

COMPANY LAW

UNIT 2 : FORMATION AND INCORPORATION DOCUMENTS

TOPIC- Formation of a Company

STAGES

- **Promotion**
- **Incorporation\Registration**
- **Declaration for Commencement of Business**

PROMOTION

PROMOTION involves

- discovery of idea\ business opportunity
- investigation of the feasibility of the idea
- assembling of business elements i.e organising funds,property, and managerial ability into a business concern

Person who does all this preliminary work is called PROMOTER. Sec.2(69) of Companies Act 2013 defines promoter. According to the definition, a promoter means a person

- has been named as such in the Prospectus or in the Annual Return
- Who has control over the affairs of the company directly or indirectly, whether as shareholder or director or otherwise
- on whose advice, directions or instructions the BOD is accustomed to act.

The proviso to this section says that the persons assisting the promoter in professional capacity ,e.g.as solicitors, accountants, counsels, experts ..are not promoters. A promoter may be individual, a firm , an association of persons or even a company.

LEGAL POSITION OF A PROMOTER

- A promoter is **neither trustee nor agent of the company** as there is no trust or principal in existence during promotional stage
- He **stands in fiduciary relationship**(position of utmost good faith, trust and confidence) towards the company. So he must act in the best interest of the proposed company.

Therefore **A PROMOTER MUST MAKE FULL DISCLOSURE OF ALL MATERIAL FACTS TO AN INDEPENDENT BODY OF DIRECTORS OR SHAREHOLDERS** i.e.-must not make SECRET PROFITS (law doesnot prohibit making of profits, it prohibits nondisclosure of it) and the disclosure should be made to independent board of directors\shareholders.

Case-Gluckstein vs. Barnes- There was a company called Olympia which was in a very bad shape at that time. Few persons formed a syndicate with an intention to purchase Olympia . They first bought the debentures of Olympia at a discount and sometime later purchased the Olympia itself for pounds140,000. Out of this money provided by themselves the debentures were repaid in full and a profit of pounds20,000 was made by them. Then they formed a new company and sold Olympia to it for pounds 180,000. The profit of pounds 40000 was revealed in the prospectus but not the profit of pounds 20000. **It was held that profit of pounds 20000 was a secret profit made by the promoters of the company and they were bound to repay it to the company.** Promoters argued that they had in fact made a proper disclosure of that pounds 20000 also to the directors of the company but this was turned down on the plea that disclosure made by them in the capacity of vendors to themselves in the capacity of directors was not sufficient. **The disclosure ought to have been made to an independent board or to all the shareholders by means of a prospectus.**

Promoters Liability

1. If secret profit is made by promoter, then the company can

- ✓ recover it from promoter along with interest, or,
- ✓ the company can set aside that transaction, restore the property back to the promoter and recover its money
- ✓ company can sue him for damages for his fraud or breach of fiduciary duties

2. Liability on Preliminary Contracts

- ✓ the promoter is personally held liable on preliminary contracts\preincorporation contracts

3. Fraud in formation of the company.

- ✓ liable for fraud u/s 447- If at the time of promotion of a company, the promoter furnishes any false \incorrect information suppresses any material information knowingly

4. Misrepresentation in Prospectus

- ✓ he is liable to original allottees of shares for misstatements\misrepresentations in prospectus. (civil as well as criminal liability u/s 35 and 34 respectively) Accordingly he would be liable to penalty in the form of damages or imprisonment or fine.

PROMOTERS REMUNERATION .

A promoter puts in lot of efforts and incurs several expenses in the process of formation of company . So he deserves the reimbursement of preliminary expenses incurred by him as well as some remuneration for the work done . However, **there is no contractual obligation on the part of the company to pay him for these** and a promoter cannot claim them as a matter of right. This is because he acted for a person who is yet to take birth and therefore there was no binding contract between them on this issue. So, it is advisable that after the incorporation of the company, he must insist on some contract entitling promoters for remuneration and reimbursement. Articles usually contain a provision authorizing the directors to pay the promoters.

- **Ways of remunerating promoters.**

- ✓ The remuneration may be paid for his services in lumpsum in cash, or partly in cash and partly in shares \debentures of the company.*
- ✓ He could also be remunerated by way of commission on purchase price of business taken over by the company,
- ✓ He may sell his own property to company at a profit provided he discloses it to an independent body of directors or shareholders.
- ***The claim for expenses should be supported by vouchers and should be placed before the directors of the company when formed.***
- ***The remuneration paid to promoters should be disclosed in the prospectus issued by the company./***

Preliminary or Pre-incorporation Contracts

These are contracts entered into by promoters with third parties to acquire some property or right for the company before its incorporation.

