)(i)	To be maintained by the contractor in respect of each work on which he engages contract labour
21	Form XVIII	Register of Wages cum Muster Roll	Rule 78(1)(a)(i)	To be maintained by the contractor in respect of each work on which he engages contract labour
22	Form XIX	Wage Slip	Rule 78(1)(b)	To be issued by the contractor to the workmen at least a day prior to the disbursement of wages(applicable when wage period is one week or more
23	Form XX	Register of deductions for damage or loss	Rule 78(1)(a)(ii)	To be maintained by the contractor in respect of each work on which he engages contract labour
24	Form XXI	Register of Fines	Rule 78(1)(a)(ii)	To be maintained by the contractor in respect of each work on which he engages contract labour
25	Form XXII	Register of Advances	Rule 78(1)(a)(ii)	To be maintained by the contractor in respect of each work on which he engages contract labour
26	Form XXIII	Register of Overtime	Rule 78(1)(a)(iii)	To be maintained by the contractor recording therein the number of hours, and wages paid for, overtime work, if any
27	Form XXIV	Return to be sent by the contractor to the licensing officer	Rule 82(1)	To be sent by the contractor in duplicate to the licensing officer not later than 30 days from the close of half year

28	Form XXV	Annual Return of Principal Employer to be sent to the Registering Officer	Rule 82(2)	Before 15th February following the end of the year to which it relates	Registering Officer of the area in which the establishment sought to be registered is located	

INDUSTRIAL DISPUTES ACT, 1947

Objective of the Act

The objective of the Industrial Disputes Act 1947 is to secure industrial peace and harmony by providing machinery and procedure for the investigation and settlement of industrial disputes by negotiations. This act deals with the retrenchment process of the employees, procedure for layoff, procedure and rules for strikes and lockouts of the company.

Meaning of Industrial Dispute

According to Section 2A: Where any employer discharges, dismisses, retrenches or otherwise terminates the services of an individual workman, any dispute or difference between that workman and his employer connected with, or arising out of, such discharge, dismissal, retrenchment or termination shall be deemed to be an industrial dispute notwithstanding that no other workman nor any union of workmen is a party to the dispute.

Significance of Industrial Dispute Act, 1947

Industrial Disputes have adverse effects on industrial production, efficiency, costs, quality, human satisfaction, discipline, technological and economic progress and finally on the welfare of the society. A discontent labour force, nursing in its heart mute grievances and resentments, cannot be efficient and will not possess a high degree of industrial morale. Hence, the Industrial Dispute Act of 1947, was passed as a preventive and curative measure.

Scope

The Industrial Dispute Act of 1947, came into force on the first day of April, 1947. Its aim is to protect the workmen against victimization by the employers and to ensure social justice to both employers and employees. The unique object of the Act is to promote collective bargaining and to maintain a peaceful atmosphere in industries by avoiding illegal strikes and lock outs. The Act also provides for regulation of lay off and retrenchment. The objective of the Industrial Disputes Act is to secure industrial peace and harmony by providing machinery and procedure for the investigation and settlement of industrial disputes by negotiations.

Important Definitions

Industry – has attained wider meaning than defined except for domestic employment, covers from barber shops to big steel companies.

Works Committee –Joint Committee with equal number of employers and employees' representatives for discussion of certain common problems.

Conciliation–is an attempt by a third party in helping to settle the disputes Adjudication – Labor Court, Industrial Tribunal or National Tribunal to hear and decide the dispute.

Industrial dispute – means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person.

Settlement – means a settlement arrived at in the course of conciliation proceeding and includes a written agreement between an employer and a workman arrived at otherwise than in the course of conciliation proceeding where such agreement has been signed by the parties thereto in such manner as may be prescribed and a copy thereof has been sent to an officer authorized by the Appropriate Government and the Conciliation Officer.

Wages – mean all remuneration capable of being expressed in terms of money, which would, if the terms of employment, express or implied were fulfilled, be payable to a workman in respect of his employment or of the work done in such an employment and includes:

(i) such allowances (including dearness allowance) as the workman is for the time being entitled to;

(ii) the value of any house accommodation, or of supply of light, water, medical attendance or other amenity or of any service or of any concessional supply of food grains or other articles;

(iii) Any traveling concession. But the following are excluded:

  (a) Any bonus.

  (b) Any contribution paid or payable to any pension fund or provident fund, or for the benefit of the workman under any law for the time being in force.

  (c) Any gratuity payable on the termination of his service.

Public utility service means-

(i) any railway service or any transport service for the carriage of passengers or goods by air;

(ii) any service in, or in connection with the working of, any major port or dock;

(iii) any section of an industrial establishment, on the working of which the safety of the establishment or the workmen employed therein depends;

(iv) any postal, telegraph or telephone service;

(v) any industry which supplies power, light or water to the public;

(vi) any system of public conservancy or sanitation;

(vii) any industry specified in the First Schedule which the appropriate Government may, if satisfied that public emergency or public interest so requires, by notification in the Official Gazette, declare to be a public utility service for the purposes of this Act, for such period as may be specified in the notification.

Dispute Settlement Authorities under the Act

The I.D. Act provides elaborate and effective machinery for the investigation and amicable settlement of industrial disputes by setting up the various authorities. These are:

- Works Committee;
- Conciliation Officer;
- Conciliation Board;
- Court of Enquiry;
- Labour Court;
- Industrial Tribunal;
- National Tribunal;
- Arbitrators;
- Grievances Settlement Authority.

Dismissal, etc., of an individual workman to be deemed to be an industrial dispute. (Sec 2A)

Difference in between the workman and his employer connected arising out of following activities shall be deemed to the industrial dispute.

- Dismissal of workman
- Discharge of workman
- Retrenchment of the workman
- Termination of workman from his services

Sec 2A (2)

Workman having the disputes can make an application to the conciliation officer to settle the dispute. After the expiry of 3 months of time conciliation officer fails to settle the dispute, workman can make a direct application to labour courts or tribunals for adjudication.

Sec 2A (3)

Workman should make an application to labour courts or tribunals for adjudication before the expiry of 3 years from the date of discharge, dismissal, retrenchment or otherwise termination of service of workman,

Works Committee (Sec. 3)

In the case of an industrial establishment in which 100 or more workmen are employed, the appropriate Government may require the employer to constitute a 'Work Committee'. It consists of equal number of representatives of employers and workmen engaged in the establishment. The representatives of the workmen shall be chosen from amongst the workmen engaged in the establishment and in consultation with the registered trade union, if any. Works committee deals with the workers problem arising day to day in the industrial establishment.

Conciliation Officer (Sec. 4)

The appropriate Government is empowered to appoint any number of persons, as it thinks fit, to be conciliation officers. The conciliation officer having duty of mediating and acts as the mediators in between the parties to resolve the dispute.

In the case of public utility services matters like strikes and lockouts the conciliation officer can initiate the conciliation proceeding ad tries to settle the dispute in between the parties.

If the conciliation officer fails to resolve the dispute between the parties, he should report to the appropriate government. If necessary the dispute shall be referred to the Board, Labour Court, Tribunal or National Tribunal, by the appropriate government. (Sec 12 (5))

Duties of conciliation officers. (Sec 12)

- Hold conciliation proceedings relating to Strikes and lockouts procedural matters of public utility services.
- Investigate the matters of the disputes.
- Conciliation officers shall induce the parties to come to a fair and amicable settlement of the dispute.
- Duty to send the report of settlement of dispute and memorandum of the settlement signed by the parties to the dispute to the government or his superior.
- In case of failure of settlement of dispute in between parties, duty to send them to the government or his superior, report of facts and circumstances relating to the disputes and in his opinion, a settlement could not be arrived at,

- Duty to send the report to the government or his superior within 14 days from the commencement of the proceeding or within such shorter period as may be fixed by the appropriate Government.

Conciliation Board (Sec. 5)

As occasion arises appropriate Government is also authorized to constitute a Board of conciliation for promoting the settlement of an industrial dispute. It consists of a chairman who shall be an independent person, and two or four other members. The members appointed shall be in equal numbers to represent the parties to the dispute. On the dispute being referred to the Board it is the duty of the Board to do all things as it thinks fit for the purpose of inducing the parties to come to fair and amicable settlement.

If there are many parties relating to or in the dispute the government may appoint the conciliation board consisting of the above said members

According to section 10 (2) when parties in the industrial dispute apply to the government to refer dispute to the Conciliation Board and if government satisfies it shall make the reference to the Conciliation Board.

Duties of Board (Sec 13)

- It shall be the duty of the Board to endeavor to bring about a settlement of dispute.
- Investigate the matters relating to the dispute between parties and inducing the parties to come to a fair and amicable settlement of the dispute.
- In case of failure of settlement of dispute in between parties, duty to send to the government the report of facts and circumstances relating to the disputes and board opinion, a settlement could not be arrived at,
- The Board shall submit its report under this section within 2 months of the date on which the dispute was referred to it or within such shorter period as may be fixed by the appropriate Government.

Court of Enquiry (Sec. 6)

As occasion arises, Government can initiate a Court of Inquiry. This Court of Inquiry was to find out matters connected with or relevant to an industrial dispute. Where a Court consists of two or more members, one of them shall be appointed as the chairman.

A Court of Inquiry looks into only matters which are referred to it by Government and submits its report to the Government ordinarily within certain period from the date of reference.

Adjudication

1. Labour Court - The appropriate Government is empowered to constitute one or more Labour Courts. Its function is the adjudication of industrial disputes relating to any matter specified in the Second Schedule.
2. Industrial Tribunal -The appropriate Government may, by notification in the Official Gazette, constitute one or more Industrial Tribunals for the adjudication of industrial disputes relating to any matter, whether specified in the Second Schedule or the Third Schedule and for performing such other functions as may be assigned to them under this Act.

According to Section 10 (2) when parties in the industrial dispute apply to the government to refer dispute to the industrial tribunal and if government satisfies it shall make the reference to the industrial tribunal.

According to Section 10 (6) no Labor Court or Tribunal shall have jurisdiction to adjudicate upon any matter which is under adjudication before the National Tribunal.

(i) A Tribunal consists of one person only.

(ii) For appointment as the presiding officer of a Tribunal

(iii) he is, or has been, a Judge of a High Court; or

(iv) he has, for a period of not less than 3 years, been a District Judge or an Additional District Judge;

(v) he is or has been a Deputy Chief Labour Commissioner (Central) or Joint Commissioner of the State Labour Department, having a degree in law and at 7 seven years' experience in the labour department after having acquired degree in law including three years of experience as Conciliation Officer:

Provided that no such Deputy Chief Labour Commissioner or Joint Labour Commissioner shall be appointed unless he resigns from the service of the Central Government or State Government, as the case may he, before being appointed as the presiding officer; or he is an officer of Indian Legal Service in Grade III with three years' experience in the grade."

3. National Tribunal - The Central Government may, by notification in the Official Gazette, constitute one or more National Industrial Tribunals. Its main function is the adjudication of industrial disputes which involve questions of national importance or affecting the interest of two or more States.

According to section 10 (1-A) dispute involves any question of national importance or is of such a nature that industrial establishments situated in more than one State, whether it relates to any matter specified in the Second Schedule or the Third Schedule, the government will order in writing refer to National Tribunal for adjudication.

According to sec 10 (2), when parties in the industrial dispute apply to the government to refer dispute to the National Tribunal and if government satisfies it shall make the reference to the National Tribunal.

The Central Government shall appoint a National Tribunal consisting of one person only.

(i) A person to be appointed a presiding officer of a National Tribunal must be, or

(ii) must have been, a judge of a High Court or

(iii) must have held the office of the chairman or

(iv) Any other member of the Labour Appellate Tribunal for a period of not less than two years.

The Central Government may appoint two persons as assessors to advise the National Tribunal.

Arbitration

Voluntary reference of disputes to arbitration (Section 10 (a)) - An arbitrator is appointed by the Government. Whether the dispute is before Labour Court, or Industrial Tribunal or National Tribunal, the parties can go to arbitration by written agreement. The arbitrators conduct the investigation in to the dispute matters and give arbitration award (final decision or settlement or decree) as for making reference of an industrial dispute. If an industrial dispute exists or is apprehended and the employer and the workman agree to refer the dispute to an arbitration, they may refer the dispute to an arbitration. But such reference shall be made before the dispute has been referred under Sec. 19 to a Labour Court or Tribunal or National Tribunal by a written agreement. The arbitrator may be appointed singly or more than one in number. The arbitrator or arbitrators shall investigate the dispute and submit to the appropriate Government the arbitration award signed by the arbitrator or all the arbitrators, as the case may be.

Grievance Settlement Authority (Section 9 (c)) - This Section is incorporated as a new chapter II B of the Act. As per this Section, the employer in relation to every industrial establishment in which fifty or more workmen are employed or have been employed on any day in the preceding twelve months, shall provide for, in accordance with the rules made in that behalf under this Act, a Grievances Settlement Authority.

Every industrial establishment employing 20 or more workmen shall have one or more Grievance Redressal Committee for the resolution of disputes arising out of individual grievances.

- The Grievance Redressal Committee shall consist of equal number of members from the employer and the workmen.
- The chairperson of the Grievance Redressal Committee shall be selected from the employer and from among the workmen alternatively on rotation basis every year.
- The total number of members of the Grievance Redressal Committee shall not exceed more than 6: Provided that there shall be, as far as practicable, one woman member if the Grievance Redressal Committee has two members and in case the number of members is more than two, the number of women members may be increased proportionately.
- The Grievance Redressal Committee may complete its proceedings within forty-five days on receipt of a written application by or on behalf of the aggrieved party.
- The workman who is aggrieved of the decision of the Grievance Redressal Committee may prefer an appeal to the employer against the decision of Grievance Redressal Committee and the employer shall, within one month from the date of receipt of such appeal, dispose off the same and send a copy of his decision to the workman concerned.
- Nothing contained in this section shall apply to the workmen for whom there is an established Grievance Redressal Mechanism in the establishment concerned."

Awards (Decree) (Sections 16, 17, 17A)

- The award of a Labour Court or Tribunal or National Tribunal shall be in writing and shall be signed by its presiding officer. [Sec 16(2)].
- Every arbitration award and every award of a Labour Court, Tribunal or National Tribunal shall, within a period of 30 days from the date of its receipt by the appropriate Government, be published in such manner as the appropriate Government thinks fit. [Sec 17(1)].
- The award published shall be final and shall not be called in question by any Court in any manner whatsoever. [Sec 17 (2)].
- An award (including an arbitration award) shall become enforceable on the expiry of thirty days from the date of its publication [Sec 17A (1)].
- Where the award has been given by a National Tribunal, that it will be inexpedient (not advisable or not practicable) on public grounds affecting national economy or social justice to give effect to the whole or any part of the award, the appropriate Government, or as the case may be, the Central Government may, by notification in the Official Gazette, declare that the award shall not become enforceable on the expiry of the said period of thirty days. [Sec 17A (1) (b)].
- The appropriate Government or the Central Government may, within 90 days from the date of publication of the award under section 17, make an order rejecting or modifying the award, to legislature of sate or parliament [Sec 17A (2)]. And if no pursuance has made, the order become enforceable after the expiry of 90 days. [Sec 17A (3)].
- Any award as rejected or modified laid before legislature of state or parliament, shall become enforceable on the expiry of 15 days from the date on which is so laid. [Sec 17A (3)].
- Award declared becomes enforceable on the specified date if mentioned, if no date mentioned award becomes enforceable according to above rules.

Period of Operation of Settlements and Awards

- A settlement shall come into operation on such date as is agreed upon by the parties to the dispute, and if no date is agreed upon, on the date on which the memorandum of the settlement is signed by the parties to the dispute.

- An award shall remain in operation for a period of one year from the date on which the award becomes enforceable under section 17A.

Provided that the appropriate Government may reduce the said period and fix such period as it thinks fit.

- The appropriate Government may, before the expiry of the said period, extend the period of operation by any period not exceeding one year at a time as it thinks fit, so however, that the total period of operation of any award does not exceed three years from the date on which it came into operation.

Strikes and Lockouts

Strike as per section 2 (q) means "a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal under a common understanding of any number of persons who are or have been so employed, to continue to work or to accept employment". Mere stoppage of work does not come within the meaning of strike unless it can be shown that such stoppage of work was a concerted action for the enforcement of an industrial demand.

Lockout as per section 2(1) means "the temporary closing of a place of employment, or the suspension of work, or the refusal by an employer to continue to employ any number of persons employed by him". Lockout is the antithesis of strike.

- It is a weapon of the employer while strike is that of the workers.
- Just as a strike is a weapon in the hands of the workers for enforcing their industrial demands, lockout is a weapon available to the employer to force the employees to see his points of view and to accept his demands.
- The Industrial Dispute Act does not intend to take away these rights.
- However, the rights of strikes and lockouts have been restricted to achieve the purpose of the Act, namely peaceful investigation and settlement of the industrial disputes.

Procedure of Strikes

According to Sec. 22(1) No person employed in a public utility service shall go on strike in breach of contract-

(a) Without giving to the employer notice of strike, as hereinafter provided, within six weeks before striking; or

(b) Within fourteen days of giving such notice; or

(c) Before the expiry of the date of strike specified in any such notice as aforesaid; or

(d) During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

Procedure of Lockouts

According to Sec. 22(2) - No person employed in a public utility service shall go on Lockout in breach of contract-

(a) Without giving to the employer notice of Lockout, as hereinafter provided, within six weeks before lockout; or

(b) Within fourteen days of giving such notice; or

(c) Before the expiry of the date of lockout specified in any such notice as aforesaid; or

(d) During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

Notice of lock-out or strike

According to Sec. 22 (3) the notice of lock-out or strike under this section shall not be necessary where there is already in existence a strike or, as the case may be, lock-out in the public utility service.

Prohibits an employer from declaring a lockout in any of the eventualities mentioned therein (Section 22(2) of the Industrial Disputes Act 1947)

No employer carrying on any public utility service shall lock-out any of his workman

a. Without giving them notice of lock-out as hereinafter provided, within six weeks before locking-out; or

b. Within fourteen days of giving such notice; or

c. Before the expiry of the date of lock-out specified in any such notice as aforesaid; or

d. During the pendency of any conciliation proceedings before a conciliation officer and seven days after the conclusion of such proceedings.

Legal strikes and Lockouts (Section 24 of ID Act 1947)

- A strike or a lockout shall be illegal, if employers or worker who ever disobeys or fails to follow [Sec 22, 23, 10(3), 10-A (4-A)] for commencing strikes or lockout, those strikes and lockout are said to illegal.
- A lock-out declared in consequence of an illegal strike or a strike declared in consequence of an illegal lock-out shall not be deemed to be illegal.

General Prohibition of Strikes and Lock-Outs

No workman who is employed in any industrial establishment shall go on strike in breach of contract and no employer of any such workman shall declare a lock- out--

(a) During the pendency of conciliation proceedings before a Board and seven days after the conclusion of such proceedings;

(b) During the pendency of proceedings before a Labour Court, Tribunal or National Tribunal] and two months after the conclusion of such proceedings;

(bb) During the pendency of arbitration proceedings before an arbitrator and two months after the conclusion of such proceedings, where a notification has been issued under sub- section (3A) of section 10A; or] [10A. Voluntary reference of disputes to arbitration]

(c) During any period in which a settlement or award is in operation, in respect of any of the matters covered by the settlement or award.

No notice of strike and lockout is necessary in industrial establishments except in public utility services.

Penalty for illegal strikes and lock-outs

As per Section-26 of the Industrial Dispute Act 1947, the Penalty for illegal strikes and lock-outs is as below-

(1) Any workman who commences, continues or otherwise acts in furtherance of, a strike which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to fifty rupees, or with both.

(2) Any employer who commences, continues, or otherwise acts in furtherance of a lock-out which is illegal under this Act, shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

Lay-Offs

According to section 25A of chapter VA of Industrial Dispute Act 1947, certain establishments do not have

any provisions relating to layoff of the employees by the employer. In such circumstances, layoff would be considered without any authority of law.

Such establishments are:

i Industrial establishments in which less than 50 workmen are employed, on an average per working day.

ii Industrial establishments which are of a seasonal character and in which work is performed only intermittently.

Employees employed in the above said establishments do not have right for laid-off compensation. However if there is any agreement between employer and employee for that purpose or on the grounds of social justice, laid-off competition can be paid.

Except above said industrial establishments, all other industrial establishments (50 workmen and above industrial establishments which are not of seasonal character) have provisions relating to lay off of the employees by the employer.

Right of Compensation by workmen laid-off

As per Section 25-C, workman has right to lay-off compensation subject to the following conditions, they are:

i. Workman name should be borne on muster rolls of the establishment and he/she is not a badli workman or a casual workman; and

ii. The workman should have completed not less than one year continuous service as defined under Section 25-B; and

iii. The workman should have laid-off, continuously or intermittently;

iv. Then the workman shall be entitled to lay-off compensation for all days during which he was so laid-off;

v. However, the workman shall not be paid lay-off compensation for such weekly holidays as may intervene the period of lay-off.

vi. The lay-off compensation is equal to 50% of the total of the basic wages and dearness allowance that would have been payable to him, if he had not been so laid off.

Explanation: “Badli workman” means a workman who is employed in an industrial establishment in the place of another workman whose name is borne on the muster rolls of the establishment, but shall cease to be regarded as such for the purposes of this section, if he has completed one year of continuous service in the establishment.

Maximum days allowed to Layoff of employee by employer

According to section 25C of Industry and dispute Act 1947, maximum days allowed to Layoff of employee by employer is 45 days, for those days, employee who is laid-off is entitled for compensation equal to 50% of the total of the basic wages and dearness allowance that would have been payable to him, had he not been so laid off.

However, if this contingency is prolonging beyond a reasonable time, say 45 days, it would be matter of serious concern both to the employer and to the workmen because both of them are put to a loss of 50% wages i.e. The employer is required pay lay-off compensation without extracting work from workmen and workmen too, would be losing 50% wages which he would have earned had he not been so laid-off. Therefore the parties can enter into an agreement not to continue lay-off after a period of 45 days in a year.

Workmen not entitled to compensation in certain cases (Section 25E)

(i) If he refuses to accept any alternative employment in the same establishment from which he has

been laid off, or in any other establishment belonging to the same employer situate in the same town or village or situate within a radius of five miles from the establishment to which he belongs, if, in the opinion of the employer, such alternative employment does not call. for any special skill or previous experience and can be done by the workman, provided that the wages which would normally have been paid to the workman are offered for the alternative employment also;

(ii) If he does not present himself for work at the establishment at the appointed time during normal working hours at least once a day;

(iii) If such laying-off is due to a strike or slowing-down of production on the part of workmen in another part of the establishment.

Retrenchment

As per Section 2(oo) - "retrenchments" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include-

(a) Voluntary retirement of the workman; or

(b) Retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

43[(bb) Termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation on that behalf contained therein; or]

(c) Termination of the service of a workman on the ground of continued ill-health;]

Procedure for Retrenchment (Section 25G)

The principle of 'Last come; First go'

Where any workman in an industrial establishment who is a citizen of India, is to be retrenched and he belongs to a particular category of workmen in that establishment, in the absence of any agreement between the employer and the workman in this behalf, the employer shall ordinarily retrench the workman who was the last person to be employed in that category, unless for reasons to be recorded the employer retrenches any other workman.

