PROCEDURAL ASPECTS OF FORMATION OF A COMPANY UNDER THE NEW COMPANIES ACT, 2013

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ABSTRACT

The online procedure for incorporation of a Company involves several steps. The very first step to incorporate a company is to apply for name availability. DIN is compulsory for persons becoming directors of the company to be formed. An application for Incorporation is required to be submitted to the ROC along with registration fee and necessary documents like MOA, AOA, Particulars of Directors/Subscribers, and Address for Registered Office of the Company, Statutory Declaration from professionals regarding compliances of statutory requirements of law. On being satisfied, ROC shall issue a certificate of Incorporation and a company comes into existence.

Keywords: Registrar of Companies; Form No.; Subscribers; Directors; Application

INTRODUCTION

Compulsory Registration

A company must be incorporated or registered under the Companies Act. Section 2(20) of the Companies Act, 2013 states that “company” means a company incorporated under this Act or under any previous company law. It means that a company comes into existence as soon as it is registered under the Companies Act. As such, a company can be created by law as separate legal person so that the members of a company shall have limited liability.

Further, according to Section 464 of the Companies Act, 2013 read with Rule 10 of the Companies (Miscellaneous) Rules, 2014, no association or partnership consisting of more than fifty persons shall be formed for the purpose of carrying on any business that has for its objects the acquisition of gain, unless it is registered as a company under the Companies Act or is formed under any other law for the time being in force.

OBJECTIVE AND RATIONALE OF THE PAPER

The professionals engaged in the formation of companies must observe the legal framework for incorporation of a company. After the repeal of Companies Act, 1956, and the enactment of new Companies Act, 2013, the procedure for incorporation of companies has undergone sea changes. New Rules have been notified by the Government to implement the provisions of the Companies Act, 2013. The present paper elaborates in detail the requirements of Companies Act, 2013 and rules made thereunder for Incorporation of Companies.

Procedure for Incorporation of A Company

Section 3(1) of the Companies Act, 2013 provides that a public company or a private company or a ‘one person company’ may be formed for any lawful purpose by certain number of subscribers who shall subscribe their names to a memorandum and comply with the requirements of the Companies Act, 2013 in respect of registration/incorporation. The required number of subscriber are (a) seven or
more persons, where the company to be formed is to be a public company ; (b) two or more persons, where the company to be formed is to be a private company; or (c) one person, where the company to be formed is to be ‘One Person Company’. However, the following requirements of law has to be fulfilled for the purpose of Incorporation of a Company

Application For name Availability

Section 4(4) of the Companies Act, 2013 provides that a person may make an application in Form No. INC.1 to the Registrar for the availability of a name set out in the application. The name shall not be identical with or resemble too nearly to the name of an existing company registered under this Act or any previous company law. Further, the proposed name of the company shall not be such that is undesirable in the opinion of the Central Government or its use will constitute an offence.

It shall be mandatory to furnish the significance and proof for use of coined words made out of the name of the promoters or their relatives. In case the name includes the name of relatives, the proof of relation shall be attached. Rule 8(4) of Companies (Incorporation) Rules, 2014 provides that in case the key word used in the name proposed is the name of a ‘person other than the name(s) of the promoters or their close blood relatives’, no objection from such other person(s) shall be attached with the application for name.

Upon receipt of an application, the Registrar may confirm the availability of name and reserve the same for a period of sixty days from the date of the application.

Application for Director Identification Number (DIN)

Every individual intending to be appointed as director of a company shall make an application for allotment of Director Identification Number to the Central Government in form DIR-3 (Section 153). The Central Government shall, within one month from the receipt of the application under section 153, allot a Director Identification Number to an applicant (Section 154).

Application for Incorporation to Registrar of Companies

An application for registration of a company shall be filed, with the Registrar within whose jurisdiction the registered office of the company is proposed to be situated, in Form no. INC. 7 along with the registration fees and certain documents and information as prescribed under section 7(1) of the Companies Act, 2013.

As per rule 12 of the Companies (Registration of Offices and Fees) Rules, 2014, the registration fee prescribed for the purpose of incorporation shall be as under:-