- 1. Such contracts are **not legally binding on the company i.e.** company can neither sue other party nor be sued by the other party on such contracts. So, **promoters will continue to be personally liable** for pre-incorporation contracts. This is because before incorporation, a company is a non-entity and for a valid contract two consenting competent parties are must.
- 2. The company **cannot even ratify the preincorporation contracts after its incorporation** because the doctrine of ratification requires existence of principal, competent to contract at the time of entering into the contract whereas company was non-existent during that time.
- 3. The only way of adopting preliminary contract is by **novation i.e.** entering into new contracts with third parties on same terms as were embodied in the original contract. So, generally promoters simply agree to draft contract to be finally entered into by vendor and the company after the incorporation. Thus a *new contract embodying the terms of the old one is made afresh by the company after its incorporation.* **Case.- Natal Land & Colonisation Co. Ltd. vs. Pauline Colliery Syndicate Ltd.**
- 4. However, **if contracts are covered under Sec.15(h) and 19(e) of Special Relief Act, 1963, they may be specifically enforced by or against the company.** Thus, if a contract is *for the purposes of the company* (is within the object clause) and *is warranted by the terms of incorporation* (necessary for incorporation) and *the company has accepted the contract and communicated its acceptance to the other party*, then only such contracts will be binding. **Case- Imperial Ice Manufacturing Co. vs. Manchershaw**

NATAL LAND & COLONISATION CO. LTD. VS PAULINE COLLIERY SYNDICATE LMT.

Natal co. entered into a contract with A who was acting as the nominee of the syndicate (which was not then registered), to grant lease of certain mining property for 3 years. After registration the syndicate sued the Natal co. for the specific performance of the agreement to grant a lease. It was held that ***the syndicate co, was not entitled to claim the lease as it was not in existence when the contract was signed and a company cannot obtain the benefit of a preincorporation contract unless a new contract is made by the co. after its incorporation.***

IMPERIAL ICE MANUFACTURING CO. VS MANCHERSHAW

The promoters of an ice manufacturing company entered into a contract with M for purchase of ice manufacturing machinery for the company. The company on its formation, subsequently adopted the contract and sent the communication of its acceptance to M. It was held that ***the contract was “ for the purposes of the company”and therefore ,enforceable by and against the company.***

STAGE II-INCORPORATION/ REGISTRATION OF A COMPANY

For registration of the company, the promotor , takes several preparatory steps like ascertaining the availability of proposed name of the co., obtaining licences etc. if applicable, fixing up with auditors, bankers, solicitors, underwriters, signatories to MOA etc, getting MOA , AOA etc prepared and fulfilling other prescribed formalities . **Section 7 of the Companies Act ,2013 is on incorporation.** Its various subsections cover the entire procedure of incorporation and the related aspects .

- **As per Section7(1)** ,The promoter is required to submit with the ROC of the State , where the registered office of the company is to be situated, the prescribed fees and the following documents\ information
 - ✓ **Application** for the registration of the proposed company
 - ✓ **MOA** of the proposed company signed by all subscribers
 - ✓ **AOA** of the proposed company signed by all the subscribers
 - ✓ **Compliance Declaration** made by advocate\CA\CS\CWA involved in company's formation and by a person named as director\mgr\secretary stating that all requirements of the Act and related Rules wrt. registration have been complied with
 - ✓ **Subscribers Declaration** made by each of the subscribers and also from all first directors that they are not guilty of any company related offence\fraud\misfeasance\breach of duty during the preceding 5 years and that all the information provided to ROC is correct and complete
 - ✓ **Address for correspondence** till its registered office is established and address is finalised
 - ✓ **Subscribers particulars** i.e their names, addresses, nationality, ID proofs and other particulars
 - ✓ **Directors particulars** i.e. their names, addresses, nationality, ID proofs, DIN and other particulars
 - ✓ **Written Consent** of directors of the proposed company to act in that capacity
 - ✓ **Particulars of directors' interest** in other companies, firms and body corporates

