# COMMENCEMENT OF BUSINESS BY PUBLIC AND PRIVATE COMPANIES

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## INTRODUCTION

Formation of a company is a long and complicated process. The first step involved in forming the company is the incorporation of the company. After the incorporation of the company, there are other procedures that are to be followed by the company before it can commence its business. The certificate of commencement of business was a mandatory step under Companies Act, 2013. It was mandatory for public companies with share capital. The certificate is issued by the registrar of joint stock companies. The certificate of commencement of business was important because only after obtaining the certificate one is allowed to start any business-related activities. Before that, one is not allowed to exercise any kind of powers or benefits which come along with company registration. when a company is formed, before that it has its several aspects and parts which has to be built after which the company is taken into an account to commence its business i.e.

- Promotion of a company
- Registration of a company
- Certificate of incorporation
- Certificate of Commencement of business

## PROMOTION OF A COMPANY

A business enterprise does not come on its own. The process of business promotions comes when someone comes up with an idea and ends when that idea is converted into the process of action i.e. the formation of business enterprise and commencement of its business. It is an overall effort that the members of the company put to make the company.

### Who is a promoter of a company?

A successful promoter is a creator of wealth and an economic prophet. The person who is concerned is known as a promoter. He conceives the idea of starting a business and takes all the measures required for bringing the enterprise into existence.

For example, Dhirubhai Ambani is the promoter of Reliance Industries. The promoter finds out the way to generate the money, search business idea, arranges for finance, gather resource and establish a going concern. He stands in fiduciary position.

**REGISTRATION OF A COMPANY**

It is the registration that gives the company a birth or existence. A company is properly formed when it is properly registered under the Company Act. The is a procedure for the registration process that every organization must follow. It involves following documents and procedures,

- **Memorandum of Association:** it is to be signed by the minimum member that is 7 persons for the public company and 2 in case of private company. It must be duly stamped.
- **Article of Association:** The document is signed by all those persons who all have signed the memorandum of association.
- **List of directors:** A list of directors with their names, address, and occupation is prepared and filed with the registrar of the companies.
- **Written consent of the directors:** A written consent of the directors that they have agreed to act as directors has to be filed with the registrar of the company along with a written approval to the effect that they will take the qualification shares and will pay for them.
- **Notice of the address of the registrar office:** it is also customary to file the notice of the address of the company’s registered office at the time of incorporation. It is to be provided within 30 days after the date of incorporation. It is to be provided within 30 days after the date of incorporation.
- **Statutory declaration:** A statutory declaration mentioning that the requisites of the act and the rules thereunder have been compiled. It must be signed by an advocate of the supreme court or of a high court or an attorney or leader entitled to before a high court or leader entitled to appear before a high court or a practicing chartered accountant in India, who engages in the company formation or by a person indicated in the article as a director, managing director, secretary or manager of a company. It is also to be filed with the registrar of the company.

**CERTIFICATE OF INCORPORATION**

The registration of the memorandum of the association, the article of association and other documents are filed with the registrar. After getting satisfied with the application & documents submitted, Registrar will issue the Certificate of incorporation. A certificate of incorporation is the ultimate proof of the existence of company.

**COMMENCEMENT OF BUSINESS**

It is a Declaration to be issued by the directors within 180 days of incorporation of company stating that the subscribers to the Memorandum of the company has paid the value of shares so agreed by them, along with a verification of registered office address of the company. The declaration needs to be filed along with proof of subscription money received by the company in form 20A with the Registrar of Companies.

As soon as a private company gets the certification of incorporation is received by the company, a public company issues a prospectus for inviting a public to subscribe to its share capital. It fixes the minimum subscription in the prospectus. Then it is required to sell the minimum number of shares mentioned in the prospectus. After completing the sale of the required number of shares, the certificate is sent to the registrar along with the letter from the bank stating that all the money is received. The registrar then the registrar issues a certificate known as 'certificate of commencement of business'. This is the conclusive evidence for the commencement of business for the public company.