<table>
<thead>
<tr>
<th>Amount of Nominal Share Capital</th>
<th>Registration Fee (Rs.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1) For registration of a company whose nominal share capital does not exceed Rs. 1,00,000</td>
<td>Rs. 5,000/-</td>
</tr>
<tr>
<td>2) For registration of a company whose nominal share capital exceeds Rs. 1,00,000, the above fee of Rs. 5,000 with the following additional fees regulated according to the amount of nominal capital</td>
<td></td>
</tr>
<tr>
<td>(a) For every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 1,00,000 up to Rs. 5,00,000</td>
<td>400</td>
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<tr>
<td>(b) For every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 5,00,000 up to Rs. 50,00,000</td>
<td>300</td>
</tr>
<tr>
<td>(c) For every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 50,00,000 up to Rs. One crore</td>
<td>100</td>
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<tr>
<td>(d) For every Rs. 10,000 of nominal share capital or part of Rs. 10,000 after the first Rs. 1 crore. Provided that where the additional fees, regulated according to the amount of the nominal capital of a company, exceeds a sum of rupees two crore and fifty lakhs, the total amount of additional fees payable for the registration of such company shall not, in any case, exceed rupees two crore and fifty lakhs.</td>
<td>75</td>
</tr>
</tbody>
</table>
Filing OF Certain Documents AND Information WITH Registrar OF Companies

According to Section 7 (1) of the Companies Act, 2013, the following documents and information shall be filed with the Registrar of Companies for registration along with the application Form No. INC.7 for registration:

Memorandum of Association and Articles of Association:- The Memorandum and Articles of the company are required to be filed with the Registrar of Companies at the time of incorporation of a company. The Memorandum and Articles of Association should be drafted in such a way that they meet the requirements of the Companies Act as well as the peculiar requirements of the business. The various requirements of Memorandum/Articles of Association which are to be fulfilled at the time of incorporation are as follows:-

Format

The Memorandum of Association 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. A Company may adopt model Articles of Association as prescribed in Table F, G, H, I and J of Schedule I as may be applicable to the case of a company or may draft its own Articles of Association.

Stamping

The Memorandum and Articles shall be stamped in accordance with the respective state stamp laws where the registered office of the company is proposed to be situated.

Signing

Memorandum and Articles of Association must be duly signed by all the subscribers to the Memorandum in such manner as may be prescribed under rules.

As per Rule 13(1) of Companies (Incorporation Rules) 2014, the memorandum and articles of association of the company shall be signed by each subscriber to the memorandum, who shall add his name, address, description and occupation, if any, in the presence of at least one witness who shall attest the signature and shall likewise sign and add his name, address, description and occupation, if any.

Literate as Subscriber to the Memorandum of Association

Where a subscriber to the memorandum is illiterate, he shall affix his thumb impression or mark which shall be described as such by the person, writing for him, who shall place the name of the subscriber against or below the mark and authenticate it by his own signature and he shall also write against the name of the subscriber, the number of shares taken by him. Such person shall also read and explain the contents of the memorandum and articles of association to the subscriber and make an endorsement to that effect on the memorandum and articles of association [Rule 13(2)& (3) of Companies (Incorporation Rules) 2014].

Body Corporate As a Subscriber To The Memorandum Of Association

Where the subscriber to the memorandum is a body corporate, the memorandum and articles of association shall be signed by director, officer or employee of the body corporate duly authorized in this behalf by a resolution of the board of directors of the body corporate and where the subscriber is a Limited Liability Partnership, it shall be signed by a partner of the Limited Liability Partnership, duly authorized by a resolution approved by all the partners of the Limited Liability Partnership. Provided that in either case, the person so authorized shall not, at the same time, be a subscriber to the memorandum and articles of Association [Rule 13(4) of Companies (Incorporation Rules) 2014].

Foreign National as a Subscriber to the Memorandum of Association

Rule 13(5) of Companies (Incorporation Rules) 2014 provides that where subscriber to the memorandum is a foreign national residing outside India--
1. In a country in any part of the Commonwealth, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.

2. In a country which is a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity shall be notarized before the Notary (Public) of the country of his origin and be duly apostillised in accordance with the said Hague Convention.

3. In a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and articles of association and proof of identity, shall be notarized before the Notary (Public) of such country and the certificate of the Notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 (40 of 1948) or, where there is no such officer by any of the officials mentioned in section 6 of the Commissioners of Oaths Act, 1889 (52 and 53 Vic.C.10), or in any Act amending the same;

4. Visited in India and intended to incorporate a company, in such case the incorporation shall be allowed if, he/she is having a valid Business Visa. In case of Person is of Indian Origin or Overseas Citizen of India, requirement of business Visa shall not be applicable.

Affidavit from Subscribers and First Directors:- An affidavit shall be filed in Form No. INC.9 from each of the subscribers to the memorandum and from persons named as the first directors in the articles of association of the company that

He is not convicted of any offence in connection with the promotion, formation or management of any company; or

He has not been found guilty of any fraud or misfeasance or of any breach of duty to any company under this Act or any previous company law during the preceding five years; and

All the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief.