Re-employment of Retrenched Workmen (Section 25H)

Where any workmen are retrenched, and the employer proposes to take into his employ any persons, he shall, in such manner as may be prescribed, give an opportunity [to the retrenched workmen who are citizens of India to offer themselves for re-employment, and such retrenched workmen] who offer themselves for re-employment shall have preference over other persons.

Retrenchment Conditions

To an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than [50 but not more than 100] workmen were employed on an, average per working day for the preceding twelve months. (Section 25A).

According to the Section 25F

a. Employee should have continuous service for not less than one year under an employer

b. One month's notice in writing indicating the reasons for retrenchment or payment for the period of the notice

c. Compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months.

d. Notice in the prescribed manner is served on the appropriate government

To an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than [one hundred] workmen were employed on an, average per working day for the preceding twelve months.

Conditions Precedent to Retrenchment of Workmen

According to the Section 25N:

a. Employee should have continuous service for not less than one year under an employer

b. Three months' notice in writing indicating the reasons for retrenchment or payment for the period of the notice

c. Compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months.

d. An application for permission to specified authority for the intended retrenchment and a copy of such application shall also be served simultaneously on the workmen concerned in the prescribed manner.

e. Compulsory permission from competent authority by employer retrenchment of workmen

f. For Industrial establishments in which not less than 100 workmen are employed, on an average per working day and are of not being seasonal character and in which work is performed only intermittently, have to seek prior permission from competent authority by the employer to layoff workman.

If no application seeking permission to retrench workmen is made by the employer or where such permission is refused, such retrenchment shall be deemed to be illegal and the workmen shall be entitled to all benefits as if they have not been given any notice. (Sub-Section 7).

Penalty for Lay-Off and Retrenchment without Previous Permission [Section5Q]

- Section 25K applies to an industrial establishment (not being an establishment of a seasonal character or in which work is performed only intermittently) in which not less than [one hundred] workmen were employed on an, average per working day for the preceding twelve months.
- Section 25M provides for Compulsory permission from competent authority by employer to lay off of Workmen of Industrial Dispute act 1947 –

a. When there are more than 100 (in UP 300 or more) workmen during preceding 12 months.

b. Three months' notice or wages thereto.

c. Form QA

d. Compensation @ 15 days' wages.

- Section 25N states the Conditions precedent to retrenchment of workmen
- Any employer who contravenes the provisions of section 25M or section 25N shall be punishable with imprisonment for a term which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

During Pendency of Proceedings (Section 33)

During the pendency of any conciliation proceeding before a conciliation officer or a Board or of any proceeding before an arbitrator or a Labour Court or Tribunal or National Tribunal in respect of an industrial dispute, employer should not do the following-

- For any misconduct connected with the dispute, discharge or punish, whether by dismissal or otherwise, any workmen concerned in such dispute,

- Alter the term of contract according to standing orders.
- Take action against the protected workman.

If employer wants to take above actions against the employee, employer should makes an application to a conciliation officer, Board, an arbitrator, a Labor Court, Tribunal or National Tribunal.

Prohibition of Unfair Labor Practice either by employer or workman or a trade union as stipulated in fifth schedule

Both the employer and the Union can be punished as per the provisions of Section 25 T.

Offences	Penalty
Committing unfair labour practices	Imprisonment of up to 6 months or with fine up to ₹ 3,000.
Illegal strike and lock-outs	Imprisonment up to one month or with fine up to ₹50 (₹1000 for lock-out) or with both.
Instigation etc. for illegal strike or lock-outs.	Imprisonment up to 6 months or with fine up to ₹1,000
Giving financial aid to illegal strikes and lock-outs.	Imprisonment for 6 months or with fine up to ₹1,000
Breach of settlement or award	Imprisonment up to 6 months or with fine. On continuity of offence fine uptoRs.200 per day
Disclosing confidential information pertaining to Sec.21	Imprisonment up to 6 months or with fine up to ₹1,000
Closure without 60 days' notice under Sec.25 FFA	Imprisonment up to 6 months or with fine up to ₹5,000
Contravention of Sec.33 pertaining to change of conditions of Service during pendency of dispute etc.	Imprisonment up to 6 months or fine up to ₹1,000.
When no penalty is provided for contravention	Fine up to ₹100 or as the Court decides.

Check List - Industrial Dispute Act, 1947						
S.No	**Type & Nature Of Document**	**Description Of the Form**	**Relevant Clause**	**Schedule Of Submission/ Maintenance**	**Submitting Authority**	**Remarks**
1	Form A	Form of application for the reference of an industrial dispute to a board of conciliation/court of enquiry/labour court/national tribunal	Rule 3	As & when a dispute is sought to be referred	Labour Secretary, GOI/Chief Labour Commissioner/RLC(C)/ALC(C)	

2	Form B	Notice to represent persons on board	Rule 6	To be issued by the Labour Secretary to the parties requiring them to nominate a certain no. of persons to represent them on board		
3	Form C	Agreement	Rule 7	As & when a dispute ought to be referred for arbitration	Labour Secretary, GOI/Chief Labour Commissioner/RLC(C)/ALC(C)	
4	Form D	Summons	Rule 17	To be issued by a board/court/labour court/tribunal/national tribunal which requires the parties to produce any books, documents for purposes of investigation		
5	Form E	Notice of change of service conditions proposed by an employer	Rule 34	As & when a change ought to be effected	Labour Secretary, GOI/Chief Labour Commissioner/RLC(C)/ALC(C)/Secretary of registered trade union	
6	Form F	Form Of Authority	Rule 36	to be sent to the concerned authority giving the names of representatives		
7	Form G	Form Of Nomination Paper	Rule 47	To be delivered to the employer nominating a candidate for election to the works' committee, duly signed by the proposer and the candidate		
8	Form G-1	Progress Report on Constitution and functioning of Works Committee for the half year ending 30th June/31st December	Rule 56-A	Not later than 20th day of the month following the half year	ALC(C)	
9	Form H	Form for memorandum of settlement	Rule 58	To be sent to Labour Secretary, GOI/ Chief Labour Commissioner/RLC(C)/ ALC(C) duly signed by the parties to the proceedings.		
10	Form I	Complaint under Section 33-A of the act	Rule 59	every complaint to be verified and to be presented in triplicate and to be accompanied by as many copies as there are opposite parties to the complaint. The complaint ought to be presented before the labour court/tribunal/National Tribunal		

11	Form J	Application for permission	Rule 60(1)	to be made by the employer seeking express permission in writing of the Conciliation officer/board/labour court/ tribunal/national tribunal	
12	Form K	Application for permission under Section 33	Rule 60(2)	to be made by the employer seeking express permission in writing of the Conciliation officer/board/labour court/ tribunal/national tribunal for any action taken under Section 33-2(a) or (b)	
13	Form K-1	Application for recovery of dues	Rule 62(1)	to be made by the workman or group of workmen to the Labour Secretary/ RLC when any money is due from an employer to a workman or group of workmen	
14	Form K-2	Application by a person authorised by a workman or heir of deceased workman for recovery of dues	Rule 62(1)	to be made by a person authorised in writing by the workman or in the case of death of workman, the assignee or heir of the deceased workman to the Labour Secretary/ RLC when any money is due from an employer to a workman or group of workmen	
15	Form K-3	Application to the labour court to receive entitlements	Rule 62(2)	To be made by a workman or group of workmen to the labour court to receive entitlements due from an employer	
16	Form K-4	Application to the labour court by a person authorised by a workman or heir of deceased workman to receive entitlements	Rule 62(2)	To be made by the assignee or heir of the deceased workman to the labour court to receive entitlements due from an employer	
17	Form L	Form of notice of strike to be given by Union/ Workmen in a Public Utility Service	Rule 71	To be made by Union/Workmen to the employer, with copy to ALC (C)/ RLC(C)/ CLC(C)	

18	Form M	Form Of Notice of Lock Out to be given by an employer carrying on a Public Utility Service	Rule 72	To be made by the Employer with a copy to The Secretary of the Registered Union/ ALC(C)/RLC(C)/CLC(C)		
19	Form N	Form of Report of Strike or Lock Out in a Public Utility Service	Rule 73	Information in this form to be submitted immediately on the occurrence of strike or lock out in a public utility service to the ALC(C) for the local area concerned		
20	Form O	Register Of Settlements	Rule 75	To be filed by the conciliation officer in respect of settlements effected under this act in respect of areas within his jurisdiction		
21	Form O-1	Notice of commncement of lay-off	Rule 75-A	within 7 days of commencement of lay off	RLC(C) with a copy forwarded to ALC(C)	
22	Form O-2	Notice Of Termination of lay off	Rule 75-A	within 7 days of termination of lay off	RLC(C) with a copy forwarded to ALC(C)	
23	Form O-3	Form of application for permission to lay off, to continue the lay off of workmen in Industrial establishments to which provisions of Chapter V-B of the act applies	Rule 75-B(1)	to be sent to the concerned authority and sent through registered post acknowledgement due		
24	Form P	Form of Notice of Retrenchment to be given by an employer under clause © of section 25(F) of this act	Rule 76	To be given within 3 days from the date on which notice is served to the workman	Central Government/ RLC(C)/ ALC(C)/concerned employment exchange	
25	Form P-A	Form of Notice of Retrenchment to be given by an employer under clause (d) of section 25(N) of this act	Rule 76-A(1)	to be served by the employer to the central govt. or such authority as specified under the act		

26	Form Q	Form of notice of closure to be given by an employer under Section 25-FFA of The Industrial Disputes Act, 1947	Rule 76-B	to be sent by the employer to the Labour Secretary(GoI)/ RLC(C)/ALC(C)/Local Employment Exchange	
27	Form Q-A	Form of notice of closure to be given by an employer under Section 25-O(1) of The Industrial Disputes Act, 1947	Rule 76-C(1)	to be served by the employer to the Labour Secretary(GoI) with a copy to the Registered Trade Union of the establishment	

TRADE UNIONS ACT, 1926

Object of the Act

To provide for the registration of Trade Union and in certain respects

To define the law relating to registered Trade Unions

Registration of Trade Union

- Any 7 or more members of a trade union may, by subscribing their names to the rules of the trade union and its compliance.
- There should be at least 10%, or 100 of the work-men, whichever is less, engaged or employed in the establishment or industry with which it is connected.
- It has on the date of making application not less than 7 persons as its members, who are workmen engaged or employed in the establishment or industry with which it is connected.

Forms Required for Registration of Trade Union

- Prescribed form with following details.
- Names, occupations and address of the members' place of work.
- Address of its head office; and

Names, ages, addresses and occupations of its office bearers.

Minimum Requirements for Membership of Trade Union

- Not less than 10%, or 100 of the workmen, whichever is less,
- Subject to a minimum of 7,
- engaged or employed in an
- Establishments etc.

Cancellation of Registration

- If the certificate has been obtained by fraud or mistake or it has ceased to exist or has willfully contravened any provision of this Act.
- If it ceases to have the requisite number of members.

Criminal Conspiracy in Trade Disputes

No office bearer or member of a registered trade union shall be liable to punishment under sub section (2) of conspiracy u/s 120B of IPC in respect of any agreement made between the members for the purpose of furthering any such object of the Trade Union.

Disqualification of Office Bearers of Trade Union

- If one has not attained the age of 18 years.
- Conviction for an offence involving moral turpitude.
- Not applicable when 5 years have elapsed.

Returns

Annually to the Registrar, on or before such date as may be prescribed, a general statement, audited in the prescribed manner, of all receipts and expenditure of every registered Trade Union during the year ending on the 31st December.

Offence	Punishment
For making false entry in or any omission in general statement required for sending returns.	Fine up to ₹500. On continuing default, additional fault, ₹5 for each week (not exceeding ₹50).
For making false entry in the form.	Fine up to ₹500.
Supplying false information regarding Trade Union	Fine up to ₹200.

MATERNITY RELIEF ACT, 1961 ALONG WITH MATERNITY BENEFIT (AMENDMENT) ACT, 2017

Object of the Act

To protect the dignity of motherhood and the dignity of a new person's birth by providing for the full and healthy maintenance of the woman and her child at this important time when she is not working.

Cash Benefits

- Leave with average pay for six weeks before the delivery.
- Leave with average pay for six weeks after the delivery.
- A medical bonus of Rs.25 if the employer does not provide free medical care to the woman.
- An additional leave with pay up to one month if the woman shows proof of illness due to the pregnancy, delivery, miscarriage, or premature birth.
- In case of miscarriage, six weeks leave with average pay from the date of miscarriage.

Non Cash Benefits/Privilege

- Light work for ten weeks (six weeks plus one month) before the date of her expected delivery, if she asks for it.
- Two nursing breaks in the course of her daily work until the child is 15 months old.

- No discharge or dismissal while she is on maternity leave.
- No change to her disadvantage in any of the conditions of her employment while on maternity leave.
- Pregnant women discharged or dismissed may still claim maternity benefit from the employer.

Exception: Women dismissed for gross misconduct lose their right under the Act for Maternity Benefit

MATERNITY BENEFIT (AMENDMENT) ACT, 2017

The Maternity Benefit (Amendment) Bill 2016 (the "Amendment Bill"), an amendment to the Maternity Benefit Act, 1961 ("Act"), was passed in Lok Sabha on March 09, 2017 , in Rajya Sabha on August 11, 2016 and received an assent from President of India on March 27,2017.

The provisions of The Maternity Benefit (Amendment) Act, 2017 (MB Amendment Act) is effective from April 01, 2017. However, provision on crèche facility (Section 11 A) shall be effective from July 01, 2017.

Applicability: The Act is applicable to all establishments which are factories, mines, plantations, Government establishments, shops and establishments under the relevant applicable legislations, or any other establishment as may be notified by the Central Government.

Eligibility: As per the Act, to be eligible for maternity benefit, a woman must have been working as an employee in an establishment for a period of at least 80 days in the past 12 months. Payment during the leave period is based on the average daily wage for the period of actual absence.

Paid Maternity leave increased to 26 weeks.
Leave prior to expected delivery date - 8 weeks

Key highlights of the Amendment

- Increase in Maternity Benefit: The period of paid maternity leave ("Maternity Benefit") that a woman employee is entitled to has been increased to 26 (twenty six) weeks. Further, the Act previously allowed pregnant women to avail Maternity Benefit for only 6 (six) weeks prior to the date of expected delivery. Now, this period is increased to 8 (eight) weeks. Maternity benefit of 26 weeks can be extended to women who are already under maternity leave at the time of enforcement of this Amendment.
- No increased benefit for Third Child: The increased Maternity Benefit is only available for the first two children. The Amendment provides that a woman having two or more surviving children shall only be entitled to 12 (twelve) weeks of Maternity Benefit of which not more than 6 (six) shall be taken prior to the date of the expected delivery.
- Adoption/Surrogacy: A woman who adopts a child below the age of 3 (three) months, or a commissioning mother (means a biological mother, who uses her egg to create an embryo implanted in any other woman), will be entitled to Maternity Benefit for a period of 12 (twelve) weeks from the date the child is handed over to the adopting mother or the commissioning mother.
- Crèche Facility: Every establishment having 50 (fifty) or more employees are required to have a mandatory crèche facility (within the prescribed distance from the establishment), either separately or along with other common facilities. The woman is also to be allowed 4 (four) visits a day to the crèche, which will include the interval for rest allowed to her.
- Work from home: If the nature of work assigned to a woman is such that she can work from home, an employer may allow her to work from home post the period of Maternity Benefit. The conditions for working from home may be mutually agreed between the employer and the woman.
- Prior Intimation: Every establishment will be required to provide woman at the time of her initial

appointment, information about every benefit available under the Act.

Leave for Miscarriage & Tubectomy Operation

- Leave with wages at the rate of maternity benefit, for a period of six weeks immediately following the day of her miscarriage or her medical termination of pregnancy.
- Entitled to leave with wages at the rate of maternity benefit for a period of two weeks immediately following the day of her tubectomy operation.

Prohibition of dismissal during absence of Pregnancy

- Discharge or dismissal of a woman employed during or on account of such absence or to give notice or discharge or dismissal on such a day that the notice will expire during such absence or to very her disadvantage.
- Discharge or dismissal during or on account of such absence or to give notice of discharge or dismissal on such a day that the notice will expire during such absence, or to vary to her disadvantage any of the conditions of her service.
- At the time during her pregnancy, if the woman but for such discharge or dismissal would have been entitled to maternity benefit or medical bonus, etc.
- Not barred in case of dismissal for cross misconduct.

Failure to Display Extract of Act

- Imprisonment may extend to one year or fine.

Forfeiture of maternity benefit

- If permitted by her employer to absent herself under the provisions of section 6 for any period during such authorized absence, she shall forfeit her claim to the maternity benefit for such period.
- For discharging or dismissing such a woman during or on account of her absence from work, the employer shall be punishable with imprisonment which shall not be less than 3 months, but it will extend to one year and will find, but not exceeding Rs.5, 000.

Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

An Act to prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments.

Be it enacted by Parliament in the Thirty-seventh Year of the Republic of India as follows :

Part I- Preliminary

Short title, extent and commencement

(1) This Act may be called the Child Labour (Prohibition and Regulation) Act, 1986.

(2) It extends to the whole of India.

(3) The provisions of this Act, other than Part III, shall come into force at once, and Part III shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different States and for different classes of establishments.

Definitions

In this Act, unless the context otherwise requires,

(i) “Appropriate Government” means, in relation to an establishment under the control of the Central

Government or a railway administration or a major port or a mine or oilfield, the Central Government, and in all other cases, the State Government;

(ii) "Child" means a person who has not completed his fourteenth year of age;

(iii) "Day" means a period of twenty-four hours beginning at midnight;

(iv) "Establishment" includes a shop, commercial establishment, workshop, farm, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;

(v) "Family", in relation to an occupier, means the individual, the wife or husband, as the case may be, of such individual, and their children, brother or sister of such individual;

(vi) "Occupier", in relation to an establishment or a workshop, means the person who has the ultimate control over the affairs of the establishment or workshop;

(vii) "Port authority" means any authority administering a port;

(viii) "Prescribed" means prescribed by rules made under Section 18;

(ix) "Week" means a period of seven days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Inspector ;

(x) "Workshop" means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of Section 67 of the Factories Act, 1948 (63 of 1948), for the time being, apply.

Part II- Prohibition of Employment of Children in Certain occupations And Processes

Prohibition of employment of children in certain occupations and processes.

No child shall be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on,

Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government.

Power to amend the Schedule

The Central Government, after giving by notification in the Official Gazette, not less than three months' notice of its intention so to do, may, by like notification, add any occupation or process to the Schedule and thereupon the Schedule shall be deemed to have been amended accordingly.

Child Labour Technical Advisory Committee

(1) The Central Government may, by notification in the Official Gazette, constitute an advisory committee to be called the Child Labour Technical Advisory Committee (hereafter in this section referred to as the Committee) to advise the Central Government for the purpose of addition of occupations and processes to the Schedule.

(2) The Committee shall consist of a Chairman and such other members not exceeding ten, as may be appointed by the Central Government.

(3) The Committee shall meet as often as it may consider necessary and shall have power to regulate its own procedure.

(4) The Committee may, if it deems it necessary so to do, constitute one or more sub-committees and may appoint to any such sub-committee, whether generally or for the consideration of any particular matter, any person who is not a member of the Committee.

(5) The term of office of, the manner of filling casual vacancies in the office of, and the allowances, if any, payable to, the Chairman and other members of the Committee, and the conditions and restrictions subject to which the Committee may appoint any person who is not a member of the Committee as a member of any of its sub-committees shall be such as may be prescribed.

Part III- Regulation of Conditions of Work of Children

Application of Part

The provisions of this Part shall apply to an establishment or a class of establishments in which none of the occupations or processes referred to in Section 3 is carried on.

Hours and Period of Work

(1) No child shall be required or permitted to work in any establishment in excess of such number of hours as may be prescribed for such establishment or class of establishments.

(2) The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.

(3) The period of work of a child shall be so arranged that inclusive of his interval for rest, under sub-section (2), it shall not be spread over more than six hours, including the time spent in waiting for work on any day.

(4) No child shall be permitted or required to work between 7 p.m. and 8 a.m.

(5) No child shall be required or permitted to work overtime.

(6) No child shall be required or permitted to work in any establishment on any day on which he has already been working in another establishment.

Weekly holidays

Every child employed in an establishment shall be allowed in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.

Notice to Inspector

(1) Every occupier in relation to an establishment in which a child was employed or permitted to work immediately before the date of commencement of this Act in relation to such establishment shall, within a period of thirty days from such commencement, send to the Inspector within whose local limits the establishment is situated, a written notice containing the following particulars, namely:

(a) The name and situation of the establishment;

(b) The name of the person in actual management of the establishment;

(c) The address to which communications relating to the establishment should be sent; and

(d) The nature of the occupation or process carried on in the establishment.

(2) Every occupier, in relation to an establishment, who employs, or permits to work, any child after the date of commencement of this Act in relation to such establishment, shall, within a period of thirty days from the date of such employment, send to the Inspector within whose local limits the establishment is situated, a written notice containing the particulars as are mentioned in sub-section (1).

(3) Nothing in Sections 7, 8 and 9 shall apply to any establishment wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from Government.

Disputes as to age

If any question arises between an Inspector and an occupier as to the age of any child who is employed or is permitted to work by him in an establishment, the question shall, in the absence of a certificate as to the age of such child granted by the prescribed medical authority, be referred by the Inspector for decision to the prescribed medical authority.

Maintenance of register

There shall be maintained by every occupier in respect of children employed or permitted to work in any establishment, a register to be available for inspection by an Inspector at all times during working hours or when work is being carried on in any such establishment, showing:

(a) The name and date of birth of every child so employed or permitted to work ;

(b) Hours and periods of work of any such child and the intervals of rest to which he is entitled;

(c) The nature of work of any such child; and

(d) Such other particulars as may be prescribed.

Display of notice containing abstract of Sections 3 and 14

Every railway administration, every port authority and every occupier shall cause to be displayed in a conspicuous and accessible place at every station on its railway or within the limits of a port or at the place of work, as the case may be, a notice in the local language and in the English language containing an abstract of Sections 3 and 14.

Health and Safety

(1) The appropriate Government may, by notification in the Official Gazette, make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishments.

(2) Without prejudice to the generality of the foregoing provisions, the said rules may provide for all or any of the following matters, namely:

(a) Cleanliness in the place of work and its freedom from nuisance;

(b) Disposal of wastes and effluents;

(c) Ventilation and temperature;

(d) Dust and fume;

(e) Artificial humidification;

(f) Lighting;

(g) Drinking water;

(h) Latrine and urinals;

(i) Spittoons;

(j) Fencing of machinery;

(k) Work at or near machinery in motion;

(l) Employment of children on dangerous machines;

(m) Instructions, training and supervision in relation to employment of children on dangerous machines;

(n) Device for cutting off power;

(o) Self-acting machines;

(p) Easing of new machinery;

(q) Floor, stairs and means of access;

(r) Pits, sumps, openings in floors, etc.

(s) Excessive weights;

(t) Protection of eyes;

(u) Explosive or inflammable dust, gas, etc.

(v) Precautions in case of fire;

(w) Maintenance of buildings; and

(x) Safety of buildings and machinery.

Part IV- Miscellaneous

Penalties

(1) Whoever employs any child or permits any child to work in contravention of the provisions of Section 3 shall be punishable with imprisonment for a term which shall not be less than three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.

(2) Whoever, having been convicted of an offence under Section 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years.