Registration of a company

- **As per section 7(2)**, the ROC, will then register the above documents and will issue the **Certificate of Incorporation** in prescribed form (INC-11). This is the birth certificate of the company which bears the name, date of incorporation, CIN, PAN, TAN and seal of that ROC. Now, Certificate of Incorporation can be issued electronically under the digital signatures of the ROC.
- **As per section 7(3)**, the ROC will also allot to the company a *Corporate Identity Number (CIN)*, which shall be a distinct identity for the company and is also mentioned in Certificate of Incorporation.
- **As per section 7(4)**, the company is required to maintain and preserve at its registered office copies of all the documents originally filed with the ROC for registration, until dissolution.
- **As per section 7(5)**, if any person furnishes any false\incorrect information\suppresses any material information in any of the documents filed with the ROC, then he shall be liable for fraud u/s 447 and be punished.
- **As per section 7(6)**, if a company got incorporated on the basis of documents which contained any false\incorrect\insufficient information etc., then the promoters, the directors and the persons who made compliance declaration will be liable for fraud u/s 447 and punished.
- **As per section 7(7)**, in case the company got incorporated on the basis of false\incorrect information etc. and the case goes to NCLT, then the tribunal can also pass the following orders
 - order any change in MOA or AOA keeping in view interest of co., members and public
 - direct that the liability of the members be unlimited
 - direct the removal of name of the company from Register of companies
 - pass an order for winding up of the company
 - pass such order as it thinks fit

Registration of a company

Now, application for incorporating a company shall be made online in (Form No.32: SPICE plus i.e. Simplified Proforma for Incorporating Companies Electronically) along with e- MOA in Form No. INC-33 and e-AOA in Form No.34. SPICE form is an integrated web form offering a bouquet of 11 services i.e. application for incorporation, application for reservation of name of company, application for allotment of DIN upto 3 directors and application for registration of PAN,TAN, GSTIN, EPFO,ESIC, Professional Tax, opening of bank account and Shop and establishment registration..... can all be made together and there is no need to apply separately for any of these matters.

EFFECT OF CERTIFICATE OF REGISTRATION -As per section 9 of Companies Act,2013 , from the date of incorporation mentioned in the Certificate of Incorporation

- subscribers to memorandum become members of the co.
- it gets status of a body corporate known by the name contained in Certificate of incorporation and gets power to hold\buy \sell assets \ enter into contracts \ sue and be sued in its own name
- shall have perpetual succession

ON LINE REGISTRATION OF COMPANY (Using SPICE +:INC 32)

1. Web Form **INC 32**: SPICE + has two parts-Part A (for name reservation of new companies) and Part B offering bouquet of services viz. Incorporation ; Reservation of Name, DIN allotment; Mandatory issue of PAN; Mandatory issue of TAN; **GSTIN; ESIC registration; EPFO registration ; Professional Tax Registration ;Opening of Bank account; Shops and Establishment Registration.**
2. File Part A of Web Form SPICE+ for name reservation. If name is approved, ROC will reserve it for a period of 20 days which can be extended upto 60 days on payment of extra fees .
3. Obtain Digital Signature Certificates as all filings will be authenticated using DSCs. Fill all particulars required in Part B of Web Form SPICE+ for OPC/ Private/ Public co.
4. Apply for DIN for upto 3 directors in the SPICE+. Also application for PAN, TAN can be made through SPICE + only.
5. Prepare **e- MOA in Form No.INC-33 and e-AOA in Form No.INC- 34**. Sign and witness them digitally and file along with SPICE+
6. Attach Web Form **AGILE PRO-S (INC-35)** containing Application for registration for **GSTIN,ESIC plus EPFO, Professional Tax, Opening of Bank Account and Shops and Establishment Registration.**
7. Attach to SPICE+ --Form No. **INC-8**(Compliance Declaration), **INC-9** (Subscribers Declaration), **DIR-2** (Directors consent)
8. The particulars of subscribers like their names, addresseess, ID proofs etc. and particulars of directors like their names, addresses, IDs, interest in other companies etc. will be filled up in the relevant sections of SPICE +.
9. For verification of office address, file Form NO. **INC-22** within 30 days of incorporation
10. ROC will examine the form and if finds it defective, inform the applicant and ask him to resubmit within 15 days. If again on resubmission not satisfied, applicant must remove defects and resubmit again in 15 days. If ROC finds everything in order, then Certificate of Incorporation in Form No. **INC-11** is generated which will contain Name of the Co., CIN, PAN, TAN and Date of incorporation.

CONCLUSIVENESS OF CERTIFICATE OF INCORPORATION

Conclusive Evidence-Evidence cannot be disputed on any ground and which the law does not allow to be contradicted.

Prima facie Evidence- Evidence which suffices for the proof of a particular fact until contradicted and overcome by another evidence.