The provisions of obtaining certificate of CoB from the respective Registrar of Companies ("RoC") were earlier provided under section 149 of the Companies Act, 1956 ("the Erstwhile Act"). The provisions were only applicable to newly incorporated public companies having share capital. After the commencement of the Act, section 11 was introduced for providing declaration of CoB and exercising of borrowing powers by the newly incorporated Companies. This time the provisions were applicable to all companies, whether private and public. It is pertinent to note here that unlike the erstwhile Act, no certificate of CoB was facilitated by RoC, but the documents filed in this regard were taken on record only. For the promotion of "Ease of doing business in India" the Govt. came up with some relaxations to the corporate entities vide notification[1] dated 26.05.2015 and notified the Companies Amendment Act, 2015 ("the Amendment Act"). Consequent to the commencement of the Amendment Act, section 11 of the Act was omitted.[2]

**CERTIFICATE FOR COMMENCEMENT OF BUSINESS UNDER THE COMPANIES ACT, 1956**

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Under the Companies Act, 1956, a private company and a public limited company not having share capital are not required to comply with any other formalities and may commence its business activities capital are not required to comply with any other formalities and may commence its business activities immediately after obtaining the certificate of incorporation from the concerned Registrar of Companies.

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[1] http://www.mca.gov.im/Ministry/pdf/AmendmentAct,2015.pdf

[2] Sehgal, C. B. (November 05, 2018). Certificate of commencement of business resurfaces. Corporate Law Services Division, 02-04

A public limited company having share capital cannot commence business until it has obtained the certificate to commence business from the concerned Registrar of Companies. Under the Companies Act, 1956 a new company would comply with the required formalities and obtain the commencement of business certificate from the Registrar as soon as possible after formation because it could not commence any business activities or exercise its borrowing powers without it.

**CERTIFICATE FOR COMMENCEMENT OF BUSINESS UNDER THE COMPANIES ACT, 2013**

At the time of enactment of the Companies Act, 2013, the requirement of getting certificate of commencement of business did not found any place. According to the Act of 2013, after completion of incorporation, companies had to obtain a certificate of commencement of business operations within 30 days and no activity could start before that. "The form meant an additional procedural requirement and payment of stamp duty, which translated into 1-2 days lead time after incorporation and before commencing business activities". Private companies will no longer have to wait for a certificate of commencement to start business operations. The government has done away with this requirement, taking another step to ease doing business in India. Promoters will only have to inform the Registrar of Companies online.

## CURRENT SCENARIO

According to the provisions of section 10A of the Act, as inserted by the Ordinance of 2018, the companies having share capital, which have been incorporated on after the date of commencement of the Ordinance, for the purpose of commencement of their businesses and exercise borrowing powers, are required to file a declaration within the period of 180 days from the date of incorporation by any of their director with regard to acceptance of subscription money from their subscribers. Further, the companies are also required to ensure about the compliance of provisions of section 12(2) of the Act, which talks about filing of a verification of their registered offices. In case the Company fails to file the declaration within the prescribed time, the Company shall be liable to penalty of Rs. 50,000/- and every officer in default shall be liable to a penalty of Rs. 1000/- for each defaulting day subject to maximum amount of Rs. 1 lac. In addition to this, RoC may remove of name of the company from the register of companies, if he has a reasonable cause to believe that the Company is not carrying on any business and operation. Though no form has been specified till date, in which the same is to be intimated to RoC. It is expected that the relevant forms will be released very soon considering the requirement caused by the Ordinance.

The Companies (Amendment) Ordinance, 2018 passed an Ordinance called as, The Companies (Amendment) Ordinance, 2018 and a new Section 10A was introduced in such ordinance. Before the introduction of Certificate of Commencement of Business, the government observed that the in most of the cases Members of the Company fails to transfer the subscription money in the Company Bank account which will be observed by them at later stage and sometimes fails to transfer the same. So in order to curve this situation and to make the process streamline the Ministry has again reintroduced the concept of certificate of commencement of Business and pursuant to this a Director of the Company shall declare and certify in form INC – 20A that every subscriber to the Memorandum has paid the subscription money and in the form 20 A they have to attach the proof of remittance towards the Bank which was remitted by every subscriber into the Company Bank Account. The Director of the Company shall also certify that Company is maintaining a Registered Office of the Company pursuant to Section 12 of the Companies Act, 2013 and all the particulars of the form shall also be certified by a practicing professional and the wrong certification shall move towards the consequences of Section 447 and Section 448 of the Companies Act, 2013. Under new rules, it is mandatory for all companies having a share capital – that are incorporated in India after November 2, 2018 – to obtain the commencement of business certificate before starting a business or exercising any borrowing powers. To obtain the certificate, the director of a newly incorporated company must file a declaration (form-20 A) stating that all subscribers to the memorandum have paid the value of shares as agreed by them. The new company must also file a verification of its registered office address with the registrar of companies (RoC) within 30 days of incorporation.