(3) Whoever:

(a) Fails to give notice as required by Section 9, or

(b) Fails to maintain a register as required by Section 11 or makes any false entry in any such register ; or

(c) Fails to display a notice containing an abstract of Section 3 and this section as required by Section 12; or

(d) Fails to comply with or contravenes any other provisions of this Act or the rules made thereunder.

Shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to ten thousand rupees or with both.

Modified application of certain laws in relation to penalties

(1) Where any person is found guilty and convicted of contravention of any of the provisions mentioned in sub-section (2), he shall be liable to penalties as provided in sub-sections (1) and (2) of Section 14 of this Act and not under the Acts in which those provisions are contained.

(2) The provisions referred to in sub-section (1) are the provisions mentioned below:

(a) Section 67 of the Factories Act, 1948 (63 of 1948);

(b) Section 40 of the Mines Act, 1952 (35 of 1952);

(c) Section 109 of the Merchant Shipping Act, 1958 (44 of 1958); and

(d) Section 21 of the Motor Transport Workers Act, 1961 (27 of 1961).

Rights of Persons with Disabilities Act, 2016 (Replacing Persons with Disabilities (Equal Opportunity Protection of Rights and Full Participation) Act, 1995)

Introduction

The Rights of Persons with Disabilities Act, 2016 is the disability legislation passed by the Indian Parliament to fulfill its obligation to the United Nations Convention on the Rights of Persons with Disabilities, which India ratified in 2007. Sec 102 of this Act speaks of repealing the pervious legislation in this regard i.e. The Persons with Disability (Equal Opportunity, Protection of Rights and Full Participation) Act of 1995. The Preamble of this Act clearly says that it aims to up hold the dignity of every person in the society and prevent any kind of discrimination. It speaks about the acceptance of people with any kind of disability and to ensure full participation of such persons and their inclusion in the society. Since India happens to be a signatory of the Convention on the Rights of Persons with Disabilities of the United Nations General Assembly, such a domestic legislation for India was indeed indispensable.

Legislative History

The Rights of Persons with Disabilities Bill, 2014 was introduced into the Parliament on 7 February 2014 and passed by the Lok Sabha on 14 December 2016. The Bill was passed by the Rajya Sabha on 16 February 2016 and received the President's assent on 28 December 2016. The Act become operational on 19 April 2017. The Central Government rules 2017 have been notified under Section 100 of the Act and have come into force with effect from the 15 June 2017.

Important Definitions[1]

Barrier: It refers to any factor which hampers the full and effective participation of persons with disabilities in the society. It includes cultural, economic, environmental, attitudinal and structural factors.

Discrimination: It has been defined in relation to disability as any distinction, exclusion, restriction on the basis of disability for which there is an impairing or nullifying of recognition, enjoyment or exercise on equal basis with others of all human rights and fundamental freedom. It has been said to include discrimination in all forms and denial pf reasonable accommodation.

Person with Disability: It has been defined as any person with long term physical, mental, intellectual or sensory impairments which on interacting with barriers hinders effective and equal growth in the society.

Person with Benchmark Disability: It refers to a person who has 40% or more of the specified disability has not been defined in measurable terms. . In case such disability has been defined in measurable terms, it is said to include a person with disability.

Person with Disability having High Support Needs: It means a person with benchmark disability certified under clause (a) of sub-section (2) of section 58, who needs high support.

Rights and Entitlements

Chapter II of the Rights of Persons with Disabilities Act, 2016 deals with the rights and entitlements for persons with disabilities.

Sec 3 speaks about Equality and Non Discrimination. It states that it is the duty of the Government to ensure that persons with disability enjoy right to equality, and a life of respect and dignity. It mandates the Government to take appropriate steps in this regard. It crucially suggests that discrimination, in any form whatsoever, shall not be done onto any person with disability. In fact it also states that it shall be the duty of the Government to

---

1. See, Team Ask Labour, The Rights of Persons with Disabilities Act, 2016

ensure reasonable accommodation to persons with disabilities.

Section 4 states that the Government and the Local Authorities to take measures to ensure that women and children with disability enjoy equal rights.

Section 5 allows such persons with disability to the right, to live in the community. It seeks the Government to ensure that such persons with disabilities are not obliged to live in a particular living arrangement. It also states that the Government should provide in-house assistance to such disabled persons along with personal assistance to support a living and other community support services.

The Act seeks to ensure an absolute end to cruelty and inhuman treatment that is rendered to persons with disability. Sec 6 of this Act ask the Government to take measures, to protect people with disability, against torture, cruel, inhuman and degrading treatment. It also prevents persons with disability from being subject to any sort of research without his free and informed consent.

Section 7 instructs the Government to take measure in order to protect persons with disability from any sort of abuse, violence or exploitation. This section gives all persons and organisations the right to approach the Executive Magistrate in case any incident of inflicting violence on person with disability is noticed. It shall be the duty of the Executive Magistrate to take swift actions once such a complaint is registered with him. It shall be his duty to rescue the victim, provide him with protective custody and provide maintenance to such person with disability.

It also speaks about the duties of a police officer when cases of cruelty against persons with disability are reported. It shall be his duty to let the victim know about his rights to approach the Executive Magistrate for maintenance or the particulars about the nearest organisation that works for the rehabilitation of person with disabilities or even his right to free legal aid.

Section 8 ensures the protection and safety of persons with disability in cases of any risk, armed conflict, humanitarian emergencies or natural disasters. It requires the District, State Disaster Management Authorities as well as the National Disaster Management Authorities to take suitable measures in this regard and maintain a list of persons with disability in every district.

Sections 9 and 10 majorly deal with home and family rights. Sec 9 prevents the separation of any child with disability, from his parents except by an order of the court and necessary relocation to any family member, community member or any governmental or private run home. Sec 10, deals with the providing of information to persons with disability, relating to reproduction and family planning. It also states that no medical process which leads to loss of fertility to be conducted on such person without informed consent.

Sections 11 to 13 deal with the rights, available to persons with disability, which are promised to every citizen of this country by the Constitution itself. Sec 11 states that it is the duty of the Election Commissions to ensure that the electoral process is understandable and accessible to them. Section 12 reflects the duty of the appropriate Government to make the legal process accessible for such persons with disability and to ensure suitable measure to render justice to such persons especially the ones requiring high support.

Section 13 deals with legal capacity of such persons with disability. It states that the appropriate Government shall have the duty to ensure that the persons with disabilities enjoy legal capacity equally like any other person and has the right to equal recognition.

Provisions relating to Education

Chapter III of the Right of Persons with Disabilities Act, 2016 speaks about provisions relating to education of children with disabilities as well as duties of educational institutions.

Sec 16 specifically deal with the duties of educational institutes. It states that the State shall endeavor to:

1. To admit children with disability without any discrimination and provide equal opportunities to them with

regards to education, sports and recreational;

2. Make buildings, campus and other facility accessible to children with disability;
3. To provide specific supports to such children in order to maximise academic and social development;
4. To make arrangements for students who are deaf or blind or both;
5. To provide for transportation facilities to children with high support needs.

Sec 17 of this Act, deals with measures to facilitate inclusive education. It makes the following provisions:

1. To make surveys from time to time to assess if special needs of children are being catered to;
2. To establish schools for children with disability and to train teachers to teach such students;
3. To provide books and other assistive educational tools to students;
4. To provide for scholarships to motivate such children;
5. To promote research to improve both teaching and learning skills.

Skill Development and Employment

Chapter IV speaks on topics relating to skill development, vocational trainings and self-employment schemes. The aim of this chapter is to allow people with disabilities to make a living for themselves as well as to be accepted for jobs without such discrimination, where such a disability would not be a barrier.

Section 19 of the Act specifically talks about the duty of the Government to formulate schemes and programmes for vocational training and self-employment and also provide loans at concessional rates in this regard.

Section 19 (2) speaks about some types of schemes which have been spoke about in sec 19(1). They are as follows:

1. Inclusion of person with disability in vocational and skill development programmes;
2. To ensure adequate support and facilities to avail specific training for such persons;
3. Loans at concessional rates including microcredit;
4. Marketing products made by such persons with disabilities;
5. Maintenance of data about progress made in these skill development programmes.

Section 20 to Section 23 prevents discrimination against persons with disability in matters relating to acquiring employment or in the course of employment.

Section 20 states that no discrimination shall be made against persons with disability in matters relating to employment and also ensure reasonable accommodation and a barrier free conducive working environment to them. If the profile of the job does not suit such a person with disability, he shall be shifted to some other post with equal pay and benefits. Such an arrangement can function till the time there is an appropriate post for him or till his superannuation.

Section 22 speaks about maintaining of record of such persons with disability in employment exchanges. Sec 23 speaks about the appointment of a Grievance Redressal Officer for every Government Establishment to address complaints regarding non-compliance of provisions u/s 20.

Social Security, Health, Rehabilitation and Recreation

Section 24 states that within limits of economic capacity, the government shall formulate schemes and programmes to ensure adequate standard of living for people with disability. Sub section 3 talks about a variety

of schemes in this regard such as:

1. Community Centres having good safety, sanitation and healthcare services;
2. Facilities for persons including children with disability who have no family or homes;
3. Support persons with disability during any natural disaster;
4. Support women with disability to make a livelihood and to support her children;
5. Ensuring safe drinking water and proper sanitation facilities especially in slum areas;
6. Comprehensive Insurance Schemes with such persons with disability etc.

Section 25 ensures to such persons with disabilities, barrier free access to free of cost healthcare on priority basis. It speaks of measures like training of staff, screening of children and sponsoring awareness campaigns etc. to achieve this objective. Sec 27 states that the appropriate Government shall, within its limits of economic capacity, make schemes for rehabilitation of such persons with disability. They may provide financial aids to such persons to further the cause of rehabilitation. Sec 28 encourages the Government to initiate research in order to devise ways to rehabilitate such persons. Sec 29 and 30 seeks to ensure that persons with disability have a good social life by way of organising cultural events, recreational activities and sport competitions and ensuring participation of persons with disability.

Special Provisions for Persons with Benchmark Disability regarding Employment

Sec 31 speaks about the right to free education for children with benchmark disability between the age of six to eighteen years in a school or special school of their choice. Sec 32 states that Government Institutions of higher education and other higher education institutions receiving aid from the Government shall reserve 5% or more seats for persons with benchmark disability and also ensure upper-age relaxation for them. Sec 33 instructs the Government, to identify posts that can be held by persons with benchmark disability, with the help of an expert committee.

Section 34 states that the appropriate Government shall ensure that at least 4% of the working strength of every Government Establishment is constituted by persons with benchmark disabilities such as:

1. Blindness and low vision;
2. Deaf and Hard of Hearing; and
3. Loco motor Disability including cerebral palsy, leprosy (cured) dwarfism, acid attack victims and muscular dystrophy.

Also, 1% of the total strength of persons with benchmark disability shall be comprised of:

1. Autism, Intellectual Disability, Specific Learning Disability and Mental Illness;
2. Persons having multiple disabilities mentioned from clauses ‘a’ to‘d’ of Sec 34(1).
3. Sec 35 speaks of the appropriate Government providing incentives to private employers who ensure 5% of their workforce is comprised of people with benchmark disability.

Section 36 speaks about the establishment of special employment exchanges that keep a track of post and vacancies for persons with disability.

Section 37 states that the appropriate Government shall make schemes in favour of persons with benchmark disability by ensuring 5% reservation for allotment of agricultural land, housing related schemes, poverty alleviation and various other developmental schemes. Women find an express mention about getting priority regarding provisions under this section.

Special Provisions for Persons with Disabilities with High Support Needs

The provisions u/s 38 deal specifically with People with Disabilities with High Support Needs. It states that any person with benchmark disability, who considers himself in need of high support or any person or an organisation, can approach the appropriate Government requesting to provide high support. There shall be an Assessment Board to assess such requests for high support and provide support in accordance to the guidelines of the appropriate Government.

Duties and Responsibilities of Appropriate Government

Enlisted below are the various duties and responsibilities that this Act seeks to confer on the appropriate Government.

1. The appropriate Government shall conduct, encourage, support and promote awareness campaigns and sensitisation programmes to ensure rights of persons with disability. Such programmes shall aim to recognise merits and abilities of persons with disability provide orientation and sensitisation at schools, colleges and workplace (Sec 39);
2. That the appropriate Government shall ensure availability of transport for persons with disability. This would include access to public transport and allowing retrofitting modifications to promote personal mobility among persons with disability (Sec 40);
3. That access to information is made available to persons with disability in all forms i.e. audio, print, electronic media etc.
4. That the appropriate Government shall take measure to promote the production and distribution of consumer products specially made for persons with disability (Sec 43);
5. Ensuring that all structures of Central Government shall be made accessible to persons having disability within stipulated time of 5yrs (Sec 45);
6. Finally to impart training to people of all walks of life such as doctors, lawyers, judges, teachers etc. about the specific needs and to develop respect for their needs.

Institutions for Persons with Disability

Chapter IX of the Act specifically deals with the procedure involving registration of institutions made especially for persons with disabilities. It states that no institution for persons with disability shall be valid without obtaining the Certificate of Registration from the Competent Authority that is established by the State Governments. Grant to such an application for obtaining Certificate of Registration, shall be given, only if the institution adheres to the provisions under this Act. Sec 53 speaks of the provision of appeal in case any person is aggrieved with the decision of the Authority to refuse grant of Certificate of Registration of revoking of the same.

Certification of Specified Disabilities

According to Sec 56 of Chapter X of this Act, the Central Government shall notify the guidelines for the purpose of assessing the extent of specified disability in a person. It shall be the duty of the appropriate Government to designate certifying authorities in this regard. Any person may approach the certifying authority for issuing the Certificate of Disability in such a manner, as may be prescribed by the Central Government.

Central and State Boards on Disability

Chapter XI speaks about the establishment of a Central Advisory Board and State Advisory Board on disability for advising the Central and the State Governments on framing policy decisions with respect to persons with

disability. It further specifies the constituent members, their terms and conditions of service, disqualifications of members of this Board, and the functions that the Board is expected to perform. Sec 72 speaks about the establishment of a District Level Committee on Disability to perform function regarding persons with disability at the district level.

Chief Commissioners and State Commissioners for Persons with Disability

Chapter XII speaks about the appointment of a Chief Commissioner and a State Commissioner look into matters of laws relating to persons with disability, inquire or suo moto take up matters of discrimination against such persons and monitor the implementation of the Act along with promoting awareness about the rights of people with disabilities. It states that an Annual Report shall be submitted by both the Chief Commissioner and the State Commissioners on matters relating to persons with disability, which are of prime importance. Powers of both the Chief Commissioner and the State Commissioners shall be equivalent to that of a civil court vested under The Code of Civil Procedure, 1908.

Special Courts

Sec 84 and 85 of Chapter XIII states that the State Government with the advice of the Chief Justice of the High Court shall specify for each district, a Court of Sessions which will act as the Special Court to try offences under this Act. For such Special Courts, the State Government may appoint a Public Prosecutor.

National Fund for Persons with Disabilities

There shall be a Fund to be called National Fund for persons with disabilities u/s 86. This includes sums grants, gifts, donation, benefactions, bequests or transfers and sums received grants-in-aid.

State Fund for Persons with Disabilities

That a Fund called State Fund for persons with disabilities shall be created by the State Government. The State Fund for persons with disabilities shall be utilised and managed in the manner prescribed by the State Government.

Offences and Penalties

Chapter XVI deals with offences and penalties for punishment for contravention of provisions of this Act or rules and regulations made thereunder. It provides that for first contravention shall be punishable with fine that extends to ten thousand rupees and subsequent contravention shall be punished with fine not less than fifty thousand and up to five lakhs.

For any offence committed by a company, the person in charge, responsible for the conduct of the business of the company, shall be punishable according to the provisions of the Act.

Acts whereby any person:-

1. Intentionally insults or intimidates with intent to humiliate a person with disability in any place within public view;
2. Assaults or uses force to any person with disability with the intent to dishonour him or outrage the modesty of any woman;
3. Having actual charge or control over a person with disability voluntarily or knowingly denies food or fluids to him;
4. Being in a position to dominate the will of a child or a woman with disability and uses that position to exploit her sexually;

5. Voluntarily injures, damages or interferes with the use of any limb or sense or any supporting device of a person with disability;

is punishable with imprisonment not less than six months which may extend up to five years and fine.

Conclusion

For persons with disability, such a piece of legislation happens to be a boon and no less. This Act deals with issues relating to the rights of persons with disabilities comprehensively. It also mandates the Government to perform its duties in the most diligent manner and make schemes and programmes towards the welfare of the community. Only time can tell, as to how far such a legislation shall penetrate the idea of belonging and acceptability, in the minds of Indian masses, about persons with disability. But this Act certainly is a step in that direction.

Prevention of Sexual Harassment of Women at Workplace (Prevention; Prohibition and Redressal) Act, 2013

In 2013, the government enacted the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the 'Act') for prevention of sexual harassment against women at the workplaces. The Central Government vide notification SO 3606 (E) appointed 9 December 2013 as the date on which the provisions of the Act came into force and on the same day, the Central Government made the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013 ("Rules").

Objectives of the Act

The Act is enacted by the Indian Parliament to provide protection against sexual harassment of women at workplace and prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto. Sexual harassment is termed as a violation of the fundamental rights of a woman to equality under Articles 14 and 15 of the Constitution of India and right to life and to live with dignity under Article 21 of the Constitution of India. Sexual harassment is also considered a violation of a right to practice any profession or to carry on any occupation, trade or business which includes a right to a safe environment free from sexual harassment.

Definitions

Sexual Harassment

The Act has adopted the definition of 'sexual harassment' from Vishaka Judgment and the term sexual harassment includes any unwelcome acts or behaviour (whether directly or by implication) such as physical contact and advances, demand or request for sexual favours, making sexually coloured remarks, showing pornography or any other unwelcome physical, verbal or non-verbal conduct of sexual nature.

Section 3 of the Act provides that no woman shall be subjected to sexual harassment at any workplace. This section further provides the circumstances which if present or connected with any act or behaviour of sexual harassment may amount to sexual harassment such as implied or expressed promise to preferential treatment or implied or explicit threat of detrimental treatment in her employment, implied or explicit threat about her present or future employment, interference with work or creating an intimidating or offensive or hostile work environment, humiliating treatment likely to affect health or safety of a woman.

Complaints Committee & Complaint Procedure

Internal Complaints Committee

The Act makes it mandatory for every employer to constitute an internal complaints committee ("ICC") which entertains the complaints made by any aggrieved women. The members of the ICC are to be nominated by the employer and ICC should consist of

(i) A Presiding Officer;

(ii) Not less than two members from amongst employees preferably committed to the cause or women or who have had experience in social work or have legal knowledge and;

(iii) One member from amongst non-governmental organizations or associations committed to the cause of women or a person familiar with the issues relating to sexual harassment. In order to ensure participation of women employees in the ICC proceedings, the Act requires that at least one-half of the members of ICC nominated by employer are women.

Local Complaints Committee

Provisions are provided under the Act to form Local Complaints Committee (LCC) for every district for receiving complaints of sexual harassment from establishments where the ICC has not been formed due to having less than 10 workers or if the complaint is against the employer himself.

Complaint procedure

The Act stipulates that aggrieved woman can make written complaint of sexual harassment at workplace to the ICC or to the LCC (in case a complaint is against the employer), within a period of three months from the date of incident and in case of a series of incidents, within a period of three months from the date of last incident. If the aggrieved woman is unable to make complaint in writing, reasonable assistance shall be rendered by the presiding officer or any member of the ICC (or in case the aggrieved woman is unable to make complaint in writing to the LCC, the reasonable assistance shall be rendered by the Chairperson or any member of the LCC) for making the complaint in writing.

As per the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Rules, 2013, in case the aggrieved woman is unable to make a complaint on account of her physical incapacity, a complaint may be filed inter alia by her relative or friend or her co-worker or an officer of the National Commission for Woman or State Women's Commission or any person who has knowledge of the incident, with the written consent of the aggrieved woman.

LESSON ROUND-UP

- Factories Act, 1948 is applicable to any premises wherein 10 or more persons with the aid of power or 20 or more workers are/were without aid of power working on any day in the preceding 12 months, wherein Manufacturing process is being carried on.
- Minimum Wages Act, 1948 is made to provide for fixing minimum rates of wages in certain employments.
- Payment of Wages Act aims to regulate the payment of wages of certain classes of employed persons.
- Employees State Insurance Act, 1948 is extended in area-wise to factories using power and employing 10 or more persons and to non-power using manufacturing units and establishments employing 20 or more person up to Rs. 7500/- per month with effect from 1.4.2004. It has also been extended upon shops, hotels, restaurants, roads motor transport undertakings, equipment maintenance staff in the hospitals.
- Any person who is employed for work of an establishment or employed through contractor in or in connection with the work of an establishment.
- Mandatory for employer to pay Minimum Bonus of 8.33% of Salary & Maximum Bonus of 20% of Salary from the accounting year in which establishment has profits (excluding First 5 years of existence).

- All workers irrespective of their status or salaries either directly or through contractor or a person recruited to work abroad are covered under Employees Compensation Act, 1923.
- Contract Labour (Regulation and Abolition) Act, 1970 aims to regulate the employment of contract labor in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith.
- The objective of the Industrial Disputes Act, 1947 is to secure industrial peace and harmony by providing machinery and procedure for the investigation and settlement of industrial disputes by negotiations. This act deals with the retrenchment process of the employees, procedure for layoff, procedure and rules for strikes and lockouts of the company.
- The Trade Unions Act, 1926 aims to provide for the registration of Trade Union and in certain respects and also to define the law relating to registered Trade Unions.
- The object of Maternity Relief Act, 1961 is to protect the dignity of motherhood and the dignity of a new person's birth by providing for the full and healthy maintenance of the woman and her child at this important time when she is not working.
- The Child Labour (Prohibition and Regulation) Act, 1986 is an Act to prohibit the engagement of children in certain employments and to regulate the conditions of work of children in certain other employments.
- The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 was enacted in 1995 to give effect to the Proclamation on the Full Participation and Equality of the People with Disability in the Asian & Pacific Region (Beijing 1992).
- It aims to spell out the responsibility of the state towards the prevention of disabilities, protection of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities.
- Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 (hereinafter referred to as the 'Act') is enacted by the Indian Parliament to provide protection against sexual harassment of women at workplace and prevention and redressal of complaints of sexual harassment and for matters connected therewith or incidental thereto.

SELF-TEST QUESTIONS

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss the details of Prevention of Sexual Harassment of Women at Workplace (Prevention; Prohibition and Redressal) Act, 2013.
2. Discuss the provisions of Contract Labour (Regulation and Abolition) Act, 1970 applicable on setting up business in India
3. What is Lay-Off. How it is different from Retrenchment.
4. What is the difference in Strike and Lock Out?
5. Discuss the provisions of Maternity Relief Act, 1961 applicable to enterprise in India with reference to latest amendments.