The Certificate of Incorporation serves as a prima facie evidence of what it contains. **Case -Jubilee Cotton Mills Ltd. vs. Lewis.** *Here, the incorporation documents were delivered to the Registrar for registration on 6th January. Two days later the Registrar issued the Certificate of Incorporation but dated it 6th January instead of 8th January, the day of actual issue of COI. On 6th January certain shares were allotted to Lewis. The question arose whether the allotment of shares was valid or not. It was held that the Certificate of Incorporation is conclusive evidence of all it contains. Hence, in the eyes of law the company was formed on 6th January and so the allotment was held valid.*

The Companies Act, 2013 doesn't contain any provisions with respect to 'Conclusiveness of Certificate of Incorporation'. Once a company got registered, and subsequently it comes to the knowledge of authorities that the company had furnished false \incorrect\ insufficient information in the documents filed at the time of incorporation, then as per sec. 7(6) of the Companies Act, 2013, the promoters\first directors of the company shall be liable for fraud u\s 447 and be punished with imprisonment and fine. Similarly u\s sec. 7(7) of the Act, the TRIBUNAL is empowered in that case, to order winding up of the company or even order the striking off of the name of the co. from the Register of companies.

Thus, the Certificate of Incorporation only serves as a prima facie evidence of what it contains. It is no more a conclusive evidence of the formation of a company. The concept of conclusiveness of certificate of incorporation has lost its relevance under Companies Act 2013. If it is proved that the company got incorporated on the basis of documents containing false or incorrect information or in any fraudulent manner, then section 7(7), allows the registrar to question the validity of proceedings prior to incorporation and take necessary actions.

III Stage: COMMENCEMENT OF BUSINESS (10A)

The Companies (Amendment) Act, 2019 has, by inserting sec. 10A, imposed a requirement on part of companies having share capital (whether public or private) to fulfill certain formalities before commencing their businesses. Accordingly, a company will not be entitled to commence its operations or exercise borrowing powers unless it has filed with the ROC-

- a) ***Declaration filed by a director in Form INC-20A*** (within 180 days of its incorporation) stating that the subscribers to that MOA have all paid up on their shares and
- b) ***Verification in Form INC-22*** (within 30 days of its incorporation) of its registered office address by attaching documents such as title deeds, lease agreements, telephone/gas/electricity/bills depicting the address of the premises.

If the company fails to comply with the requirements of Sec. 10 A, then it shall be liable to a penalty of Rs. 50,000 and every officer in default shall be liable to a penalty of Rs. 10,000 per day during which default continues. In case no Declaration as prescribed above is filed with the Registrar, it could even lead to removal of the companies' name from the Register of Companies.

Borrowing powers mean power to borrow on loans, debentures etc.

PROVISIONAL CONTRACTS

Provisional Contracts - These are the contracts entered into by a company after obtaining Certificate of Incorporation but before becoming eligible to commence business. Such contracts are not legally binding upon the company until it becomes eligible for the commencement of business. A company becomes eligible to commence its business only after it files with the Registrar of Companies the two documents namely -Declaration of Subscribers (within 180 days of incorporation) that all the subscribers have paid the value of their shares and Verification of office address (within 30 days of incorporation) Thereafter provisional contracts become automatically binding on the company.

PRELIMINARY CONTRACTS	PROVISIONAL CONTRACTS
These contracts are made before the registration of the company	These contracts are made after registration but before fulfilling requirements u/s 10A
The company can neither sue nor be sued to enforce the preincorporation contracts	The company cannot be sued for enforcing a provisional contract till it becomes eligible for commencement of business.
Preliminary contracts can be made binding by ratification if covered u/s 15h and 19e of Special Relief Act, 1963	Provisional contracts become binding as soon as company becomes eligible for commencing business and do not require any ratification.
Special Relief Act,1963 governs preincorporation contracts	Companies Act,2013 governs provisional contracts by inserting sec.10A
Promoters are liable on preincorporation contracts unless covered under Special Relief Act	Company is liable on provisional contracts but only after getting eligibility for commencement

ON LINE REGISTRATION OF COMPANY (Using SPICE +)

ABBREVIATIONS USED

SPICE + - **S**implified **P**roforma for **I**ncorporating the **C**ompany **E**lectronically

AGILE PrO-S – **A**pplication for registration for **G**STIN, **E**SIC **p**lus **E**PF**O**, **P**rofessional Tax, **O**pening of Bank Account and **S**hops and Establishment Registration.

CIN- Corporate Identity Number

PAN- Permanent Account Number

TAN- Tax deduction Account Number

GSTIN- Goods and Services Tax Identification Number

ESIC- Employees State Insurance Corporation registration number

EPFO – Employees Provident Fund Organisation registration number

DIN- Director Identification Number