Address for Correspondence and Registered Office:- The address for correspondence is required to be provided at the time of applying for registration of a Company. Section 12 provides that a company shall, on and from the fifteenth day of its incorporation and at all times thereafter, have a registered office capable of receiving and acknowledging all communications and notices as may be addressed to it. The company shall furnish to the Registrar of Companies verification of its registered office within a period of thirty days of its incorporation by filing Form No. INC.22 [Rule 25 of Companies (Incorporation) Rules, 2014].

Particulars of the Subscribers:- The particulars of every subscriber to the memorandum including name, surname or family name, residential address, nationality and such other particulars as prescribed under Rule 16 of Companies (Incorporation) Rules, 2014 shall be filed with the Registrar of Companies along with proof of identity. Accordingly, the specimen signature and latest photograph of the subscribers shall be duly verified by the banker or notary in Form No.INC.10.

Particulars of the First Directors and their Interest in other Body Corporates:- The particulars of the persons mentioned in the articles as the first directors of the company, their names, including surnames or family names, the Director Identification Number(DIN), residential address, nationality and such other particulars including proof of identity as may be prescribed under Rule 18 of the Companies (Incorporation) Rules, 2014 shall be filed with the Registrar of Companies. These particulars including their interest in other firms or bodies corporate along with their consent to act as director of the company are to be filed in Form No. DIR.12 with Registrar of Companies.
Statutory Declaration: A declaration shall be filed in the prescribed Form No. INC.8 by an advocate, a chartered accountant, cost accountant or company secretary in practice, who is engaged in the formation of the company, and by a person named in the articles as a director, manager or secretary of the company, that all the requirements of this Act and the rules made thereunder in respect of registration have been complied with.

**Integrated Incorporation Form INC.29 For Incorporation Of Companies**

The Ministry of Corporate Affairs has introduced the Integrated Incorporation Form - INC-29 with the intent to ease the procedure for incorporation of companies. INC-29 is one Single form for incorporating a company and addresses of the procedural requirements pursuant to sections 4, 7, 12 and 153 of the Companies Act, 2013.

Form - INC-29 takes care of three separate processes with this single form namely application for DIN, application for name approval and application for incorporation of companies. Consequently, the filing of the following e-forms is not required:

1. Form DIR-3 (Application for allotment of DIN in case proposed Directors have no DIN)
2. Form INC-1 (Application for Reservation of name)
3. Form INC-7 (Application for incorporation of a company)
4. Form DIR-12 (Details of Directors)
5. Form INC-22 (Details of registered office) (Optional at the time of incorporation)

INC-29 aims to reduce of time and money while incorporating companies. Fee for the form is Rs. 2000/- plus registration fee.

Incorporation of the company through this integrated form for incorporation INC-29 is optional. Standalone e-Forms DIR-3, INC-1, INC-7, DIR-12, INC-22 will continue to be available at MCA website. In case any stakeholder wants to avail any of these services separately/independently, he may use the existing e-forms and follow the existing process.

Facility for using ‘integrated form’ is not available for incorporating Section 8 companies.

**Certificate of Incorporation [Section 7(3)]**

The Registrar on the basis of documents and information filed under sub-section (1) of Section 7 shall register all the documents and information in the register and issue a certificate of incorporation in Form No. INC.11 to the effect that the proposed company is incorporated under this Act [Section 7(2)]. The Registrar shall allot to the company a Corporate Identity Number (CIN), which shall be a distinct identity for the company and which shall also be included in the certificate.

**Liability for False Information [Section 7(5)]**

If any person furnishes any false or incorrect particulars of any information or suppresses any material information, of which he is aware in any of the documents filed with the Registrar in relation to the registration of a company, he shall be liable for action under section 447 of the Companies Act, 2013.

**Conclusiveness of Certificate of Incorporation (Section 9)**

From the date of incorporation mentioned in the certificate of incorporation, all the subscribers to the memorandum and all the members of the company shall be a body corporate by the name contained in the memorandum, capable of exercising all the functions of an incorporated company under the Companies Act, 2013. It shall have perpetual succession with power to acquire, hold and dispose of property, both movable and immovable, tangible and intangible, to contract and to sue and be sued by the said name.
The Companies (Amendment) Act, 2015 has omitted section 11 of the Companies Act, 2013. Therefore, now all the companies (including public companies) can commence business with effect from the date of its incorporation without complying with any further legal formalities.

CONCLUSION AND SUGGESTION

The Companies (Amendment) Act, 2015 has omitted certain provisions which were considered to be restrictive in order to promote the formation of companies in India. It has removed the minimum paid-up capital requirement (Rs. 1 lakh for private companies and Rs. 5 lakh for public companies) and now companies can be formed even with the authorized share capital of Rs. 2/-. The procedure for incorporation of company has been simplified by the Indian Government to the maximum extent possible in order to facilitate trade and commerce. It will certainly pave the way of economic progress of the nation.

REFERENCES

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