Lesson 18

Compliances relating to Environmental Laws (Provisions applicable for setting up of Business)

LESSON OUTLINE

- Introduction
- Environmental Regulations in India: A Bird's Eye View
- Water (Prevention and Control of Pollution) Act, 1974
- Checklist under Water (Prevention and Control of Pollution) Act, 1974 and the Rules therein
- Air (Prevention and Control of Pollution) Act, 1981
- Checklist under Air (Prevention and Control of Pollution) Act 1981 and Rules thereunder
- Environment Protection Act, 1986
- Checklist under Environment Protection Act, 1986 and Rules thereunder
- Public Liability Insurance Act 1991
- National Green Tribunal Act, 2010
- Checklist of Compliances under Other Environmental Law
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

With the recognition of Right to a Healthy Environment as a human right under the Universal Declaration of Human Rights and its related covenants, measures are taken at full force to enforce these rights and guard the right to environment at parity. With the endowed protection to environment under the Constitution and some specific Statutes, all the persons, be it natural or legal, including a Company, owes a duty to conduct themselves in such a manner that their act or omission should not pollute the environment. Therefore, a company is necessitated to abide by various laws in order to protect the environment. A brief list of the statutory protection to environment is discussed in this chapter.

INTRODUCTION

India's economic development propelled by rapid industrial growth and urbanization is causing severe environmental problems that have local, regional and global significance. Recognizing the need for regulating the factors which are affecting environment, Government of India has established an environmental legal and institutional system to meet these challenges within the overall framework of India's development agenda and international principles and norms. Legal Framework India has an elaborate legal framework with number of laws relating to environmental protection. Along with specific laws regulating environment, Indian Constitution also directs few directives in the ensuring protection of the environment at priority. Article 48A of Indian Constitution, which is a Directive Principles of State Policy, enjoins the State to make endeavour for protection and improvement of the environment and for safeguarding the forest and wildlife of the country. This articles was inserted by 42nd Amendment Act, in force with January 3rd 1977. Apart from this Article 51-A (G), also inserted by 42nd Amendment Act, 1976 states that "It shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. In addition, our association with the international charters too support a fortified environment regulations in India.

ENVIRONMENTAL REGULATIONS IN INDIA: A BIRD'S EYE VIEW

With the recognition of Right to Healthy Environment as a human right under the Universal Declaration of Human Rights and its related covenants, measures are taken at full force to enforce these rights and guard the right to environment at parity. With the endowed protection to environment under the Constitution and Specific Statutes, all the person as be it natural or legal including a Company owes a duty to conduct themselves in such a manner that their act or omission should not pollute the environment. Therefore, a company is necessitated to abide by various laws in order to protect the environment. A brief list of the statutory protection to environment is as below:

Year	Environmental Regulations
1974	Water (Prevention & Control of Pollution Act) Amendments, 1988
1975	The Water (Prevention & Control of Pollution) Rules, 1975
1977	The Water (Prevention & Control of Pollution) Cess Act, 1977
1978	The Water (Prevention & Control of Pollution) Cess Rules, 1978
1981	The Air (Prevention & Control of Pollution) Act, Amendments, 1987
1982/1983	The Air (Prevention & Control of Pollution) Rules
1986	The Environment (Protection) Act, Amendments (1989,1990,1993,1996,1997,1998, 1999,2000,2001)
1986	The Environmental (Protection) Rules
1992	E (P) Act Notification – "Environment Statement"
1994	E (P) Act Notification – "Environmental Clearance"
1997	Amendments in the Environment Clearance, Notification – "Public Hearing" made mandatory
1989	The Hazardous Wastes (Management and Handling) Rules, Amendments, 2000, Draft Amendments 2002
1989	Manufacture, Storage and Import of Hazardous Chemical Rules, Amendments, 1994, 2000
1991	The Public Liability Insurance Act/Rules, 1992
1995	The National Environment Tribunal Act
1997	Prohibition on the Handling of Azo dyes
1997	The National Environment Appellate Authority Act
1998	The Bio-Medical Waste (M&H), Rules
1999	Notification for making 100% Utilization of Fly-ash made mandatory

1999	Regulation on recycling of Waste Oil and Non-ferrous scrape
2000	Municipal Solid Waste (M&H) Rules
2000	Ozone Depleting Substance (R&C) Rules
2000	Noise Pollution (Regulations and Control)
2001	Batteries (M&H) Rules
2001	Protection of Plant Varieties and Farmers' Rights Act
2002	Wild Life (Protection) Amendment Act, 2002
2006	The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
2008	Hazardous Wastes (Management, Handling and Transboundary) Rules, 2008
2010	National Green Tribunal Act, 2010
2011	E-waste (Management and Handling) Rules
2016	E-Waste (Management) Rules

India has an elaborate legal framework with number of laws relating to environmental protection. Key national laws include the following:

- Water (Prevention and Control of Pollution) Act, 1974;
- Water (Prevention and Control of Pollution) Cess Act, 1977;
- Air (Prevention and Control of Pollution) Act, 1981;
- Environment (Protection) Act, 1986;
- The Public Liability Insurance Act, 1991;
- The Biodiversity Act, 2002;
- The National Green Tribunal Act, 2010;
- Hazardous Wastes (Management, Handling and Transboundary Movement) Rules, 2008.

Water (Prevention and Control of Pollution) Act, 1974

The Water Prevention and Control of Pollution Act, 1974 (the “Water Act”) has been enacted to provide for the prevention and control of water pollution and to maintain or restore wholesomeness of water in the country. It further provides for the establishment of Boards for the prevention and control of water pollution with a view to carry out the aforesaid purposes. The Water Act prohibits the discharge of pollutants into water bodies beyond a given standard, and lays down penalties for non-compliance. At the Centre, the Water Act has set up the CPCB which lays down standards for the prevention and control of water pollution. At the State level, SPCBs function under the direction of the CPCB and the State Government.

Further, the Water (Prevention and Control of Pollution) Cess Act was enacted in 1977 to provide for the levy and collection of a cess on water consumed by persons operating and carrying on certain types of industrial activities. This cess is collected with a view to augment the resources of the Central Board and the State Boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974. The Act was last amended in 2003.

It necessitate to:

- Provide information to the SPCB
- Provide access to the SPCB for taking samples
- Allow entry to the SPCB to ascertain that the provisions of the Act are being compiled with.

Responsibilities:

- Obtain “Consent to Establish”
- Obtain “Consent to Operate”
- Apply for renewal of the “Consent to Operate” before the expiry of validity period
- Consent to be deemed as granted automatically and unconditionally after four months from the date of application already given or refused before this period
- Refusal of “Consent” to be recorded in writing
- Pay Water Cess as indicated in the assessment order
- Affix water meters of the prescribed standards
- Provide access to SPCB
- Pay interest in case of delay in paying the Water Cess
- Pay penalty for non-payment of Cess
- Industry is entitled to 25% rebate if meeting certain conditions.

Checklist under Water (Prevention and Control of Pollution) Act, 1974and the Rules therein

S.N.	Particulars	Compliance	Remarks
1.	The Company has got any direction from the State Board or any officer empowered by it for abstracting water from any such stream or well in the area in quantities which are substantial in relation to the flow or volume of that stream or well or is discharging sewage or trade effluent into any such stream or well, to give such information as to the abstraction or the discharge at such times and in such form as may be specified in the directions.		
2.	Whether the company complied with the direction of State Board or any other officer empowered.		
3.	The State Board or any officer authorized in this behalf have taken (i) Samples of water from any stream or well. (ii) Samples of any sewage or trade effluent passing from any plant or vessel or over any place into any such stream or well.		
4.	Person authorized by the State Board have inspected the premises of the company to determine whether an order or direction is being complied with or for the purposes of examining plant, premises or any material object or for search and seizure of any material object which may furnish evidence of Commission of an offence under the Act.		
5.	Prior Consent of the State Board under section 25 is taken (i) to set up any industry, plant or process which is likely to discharge sewage or trade effluent into a stream or well or sewer or on land ; or i. Bring into use any new or altered outlets for the discharge of sewage; or ii. Begin to make any new discharge of sewage.		

6.	Any Notice has been received by the company from state board for not taking prior consent required as per section 25 (1) to establish any industry, operation or process, or any treatment and disposal system or any extension or addition thereto, or using the new or altered outlet for discharge of sewage or started new discharge of sewage, as the case may be.		
7.	The company has received order from State Board to remove the matter, which is, or may cause pollution; or remedy or mitigate the pollution, or issue prohibition orders to the concerned persons from discharging any poisonous or noxious or polluting matter.		
8.	The company has received an order under section 33 (2) restraining the company from polluting the water in any stream or well.		
9.	The company has received any directions in writing for the closure, prohibition or regulation of any industry, operation or process; or the stoppage or regulation of supply of electricity, or water or any other service under section 33A.		

AIR (PREVENTION AND CONTROL OF POLLUTION) ACT, 1981

The Air (Prevention and Control of Pollution) Act, 1981 (the "Air Act") is an act to provide for the prevention, control and abatement of air pollution and for the establishment of Boards at the Central and State levels with a view to carrying out the aforesaid purposes.

To counter the problems associated with air pollution, ambient air quality standards were established under the Air Act. The Air Act seeks to combat air pollution by prohibiting the use of polluting fuels and substances, as well as by regulating appliances that give rise to air pollution. The Air Act empowers the State Government, after consultation with the SPCBs, to declare any area or areas within the State as air pollution control area or areas. Under the Act, establishing or operating any industrial plant in the pollution control area requires consent from SPCBs. SPCBs are also expected to test the air in air pollution control areas, inspect pollution control equipment, and manufacturing processes.

Under this statute, one has to comply,

- Comply with the conditions in the "Consent to Establish" or "Consent to Operate"
- Not to discharge air pollutant(s) in excess of the prescribed standards
- Furnish information to the SPCB of any accident or unforeseen act or event
- Allow entry to the SPCB to ascertain that provisions of the Act are being complied with
- Provide information to enable SPCB to implement the Act
- Provide access to the SPCB for taking samples
- Comply with the directions issued in writing by the SPCB
- Obtain "Consent to Establish"
- Obtain "Consent to Operate"
- Apply for the renewal of "Consent to Operate" before expiry of the validity period
- Consent to be deemed as granted after four months from the date of receipt of application if no communication from the SPCB is received

- A prior "Notice of Inspection" to be served by the SPCB
- Industry to ensure that specified emission sampling procedure is being followed by the SPCB
- Opportunity to file objections with the SPCB within 15 days from the date of service of notice
- PCB to record reasons in writing in case it does not provide an opportunity to the industry to file objections.

Checklist under Air (Prevention and Control of Pollution) Act 1981 and Rules thereunder

S.N.	Particulars	Compliance	Remarks
1.	The Company has established any industrial plant in an air pollution control area. If yes, whether the company has taken previous consent of the State Pollution Control Board.		
2.	The Company has made an application for consent of the State Board under subsection (1) in the prescribed form and the application contained the prescribed particulars.		
3.	The company has got consent in writing from the State Board. Whether the consent given to company has been cancelled by State Board before the expiry of the period for which it is granted for non-fulfilment of conditions subject to which the consent was granted.		
4.	The Company has complied with the following conditions as laid in the consent by the State Board namely; i. Installation and operation of the control equipment of such specification as the State Board may approve. ii. Alteration or replacement of the existing control equipment if any, in accordance with the directions of the State Board; iii. Keeping the control equipment referred above in good running condition; iv. Erection or re-erection of Chimney, wherever necessary of such specifications as the State Board may approve in this behalf; v. Such other conditions as the State Board may specify in this behalf.		
5.	The Company has got any order from court restraining the company discharging or causing or permitting to be discharged the emission of any air pollutants.		
6.	The Company has received any direction from the State Board for supply of any information (including information regarding the types of atmosphere and the level of the emission of such air pollutants).		
7.	Whether any person authorized in this behalf by the State Board has inspected the premises of the company for the purpose of verifying the correctness of information supplied.		

8.	A State Board or any officer empowered by it in this behalf has taken any samples of air or emission from any chimney, flue or duct or any other outlet for the purpose of analysis.		
9.	The Company is discharging or causing or permitting to be discharged the emission of any air pollutant in excess of the standards laid down by the State Board under section 17(1)(g)		

ENVIRONMENT PROTECTION ACT, 1986

The Environment Protection Act, 1986 (the "Environment Act") provides for the protection and improvement of environment. The Environment Protection Act establishes the framework for studying, planning and implementing long-term requirements of environmental safety and laying down a system of speedy and adequate response to situations threatening the environment. It is an umbrella legislation designed to provide a framework for the coordination of central and state authorities established under the Water Act, 1974 and the Air Act. The term "environment" is understood in a very wide term under s 2(a) of the Environment Act. It includes water, air and land as well as the interrelationship which exists between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.

Under the Environment Act, the Central Government is empowered to take measures necessary to protect and improve the quality of environment by setting standards for emissions and discharges of pollution in the atmosphere by any person carrying on an industry or activity; regulating the location of industries; management of hazardous wastes, and protection of public health and welfare. From time to time, the Central Government issues notifications under the Environment Act for the protection of ecologically-sensitive areas or issues guidelines for matters under the Environment Act.

In case of any non-compliance or contravention of the Environment Act, or of the rules or directions under the said Act, the violator will be punishable with imprisonment up to five years or with fine up to Rs 1,00,000, or with both. In case of continuation of such violation, an additional fine of up to Rs 5,000 for every day during which such failure or contravention continues after the conviction for the first such failure or contravention, will be levied. Further, if the violation continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to seven years.

Under this Act, one is necessitated to

- Comply with the directions issued by the Central Government. The direction may include:
  - closure, prohibition or regulation of any industry, or
  - stoppage or regulation of the supply of electricity, water or any other service
- Prevent discharges or emissions excess of the prescribed standards
- Furnish information of any accidental or unforeseen event
- Allow entry and inspection to ascertain compliance
- Allow samples to be taken
- Submit an "Environmental Statement" every year to the SPCB
- Obtain prior "Environmental Clearances" from MoEF, in case of a new project or for modernization/ expansion of the existing project.

Checklist under Environment Protection Act, 1986 and Rules thereunder

S.N.	Particulars	Compliance	Remarks
1.	The Company has received any direction from the Central Government in writing for the closure, prohibition or regulation of any industry, operation or process; or stoppage or regulation of the supply of electricity or water or any other service under section 5 of the Act		
2.	The company compiled with the directions received from Central Government under section 5 of the Act.		
3.	The Company does not discharge or emit or permit to be discharged or emitted any environmental pollutants in excess of such standards as specified under section 7 of the Environment (Protection) Act, 1986 read with rule 3A of the Environment (Protection) Rules, 1986.		
4.	The Central Government or any officer empowered by it in this behalf have taken samples of air, water, soil or other substance from any factory, premises or other place in such manner as may be prescribed for the purpose of analysis.		
5.	Any person empowered by the Central Government has carried out inspection for determining whether any provisions of this Act or the rules made thereunder or any notice, order, direction or authorization served, made, given or granted under this Act is being or has been complied with.		
6.	The company complied with the safeguard measure as prescribed for handling any hazardous substance.		
7.	In case of discharge of environmental pollutant in excess of prescribed standard, the Company has given intimation of the fact of such occurrence or apprehension of such occurrence to all the following authorities or agencies, namely – i. The officer-in-charge of emergency or disaster relief operation in a district or other region of a state or Union territory specified by whatever designation by the Government of the said State or Union territory, and in whose jurisdiction the industry, process or operation is located. ii. Central Board or a State Board as the case may be and its regional officer having local jurisdiction who have been delegated powers under section 20, 21, 23 of the Water (Prevention and Control of Pollution) Act 1974 and section 24 of the Air (Prevention and Control of Pollution) Act, 1981. iii. The statutory authorities or agencies specified in column 3 in relation to places mentioned in column 2 against thereof of the Schedule II.]		

8.	The Company has submitted an environmental audit report for the financial year ending the 31st March in Form V to the concerned State Pollution Control Board on or before the 30th Day of September.		

PUBLIC LIABILITY INSURANCE ACT 1991

Public Liability Insurance Act, 1991 is to provide the compensation for damages to victims of an accident of handling any hazardous substance or it is also called, to save the owner of production/storage of hazardous substance from hefty penalties. This is done by proving compulsory insurance for third party liability. As from the name of the act, it is Public Liability.

First time owner is put on anvil to provide the compensation/relief, when death or injury to any person (please note-other than a workman) or damage to any property has resulted from an accident of hazardous substance.

Actually the owner shall buy one or more insurance policies before he/she starts handling any hazardous substance. When any accidents come in knowledge of Collector, then he/she verify the occurrence of accident and order for relief as he/she deems fit.

The salient features of compliance under this Act are as below:

- Owner to provide relief in case of death or injury or damage to property from an accident on the principle of no fault.
- Owner to draw insurance policies more than the paid-up capital but less than
- Rs. 50 Crores.
- 'Paid-up Capital' is the market value of all assets and stocks on the date of insurance.
- Owner to pay additional amounts as contribution to the 'Environmental Relief Fund'.
- Owner to provide any information required for ascertaining compliance with the provisions of the Act.
- Owner to allow entry and inspection to ascertain compliance with the provisions of the Act.
- Owner to pay the amount of an award as specified by the Collector.
- Comply with the directions issued in writing by the Central Government, directions may include;
  - (i) Prohibition or regulations of handling of any hazardous substances, or
  - (ii) Stoppage or regulation of the supply of electricity, water or any other service.

NATIONAL GREEN TRIBUNAL ACT, 2010

The National Green Tribunal (NGT), 2010 was established keeping in mind The Rio Conference of 1992 and based on the international environment principles of 'polluter pays principle' and 'Sustainable Development'. This was established to deal with environment related disputes, a speedy disposal of these cases and giving relief and compensation for damages to persons and property and for matters connected or incidental thereto. It comprises of a chairman, who could be a sitting or a retired judge of the Supreme Court, and various other members and experts provided under the provisions of the tribunal. It would mainly deal with civil cases and is not bound to follow the procedural law under Code of Civil Procedure, 1908, but shall be guided by principles of natural justice. It proposed to have five places of sitting with Delhi as its headquarters and others being Bhopal, Pune, Kolkata and Chennai.

The National Green Tribunal Act, 2010 (No. 19 of 2010) (NGT Act) has been enacted with the objectives to provide for establishment of a National Green Tribunal (NGT) for the effective and expeditious disposal of

cases relating to environment protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

The Act received the assent of the President of India on June 2, 2010, and was enforced by the Central Government vide Notification No. S.O. 2569(E) dated October 18, 2010, with effect from October 18, 2010. The Act envisages establishment of NGT in order to deal with all environmental laws relating to air and water pollution, the Environment Protection Act, the Forest Conservation Act and the Biodiversity Act as have been set out in Schedule I of the NGT Act.

Consequent to enforcement of the National Green Tribunal Act, 2010, the National Environment Tribunal Act, 1995 and the National Environment Appellate Authority Act, 1997 stand repealed. The National Environment Appellate Authority established under s 3(1) of the National Environment Appellate Authority Act, 1997stands dissolved, in view of the establishment of the National Green Tribunal under the National Green Tribunal Act, 2010 vide Notification no. S.O. 2570(E) dated October 18, 2010.

Objectives of National Green Tribunal

The Preamble of the Act states the object is to provide for the establishment of a National Green Tribunal (herein referred as NGT) for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

- The effective and speedy disposal of the cases relating to environment protection and conservation of forests and other natural resources. All the previous pending cases will also be heard by the Tribunal.
- It aims at enforcing all the legal rights relating to the environment
- It also accounts for providing compensation and relief to effected people for damage of property.

Power of National Green Tribunal

The NGT has a power to hear all civil matters which are related to environment and questions regarding the enforcement and implementation of laws which fall under the seven categories of laws namely (in order of their enactment)

- The Water (Prevention and Control of Pollution) Act, 1974;
- The Water (Prevention and Control of Pollution) Cess Act, 1977;
- The Forest (Conservation) Act, 1980;
- The Air (Prevention and Control of Pollution) Act, 1981;
- The Environment (Protection) Act, 1986;
- The Public Liability Insurance Act, 1991;
- The Biological Diversity Act, 2002

The NGT has been given the power to regulate the procedure by itself. It does not follow the principles of civil procedure code instead it follows principles of natural justice. The NGT also at the time of giving orders shall apply the principals of sustainable development and also the principal that the one who pollutes shall pay. It will have the same power as of the civil court in deciding the matter falling within these seven legal acts. Even the NGT will not be bound by the rules of evidence as mentioned in the Indian evidence act. Anything which is not covered under these seven acts the NGT is not competent to admit the suit for that matter. The major drawback of this limitation is that a person cannot approach the NGT for every environmental issue. For instance NGT

cannot admit a suit for cutting of trees in a forest even though it is related to environment. This is because the protection of forest act is not within the jurisdiction of NGT. So in a way it is ambiguous for a common person to comprehend when to and when not to go to NGT to seek remedy. This is a reform which NGT needs that there should be inclusion of all acts related to environment degradation.

The major benefit with NGT is that it has a strong order enforcing mechanism. If the orders of NGT are not complied with than it has the power to impose both punishment as well as fine. The punishment is up to three years and the penalty is up to ten crore and for firms in can extend up to twenty five crores. Also the director or manager of the firm can be punished or penalized if it is found by the tribunal that the offence has been committed on the orders or with the consent of such officer of the firm.

The act also provides various kinds of reliefs to the persons who are affected by the degradation of environment as the inhabitant of that particular area. One of the provisions of the act is to provide compensation to the victims of any loss occurring from accident or leakage while handling hazardous substance. So this provision basically will deal with any loss which occurs due to leakage of some hazardous gas in a locality. This was necessary because earlier law was silent in this regard due to which the people who suffered damages in the Bhopal Gas Tragedy could not get proper compensation from the union carbide.

Any person who has sustained the injury can file a suit in the National Green Tribunal. The suit can also be filed by a person who is the owner of the property to which the loss is caused. In case there is a death as a consequence of damage then the legal representative of such a person can file a case. The government or the government agencies related to environment can file a suit in place of that person like the central or the state government or the central pollution control board or state pollution control board. The act also provides for fast delivery of justice and the act provides that all possible efforts will be made to dispose of the case within six months from the date of filing the suit. The period for filing a suit with NGT is up to 5 years from the date on which the cause for compensation arose. However if the tribunal has sufficient grounds for believing that the person has reasonable cause that prevented him from filing a suit in NGT than it can extend the period for a maximum of sixty days. A person can argue his own matter before the tribunal and he does not need to be an advocate to do so. There is just a single requirement that the person should be in a formal dress while addressing the court. The medium of communication in the NGT is English and the arguments should be presented in the same.

If a person is not satisfied with the orders of the tribunal he can seek the review of the decision of NGT under rule 22 of the NGT rule. And even then if he is not satisfied with the decision of the tribunal he can file an appeal to the Supreme Court of India. But the appeal has to be filed within ninety days of the orders passed by NGT.

Checklist of Compliances under Other Environmental Law

S.N.	COMPLIANCES	ACTION
	WASTE MANAGEMENT	
1.	Are appropriate Waste Management practises being followed?	
2.	Is the full Duty of Care being Completed?	
3.	Has the legal compliance of waste carriers been checked?	
4.	Are waste transfer notes being retained?	
5.	Is hazardous waste being disposed of according to legislative rule?	
6.	Are all waste streams being segregated effectively?	
7.	Does the organization need to register as a producer of hazardous waste?	

