

Key Highlights of the Companies Act, 2013- Incorporation of the Companies

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Abstract— The current paper encompasses the key changes and new aspects which came in Companies Law with the introduction of the new Companies Act, 2013 relating to the provisions for incorporation of the Companies. An attempt is made to sum up as far as possible the basic structure of the Companies Law in India in that regard.

Keywords—Companies Act, OPC, ROC, Memorandum.

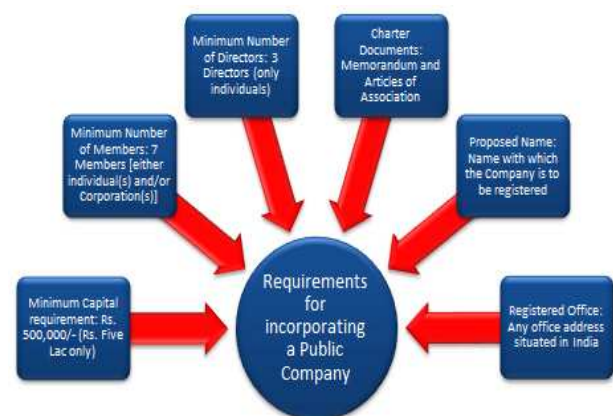
I. INTRODUCTION

With the advent of the new Companies Act, 2013 there is lot of discussion about the basic structure of the Companies Law in India and the direction in which it is heading relating to the incorporation of the companies. While the old Companies Act of 1956, in many aspects has become obsolete, the new Companies Act of 2013 has overcome almost all those deficiencies. In the current article I have tried to sum up the basic structure of the Companies Law after the introduction of Companies Act 2013 dealing mainly with the provisions of incorporation. The Companies Act, 2013 introduces many new concepts and terms like 'one-person company' and has incorporated certain new provisions for memorandum and articles of association, like the concept of the entrenchment provisions in the articles of association of the company has been introduced.

II. COMPANY AND ITS TYPES

Apart from the existing two types of companies (as per Companies Act, 1956), public or private limited company, the Companies Act, 2013 introduces a new entity 'one-person company' (OPC). An OPC means a company which has only one person as its member (section 3(1) of Companies Act, 2013). The rules also state that only a natural person who is an Indian citizen and resident in India can incorporate an OPC or be a nominee for the sole member of an OPC.

The following diagram gives a brief account of all the requirements to be followed during the incorporation of the Company.



Memorandum of association

The Companies Act, 2013 clearly mentions the contents for the memorandum of association which are mandatory and are similar to the provisions of the Companies Act, 1956 and among others refer to the following:

- Name of the company with last word as limited or private limited as the case may be
- State in which registered office of the company will be situated
- Liability of the members of the company

However, the objects clause in the memorandum needs not to be classified as the following as given in the Companies Act, 1956:

- i. The main object of the company
- ii. Objects incidental or ancillary to the attainment of the main object (iii) Other objects of the company (section 4(1) of Companies Act, 2013)

The main purpose in the Companies Act, 1956 to classify the objects clause as per section 149 of the Companies Act, 1956, is to keep a tab on the company to commence any business 'other objects of the company' not incidental or ancillary to the main objects without complying certain requirements as prescribed like passing a special resolution, filing of declaration with the ROC among others.

Name Reservation: The Companies Act, 2013 includes the procedure of applying for the availability of a name for a new company or an existing company in sections 4(4) and 4(5) of Companies Act, 2013.

Articles of association

The Companies Act, 2013 introduced the concept of entrenchment provision with respect to the articles of association of a company. An entrenchment provision is one which is a more restrictive procedure compared to passing a special resolution for any alteration in the articles of association.

A private company can include entrenchment provisions only after all its members agree to it, and in case of a public company, if a special resolution is passed (section 5 of Companies Act, 2013).

Incorporation of a company

The Companies Act, 2013 includes a mandatory declaration stating that all provisions of the Companies Act, 1956 have been complied with, which are in line with the existing requirements of Companies Act, 1956.

Additionally, an affidavit from the subscribers to the memorandum and from the first directors has to be filed with the ROC, to the effect that they are not convicted of any offence in connection with promoting, forming or managing a company or have not been found guilty of any fraud or misfeasance, etc., under the Companies Act, 2013 during the last five years along with the complete details of name, address of the company, particulars of every subscriber and the persons named as first directors.

The Companies Act, 2013 further prescribes that if a person furnishes false information, he or she, along with the company will be subject to penal provisions as applicable in respect of fraud i.e. section 447 of Companies Act, 2013 (section 7(4) of Companies Act, 2013).

Formation of a company with charitable objects

As per section 8 of Companies Act 2013, where it is proved to the satisfaction of the Central Government that a person or an association of persons want to register themselves under section 8 as a limited company for the furtherance of above mentioned objects, the Central Government may, by licence issued in prescribed manner 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 form, register such person or association of persons as a company under this section.