**Steps to obtain Certificate of Commencement of Business**

- File form 20A (a declaration) and attach with it the bank account statements of the company as proof of payments for the value of share. If bank statements are not available, the company may attach valid payment proof receipts (NEFT/RTGS).
- File certificate of registration, which in case of non-banking financial institutions is issued by the Reserve Bank of India.

All these documents must be submitted along with the prescribed fee, within one hundred and eighty days of incorporation of the company.

Companies must note that the Ordinance also empowers the RoC to conduct physical verification of their registered office. It is therefore advisable to companies to maintain their legal documents such as memorandum of association, certificate of incorporation; forms along with attachments filed with RoC and its challans, and any other documents as per provision of articles of association of the company, at their registered office to avoid any non-compliance:

## CONSEQUENCES OF NON-COMPLIANCE

**Penal provision**

If a company fails to obtain the Certificate of Commencement of Business within the stipulated time, then, there is a penalty of Rs 50,000 (US$703) on the company and Rs 1,000 (US$14) per day up to a total of Rs 100,000 (US$1405) on every director of the company.

**Other provisions**

The RoC may initiate action for the removal of the name of the company from the register of companies if he or she has a reasonable cause to believe that the company is not carrying on any business operation in the registered office.

**Fee for filing e-form 20A**

In the case of companies having share capital, the fee is as follows:

- Less than 100,000 – Rs 200 (US$2.8)
- Between 100,000 to 499,999 – Rs 300 (U0S$4.2)
- Between 500,000 to 2,499,999 – Rs 400 (US$5.6)
- Between 2,500,000 to 9,999,999 – Rs 500 (US$7)
- More than 10,000,000 – Rs 600 (US$8.4)

If the company does not have share capital, the prescribed fee for the certificate of business commencement is Rs 200 (US$2.8).[3]

## ANALYSIS

The good old provisions of declaration of CoB, which were required to be complied by public companies only, to state that the minimum capitalization has been raised and the company may now start its business, has been brought back into force.

In the Companies Act, 1956, the requirement of obtaining certificate of CoB from the respective RoC were applicable to only to the newly incorporated public companies having share capital. With the

[3] Associates, D. S. (2019, February 22). India Mandates Certificate of Commencement of Business for Newly Incorporated Companies. India Briefing .

commencement of Ordinance, now the provisions of declaration of CoB are applicable to every company having share capital, which has been incorporated on and after the date of commencement of Ordinance, 2018. Apparently, there is no carving out in the law for private companies, which means either the MCA uses its "main hoon naa" powers to grant exemption, or the section applies to all companies.

Section 11 of the Act, was notified on 01.04.2014 along with the majority of provisions of the Act. The basic purpose of bringing in the provision of section 11 was to ensure the payment of share application money by the promoters and the verification of registered office of the Company. Owing to various representations and for promotion of "Ease of doing business in India", the Govt. intended to promote the corporate structure of business. Therefore, the relaxation in this regard was provided to the stakeholders and section 11 was omitted by the Amendment Act.

Consequent to the omission of the aforesaid section, it was observed that the relaxation was misused by some of the corporate entities with regard to maintenance of their registered offices and payment of subscription fees. These companies were formed only for the purpose of circulation of monetary transactions which might not be allowed by the regulatory authorities directly. Therefore, keeping in mind the instances as mentioned above, it was again observed to bring back the same provisions with regard to filing of declaration by director for the payment by subscription money and verification of registered office so as to keep a track upon the companies.

## CONCLUSION

The basic purpose of bringing the Ordinance is always due to some emergency or urgent need. The same has been observed in the aforementioned subject matter. It was much needed requirement to curb the malpractices by some of corporate entities who intend to take the wrong benefit of the omission of section 11 of the Act, the Ministry has again brought back the same provisions. The corporate entities which were not maintaining their registered offices, and giving rise to various frauds, will now come under the scanner. As it is that said Precaution is better than cure, the government is trying to tap defunct or paper companies while incorporation rather than fishing for them subsequently. It is also to be noted that section 12(9) of the Act, also empowers RoC to do physical verification of the registered office of the companies, if it has reasons to believe that the company is not carrying on any business or operations and if it come to the notice of RoC that the company is not complying with the provision of maintaining its registered office, it may initiate action for the removal of the name of the company from the register of companies. Although the provisions of the section 10A of the Act are stricter in compliance, to bring back the same is a welcome step taken by the Ministry which will be beneficial for the stake holders as well as for the Govt. for better governance of corporate entities.