8.	Are good housekeeping and recycling measures being followed to prevent waste being needlessly sent to landfill?	
WATER		
1.	Are only authorised discharges to surface water or controlled waters being made?	
2.	Are good housekeeping procedures being followed to avoid unnecessary consumption of water?	
AIR EMISSIONS		
1.	Is there any waste being burnt on site?	
2.	Has all equipment been checked to ensure there are no unnecessary emissions to air?	
CONTAMINATION		
1.	Are all chemical substances and fuel being stored appropriately?	
2.	Is all pollution control equipment working effectively? e.g. Bunding	
3.	Are spill kits present and accessible?	
4.	Are all hazardous or contaminated materials being disposed of correctly?	
5.	Is there any evidence of past unreported spills?	
6.	Are all necessary employees aware and Knowledgeable of spill procedures?	
7.	Are all chemicals being stored and handled in accordance with the product data sheets and/or guidance information?	
NOISE		
1.	Have noise mitigation measures been followed?	
2.	Are there ear plugs available in workshops?	
ASBESTORS		
1.	Is Asbestos Register up-to date?	
2.	Are legislative procedures relating to asbestos being followed?	
TRANSPORT		
1.	Do all vehicles have up to date MOTs?	

ENERGY CONSUMPTION		
1.	Are good housekeeping procedures being followed to avoid unnecessary consumption of electricity and gas?	

LESSON ROUND-UP

- The Water Prevention and Control of Pollution Act, 1974 (the "Water Act") has been enacted to provide for the prevention and control of water pollution and to maintain or restore wholesomeness of water in the country. It further provides for the establishment of Boards for the prevention and control of water pollution with a view to carry out the aforesaid purposes.
- The Air (Prevention and Control of Pollution) Act, 1981 (the "Air Act") is an act to provide for the prevention, control and abatement of air pollution and for the establishment of Boards at the Central and State levels with a view to carrying out the aforesaid purposes.
- The Environment Protection Act, 1986 (the "Environment Act") provides for the protection and improvement of environment. The Environment Protection Act establishes the framework for studying, planning and implementing long-term requirements of environmental safety and laying down a system of speedy and adequate response to situations threatening the environment. It is an umbrella legislation designed to provide a framework for the coordination of central and state authorities established under the Water Act, 1974 and the Air Act.
- Public Liability Insurance Act, 1991 is to provide the compensation for damages to victims of an accident of handling any hazardous substance or it is also called, to save the owner of production/ storage of hazardous substance from hefty penalties. This is done by proving compulsory insurance for third party liability. As from the name of the act, it is Public Liability.
- The National Green Tribunal (NGT), 2010 was established keeping in mind The Rio Conference of 1992 and based on the international environment principles of 'polluter pays principle' and 'Sustainable Development'.
- Any person who has sustained the injury can file a suit in the National Green Tribunal. The suit can also be filed by a person who is the owner of the property to which the loss is caused. In case there is a death as a consequence of damage then the legal representative of such a person can file a case.

SELF-TEST QUESTIONS

(*These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation*)

1. Write a detailed note on National Green Tribunal
2. Discuss the provisions of Water (Prevention and Control of Pollution) Act, 1974 applicable to setting up of business in India.
3. What are the key features of Public Liability Insurance Act, 1991.
4. Discuss aims and objectives of Environment Protection Act, 1986.

Lesson 19

Dormant Company

LESSON OUTLINE

- Meaning of Dormant Company
- Procedure to obtain Dormant Status
- Compliances by Dormant Company
- Seeking the status of Active Company from Dormant Company
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

Companies are generally classified on the basis of their incorporation, number of members, size, basis of control and motive. Additionally, companies can also be classified based on their status. Sometimes, due to various reasons, the promoters of a company may feel the need to temporarily close down the company but they do not want to dissolve it. In such cases, the company may become dormant as against an active company which is carrying on business. Thus, on the basis of its status, companies may be classified into active, dormant, under liquidation, under process of striking off, strike off, dissolved, amalgamated, etc. The 'status' of the company signifies the current state of the company - Whether it is active and operating OR dormant OR it has been struck off and closed.

After reading this lesson, you would be able to understand the concepts of dormant and active company, legal procedure involved in obtaining the status of dormant company, compliances for the purpose of dormant company and procedure to make a dormant company active.

INTRODUCTION

The Ministry of Corporate Affairs ("MCA") vide notification dated 31st March, 2014 notified Section 455 of the Companies Act, 2013 ("Act") dealing with the provision of Dormant Company. In addition to the provisions of the Act relating to Dormant Company, MCA has also issued the Companies (Miscellaneous) Rules, 2014 ("Rules") to be effective from the same date i.e. 01 April 2014 in order to provide procedural guidelines for changing the status of an "Active" company to "Dormant" company and vice versa.

In simple words, dormant company means a company which is an inactive company in the records of the Registrar of Companies and which is not carrying out any business activity and has applied to the Registrar of Companies to change its status in the register of companies maintained by the Registrar of Companies from "Active Company "to "Dormant company". A company can become dormant immediately after its registration or after a few years of its incorporation. There are many reasons why a company changes its status from "active "to "dormant". Major reason for such a change is when a company has to start its business activities after a few years owing to a variety of reasons, it may make application to the Registrar of Companies to change the status of the company to "dormant". Dormant companies are also known as inactive companies.

A Dormant Company offers excellent advantage to the promoters who want to hold an asset or intellectual property under the corporate shield for its usage at a later stage. For instance: if a promoter wants to buy land now for its future project at a comparatively lesser price, he may do the same through dormant company so that he can use the land for its future project. Thus, dormant company status is a new phenomenon in the Companies Act, 2013 and is an excellent tool for keeping assets in the company for its future usage. A dormant company may be either a public company or a private company or a one person company (OPC).

Section 455 of the Companies Act 2013 read with Companies (Miscellaneous) Rules, 2014 stipulate the provisions pertaining to "Dormant Company". Where a company is formed and registered under this Act for a future projector to hold an asset or intellectual property and "has no significant accounting transaction", such a company or An Inactive Company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.

For the above purposes, Inactive Company means a company which:

(a) is not carrying on any business or operations; or

(b) has not made any significant accounting transaction during last two financial years,

(c) has not filed financial statements and annual returns during the last two financial years.

Significant Accounting Transaction means any transaction made by the company except transactions mentioned below:

(a) payment of fees by a company to the Registrar;

(b) payments made by company to fulfil the requirements of this Act or any other law;

(c) allotment of shares to fulfil the requirements of this Act; and

(d) payments for maintenance of its office and records.

All the transactions apart from the above mentioned transactions will be considered as Significant accounting transactions. If a company has made the above mentioned transactions in last two years, even then that company will fall under the definition of Inactive Company.

OBTAINING DORMANT STATUS

A Company can obtain status as Dormant Company *suo-moto* or ROC may declare a company as Dormant.

Suo-Moto application: A company which meets the above criteria can apply *suo-moto* to Registrar of Companies

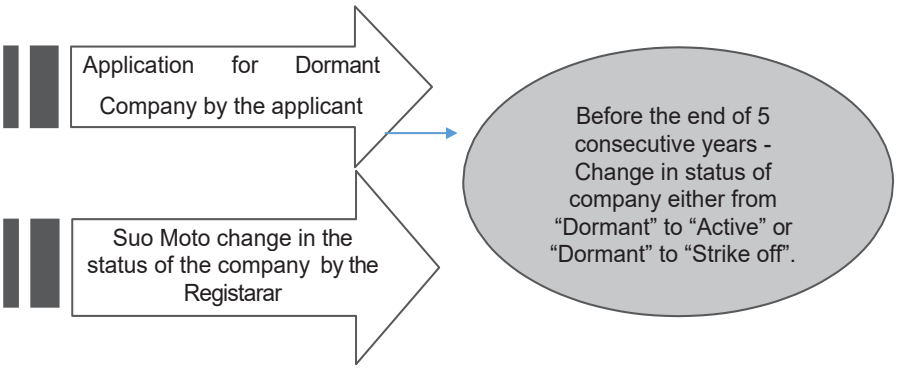
(ROC) for the status of a "Dormant company" in Form MSC-1 along with such fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 after complying with the provision of Rule 3 of The companies (Miscellaneous) Rules, 2014 .

Dormant by ROC: In case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar may issue a notice to such company and enter the name of such company in the register maintained for dormant companies.

Hence, it is not always the company which applies for the status of the dormant company; even the Registrar is empowered *suo moto* to change the status of a company into a dormant company.

The Registrar shall initiate the process of striking off the name of the company if the company remains as a dormant company for a period of five consecutive years.

Legal framework for Dormant Companies



Maximum period for which the company can be in the dormant status is five consecutive years. Before completion of 5 years as dormant company, such a company may apply for activation or strike off.

Where a company fails to comply with the requirements of Section 455 of the Companies Act 2013 read with Companies (Miscellaneous) Rules, 2014, the Registrar can strike off the name of a dormant company from the register of dormant companies.

Procedure to obtain the status of a Dormant Company

The Act read with the Rules stipulates the following procedure to be followed by a company for obtaining status as a 'dormant company':

1. The company shall call a board meeting to fix day, date, time and venue for General Meeting of the members of the company to pass resolution for making application to the ROC to obtain status of a dormant company.
2. The company shall obtain Statement of affairs from the Auditor of the company. The statement of affairs shall give the financial position of the company at the time of passing resolution in the shareholders meeting.
3. The company shall hold the General Meeting at the appointed time, place and date as per the notice calling the said meeting. The notice shall propose the resolution as a special resolution.
4. The company shall pass a special resolution for obtaining the status of a dormant company and authorize the director(s) to make application to ROC after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value).
5. After passing the special resolution, the company shall file e-form MGT-14 with ROC for filing special resolution.

6. After filing of form MGT-14, the company shall file Form MSC-1 with the ROC along with the copy of the special resolution, copy of statement of affairs, declarations by the directors and other necessary documents.
7. On being satisfied with the merits of the application, the ROC shall issue certificate in Form MSC -2 for confirming the application.

Prerequisite for obtaining the status of Dormant Company

The Registrar shall not grant the status of a dormant company if:

(a) any inspection, inquiry or investigation has been ordered or taken up or carried out against the company.

(b) any prosecution has been initiated and pending against the company under any law.

(c) there are public deposits which are outstanding or the company is in default in payment thereof or interest thereon.

(d) there are outstanding loans, whether secured or unsecured.

(e) if company has any Outstanding Unsecured Loan then the company may apply for status of Dormant only after obtaining NOC from the lender. Such NOC is required to be attached in the Form which is required to be filed with ROC.

(f) there is no dispute in the management or ownership of the company; A certificate in this regard is required to be taken from Management. Such Certificate is required to be attached in the Form which is required to be filed with ROC.

(g) there are outstanding statutory taxes, dues, duties, etc., payable.

(h) there is default in payment of its workmen's dues.

(i) the Company is a listed company.

BENEFITS / EXEMPTIONS PROVIDED TO A DORMANT COMPANY

By obtaining the status of a dormant company, the company enjoys the following exemptions:

(a) Dormant Company shall hold only two board meetings in a year with a gap of 90 days in between the two board meetings.

(b) Dormant Company is not required to include the statement of cash flow in its financial statement.

(c) The provision of rotation of auditors is not applicable in case of a dormant company.

(d) Dormant companies enjoy the advantages of lower statutory compliance cost as there are few statutory compliances applicable to dormant company as compared to active company

(e) Dormant status is an advantage to promoters who want to hold intellectual property or an asset under the corporate shield for its usage at a later stage.

(f) Companies can enjoy the status of dormant company for a period of 5 consecutive years

REVIEW QUESTIONS

A. Choose the correct answer

1. What is the maximum allowable period as per Companies Act 2013 to be in dormant status?
   (a) 5 calendar years
   (b) 5 years
   (c) 5 consecutive years
   (d) 5 Financial year

Correct answer : (c)

2. Certificate confirming the change of status from Active to Dormant company is issued in which form.
   (a) Form MSC -1
   (b) Form MSC -2
   (c) Form MSC -3
   (d) Form MSC -4

Correct answer : (b)

B. State whether the following statement is "True" or "False"

1. A company can be in dormant status for unlimited period of time.
   - True
   - False

Correct answer: False

2. Regional Director can Suo moto change the status of the company from Active to dormant company
   - True
   - False

Correct answer: False

3. Listed Company cannot make an application for Dormant status
   - True
   - False

Correct answer: True

COMPLIANCE REQUIREMENTS BY DORMANT COMPANY

The Registrar maintains the register of Dormant Companies.

– A dormant company shall have a minimum number of three directors in case of a public company, two directors in case of a private company and one director in case of a One Person Company.

– In order to retain the status of the dormant company , such a company is required to file "Return of Dormant Company" in form MSC -3 annually, inter-alia, indicating financial position, duly audited by a chartered accountant in practice along with such annual fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 within a period of thirty days from the end of each financial year

- A Dormant Company need not enclose cash flow statements in its annual accounts.
- A Dormant Company is required to convene at least one meeting of the Board of Directors in each half of a calendar year and the gap between the two meetings is not less than ninety days. Section 173(5)
- The provisions of the Act in relation to the rotation of auditors are not applicable to dormant companies
- Company shall continue to file the return or returns of allotment and change in directors in the manner and within the time specified in the Act, whenever the company allots any security to any person or there is any change in the directors of the company

LEGAL FRAMEWORK DEALING WITH THE PROVISION OF SEEKING THE STATUS OF ACTIVE COMPANY FROM DORMANT COMPANY

Section 455 of the Companies Act 2013 read with Rule 8 of the Companies (Miscellaneous) Rule, 2014 lays down the provisions for seeking the status of active company from dormant company. An application for obtaining the status of an active company from dormant company is required to be made before the end of five consecutive years from the date of becoming a dormant company In case the said application is not made before the end of five consecutive years from the date of becoming a dormant company, the name of the company may be removed from the register of companies maintained by the Registrar of companies.

Moreover, if any company has contravened any of the conditions mentioned in the grounds of application for obtaining the status of dormant company, such company should within seven days of such contravention, file an application for obtaining the status of an active company. The Registrar can take action to remove the company from the list of dormant companies, if it is observed that the company has contravened the conditions for granting the dormant company status, after carrying out an enquiry and after giving a notice and a reasonable opportunity of being heard.

Procedure to obtain the status of an Active Company from Dormant Company

The dormant company shall follow the below procedure for obtaining status of an active company on its own:

(a) An application for obtaining the status of an active company is required to be made in Form MSC-4 along with fees as provided in the Companies (Registration Offices and Fees) Rules, 2014 which should be accompanied by a return in Form MSC-3 in respect of the financial year in which the application for obtaining the status of an active company is being filed.

(b) The Registrar after considering the application filed for obtaining the status of the active company from dormant company shall issue a certificate in Form MSC-5 allowing the status of an active company to the applicant.

The Registrar of Companies shall in the following cases change the status of the dormant company to active company:

(a) Where a dormant company does or omits to do any act mentioned in the grounds in the application made for obtaining status of a dormant company and such act or omission affects its status of dormant company, the directors of such a company are required to file an application within seven days from such event for obtaining the status of an active company.

(b) Where the Registrar has reasonable cause to believe that any company registered as 'dormant company' under his jurisdiction has been functioning in any manner, directly or indirectly affecting the status of dormant company , Registrar can initiate the proceedings for enquiry under section 206 of the Companies Act 2013 and if, after giving a reasonable opportunity of being heard to the company in this regard, it is found that the company has actually been active, the Registrar can remove the name of such company from register of dormant companies and treat it as an active company.

REVIEW QUESTIONS

A. Choose the correct answer

1. State whether the following statement is "True" or "False"

   After the end of five consecutive years from the date of becoming a dormant company, the name of the company is strike off from the registrar of companies maintained by the Registrar of companies.

   - True
   - False

Correct answer: True

2. Central Government has power to Strike off the Dormant Company.

   - True
   - False

Correct answer: False

B. Choose the correct answer

In which form an application is to be made for obtaining the status of an active company

(a) Form MSC - 3

(b) Form MSC - 4

(c) Form MSC - 5

(d) Form MSC - 6

Correct answer: (b)

LESSON ROUND-UP

– 'Dormant company' means a company which is an inactive company in the records of the Registrar of Companies and which is not carrying out any business activity and has applied to the Registrar of Companies to change its status in the register of companies.

– 'Inactive company' means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years.

– Section 455 of the Companies Act, 2013 read with Companies (Miscellaneous) Rules, 2014 stipulate the provisions pertaining to "Dormant Company".

– A company can either on an application to Registrar change the status of the company from Active to dormant company or the Registrar can suo moto after issuing the notice to the concerned company change the status of the company from active to dormant company in the Register of companies and enter the name of such a dormant company in the Register of Dormant Companies maintained by the Registrar.

– A dormant company enjoys the status of the dormant company for a maximum period of five consecutive years. Before the end of the five consecutive years an application is required to be made for changing the status of the company from dormant to active company or such a company's name is struck off from the Register of companies. However, if the company breaches any of the ground of

being a dormant company then such a company's status is automatically changed from dormant to active company in the Register maintained by the Registrar of companies.

– The Act provides certain benefits / exemptions to a dormant company apart from lesser compliance requirements.

GLOSSARY

Inactive Company	Means a company which has not: a. carrying on any business or operations b. not made any significant accounting transaction during last two financial years c. not filed financial statements and annual returns during the last two financial years
Significant Accounting Transaction	It means any transaction made by the company except below transaction: (a) payment of fees by a company to the Registrar; (b) payments made by company to fulfil the requirements of this Act or any other law; (c) allotment of shares to fulfil the requirements of this Act; and (d) Payments for maintenance of its office and records.
Listed company	It means a Company whose shares are traded on an official stock exchange

SELF-TEST QUESTIONS

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Power of Registrar of Companies to change the status of active company into Dormant Company
2. Discuss in brief the law relating to Active Company
3. Circumstances under which the status of the Dormant Company is restored to active company
4. Summaries the provisions of the Companies Act 2013 relating to prerequisite for active company to change its status to Dormant Company.
5. Circumstances under which dormant company is strike off from the Register of Companies.

Lesson 20

Strike Off and Restoration of Name of the Company and LLP

LESSON OUTLINE

- Introduction
- Legal framework dealing with the provisions of striking off –
  - (A) Suo-moto strike off
  - (B) Application by the Company
- Striking off the name of the LLP from the register of LLP
- Procedure of striking off
- Liabilities of partners to continue after strike off
- Restoration of LLP
- Procedure for making application to NCLT
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

On incorporation, the name of the company and LLP is entered in the Register maintained by the Registrar. On striking off, the name of the company/ LLP is temporarily removed from the Register. The name of the company can be restored in the Register on making an application.

After reading this lesson you would be able to understand the circumstances under which the name of the company and LLP is struck off from the Register, procedure for striking off of the name, procedure for restoration of the name, etc.

INTRODUCTION

The Ministry of Corporate Affairs ("MCA") vide Notification dated 26 December, 2016 notified Sections 248 to 252 of the Companies Act, 2013 ("Act") dealing with the provision for Removal of Names of Companies from the Register of Companies. The provisions relating to strike off provide an opportunity to the non working companies to get their names struck off from the records of the ROC. The MCA has also issued the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 ("Rules") to be effective from the same date i.e. 26th December 2016 in order to provide procedural aspects of striking off.

WAYS OF STRIKING OFF OF COMPANIES

- By Registrar of Companies on *suo-motu*
- By Application of Company for removal of name/ Strike off of Company

A company which is undergoing the process of 'Striking Off' either voluntarily or by action of the Registrar is given the status as 'Striking Off' and the status of the company is changed to Dissolved or Liquidated when affairs of the company are completely wound-up by following the provision of winding-up of Company. After dissolution or liquidation, the company ceases to exist.

The provisions of Sections 248 to 252 of the Companies Act, 2013 read with Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 deal with the removal of names of companies from the Register of Companies.

Legal Framework dealing with the provisions of Striking off:

In case of an existing company which has failed to commence its business within one year of its incorporation or is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act 2013, the Registrar can suo motu after giving notice and opportunity of being heardstrike off the name of the company from the register of companies, and publish notice thereof of the striking off of the name of the company from the register of companies in the Official Gazette and on the publication of this notice in the Official Gazette, the company shall stand dissolved.

Striking off under Chapter XVIII of the Companies Act, 2013 can also be by way of an application filed by company to Registrar for removing its name from the register of companies. On receipt of the application along with necessary fees, the Registrar issues a Public notice for intimating the general public about the receipt of an application for removal of name of the company and giving a chance to the creditors and general public to submit their objection, if any, to the proposed application. In case no objection is received, the Registrar may proceed to strike off the name of the Company. On the publication in the Official Gazette of this notice, the name of the company stands struck off with effect from the date mentioned therein.

Strike Off by ROC Suo Motu

Subject to the provisions of sub section 1 of section 248 of companies Act 2013 read with Rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, in the following cases, the Registrar can suo motu remove the name of the company from the Register:

(a) a company has failed to commence its business within one year of its incorporation or;

(b) a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013 or

(c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay

at the time of incorporation of a company and a declaration to this affect has not filed within 180 days of its incorporation under section 10A(i); or

(d) the company is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9).

Before removal of the name of the company from the Register, the registrar is required to send a notice in Form STK 1 to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies. Such a notice should contain the reasons for which the name of the company is to be removed from the register of companies. Such a notice should be sent to all the directors of the company at the addresses available on record, by registered post with acknowledgement due or by speed post. On receipt of such a notice the company and all the directors of the company are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the company should not be removed from the register of companies. Such representations should be given within a period of thirty days from the date of the notice.

Case Law

International Security Printers Private Limited v. *ROC* Delhi dated 8th August, 2017

In this case; Petition was filed by the International Security Printers Pvt. Ltd challenging the order of ROC for strike off the name of the Company. ROC exercises his power for strike off of Companies. Petitioner….ROC has struck off 6000 Companies.

- No notice was issued to them and neither did the roc adhere to any legal procedure which required a letter to be sent to the Company.
- The gazette notification was required to be published and the copy of the notification was required to be sent to the registered office of the Company.
- It is averred that without adhering to the aforesaid procedure, the impugned action is vitiated and is in gross violation of the principles of natural justice as no opportunity for hearing was given before taking the impugned step

Decision of the HON'BLE BENCH

Principle of Natural Justice: ROC however has failed to prove the allegation that proper step were taken in compliance of the mandatory provisions of Section 252 (4),(5),(6) which are a pre requisite for striking off the name of Company from the Registrar. In the absence of impugned action of the Respondent would be arbitrary, illegal and against the principles of natural justice. This Petition Accepted.

Procedure to be followed by ROC for striking of the name of the Company on *suo motu* basis:

Service of notice
Reply to Notice
Consideration of the representation made
Publication of Notice
Intimation to regulatory authorities
Striking off / Removal of the name of the company
Provision for realisation of amount due
Notice of dissolution of the company

1. **Service of notice:** The registrar is required to send a notice in Form STK 1 to the company and all the directors of the company, of his intention to remove the name of the company from the register of companies. Such a notice should contain the reasons on which the name of the company is to be removed from the register of companies. Such a notice should be sent to all the directors of the company at the addresses available on record, by registered post with acknowledgement due or by speed post.

2. **Reply to Notice:** On receipt of such a notice the company and all the directors of the company are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the company should not be removed from the register of companies. Such a representation should be given within a period of thirty days from the date of the notice.

3. **Consideration of the representation made:** The ROC will consider the representation made by the company and all the directors of the company. If the ROC is not satisfied with the representation made by the company and its directors, it may proceed to strike off the name of company.