Commencement of business

As per the provisions of section 149 of the Companies Act, 1956 outlining the requirement with respect to the commencement of business for public companies that have a share capital would now be applicable to *ALL* companies. The Companies Act, 2013 empowers the ROC to initiate action for removal of the name of a company in case the company's directors have not filed the declaration related to the payment of the value of shares agreed to be taken by the subscribers to the memorandum and that the paid-up share capital of the company is not less than the prescribed limits as per the Companies Act, 2013, within 180 days of its incorporation and if the ROC has reasonable cause to believe that the company is not carrying on business or operations (section 11 of Companies Act, 2013).

Registered office of company

The new Companies Act, 2013 makes it mandatory for all Companies to print or affix its name and the address of its registered office in English and in Vernacular Language, outside every office or place of business and to print the following details in all its business letters, bill heads, letter papers and in all its notices and other official publications which shall ensure transparency in dealings by the company with stakeholders at large.

Alteration of memorandum

Alteration of Memorandum of Association is an important exercise through which the company brings about the required flexibility which is pertinent to its existence and survival as an entity.

An act like the change of situation requires the prior approval of the Board of directors or the permission of the government or in certain cases both along with a special resolution. It however has to be remembered that apart from the approval by government or the board of directors or the appropriate authority concerned there are many other statutory limitations involved in the alteration of the memorandum.

Subsidiary company not to hold shares in its holding company

The existing provision of section 42 of the Companies Act, 1956 which prohibits a subsidiary company to hold shares in its holding company continue to get acknowledged in the Companies Act, 2013. Thus, the earlier concern that if a subsidiary is a body corporate, it may hold shares in another body corporate which is the subsidiary's holding company continues to apply (section 19 of Companies Act, 2013).

III. PROSPECTUS AND PUBLIC OFFER

Any business cannot run without funds. In case of an incorporated company, initial capital always come from

subscribers to the memorandum. As we have discussed in earlier post Commencement of Business, company should commence its business within 180 days by filing some documents with Registrar of Companies. This is legal requirement of Section 11, all subscribers should paid the value of shares agreed to be taken by him and company should receive that money before filing document for filing for commencement of business. But this initial capital may not be sufficient for running a business. Public funding is a fundamental proposition for legal structure called company. The Companies Act, 2013 has introduced a new section 23 to explicitly provide the ways in which a public company or private company may issue securities.

Issue of Securities by Private Company:

A private Company may issue its securities:

- i. By way of right or bonus issue; or
- ii. Through private placement.

Issue of Securities by Public Company:

A Public company may issue securities:

- i. To public through prospectus i.e. "Public Offer";
- ii. Through private placement;
- iii. Through right or bonus issue.

Offer of Securities for Sale:

Where a company allots or agree to allot any securities of the company with a view to all or any of those securities being offered for sale to the public shall be treated as if the securities had been offered to the public for subscription and as if persons accepting the offer were subscribers for those securities.

Any document by which this offer for sale to the public is made shall be deemed to be a prospectus issued by the company. All enactments and rules related to prospectus and liability in respect of any mis-statements etc. are applicable to such document.

If it is shown that:

- i. An offer of the securities for sale to the public was made within six months after the allotment or agreement to allot; or
- ii. At the date when the offer was made, the whole consideration had not been received by company for such securities;
- iii. It will be presumed that such allotment or agreement to allot securities was made with an intention to the securities will be offered for sale to the public (section 25 of Companies Act, 2013).

Offer for Sale:

Where certain members of company propose to offer whole or part of their holding of share to public, they may do so in accordance with prescribed procedure. This proposal must

be in consultation with the Board of Directors and in accordance with the any law for the time being in force.

Any such offer document shall be deemed to be prospectus issued by the company and all law and related to prospectus shall apply to this document.

All these members shall collectively authorize the company to take all actions in respect of offer of sale for and on their behalf. They will reimburse the company all expenses incurred by it on that matter (section 28 of Companies Act, 2013).

Private Placement:

A company, whether private or public, may make private placement of securities through issue of a "Private Placement Offer Letter" (PPOL).

The offer of securities or invitation to subscribe securities shall be made to such number of persons not exceeding fifty or such higher number as may be prescribed in a financial year and on such conditions as may be prescribed. For this purpose, qualified institutional buyers and employees of the company being offered securities under a scheme of employees' stock option shall not be counted.

If a company, listed or unlisted, makes an offer to allot or invites subscription, or allots, or enters into an agreement to allot, securities to more than the prescribed number of persons, same shall be deemed to be an offer to the public. There will be no difference on whether, the company intends to list its securities or not on any recognized stock exchange. There will also be no difference whether such stock exchange is in or outside India. There shall also be no difference company has already received any payment or not (section 42 of Companies Act, 2013).