4. **Publication of Notice:** The notice for removal of the name of the company should be in form STK 5 for the information of the general public and should be

   (i) placed on the official website of the Ministry of Corporate Affairs on a separate link established on such website in this regard;

   (ii) published in the Official Gazette;

   (iii) published in Form No. STK 5A in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

   Such a publication is required to be given for the information of the general public in order to enable the general public to give their objections, if any, to the proposed removal / striking off of name of the companies from the register of companies and requiring them to send their objection to the ROC within thirty days from the date of publication of the notice

5. **Intimation to regulatory authorities:** Intimation about the proposed action of removal or striking off the names of company should be sent to the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over such a company. Such intimation should be given to enable the authorities to give their objections, if any. Such objections are required to be given within a period of thirty days from the date of issue of the letter of intimation.

6. **Striking off / Removal of the name of the company:** After expiry of thirty days from the date of publication of the notice in the newspaper, official gazette and intimation to regulatory authorities, if there are no objections received within thirty days from the general public or respective authority and unless cause to the contrary is shown by the company, the ROC can proceed to strike off or remove the name of the company from the Register of companies.

7. **Provision for realisation of amount due:** The ROC before passing an order for Striking off / Removal of the name of the company should satisfy that sufficient provision has been made for the realisation of all the amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time. Registrar can obtain necessary undertakings from the director or other persons in charge of the management of the company.

8. **Notice of dissolution of the company:** After the expiry of the time mentioned in the notice, the ROC can strike off the name of the company from the Register. The notice of striking off the name of the company from the register of companies and its dissolution should be published in the Official Gazette in Form STK 7 and the same should also be placed on the official website of the Ministry of Corporate Affairs. The company shall stand dissolved on the publication of this notice in the Official Gazette.

Strike Off by Way of Filing an Application by the Company

Strike off provisions gives a choice or an option to non working company to remove its name from the Register of Companies. There are many companies which are registered with ROC but due to various reasons they are not operative. The Strike off gives an option to such companies to apply to ROC for removal of their name from the Register of Companies. The procedure of this exit is now governed under sub section (2) of section 248 of Companies Act, 2013 read with Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 This act is a speedy way to close down a company being non–operational over a period of time.

Subject to the provisions of sub section 2 of section 248 of companies Act 2013 read with Rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016, the company can on its own file an application for removal of name of company from the Register of companies.

Type of Companies which cannot be removed under these provisions:

(i) Listed Companies

(ii) Companies registered under section 8

(iii) Companies having charges which are pending for satisfaction

(iv) Companies whose application for Compounding is pending

(v) Companies against which any prosecution for an offence is pending in any court

(vi) [1]Vanishing Companies

(vii) Companies that have been delisted due to non-compliance of listing regulations or listing agreement or any other statutory laws;

(viii) Companies where inspection or investigation is ordered and being carried out or actions or such order are yet to be taken up or were complete but prosecutions arising out of such inspection or investigation are pending in the court.

(ix) Companies which have accepted public deposits which are either outstanding or the company is in default in repayment of the same;

(x) Companies where notices under section 234 of CA 1956 or 206 or 207 of the CA 2013 have been issued by the Registrar or Inspector and reply thereto is pending or report under section 208 is pending or where any prosecution arising out of such inquiry or scrutiny, if any, is pending with the court.

On the following grounds, the company through its board of directors, can file an application for removal of name of company from the Register of companies

(a) Where a company has failed to commence its business within one year of its incorporation or;

(b) Where a company is not carrying on any business or operation for a period of two immediately preceding financial years and has not made any application within such period for obtaining the status of a dormant company under section 455 of the Companies Act, 2013.

(c) the subscribers to the memorandum have not paid the subscription which they had undertaken to pay at the time of incorporation of a company and a declaration to this effect has not been filed within 180 days of its incorporation;

---

1. Means a Company registered under this act, listed on stock exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of 2 years, and not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange, and none of its directors are traceable

(d) the comp[any is not carrying on any business or operations as revealed after the physical verification carried out under section 12(9).

Before making an application to the ROC for removal of the name of the company, the board of directors of the company shall take all the steps necessary in order to extinguish all its liabilities. Approval of the shareholders is also required to be taken for filing an application to the ROC for the removal of the name of the company from the Register of companies.

Situations in which Company cannot apply for Strike off:

The Company shall not made any application for the strike off of the Company if at any time in the previous 3 months, the company has done any of the below mentioned activities:

i. Has Changed its name or

ii. Has Shifted its registered office from one State to another;

iii. has made a disposal for value of property or rights held by it, immediately before cesser of trade or otherwise carrying on of business, for the purpose of disposal for gain in the normal course of trading or otherwise carrying on of business;

iv. has engaged in any other activity except the one which is necessary or expedient for the purpose of making an application under that section, or deciding whether to do so or concluding the affairs of the company, or complying with any statutory requirement;

v. has made an application to the Tribunal for the sanctioning of a Scheme of Compromise or Arrangement and the matter has not been finally concluded; or

vi. is being wound up under Chapter XX of the Companies Act, 2013, whether voluntarily or by the Tribunal.

Procedure of striking off of the name of the company by way of an application to ROC

The board of directors of the company shall follow the following procedure for removal of name of the company from the register of ROC:

(i) Call and hold Board Meeting to pass Board resolution for the purpose of striking off of the name of the company from the register of the ROC subject to the approval of the shareholders of the company and to authorize any director to file an application and for fixing date, time and venue for the Extra Ordinary General Meeting of the shareholder.

(ii) After passing of Board resolution, if there is any liability in the company, the company will set off / pay all liabilities.

(iii) Every director of the company should sign and execute indemnity bond in Form STK 3 and Affidavit in Form STK 4 which should be duly notarized. In case director is a foreign national or non-resident Indian, the documents should be notarized or apostilled or consularised.

(iv) Company should get the statement of accounts prepared showing the assets and liabilities of the company made up to a day, not more than thirty days before the date of application. Such a statement should be certified by a Chartered Accountant;

(v) General Meeting should be held on the day, date, time and venue as fixed earlier for passing of the special resolution.

(vi) Within thirty days from the date of the passing of the special resolution in the General Meeting or after obtaining consent, company should file MGT-14.

(vii) Approval of concerned authorities is required in case of a company regulated by any other authority.

(viii) Thereafter, an application for removal of the name of the company shall be made in Form STK-2 along with prescribed fee. Following documents will be attached in the Form STK-2. {Rule 4(1)}

Attachment – STK-2: Rule 4(3)

(a) NOC from the appropriate concerned authority, if required (RBI, IRDA, Housing Finance, SEBI etc.) Rule 4(2)

(b) [1]Indemnity Bond from Every Director in Form STK-3

(c) Statement of Accounts certified by CA. Statement should not be older than 30 days from the date of application.

(d) An Affidavit from every Director in Form STK-4.

(e) CTC of Special Resolution duly signed by each Director.

(f) Statement regarding pending litigations, if any, involving Company. (Better to give in affidavit format).

(ix) E-Form STK-2 shall be signed by an authorized director.

(x) E-Form STK-2 shall be certified by Company secretary in whole time practice or Chartered Accountant in whole time practice or Cost Accountant in whole time practice.

(xi) Public notice by ROC: After filing application for strike off by the company, the ROC shall publish a public notice in Form STK-6 inviting objections to the proposed strike off, if any. The notice will also be published for information of the general public in the following ways:

(a) placed on the official website of the Ministry of Corporate Affairs on a separate link established on such website in this regard;

(b) published in the Official Gazette;

(c) Published in English language in a leading English newspaper and at least once in vernacular language in a leading vernacular language newspaper, both having wide circulation in the State in which the registered office of the company is situated.

(xii) Intimation to regulatory authorities: Intimation about the proposed action of removal or striking off the names of company should be sent to the Income-tax authorities, central excise authorities and service-tax authorities having jurisdiction over such a company.

(xiii) Striking off / Removal of the name of the company: After thirty days from the date of publication of the notice in the newspaper, official gazette and intimation to regulatory authorities and unless cause to the contrary is shown by the company, if there are no objections received within thirty days from the general public or respective authority, the ROC can proceed to strike off or remove the name of the company from the Register of companies.

(xiv) Provision for realisation of amount due: The ROC before passing an order for striking off / Removal of the name of the company should satisfy himself that sufficient provision has been made for the realisation of all amount due to the company and for the payment or discharge of its liabilities and obligations by the company within a reasonable time. Registrar can obtain necessary undertakings from the director or other persons in charge of the management of the company. The assets of the company should be made available for the payment or discharge of all its liabilities and obligations even after the date of the order removing the name of the company from the register of companies.

---

1. If the person is foreign national or non-resident Indian, the indemnity bond, and declaration shall be notarized or apostillised or consularised.

(xv) Notice of dissolution of the company: After the expiry of the time mentioned in the notice, the ROC can strike off the name of the company from the Register. The notice of striking off the name of the company from the register of companies and its dissolution should be published in the Official Gazette in Form STK 7 and the same should also be placed on the official website of the Ministry of Corporate Affairs. The company shall stand dissolved on the publication of this notice in the Official Gazette.

No objection certificate from appropriate Regulatory Authority

No objection certificate from appropriate Regulatory Authority concerned is required in case a company is regulated under a special Act and in case of the following companies. Such a No objection certificate should be attached to the application in form STK- 2.

(i) companies which have conducted or conducting non-banking financial and investment activities as referred to in the Reserve Bank of India Act, 1934 (2 of 1934) or rules and regulations thereunder;

(ii) housing finance companies as referred to in the Housing Finance Companies (National Housing Bank) Directions, 2010 issued under the National Housing Bank Act, 1987 (53 of 1987);

(iii) insurance companies as referred to in the Insurance Act, 1938 (4 of 1938) or rules and regulations thereunder;

(iv) companies in the business of capital market intermediaries as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;

(v) companies engaged in collective investment schemes as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;

(vi) asset management companies as referred to in the Securities and Exchange Board of India Act, 1992 (15 of 1992) or rules and regulations thereunder;

Penalty: If an application is made in violation of section 248(1), it shall be punishable with fine which may extend to one lakh rupees. An application filed under sub-section (2) of section 248 shall be withdrawn by the company or rejected by the Registrar as soon as conditions under sub-section (1) are brought to his notice.

Status of Strike Off Company

If a company stands dissolved under section 248, it shall on and from the date mentioned in the notice cease to operate as a company and the Certificate of Incorporation issued to it shall be deemed to have been cancelled from such date except for the purpose of realising the amount due to the company and for the payment or discharge of the liabilities or obligations of the company.

Fraudulent Application for Removal of Name

If it is found that an application by a company has been made with the object of evading the liabilities of the company or with the intention to deceive the creditors or to defraud any other persons, the persons in charge of the management of the company shall, notwithstanding that the company has been notified as dissolved be liable for the following:

(i) be jointly and severally liable to any person or persons who had incurred loss or damage as a result of the company being notified as dissolved; and

(ii) be punishable for fraud in the manner as provided in section 447.

The Registrar has the power to recommend prosecution of the persons responsible for the filing of an application.

Liabilities of directors, managers, officers and members to be continue

The liability, if any, of every director, manager or other officer who was exercising any power of management, and of every member of the company dissolved under this section, shall continue and may be enforced as if the company had not been dissolved.

List of STK forms

Sr. No	Name of Form	Purpose	Governed by
1	Form STK-1	Notice by Registrar for removal of name of a company from the register of Companies	Section 248(1) of the Companies Act,2013& rule 3 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016
2	Form STK-2	Application by company to ROC for removing its name from register of Companies.	Section 248(2) of the Companies Act, 2013 & Rule 4(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
3	Form STK-3	INDEMNITY BOND (to be given individually or collectively by every director).	Pursuant to clause (i) of sub-rule (3) of rule 4 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
4	Form STK-4	AFFIDAVIT (to be given individually by every Director).	Section 248(2) of the Companies Act, 2013 & clause (iii) of sub-rule (3) of Rule 4.
5	Form STK-5	PUBLIC NOTICE	Section 248(1) & (4) of the Companies Act, 2013 & rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
6	Form STK-5A	PUBLIC NOTICE	Section 248(1) & (4) of the Companies Act, 2013 & rule 7(1) of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
7	Form STK-6	PUBLIC NOTICE	Section 248(2) & (4) of the Companies Act, 2013 & rule 7 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016.
8	Form STK-7	Notice of Striking Off and Dissolution.	Section 248(5) of the Companies Act, 2013& rule 9 of the Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016

REVIEW QUESTIONS

A. Choose the correct answer

State whether the following statement is "True" or "False"

(1) Under Section 248(2), Registrar has the power to strike off the name of the company

- True
- False

Correct answer: False

(2) Notice is send by the ROC in form STK 5

- True
- False

Correct answer: False

B. Choose the correct answer

In which form an application is to be made by company to ROC for removing its name from register of Companies.

(a) Form STK-1

(b) Form STK-2

(c) Form STK-3

(d) Form STK-4

Correct answer: (b)

Restoration of the company

Registrar of Companies can *suo motu* after issuing the notices under section 248(1) strike of the name of the company. It may happen that the name of the company may be struck off even though the company is active company but due to the non-filing of reply, the ROC has removed the name of the company from the Register. In such a case the directors of such a company have no option but to approach NCLT by making an appeal for the restoration of the name of the company in the Register of companies maintained by the ROC. Legal provisions related to restoration of name of the struck off companies are given in Section 248 to 252 of the Act read with Rule 87A of the NCLT (Amendment) Rules, 2017 and the Companies (Removal of Name of Companies from the Register of Companies) Rules, 2016.

Appeal to NCLT for restoration of the name of the company

Any person aggrieved by the order of the ROC may file an appeal before the Tribunal within 3 years of the order passed by ROC and if the Tribunal is of the opinion that the removal of name of company is not justified in view of the absence of any of the grounds on which the order was passed by the ROC, it may pass an order for restoration of the name of the company in the register of companies after giving a reasonable opportunity of making representations and of being heard to the ROC, the company and all the persons concerned.

Application to NCLT by ROC for restoration of the name of the company

The ROC may, within a period of three years from the date of passing of the order dissolving the company under section 248, file an application before the Tribunal seeking restoration of name of such company if it is satisfied

that that the name of the company has been struck off from the register of companies either inadvertently or on the basis of incorrect information furnished by the company or its directors.

Application to NCLT for restoration of the name of the company by Company or any member or creditor or workmen:

The Tribunal, on an application made by the company, member, creditor or workman before the expiry of 20 years from the publication in the Official Gazette of the notice of dissolution of the company, if satisfied that:

(a) the company was, at the time of its name being struck off, carrying on business or in operation; or

(b) otherwise it is just that the name of the company be restored to the register of companies,

may order the name of the company to be restored to the register of companies. Further, the Tribunal may also pass an order and give such other directions and make such provisions as deemed just for placing the company and all other persons in the same position as nearly as may be as if the name of the company had not been struck off from the register of companies.

STRIKING OF THE NAME OF THE LIMITED LIABILITY PARTNERSHIP (LLP) FROM THE REGISTER OF LIMITED LIABILITY PARTNERSHIPS

Similar to the provision of section 248 to 252 of the Companies Act, 2013 read with Companies (Removal of Names of Companies from the Register of Companies) Rules, 2016 dealing with the provision for Removal of Names of Companies from the Register of Companies, Section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of the Limited Liability Partnership Rules, 2009 deals with the provision for the striking off the name of the Limited Liability Partnership from the register of limited liability partnerships.

The Ministry of Corporate Affairs has recently amended Limited Liability Partnership Rules, 2009 by introducing the Limited Liability Partnership (Amendment) Rules, 2017 with effect from 20th May, 2017. With this amendment, LLP Form 24 has been introduced by the MCA to allow easy closure of a LLP by making an application to the Registrar for striking off the name of LLP.

Legal Framework dealing with the provision of Striking off

In case of an existing LLP which is not carrying on any business or operation for a period of one year or more, it can make an application in Form 24 to the Registrar, with the consent of all partners of the limited liability partnership for striking off its name from the register. Similarly, where the Registrar has reasonable cause to believe that a limited liability partnership is not carrying on business or its operation, in accordance with the provisions of this Act for a period of two years or more, the name of limited liability partnership may be struck off from the register of limited liability partnerships by ROC by taking suo motu action for striking off the name of the LLP. However before striking off the name of the LLP, the registrar shall give reasonable opportunity of being heard.

Strike Off by ROC Suo Motu

Subject to the provisions of section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of Limited Liability Partnership Rules, 2009 as amended from time to time, the Registrar can suo motu remove the name of the LLP from the Register in case a limited liability partnership is not carrying on any business or operation for a period of two years or more and the Registrar has reasonable cause to believe the same. In such a case the Registrar can suo motu take the action for striking off the name of the LLP.

Procedure to be followed by ROC for striking of the name of the LLP on suo motu basis:

Serve of notice
Reply to Notice

Consideration of the representation made
Publication of Notice
Striking off of the name of the LLP
Provision for realisation of amount due
Notice of dissolution of the LLP

1. **Serve of notice:** Before striking off the name of the LLP, the registrar is required to send a notice to the LLP and all the partners of the LLP of his intention to remove the name of the LLP from the register of partnership. Such a notice shall contain the reasons for which the name of the LLP is to be removed from the register.
2. **Reply to Notice:** On receipt of such a notice the LLP and all the partners of the LLP are required to send their representations along with copies of the relevant documents, if any, explaining the reasons as to why the name of the LLP should not be removed from the register. Such a representation should be given within a period of one month from the date of the notice.
3. **Consideration of the representation made:** The Registrar will consider the representation made. If the Registrar is not satisfied with the representation made by the LLP and its partners, it may proceed to strike off the name of LLP
4. **Publication of Notice:** Notice shall be placed on the website of the Ministry of Corporate Affairs for the information of the general public for the period of one month. Such publication is required to be given for the information of the general public in order to enable the general public to give their objections, if any, to the proposed striking off of name of the LLP from the register and requiring them to send their objection to Registrar within one month from the date of publication of the notice
5. **Striking off of the name of the LLP:** After the expiry of the time limit of one month and unless cause to the contrary is shown by the LLP, if there are no objections received, the Registrar can proceed to strike off the name of the LLP from the Register of partnership.
6. **Provision for realisation of amount due:** The Registrar before passing an order for striking off of the name of the LLP should satisfy that the sufficient provision has been made for the realization of all amount due to the limited liability partnership and for the payment or discharge of its liabilities and obligations by the limited liability partnership within a reasonable time. Registrar can obtain necessary undertakings from the designated partner or partner or other persons in charge of the management of the limited liability partnership.
7. **Notice of dissolution of the LLP:** After the expiry of the time mentioned in the notice, the Registrar can strike off the name of the LLP from the Register. The notice of striking off the name of the LLP from the register and its dissolution should be published in the Official Gazette. The LLP shall stand dissolved on the publication of this notice in the Official Gazette.

Strike Off by Way of Filing an Application by the LLP

Subject to the provision of section 75 of the Limited Liability Partnership Act, 2008 read with Rule 37 of the Limited Liability Partnership Rules, 2009, where a limited liability partnership is not carrying on any business or operation for a period of one year, such a LLP can make an application for purpose of suo motu striking off the name of the LLP.

Procedure of striking off of the name of the LLP by way of an application to ROC:

1. Calling and holding the meeting of the partners of LLP making an application for the striking off of the name of the LLP and authorizing the partner to make the application to Registrar. The consent of

all partners of the limited liability partnership should be obtained before making an application to the Registrar for striking off of the name of the LLP.

2. All the pending filing including the Annual Filing of form 8 and 11 up to the end of the financial year in which the limited liability partnership ceased to carry on its business or commercial operations should be completed before making of an application for striking off of the name of the LLP.
3. Approval of concerned authorities should be obtained in case of a LLP regulated by any Special Law.
4. All the Designated Partners of the LLP must execute an affidavit, either jointly or severally, that the Limited Liability Partnership ceased to carry on commercial activity from (Date) or has not commenced business and also declare that the LLP has no liabilities and indemnify any liability that may arise even after striking off its name from the Register. The liability of the Partners would not be extinguished even after closure of a LLP while using Form LLP 24.
5. Thereafter, an application for striking of the name of the LLP shall be made in Form 24 along with fees as prescribed and along with following documents:
   (a) a statement of account disclosing nil assets and nil liabilities, certified by a Chartered Accountant in practice made up to a date not earlier than thirty days of the date of filing of Form 24.
   (b) Copy of acknowledgement of latest Income tax return- Self Explanatory
   (c) copy of the initial limited liability partnership agreement, if entered into and not filed, along with changes thereof
   (d) an affidavit signed by the designated partners, either jointly or severally, to the effect,—
      (i) that the Limited Liability Partnership has not commenced business or where it commenced business, it ceased to carry on such business from ……(dd/mm/yyyy);
      (ii) that the limited liability partnership has no liabilities and indemnifying any liability that may arise even after striking off its name from the Register;
      (iii) that the Limited Liability Partnership has not opened any Bank Account and where it had opened, the said bank account has since been closed together with certificate(s) or statement from the respective bank demonstrating closure of Bank Account;
      (iv) that the Limited Liability Partnership has not filed any Income-tax return where it has not carried on any business since its incorporation, if applicable.
   (e) Copy of Detailed Application- Mention full details of LLP plus reasons for closure
   (f) Copy of Authority to Make the Application- Duly signed by all the Partners
6. Publication of Notice: Notice shall be placed on the website of the Ministry of Corporate Affairs for the information of the general public for the period of one month.
7. Striking off of the name of the LLP: After the expiry of the time limit of one month and unless cause to the contrary is shown by the LLP, if there are no objections received, the Registrar can proceed to strike off the name of the LLP from the Register of partnership.
8. Provision for realisation of amount due: The Registrar before passing an order for striking off of the name of the LLP should satisfy that the sufficient provision has been made for the realization of all amount due to the limited liability partnership and for the payment or discharge of its liabilities and obligations by the limited liability partnership within a reasonable time. Registrar can obtain necessary undertakings from the designated partner or partner or other persons in charge of the management of the limited liability partnership.

9. Notice of dissolution of the LLP: After the expiry of the time mentioned in the notice, the Registrar can strike off the name of the company LLP from the Register. The notice of striking off the name of the LLP from the register and its dissolution should be published in the Official Gazette. The company shall stand dissolved on the publication of this notice in the Official Gazette.

10. Striking off of the name of the LLP: On processing the application, if found acceptable, the concerned Registrar will strike off the name of the LLP from the Register of the Partnership.

Liabilities of Partners to be continued after Striking Off

The liability of all designated partners of the limited liability partnership would continue and may be enforced as if the limited liability partnership had not been dissolved.

Restoration of the LLP

Registrar can *suo motu* after issuing the notices under section 75 strike off the name of LLP. In such a case it may happen that the name of the LLP may be struck off even though the LLP is active, but the Registrar removed the name of the LLP from the Register.

Since there is no relief provided in the Limited Liability Partnership Act, 2008 or in the Limited Liability Partnership Rules, 2009, in such a case, the partners of such a LLP have to approach the jurisdictional High Court by writ petition under Article 226 of the Constitution of India for restoration of the LLP.

REVIEW QUESTIONS

A. Choose the correct answer

State whether the following statement is "True" or "False"

1. Under Section 37 Registrar has the power to strike off the name of the LLP
   - True
   - False

Correct answer: False

2. LLP can be restored after 20 years
   - True
   - False

Correct answer: False

3. Registrar can make an application for restoration of LLP
   - True
   - False

Correct answer: False

B. Choose the correct answer

1. In which form an application is to be made by company to LLP for removing its name from LLP from Register
   (a) Form 21
   (b) Form 24
   (c) Form 20
   (d) Form 42

Correct answer: (b)

LESSON ROUND-UP

- The Registrar has suo motu power to remove the name of the company and LLP from the register after complying the provision of the law. With the view to enable the defunct company / LLP to remove their name from the Register, the provisions are made for such companies / LLP, providing an exit scheme. Such companies / LLP can apply to the Registrar for striking off their name from the Register.
- The provisions of section of section 248 to 252 of the Companies Act 2013 provide an easy exit to company and are much speedy as compared to other modes of winding up under the Companies Act. Even though the company can easily dissolve through this mode and its name removed from the ROC's register, the liabilities continue on every director, officer and members of the company and may be enforced in the same manner as if the company had not been dissolved. In addition, by providing restoration provisions, the company which has been struck off may get a chance to restore its name in the register and get active with the permission of NCLT even within 20 years of being struck off.

GLOSSARY

Defunct company	The company which failed to commence business within one year from the date registration without any proper reason which beyond the control of the company. Again if a company is not filling its balance sheet for many years than also it will be traded as defunct company.
Vanishing Company	A company, registered under the Act or previous company law or any other law for the time being in force and listed with Stock Exchange which has failed to file its returns with the Registrar of Companies and Stock Exchange for a consecutive period of two years, and is not maintaining its registered office at the address notified with the Registrar of Companies or Stock Exchange and none of its directors are traceable.
Cessation of commercial operation	It is the date from which the Limited Liability Partnership ceased to carry on its revenue generating business and the transactions such as receipt of money from debtors or payment of money to creditors, subsequent to such cessation will not form part of revenue generating business.

SELF-TEST QUESTIONS

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Discuss in brief the law to strike off of the company by Application by the Company.
2. Power of Registrar of Companies to Strike off the name of the Company
3. Power of the NCLT to restore the name of eh Struck off company
4. Discuss in brief the law to strike off of the LLP by Application by the partners of LLP.
5. Power of Registrar to Strike off the name of the LLP
6. Power of the NCLT to restore the name of the Struck off LLP

Lesson 21

Corporate Insolvency Resolution Process, Liquidation and Winding Up: An Overview

LESSON OUTLINE

- Introduction
- Corporate Insolvency Resolution Process
- Important Definitions'
- Important Rules and Regulations
- Resolution Process
- Time limit of Corporate Insolvency Resolution process
- Moratorium
- Interim Resolution Professional
- Resolution Professional
- Committee of Creditors
- Resolution Plan
- Liquidation Process
- Voluntarily Liquidation
- Waterfall arrangement
- Dissolution of corporate debtor
- Winding up
- LESSON ROUND UP
- SELF-TEST QUESTIONS

LEARNING OBJECTIVES

The Insolvency and Bankruptcy Code, 2016 consolidate and amend the laws relating to insolvency of companies, partnership firms, limited liability partnership, individuals into a single legislation. It aims to provide time bound resolution and empowered the creditors to initiate the insolvency resolution process if default occurs.

The Corporate Insolvency Resolution Process (CIRP) can be initiated by making an application to the NCLT by the Financial Creditors under Section 7, by Operational Creditors under Section 9, and by the Corporate Debtor under Section 10 of the IBC, 2016. The basic departure from the old law in the new Code is that a company which has gone insolvent cannot start the Liquidation process at the primary stage until and unless it has gone through the process of Corporate Insolvency Resolution Process (CIRP). Under the said resolution process, options for revival of the company are looked into and if the said resolution process fails then only the company goes into liquidation.

The IBBI has notified the IBBI (Voluntary Liquidation Process) Regulations, 2017, which provides for the process for voluntary liquidation by a corporate person.

Chapter XX of the Companies Act, 2013 regulates the winding-up of companies in India. Section 255 of the Insolvency and Bankruptcy Code, 2016 has been notified with effect from November 15, 2016, and by virtue of Section 255, the Companies Act, 2013 stands amended in accordance with Schedule XI of the Code.

After reading this lesson, you will be able to understand the CIRP, liquidation and voluntary liquidation of a corporate person and the winding-up by the Tribunal.

INTRODUCTION

The words "Insolvency" and "Bankruptcy" are generally used interchangeably in common parlance but there is a marked distinction between the two. Insolvency and bankruptcy are not synonymous.

The term "insolvency" denotes the state of one whose assets are insufficient to pay his debts; or his general inability to pay his debts. The term "insolvency" is used in a restricted sense to express the inability of a party to pay his debts as they become due in the ordinary course of business.

The word "bankruptcy" denotes a legal status of a person or an entity who cannot repay debts to creditors. The bankruptcy process begins with filing of a petition in a court or before an appropriate authority designated for this purpose. The debtor's assets are then evaluated and used to pay the creditors in accordance with law.

Therefore, while insolvency is the inability of debtors to repay their debts, the bankruptcy, on the other hand, is a formal declaration of insolvency in accordance with law of the land. Insolvency describes a situation where the debtor is unable to meet his/her obligations and bankruptcy occurs when a court determines insolvency, and gives legal orders for it to be resolved. Thus insolvency is a state and bankruptcy is the conclusion.

The term insolvency is used for individuals as well as organisations/corporates. If insolvency is not resolved, it leads to bankruptcy in case of individuals and liquidation in case of corporates.

Liquidation, on the other hand, in its general sense, means closure or winding-up of a corporation or an incorporated entity through legal process on account of its inability to meet its obligations or to pay its debts. In order to clear the indebtedness, the assets are sold at the most reasonable rates by a competent liquidator appointed in this regard.

The Insolvency and Bankruptcy Code, 2016

The Insolvency and Bankruptcy Code Bill was drafted by a specially constituted "Bankruptcy Law Reforms Committee" (BLRC) under the Ministry of Finance. The Insolvency and Bankruptcy Code was introduced in the Lok Sabha on 21st December, 2015 and was subsequently referred to a Joint Committee of Parliament. The Committee submitted its recommendations and the modified Code was passed by Lok Sabha on 5th May, 2016. The Code was passed by Rajya Sabha on 11th May, 2016 and it received the Presidential assent on 28th May, 2016.

The Insolvency and Bankruptcy Code, 2016 consolidates the existing framework by creating a single law for insolvency and bankruptcy. The Code applies to companies, partnerships, limited liability partnerships, individuals and any other body which the central government may specify.

Section 2 of the Insolvency and Bankruptcy Code, 2016 as amended vide the Insolvency and Bankruptcy Code (Amendment) Act, 2018 provides that the provisions of the Code shall apply to –

(a) any company incorporated under the Companies Act, 2013 or under any previous company law,

(b) any other company governed by any special Act for the time being in force,

(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008,

(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify in this behalf,

(e) personal guarantors to corporate debtors,

(f) partnership firms and proprietorship firms; and

(g) individuals, other than persons referred to in clause (e) in relation to their insolvency, liquidation, voluntary liquidation or bankruptcy, as the case may be.

The Insolvency and Bankruptcy Code, 2016 consists of total 255 sections organised in five Parts. Part II

deals with insolvency resolution and liquidation for corporate persons whereas Part III lays down procedure for insolvency resolution and bankruptcy for individuals and partnership firms. Part IV of the Code makes provisions for regulation of Insolvency Professionals, Agencies and Information Utilities and Part V includes provisions for miscellaneous matters. The Code also has eleven Schedules which amends various statutes.

Some Salient Features of the Insolvency and Bankruptcy Code, 2016

1. To ensure a formal and time bound insolvency resolution process, the Code creates a new institutional framework consisting of the Insolvency and Bankruptcy Board of India (IBBI), Adjudicating Authorities (AAs), Insolvency Professionals (IPs), Insolvency Professional Agencies (IPAs) and Information Utilities (IUs).
2. The Insolvency Professionals control the assets of the debtor during the insolvency resolution process. The insolvency professional verifies the claims of the creditors, constitutes a committee of creditors, runs the debtor's business during the moratorium period and assists the creditors in finalising the revival plan. In liquidation, the insolvency professional acts as a liquidator and bankruptcy trustee. The Insolvency and Bankruptcy Board of India has framed the IBBI (Insolvency Professional) Regulations, 2016 to regulate the working of Insolvency Professionals.
3. While the Insolvency professionals assist in the insolvency resolution proceedings envisaged in the Code, the Information Utilities, on the other hand, collect, collate, authenticate and disseminate financial information. The purpose of such collection, collation, authentication and dissemination of financial information of debtors in centralised electronic databases is to facilitation swift decision making in the resolution proceedings. The Insolvency and Bankruptcy Board of India has framed the IBBI (Information Utilities) Regulations, 2017.
4. The Code proposes two Tribunals to adjudicate insolvency resolution cases. In the case of insolvency of companies and Limited Liability Partnerships (LLPs), the adjudication authority is the National Company Law Tribunal (NCLT), while the cases involving individuals and partnership firms are handled by the Debts Recovery Tribunals (DRTs). The insolvency proceeding will be initiated by NCLT or DRT, as the case may be, after verification of the claims of the initiator. Appeals from NCLT orders lie to the National Company Law Appellate Tribunal (NCLAT) and thereafter to the Supreme Court of India.
5. In resolution process for corporate persons, the Code proposes two independent stages:
   (i) Insolvency Resolution Process, during which the creditors assess the viability of debtor's business and the options for its rescue and revival.
   (ii) Liquidation, in case the insolvency resolution process fails or financial creditors decide to wind-up and distribute the assets of the debtor.
6. A financial creditor (for a defaulted financial debt) or an operational creditor (for an unpaid operational debt) can initiate Corporate Insolvency Resolution Process (CIRP) against a corporate debtor. The defaulting corporate debtor, its shareholders or employees, may also initiate voluntary insolvency proceedings. The National Company Law Tribunal (NCLT) is the designated adjudicating authority in case of corporate debtors.

APPLICABILITY

Part II of Insolvency and Bankruptcy Code, 2016 shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees.

However, the Central Government may, by notification, specify the minimum amount of default of higher value which shall not be more than one crore rupees.

IMPORTANT DEFINITIONS

- "Adjudicating Authority", for the purposes of Part II, means National Company Law Tribunal constituted under section 408 of the Companies Act, 2013
- "Corporate applicant" means –
  - (a) corporate debtor; or
  - (b) a member or partner of the corporate debtor who is authorised to make an application for the corporate insolvency resolution process under the constitutional document of the corporate debtor; or
  - (c) an individual who is in charge of managing the operations and resources of the corporate debtor; or
  - (d) a person who has the control and supervision over the financial affairs of the corporate debtor;
- "Corporate person" means a company as defined in clause (20) of section 2 of the Companies Act, 2013, a limited liability partnership, as defined in clause (n) of sub-section (1) of section 2 of the Limited Liability Partnership Act, 2008, or any other person incorporated with limited liability under any law for the time being in force but shall not include any financial service provider.
- "Corporate Guarantor" means a Corporate person who is the surety in a contract of guarantee to a Corporate Debtor.
- "Financial creditor" means any person to whom a financial debt is owed and includes a person to whom such debt has been legally assigned or transferred to
- "Financial debt" means a debt alongwith interest, if any, which is disbursed against the consideration for the time value of money and includes –
  - (a) money borrowed against the payment of interest;
  - (b) any amount raised by acceptance under any acceptance credit facility or its de-materialised equivalent;
  - (c) any amount raised pursuant to any note purchase facility or the issue of bonds, notes, debentures, loan stock or any similar instrument;
  - (d) the amount of any liability in respect of any lease or hire purchase contract which is deemed as a finance or capital lease under the Indian Accounting Standards or such other accounting standards as may be prescribed;
  - (e) receivables sold or discounted other than any receivables sold on non-recourse basis;
  - (f) any amount raised under any other transaction, including any forward sale or purchase agreement, having the commercial effect of a borrowing;

  Explanation: for the purpose of this sub-clause:

  - (i) any amount raised from an allottee under real estate project shall be deemed to be an amount having the commercial effect of a borrowing; and
  - (ii) the expressions, " allottee" and "real estate project" shall have the meanings respectively assigned to them in clauses(d) and (zb) of Section 2 of Real Estate (Regulation and Development) Act, 2016.
  - (g) any derivative transaction entered into in connection with protection against or benefit from fluctuation in any rate or price and for calculating the value of any derivative transaction, only the market value of such transaction shall be taken into account;

(h) any counter-indemnity obligation in respect of a guarantee, indemnity, bond, documentary letter of credit or any other instrument issued by a bank or financial institution;

(i) the amount of any liability in respect of any of the guarantee or indemnity for any of the items referred to in sub-clauses (a) to (h) of this clause;

- "Insolvency professional" means a person enrolled under section 206 with an insolvency professional agency as its member and registered with the Board as an insolvency professional under section 207.
- "Insolvency professional agency" means any person registered with the Board under section 201 as an insolvency professional agency.
- "Insolvency resolution process costs" means –

  (a) the amount of any interim finance and the costs incurred in raising such finance;

  (b) the fees payable to any person acting as a resolution professional;

  (c) any costs incurred by the resolution professional in running the business of the corporate debtor as a going concern;

  (d) any costs incurred at the expense of the Government to facilitate the insolvency resolution process; and

  (e) any other costs as may be specified by the Board
- "Liquidation commencement date" means the date on which proceedings for liquidation commence in accordance with section 33 or section 59, as the case may be.
- "Liquidation cost" means any cost incurred by the liquidator during the period of liquidation subject to such regulations, as may be specified by the Board.
- "Liquidator" means insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be.
- "Resolution professional", for the purposes of Part II, means an insolvency professional appointed to conduct the corporate insolvency resolution process and includes an interim resolution professional; and

IMPORTANT RULES AND REGULATIONS

- Insolvency and Bankruptcy Board of India (Insolvency Professional Agencies) Regulations, 2016
- Insolvency and Bankruptcy Board of India (Model Bye-Laws and Governing Board of Insolvency Professional Agencies) Regulations, 2016
- Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016
- Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016
- Insolvency and Bankruptcy (Application to Adjudicating Authority) Rules, 2016
- Insolvency and Bankruptcy Board of India (Liquidation Process) Regulations, 2016
- Insolvency and Bankruptcy board of India (Voluntary Liquidation Process) Regulations, 2017
- Insolvency and Bankruptcy Board of India (Information Utilities) Regulations, 2017

PERSONS WHO MAY INITIATE CORPORATE INSOLVENCY RESOLUTION PROCESS (CIRP)

Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution Process.

RESOLUTION PROCESS

1. A financial creditor either by itself or jointly with other financial creditors or any other person on behalf of the financial creditor, as may be notified by Central Government may file an application for initiating corporate insolvency resolution process against a corporate debtor before the Adjudicating Authority when a default has occurred.
2. The financial creditor shall, along with the application furnish –
   (a) record of the default recorded with the information utility or such other record or evidence of default as may be specified;
   (b) the name of the resolution professional proposed to act as an interim resolution professional; and
   (c) any other information as may be specified by the Board.
3. The Adjudicating Authority shall, within fourteen days of the receipt of the application under sub-section (2), ascertain the existence of a default from the records of an information utility or on the basis of other evidence furnished by the financial creditor. If the said Authority has not ascertained the existence of default and passed any such order within such time, it shall record its reason in writing for the same.
4. Where the Adjudicating Authority is satisfied that –
   (a) a default has occurred and the application under sub-section (2) is complete, and there is no disciplinary proceedings pending against the proposed resolution professional, it may, by order, admit such application; or
   (b) default has not occurred or the application under sub-section (2) is incomplete or any disciplinary proceeding is pending against the proposed resolution professional, it may, by order, reject such application.

   However, before rejecting the application, the Adjudicating Authority shall give a notice to the applicant to rectify the defect in his application within seven days of receipt of such notice.
5. The corporate insolvency resolution process shall commence from the date of admission of the application.
6. The Adjudicating Authority shall communicate the order to the financial creditors and the corporate debtor within seven days of admission or rejection of such application, as the case may be.
7. (1) An operational creditor may, on the occurrence of a default, deliver a demand notice of unpaid operational debtor copy of an invoice demanding payment of the amount involved in the default to the corporate debtor in such form and manner as may be prescribed.

   (2) The corporate debtor shall, within a period of ten days of the receipt of the demand notice or copy of the invoice mentioned in sub-section (1) bring to the notice of the operational creditor –
   (a) existence of a dispute, if any, or record of the pendency of the suit or arbitration proceedings filed before the receipt of such notice or invoice in relation to such dispute;
   (b) the payment of unpaid operational debt –
      (i) by sending an attested copy of the record of electronic transfer of the unpaid amount from the bank account of the corporate debtor; or
      (ii) by sending an attested copy of record that the operational creditor has encashed a cheque issued by the corporate debtor.

TIME LIMIT OF CORPORATE INSOLVENCY RESOLUTION PROCESS

The corporate insolvency resolution process shall be completed within a period of one hundred and eighty days from the date of admission of the application to initiate such process. The resolution professional shall file an application to the Adjudicating Authority to extend the period of the corporate insolvency resolution process beyond one hundred and eighty days, if instructed to do so by a resolution passed at a meeting of the committee of creditors by a vote of sixty-six per cent. of the voting shares.

The Adjudicating Authority is satisfied that the subject matter of the case is such that corporate insolvency resolution process cannot be completed within one hundred and eighty days, it may by order extend the duration of such process beyond one hundred and eighty days by such further period as it thinks fit, but not exceeding ninety days

However, corporate insolvency resolution process shall be mandatorily completed within a period of three hundred and thirty days from the insolvency commencement date including any extension of the period of CIRP granted under section 12 and the time taken in legal proceedings in relation to such resolution process of the corporate debtor.

WITHDRAWAL OF APPLICATION

The Adjudicating Authority may allow the withdrwal of application admitted on an application made by the applicant with the approval of Ninety percent voting share of the committee of creditors in the prescribed manner.

MORATORIUM

On commencement of the CIRP, the adjudicating authority passes an order declaring moratorium for prohibiting all of the following by virtue of section 14 of the IBC:

(a) Institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority;

(b) Transferring, encumbering, alienating or disposing of by the corporate debtor any of its assets or any legal right or beneficial interest therein;

(c) Any action to foreclose, recover or enforce any security interest created by the corporate debtor in respect of its property including any action under SARFAESI Act, 2002;

(d) The recovery of any property by an owner or lessor where such property is occupied by or in the possession of the corporate debtor.

The order of moratorium shall have effect from the date of order till the completion of CIRP or date of approval of resolution plan or order of liquidation, as the case may be.

INTERIM RESOLUTION PROFESSIONAL (IRP)

The IRP takes over the management of the corporate debtor and is in charge of day-to-day affairs of the corporate debtor. He may appoint professionals and consultants to support him in his duties.

The primary duties of the IRP are to:

(a) Make public announcement about the CIRP of the corporate debtor

(b) Invite claims from creditors

(c) Get valuation of the corporate debtor done

On receipt of claims from the creditors, the IRP shall verify the claims and make list of accepted claims. Within 30 days of commencement of CIRP, the IRP shall constitute a Committee of Creditors (COC) which primarily consists of all financial creditors of the corporate debtor. The IRP shall also prepare an Information Memorandum containing prescribed details of the corporate debtor.

RESOLUTION PROFESSIONAL

Resolution Professional (RP) is a new category of professionals who on meeting stipulated criteria, is registered with the Insolvency and Bankruptcy Board of India. Only a person who is registered as a Resolution Professional / Insolvency Professional can act as such. Company Secretaries are eligible to be registered as Resolution Professionals subject to meeting stipulated criteria.

COMMITTEE OF CREDITORS

Committee of Creditors (CoC) is a committee consisting of the financial creditors of the corporate debtor. This Committee eventually forms the decision making body of the various routine tasks involved in Corporate Insolvency Resolution Process (CIRP), responsible for giving approval to the IRP/ RP to carry out actions that might affect the CIRP.

The power to ratify the managerial decisions taken by the RP vests upon the Committee. CoC approves/ rejects the Resolution Plan, extension of CIRP, decides upon liquidation of the Corporate Debtor, ratifies expenses borne by the RP, etc.

The CoC at its first meeting shall appoint a Resolution Professional (RP). In doing so, it may either confirm the appointment of IRP as RP or appoint another RP of its choice. The RP then takes over the management of the corporate debtor from the IRP. The RP shall act under the guidance and superintendence of the CoC. All decisions of the CoC shall be taken by 66% majority. Each member of the CoC has voting share in proportion to the amount of debt outstanding to the corporate debtor. The RP shall take approval of the CoC for matters stipulated in the Code.

RESOLUTION PLAN

The objective behind the CIRP is that the corporate debtor should get a chance to revive itself from insolvency. The corporate debtor is in insolvency due to various reasons including market conditions, business cycles, wrongful acts of the promoters, amongst others. The corporate debtor should get a fresh chance to revive itself and recommence its operations either in the same management or a new management. With this intent in mind, the RP invites proposals to revive the corporate debtor. These proposals are known as “resolution plans” and they can be submitted by any person who is interested in revival of the company. These plans include proposals to pay off the existing liabilities of the corporate debtor in part or in full and to restart its operations over a period of time. There are safeguards against a defaulting promoter submitting a resolution plan so that such defaulting promoter is not able to takeover a debt free company at lower cost by way of a resolution plan.

The resolution plan is submitted to the RP who in turn places all such plans before the CoC. The CoC shall approve the most suitable resolution plan. Such resolution plan approved by the CoC is submitted to the Tribunal for its approval. In case the Tribunal approves the resolution plan, the corporate debtor is out of CIRP.

LIQUIDATION PROCESS

Liquidation of corporate person is considered to be the last resort in order to recover money. When the resolution plan has failed and no other way could be adopted then dissolution of company is the only resort. An auction is conducted where the assets of the company is sold to realize money to return it to the lenders. The provisions dealing with the liquidation of corporate persons are covered in the chapter III of the Part II of the Insolvency and Bankruptcy code.

Sections 33 to 54 of the Insolvency and Bankruptcy Code, 2016 and IBBI (Liquidation Process) Regulations, 2016 lays down the law relating to liquidation process for corporate persons.

An attempt is first made to resolve the insolvency of corporate debtor through corporate insolvency resolution process laid down in Chapter II of Part II of the Code. The provisions relating to liquidation in Chapter III of Part II of the Code comes into effect if the attempts to resolve corporate insolvency under Chapter II of the Code fail.

Section 33 of the Code lists out the triggers for initiating the liquidation process for corporate persons. Section 33 of the Code reads as follows:

(1) Where the Adjudicating Authority, –

(a) before the expiry of the insolvency resolution process period or the maximum period permitted for completion of the corporate insolvency resolution process under section 12 or the fast track corporate insolvency resolution process under section 56, as the case may be, does not receive a resolution plan under sub-section (6) of section 30; or

(b) rejects the resolution plan under section 31 for the non-compliance of the requirements specified therein, it shall –

(i) pass an order requiring the corporate debtor to be liquidated in the manner as laid down in this Chapter;

(ii) issue a public announcement stating that the corporate debtor is in liquidation; and

(iii) require such order to be sent to the authority with which the corporate debtor is registered.