Variation in terms of contract or objects:

The Companies Act, 2013 states that a special resolution is required to vary the terms of a contract referred to in the prospectus or objects for which the prospectus was issued (section 27 (1) of Companies Act, 2013). The Companies Act, 1956 currently requires approval in a general meeting by way of an ordinary resolution. The Companies Act, 2013 also requires that dissenting shareholders shall be given an exit offer by promoters or controlling shareholders (section 27 (2) of Companies Act, 2013).

Shelf prospectus

The Companies Act, 2013 extends the facility of shelf prospectus by enabling SEBI to prescribe the classes of companies that may file a shelf prospectus. The Companies Act, 1956 currently limits the facility of shelf prospectus to public financial institutions, public sector banks or scheduled banks (section 31 (1) of Companies Act, 2013).

Global depository receipts (GDRs)

The Companies Act, 2013 includes a new section to enable the issue of depository receipts in any foreign country subject to prescribed conditions (section 41 of Companies Act, 2013). Currently, the provisions of section 81 of the Companies Act, 1956 relating to further issue of shares are being used in conjunction with the requirements mandated by SEBI for the issuance of depository receipts. In several aspects across the Companies Act, 2013, it appears that the Companies Act, 2013 supplements the powers of SEBI by incorporating requirements already mandated by SEBI.

Share capital

The new Companies Act, 2013 introduced some significant changes in the provisions relating to Share capital and debentures. For instance, the Companies Act, 2013 does not give any saving of section 90 of the Companies Act, 1956 to private companies. Therefore, the applicability of the sections of the Companies Act, 2013 are now applicable to private companies and no longer restricted to public companies only. Now there are only two kinds of share capital that can be newly issued.

Prohibition on issue of shares at a discount

As per Companies Act, 2013, Companies are not permitted to issue shares at a discount with the only exception of sweat equity shares, where shares are issued to employees in lieu of their services (section 53 and Section 54 of Companies Act, 2013). Explanation I defined company for the purpose of this section and explanation II defined sweat equity.

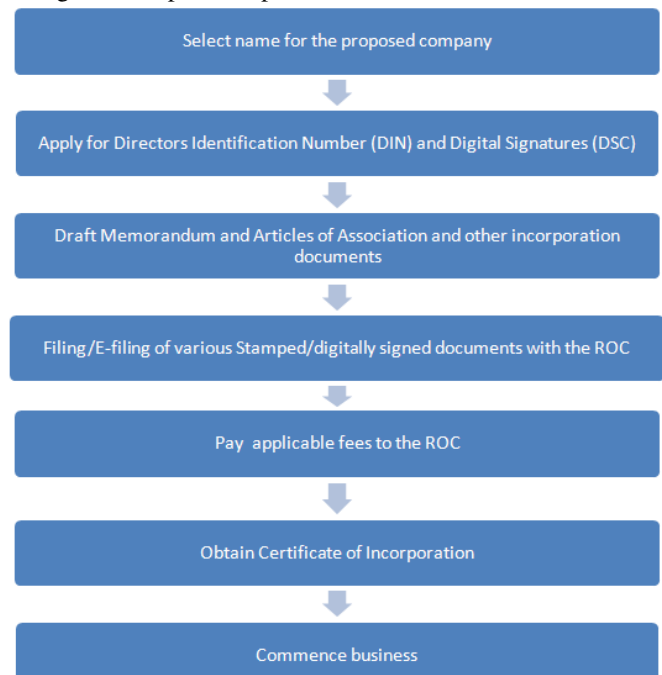
Issue and redemption of preference shares

The Companies Act, 2013 follows the same provisions as of the Companies Act, 1956, with some minor changes. The existing requirement which states that a company cannot issue preference shares having a redemption period of more than 20 years remains the same except in case of infrastructure projects. Infrastructure projects are defined in Schedule VI of the Companies Act, 2013 and shares issued for these are subject to redemption at such percentage as prescribed on an annual basis upon the option of preference shareholders. The Companies Act, 2013 does not provide for any penalty with respect to non-compliance with the provision of this section.

Issue of bonus shares

The Companies Act, 2013 includes a specific section for issue of fully paid-up bonus share. The issue of bonus shares can be made out of the free reserves or the securities premium account or the capital redemption reserve account, subject to the fulfillment of certain conditions like the authorization by the articles, approval in the general meeting etc. (section 63 of Companies Act, 2013).

The below diagram depicts the procedure to be followed during the incorporation process:



IV. CONCLUSION

With the introduction of the new Companies Act, 2013, it can truly be said that the process and requirements to be followed for the incorporation of a company in many aspects are now at ease. The continued importance given by the Ministry of Corporate Affairs towards E-Filing and Online services can be seen with their efforts to make every transaction as far as possible, paperless. The new Companies Act has new standards in the corporate laws in India which will help the Indian corporate to keep pace with international standards.

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