(2) Where the resolution professional, at any time during the corporate insolvency resolution process but before confirmation of resolution plan, intimates the Adjudicating Authority of the decision of the committee of creditors approved by not less than 66% of the voting share to liquidate the corporate debtor, the Adjudicating Authority shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(3) Where the resolution plan approved by the Adjudicating Authority is contravened by the concerned corporate debtor, any person other than the corporate debtor, whose interests are prejudicially affected by such contravention, may make an application to the Adjudicating Authority for a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(4) On receipt of an application under sub-section (3), if the Adjudicating Authority determines that the corporate debtor has contravened the provisions of the resolution plan, it shall pass a liquidation order as referred to in sub-clauses (i), (ii) and (iii) of clause (b) of sub-section (1).

(5) Subject to section 52, when a liquidation order has been passed, no suit or other legal proceeding shall be instituted by or against the corporate debtor:

Provided that a suit or other legal proceeding may be instituted by the liquidator, on behalf of the corporate debtor, with the prior approval of the Adjudicating Authority.

(6) The provisions of sub-section (5) shall not apply to legal proceedings in relation to such transactions as may be notified by the Central Government in consultation with any financial sector regulator.

(7) The order for liquidation under this section shall be deemed to be a notice of discharge to the officers, employees and workmen of the corporate debtor, except when the business of the corporate debtor is continued during the liquidation process by the liquidator.

Liquidator

Section 34 of the Code provides for the appointment of liquidator and the fees to be paid to him. According

to section 5(18) of the Code, a "liquidator" means an insolvency professional appointed as a liquidator in accordance with the provisions of Chapter III or Chapter V of this Part, as the case may be.

Section 35 provides a non-exhaustive list of powers and duties of the liquidator to ensure orderly completion of the liquidation proceedings.

Liquidation Estate

Section 36 provides for the creation of a liquidation estate comprising the assets of the corporate debtor as set out in section 36(3). Section 36 also lists out the assets which are to be excluded from the liquidation estate. The Central Government has been given the power to notify assets, in consultation with the appropriate financial sector regulators, which will be excluded from the estate in the interest of efficient functioning of the financial markets.

Section 36(1) provides that for the purpose of liquidation, the liquidator shall form an estate of the assets mentioned in sub-section (3), which will be called the liquidation estate in relation to the corporate debtor.

Section 36(2) further provides that the liquidator shall hold the liquidation estate as a fiduciary for the benefit of all the creditors.

VOLUNTARILY LIQUIDATION

The Insolvency and Bankruptcy Code 2016 (the Code) not only enables the insolvency proceedings of the insolvents but also contains provisions for solvent entities that want to surrender their business and refrain from carrying on their business. To be eligible for voluntary liquidation, the solvent entity must be in a state to pay off its debts.

The provisions relating to voluntarily winding up of Companies have been removed from the Companies Act, 2013 (w.e.f April 01,2017) and are now governed by Insolvency and Bankruptcy Code.

A corporate person will be eligible to opt for voluntary liquidation under the Code provided it fulfils the two mandatory conditions i.e. (i) either the company has no debt or that it will be able to pay its debts in full from the proceeds of assets to be sold in the voluntary liquidation; and (ii) the company is not being liquidated to defraud any person.

Code reduces the intervention of the regulatory authorities drastically that fasten up the process. Once the liquidation process is completed, the liquidator has to make an application to the Tribunal for passing the order of dissolution of the company.

Section 59 of the Code and IBBI (Voluntary Liquidation Process) Regulations, 2017 govern voluntary liquidation process.

1. Additional declaration by the directors that company is not wound up to defraud any person
2. Only insolvency professional can, who meets the eligibility criteria as specified under Regulations, be appointed as liquidator;
3. Maintenance and preservation of various registers in the prescribed manner;
4. Preparation of various reports by the liquidator as to be submitted to a corporate person, Registrar of Companies ("ROC"); and the Insolvency and Bankruptcy Board of India ("Board")
5. Receipt of stakeholders claims by liquidator only in specified forms;
6. The liquidator shall endeavour to wind up the affairs of the corporate person within 12 (twelve) months from the voluntary liquidation commencement date;

Section 59 of the code provides that a Corporate person (includes Company, LLP, etc. in terms of definition

under section 3(7) who intends to liquidate itself voluntarily and has not committed any default may initiate voluntary liquidation proceedings under the provisions of Chapter V, Part II of Code.

Brief of procedure of voluntary liquidation of a corporate person under IBC is given below:

Step I: Submission of declaration(s) to ROC, stating that the company will be able to pay its dues and is not being liquidated to defraud any person;

Step II: Passing of special resolution for approving the proposal of voluntary liquidation and appointment of liquidator ("Approval"), within 4 (four) weeks of the aforesaid declaration(s). If a corporate person owes debts, approval of two-third majority creditors would also be required;

Step III: Public announcement inviting claims of all stakeholders, within 5 (five) days of such approval, in newspaper as well as on website of the corporate person;

Step IV: Intimation to the ROC and the Board about the approval, within 7 (seven) days of such approval;

Step V: Preparation of preliminary report about the capital structure, estimates of assets and liabilities, proposed plan of action etc., and submission of the same to a corporate person within 45 (forty-five) days of such approval;

Step VI: Verification of claims, within 30 (thirty) days form the last date for receipt of claims and preparation of list of stakeholders, within 45 (forty-five) days from the last date for receipt of claims;

Step VII: Opening of a bank account in the name of the corporate person followed by the words 'in voluntary liquidation', in a scheduled bank, for the receipt of all moneys due to the corporate person

Step VIII: Sale of assets, recovery of monies due to corporate person, realization of uncalled capital or unpaid capital contribution;

Step IX: Distribution of the proceeds from realization within 6 (six) months from the receipt of the amount to the stakeholders;

Step X: Submission of final report by the liquidator to the corporate person, ROC and the Board and application to the National Company Law Tribunal ("NCLT") for the dissolution;

Step XI: Submission of NCLT order regarding the dissolution, to the concerned ROC within 14 (fourteen) days of the receipt of order.

WATERFALL ARRANGEMENT

Section 53 of the Code provides for the manner of distribution of assets in case of liquidation and order of priority of distribution. It is pertinent to note that this order of priority is notwithstanding anything contrary which is contained in any other Central or State law. This order of priority is also known as the "waterfall arrangement" since each of category of persons comes in priority after the previous one.

Notwithstanding anything to the contrary contained in any law enacted by the Parliament or any State Legislature for the time being in force, the proceeds from the sale of the liquidation assets shall be distributed in the following order of priority and within such period and in such manner as may be specified:

(a) Insolvency resolution process costs and liquidation costs paid in full

(b) Following debts shall rank equally between and among the following:

  (i) Workmen's dues for the period of 24 months preceding the liquidation commencement date

  (ii) Debts owed to secured creditor in the event such secured creditor has relinquished security under section 52

(c) Wages and any unpaid dues owed to employees other than workmen for the period of 12 months preceding the liquidation commencement date

(d) Financial debts owed to unsecured creditors

(e) Following dues shall rank equally between and among the following:

(i) Any amount due to the Central / State Government including amount to be received on account of Consolidated Fund of India and Consolidated Fund of a State, if any, in respect of whole or any part of the period of two years preceding the liquidation commencement date

(ii) Debts owed to a secured creditor for any amount unpaid following enforcement of security interest

(f) Any remaining debts and dues

(g) Preference shareholders, if any; and

(h) Equity shareholders or partners, as the case may be.

Any contractual arrangements between recipients above with equal ranking, if disrupting the order of priority shall be disregarded by the liquidator.

The fees payable to the liquidator shall be deducted proportionately from proceeds payable to each class of recipients and proceeds to the relevant recipient shall be distributed after such deduction.

DISSOLUTION OF CORPORATE DEBTOR

Once the assets of the corporate debtor are completely liquidated, the liquidator shall make an application to the Tribunal for dissolution of the corporate debtor. The Tribunal shall pass necessary order to dissolve the corporate debtor.

Thus, it can be seen that the CIRP and subsequent liquidation process of the corporate debtor is a time bound process aimed at expediting the revival or dissolution of corporate debtors.

WINDING UP

Object and Scope of the law

One of the hallmarks of a reliable economy is the time taken for a company to wind-up. India's record in this area was not satisfactory. This was a major sore point for foreign investors who were looking for a way to close down the operations in a reasonable time. With this as one of its intents, the Insolvency and Bankruptcy Code was brought into effect in the year 2016. The Code is a game changer in the way insolvency is dealt with in this country.

Meaning of Winding-up

Winding-up is the process of closing down the legal existence of a company or LLP. During this process, the assets of the entity are realized, its liabilities are paid off and any surplus is distributed amongst the contributories. Once the adjudicating authority is convinced that these processes are completed, the entity is dissolved.

During winding up, the management of the company / LLP is in the hands of the liquidator and not the governing body / board of directors. However, the assets and liabilities still belong to the company until dissolution takes place. On dissolution, the entity loses its legal existence.

The Insolvency and Bankruptcy Code, 2016 has made significant amendments to provisions relating to winding up in the Companies Act, 2013. The important ones are discussed below:

"*Winding up*" – The expression "winding up" was not defined in the Companies Act, 2013 or in the erstwhile Companies Act of 1956. The Eleventh Schedule has added sub-section (94A) to section 2 of the Companies Act, 1956. The definition of "winding up" reads as follows:

"Winding up" means winding up under the Companies Act, 2013 or liquidation under the Insolvency and Bankruptcy Code, 2016, as applicable." [Section 2(94A)]

Voluntary winding up – Provisions relating to voluntary winding up in the Companies Act, 2013 i.e., sections 304 to 323 have been omitted by the Insolvency and Bankruptcy Code, 2016. Voluntary liquidation is now dealt with under section 59 of the Insolvency and Bankruptcy Code, 2016.

Inability to pay debts – Insolvency and Bankruptcy Code, 2016 has substituted section 271 of the Companies Act, 2013. Winding-up due to inability to pay debts is now governed by the Code.

Difference Between 'Winding Up' and 'Dissolution'

Many times, the terms 'winding up' and 'dissolution' are used interchangeably. This is not correct. There are very important differences in these two terms which are given below:

(1) Winding up is the first stage of ending the legal existence of the entity. In this stage, the assets of the entity are realized, its liabilities paid off and surplus, if any, is distributed amongst the contributories. Whereas dissolution is the final stage after completion of winding up process and by act of law, the legal existence of the entity comes to an end.

(2) The winding up process is handled by a liquidator / insolvency professional. The dissolution can happen only by way of an order passed by the adjudicating authority.

(3) Creditors can prove their claims during winding up but not on dissolution since the entity no longer exists.

(4) Winding up need not result in dissolution in all cases. A company which is in winding up can be taken over / amalgamated by any other entity / company which will result in the company coming out of winding up process and being handed over to the shareholders. This is not possible in case of dissolution.

Winding Up by Tribunal

Section 271 of the Companies Act 2013 provides grounds for winding up of the company by the Tribunal.

According to section 271, a company may be wound up by the Tribunal in following cases:

(a) If the company has, by special resolution, resolved that the company be wound up by the Tribunal;

(b) If the company has acted against the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality;

(c) If on an application made by the Registrar or any other person authorized by the Central Government by notification under this Act, the Tribunal is of the opinion that the affairs of the company have been conducted in a fraudulent manner or the company was formed for fraudulent and unlawful purpose or the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct in connection therewith and that it is proper that the company be wound up;

(d) If the company has made a default in filing with the Registrar its financial statements or annual returns for immediately preceding five consecutive financial years; or

(e) If the Tribunal is of the opinion that it is just and equitable that the company should be wound up.

For commencing proceedings under section 271, a petition is to be made to the Tribunal. According to section 272, this petition may be made by any of the following persons:

(a) The company;

(b) Any contributory or contributories;

(c) All or any of the persons specified in clauses (a) and (b);

(d) The Registrar;

(e) Any person authorised by the Central Government in that behalf; or

(f) In a case falling under clause (b) of section 271, by the Central Government or a State Government.

Any petition filed by the company shall be accompanied by a statement of affairs in prescribed form. A petition can be filed by the Registrar only with previous sanction of the Central Government which shall be accorded only after giving to the company a reasonable opportunity of being heard.

Any petition filed under this section, apart from that filed by the Registrar himself, shall be served on the Registrar and the Registrar shall submit his views to the Tribunal within 60 days of receipt of such petition.

On a petition filed under section 272, the Tribunal may pass any of the following orders within 90 days of presentation of the petition:

(a) Dismiss it, with or without costs;

(b) Make any interim order as it thinks fit;

(c) Appoint a provisional liquidator of the company till the making of a winding up order;

(d) Make an order for the winding up of the company with or without costs; or

(e) Any other order as it thinks fit.

The Tribunal shall give an opportunity of being heard to the company before appointment of a Provisional Liquidator.

The order for winding up of a company shall operate in favour of all the creditors and all contributories of the company as if it had been made out on the joint petition of creditors and contributories.

The liquidator is required to submit to the Tribunal, a report containing the following particulars, within sixty days from the order:

(a) the nature and details of the assets of the company including their location and value, stating separately the cash balance in hand and in the bank, if any, and the negotiable securities, if any, held by the company:

(b) valuation Report of the assets obtained from registered valuers

(c) amount of capital issued, subscribed and paid-up;

(d) the existing and contingent liabilities of the company including names, addresses and occupations of its creditors, stating separately the amount of secured and unsecured debts, and in the case of secured debts, particulars of the securities given, whether by the company or an officer thereof, their value and the dates on which they were given;

(e) the debts due to the company and the names, addresses and occupations of the persons from whom they are due and the amount likely to be realised on account thereof;

(f) guarantees, if any, extended by the company;

(g) list of contributories and dues, if any, payable by them and details of any unpaid call;

(h) details of trademarks and intellectual properties, if any, owned by the company;

(i) details of subsisting contracts, joint ventures and collaborations, if any;

(j) details of holding and subsidiary companies, if any;

(k) details of legal cases filed by or against the company; and

(l) any other information which the Tribunal may direct or the Company Liquidator may consider necessary to include.

When the affairs of a company have been completely wound up, the Company Liquidator shall make an application to the Tribunal for dissolution of such company.

The Tribunal shall on an application filed by the Company Liquidator or when the Tribunal is of the opinion that it is just and reasonable in the circumstances of the case that an order for the dissolution of the company should be made, make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.

LESSON ROUND-UP

- Part II of the Code shall apply to matters relating to the insolvency and liquidation of corporate debtors where the minimum amount of the default is one lakh rupees.
- Where any corporate debtor commits a default, a financial creditor, an operational creditor or the corporate debtor itself may initiate corporate insolvency resolution process.
- 'Resolution plan' means a plan proposed by resolution applicant for insolvency resolution of the corporate debtor as a going concern in accordance with Part II.
- Committee of creditors shall approve a resolution plan by a by a vote of not less than sixty-six percent of voting share of the financial creditors. Once the resolution plan is approved by the committee of creditors, it is then presented to the adjudicating authority for its approval.
- Sections 33 to 54 in Chapter III of Part II of the Insolvency and Bankruptcy Code, 2016 lays down the procedure relating to liquidation process for corporate persons.
- Liquidation provisions in Chapter III of Part II of the Code comes into effect if the attempts to resolve corporate insolvency under Chapter II of the Code fail. Section 33 of the Code lists out the triggers for initiating the liquidation process for corporate persons.
- Section 34 of the Code provides for the appointment of liquidator and the fees to be paid to him.
- Section 54 provides that after the affairs of the corporate debtor have been wound up and its assets are completely liquidated, the liquidator shall make an application to the adjudicating authority for the dissolution of the corporate debtor.
- Section 59 in Chapter V of Part II of the Insolvency and Bankruptcy Code, 2016 provides for the initiation of voluntary liquidation proceedings by a corporate debtor who has not defaulted on any debt due to any person.
- The Insolvency and Bankruptcy Board of India has made the IBBI (Voluntary Liquidation Process) Regulations, 2017 to regulate the voluntary liquidation of corporate persons.
- The main purpose of winding-up of a company is to realize the assets and pay the debts of the company expeditiously and fairly in accordance with the law.
- The Insolvency and Bankruptcy Code, 2016 has made significant amendments to provisions relating to winding-up in the Companies Act, 2013.
- Section 271 of the Companies Act, 2013 contains grounds under which a company may be wound-up by the Tribunal (NCLT).
- Section 271 of the Companies Act, 2013 mentions about who can file petition for winding-up.

SELF-TEST QUESTIONS

(These are meant for re-capitulation only. Answers to these questions are not to be submitted for evaluation)

1. Explain in brief the process of corporate insolvency resolution process?
2. Distinguish between winding up and dissolution.
3. What is the difference between liquidation and voluntarily liquidation?
4. What are the circumstances in which a company may be wound up by the Tribunal?

EXECUTIVE PROGRAMME

SETTING UP OF BUSINESS ENTITIES AND CLOSURE

EP-SBEC

TEST PAPER

WARNING

It is brought to the notice of all students that use of any malpractice in Examination is misconduct as provided in the explanation to Regulation 27 and accordingly the registration of such students is liable to be cancelled or terminated. The text of regulation 27 is reproduced below for information:

"27. Suspension and cancellation of examination results or registration.

In the event of any misconduct by a registered student or a candidate enrolled for any examination conducted by the Institute, the Council or any Committee formed by the Council in this regard, may suo motu or on receipt of a complaint, if it is satisfied that, the misconduct is proved after such investigation as it may deem necessary and after giving such student or candidate an opportunity of being heard, suspend or debar him from appearing in any one or more examinations, cancel his examination result, or registration as student, or debar him from re-registration as a student, or take such action as may be deemed fit.

EXECUTIVE PROGRAMME

SETTING UP OF BUSINESS ENTITIES AND CLOSURE – TEST PAPER

(This test paper is for practice and self study only and not to be sent to the Institute)

Time allowed: 3 hours *Maximum Mark: 100*

Note : Answer **ALL** Questions

PART A (40 MARKS)

1. (i) Rahul registered a One Person Company under Companies Act, 2013 for conducting a business of readymade garments. But due to insufficient availability of funds and his deteriorating health, his company has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years. Now, Rahul do not want to run his business for next few years and wanted to do the same thorough declaring the company dormant. Would he be able to declare his company dormant or Inactive? Support your answers with relevant provisions of law. ***(5 marks)***

(ii) Explain Partnership deed and also explain the key ingredients of partnership deed? ***(5 marks)***

(iii) What is an LLP Agreement? State the procedure for altering the LLP Agreement? ***(5 marks)***

(iv) XYZ Private Limited wants to get converted into One Person Company. Discuss the brief procedure for such conversion mentioning the provisions of the governing rules. ***(5 marks)***

2. (i) Define Joint Venture? What are the different modes of Joint Venture? ***(5 marks)***

(ii) Explain how the political issue plays a vital role in taking the foreign investment decisions? ***(5 marks)***

3. (i) What are the different routes of Overseas Investments? ***(5 marks)***

(ii) Briefly explain the following:-

- Types of Trust
- Angel Investors ***(5 marks)***

PART – B (35 MARKS)

4. (i) Discuss the significance of Patents for the growth and development of Business Entity. Also discuss the procedure of registering Patents in India. ***(5 Marks)***

(ii) What is the process of acquiring PAN and TAN for a business entity in India. Discuss in detail. ***(5 Marks)***

(iii) Why it is mandatory for the company to maintain certain records. List out the statutory registers required to be maintained under the Companies Act, 2013. ***(5 Marks)***

(iv) Discuss the statutory provisions for preventing child labour in any business engagement in India. ***(5 Marks)***

5. (i) Photographer ART shot a photograph of a company's front office having holding a line of company's product in a row and sold it for use in greeting cards and similar products. For the use of the photograph, no consent has been taken from the company. Company filed a suit for the infringement

of copyright. The photographer claimed that with the use of this photograph on greetings and other products, the company's products were marketed and the company enjoyed a gain.

Discuss the matter in the light of Indian Copyright Law, 1957 along with your rationale on whether the photographer is liable or not liable for infringement of Copyright. ***(5 Marks)***

(ii) In year 2010, Mr. X has started a cutlery business as an start up initially with the engagement of 5 labour in his start up. By the end of year 2015, the start has become a popular cutlery service for various events and functions and has growth tremendously. This made Mr. X to have a staff of 18 people in addition to his 7 wage contractual workers who used to transport the cutlery to the desired destination.

Till 2017, he has not registered himself for ESI and PF. Discuss with reasons, whether he is liable to register with ESI and PF or not. If yes, then what would have been the penalty for his non-registration? Would your answer differ, if his 7 wage workers are hired from a third party employment contact?

(5 Marks)

(iii) A group of laborers of ZBG Company (a public utility service) were having some conflict of interest with their management. And henceforth, they filed a case in front of labour commissioner to decide upon their issues and concern. In the pendency of the matter itself, they announced and went off on a strike against the management stopping the entire work at the company. This strike was also not supported by any prior notice to the management.

Discuss upon the validity of strike in this matter. Also briefly discuss the matter of issuing a notice before the strike in terms of Industrial Dispute Act, 1947. ***(5 Marks)***

PART C (25 MARKS)

(Insolvency; Winding up & Closure of Business)

6. (i) Explain in brief the process of corporate insolvency resolution process?

(ii) Explain different forms of striking off of Companies?

(iii) Explain the term called Waterfall arrangement and Moratorium?

(iv) How to restore the name of the company which is already strike off by the ROC?

(v) What are the various compliance requirements of Dormant Company? ***(5 marks each)***

BIBLIOGRAPHY & REFERENCES

- Agarwal Parul (2016), Registers and Documents to be maintained by the Company, R and A Associates.
- American Speech Language Hearing Association (2015), Types of Business Entities, the ASHA Group.
- Bakshi P.M. (1992) The Environment (Protection) Act 1986, Indian Law Institute, New Delhi India.
- Bedi and Bedi (2004) Encyclopedia of Environment & Pollution Laws.
- Bishnoi, B. R. & Goyal, P. (2012)Management of Intellectual Property Rights in India.
- Central Board for the Prevention and Control of Water Pollution (Procedure for Transaction of Business) Rules, 1975.
- Forms and Downloads, Ministry of Corporate Affairs, Government of India.
- Jaiswal, B. & Pandey, V. K. (2012) Intellectual Property Rights Infringements and their Impact over Business Strategies: Perspective of IT Industry in India, International Journal of Business Economics and Management Research, 3(3), 1-17.
- Kiran, R. & Jain, V. (2012).Enhancing Innovation and Intellectual Property Culture in Manufacturing Small and Medium Enterprises. African Journal of Business Management, 6(4), 1234-1243.
- Labour Laws Compliances for Startups in India, Ipleader.
- Mehyuh Ruth (2017), Labour Law Compliance Checklist in India, The Chron.
- Pandey Anubhav (2017), The Insolvency and Bankruptcy Procedure in India, The iPleader.
- Record and the Departmental Reports of - Agriculture, Public Health HPGCL, HUDA, Forest, Health, Transport, Irrigation, Industries, Mining, Rural Development, Haryana State Pollution Control Board, HSIDC.
- The Rio Declaration, 2012.
- Rogowasky Ryan (2014), Setting up of Business in Abroad, the Entrepreneur India.
- Vaish et al. (2017), Environmental Laws in India, Vasih Associates Advocates, The Mondaq.

Websites

- http://www.cbec.gov.in
- http://www.cbec.gov.in/htdocs-cbec/gst
- http://www.ibbi.gov.in/
- https://www.incometaxindiaefiling.gov.in
- https://www.indiafilings.com/
- http://www.ipindia.nic.in/
- http://www.legalserviceindia.com
- http://www.mca.gov.in/
- http://www.rbi.org.in/
- http://shodhganga.inflibnet.ac.in