

BUSINESS SETUP IN INDIA

The two main types of company which can be incorporate in India are Public Company or a Private Company. In case of a Public Company, any seven or more persons may form an incorporated company by subscribing their names to the memorandum of association and complying with other requirements in respect of registration. Further in case of a Private Company any two or more persons may form an incorporated company by subscribing their names to the memorandum of association.

The application for registration of a company should be presented to the Registrar of the state in which the business office of the company is to be situated. The application shall be accompanied by the following documents.

1. The Memorandum of Association.
2. The Articles of Association duly signed by the subscribers of the memorandum.
3. A notice of address of the registered office of the company. This may be done within 30 days of registration if it cannot be filed at the time of registration.
4. A list of directors and their consent to act signed by each.
5. An undertaking in writing signed by each such director to take and pay for their qualification shares, if any.

Note: Items number 4 and 5 are not required to be filed in the case of a Private Company.

If the registrar is satisfied that all the requisite documents delivered to him are in order, he shall register the Memorandum and the Articles, if any, provided he is satisfied on the following point:

- (a) The relevant provisions of the act have been complied with.
- (b) The objects of the company are lawful.
- (c) The requisite number of persons required under the act have subscribed and duly signed.
- (d) The memorandum and the articles comply in all respects with the provisions of the act.
- (e) The name selected by the company is acceptable.
- (f) The statutory declaration has been properly made.

If the registrar of companies is satisfied that all the aforesaid requirements have been complied with, he will register the company and place its name on the register of companies.

Certificate of incorporation:

On registration the registrar will issue a certificate of incorporation whereby he certifies that the company is incorporated. From the date of incorporation mentioned in the certificate, the company becomes a legal person separate from its shareholders. The legal effect of incorporation is as under:

- (a) A company becomes a body corporate distinct from its members. It becomes a legal person and not a mere aggregate of the shareholders. Thus, where all the members of a company were killed by a bomb the company was deemed to survive.

- (b) A company has a perpetual succession and a common seal it is an immortal being.
- (c) A company can sue and be sued in its own name.
- (d) A company has a right to hold and alienate its own property. The property of the company belongs to the company itself and not to the individual members.
- (e) Company's debts and obligations are the liabilities of the company only and cannot be enforced against the individual shareholders.

**Conclusiveness of the certificate of incorporation
(Only required in case of Public Company)**

The certificate of incorporation shall be conclusive evidence that-

- (a) All the requirements of the act have been complied with in respect of registration;
- (b) All the pre-conditions of registration have been complied with;
- (c) The company is duly registered; and
- (d) That the company came into existence on the date of the certificate.

TYPES OF COMPANY WHICH CAN BE INCORPORATED IN INDIA

1. "**Private company**" means a company which has a minimum paid-up capital of one lakh rupees or such higher paid-up capital as may be prescribed, and by its articles,

- a. restricts the right to transfer its shares, if any;
- b. limits the number of its members to fifty (50) not including —
 - i. persons who are in the employment of the company; and
 - ii. 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; and
- c. prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company; and
- d. prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives ;

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

- 2. "**Public company**" means a company which —
 - a. is not a private company;
 - b. has a minimum paid-up capital of five lakh rupees or such higher paid-up capital, as may be prescribed;
 - c. is a private company which is a subsidiary of a company which is not a private company.
- 3. "**Foreign company**" means a company which
 - a. is incorporated outside India and
 - b. has established a place of business within India.

Within 30 days of establishment of such place of business within India, the Foreign Company is required to submit documents/details. Alterations and changes in these documents/details are required to be notified within 30 days.

The provisions of Section 108C on restrictions of transfer of shares of foreign companies, sections 118 (right to obtain copies of trust deed), 124 to 145 (registration of charges), 159 (annual returns to be made by company), 209 (books of account to be kept by company), 209A (inspection of books of account of company), 233A (power of Central Government to direct special audits in certain cases), 233B (audit of cost accounts in certain cases), 234 to 246 (power of Registrar to call for information, etc.), 295 (loans to Directors), 297 (Board's sanction to be required in certain contracts in which Directors are interested), apply to such foreign company.

4. **"Company limited by guarantee"** means a company having the liability of its members limited by the memorandum 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. Such company could be a "company limited by guarantee and not having share capital" or a "company limited by guarantee and having a share capital".
5. **"Unlimited Company"** means a company not having any limit on the liability of its members. The liability of a member extends to the whole amount of company's debts and liabilities but the member will be entitled to claim contribution from other members. The Memorandum and Articles of such company is as per Table E of Schedule I of the Act.

6. Holding & Subsidiary Company

"Holding company" means a holding company within the meaning of section 4 of the Act;

"Subsidiary company" or **"subsidiary"** means a subsidiary company within the meaning of Section 4 of the Act.

1. For the purposes of this Act, a company shall, subject to the provisions of subsection (3), be deemed to be a subsidiary of another if, but only if—
 - a. that other controls the composition of its Board of directors; or
 - b. that the other —
 - i. where the first-mentioned company is an existing company in respect of which the holders of preference shares issued before the commencement of this Act have the same voting rights in all respects as the holders of equity shares, exercises or controls more than half of the total voting power of such company;
 - ii. where the first-mentioned company is any other company, holds more than half in nominal value of its equity share capital; or
 - c. the first-mentioned company is a subsidiary of any company which is that other's subsidiary.

Provisions affecting holding subsidiary relationship

- a. Holding company as shadow Director
Subsidiary's membership of its Holding company
Obligation on the part of holding company to furnish certain information to its shareholders about the subsidiary e.g. Annual Accounts of all the subsidiaries to be attached with the Annual Accounts of the holding company
- b. Financial year of Holding & Subsidiary Company
- c. Rights of Holding Company's representatives & members
- d. Investigation of the affairs of the Subsidiary's Holding Company.

7. Limited Liability Partnership (LLP)

It may be noted that LLP is not a Company under the Companies Act, 1956 but it is defined under section 2(1)(n) of the Limited Liability Partnership Act, 2008 as a "partnership formed and registered under the Limited Liability Partnership Act, 2008".

LLPs are bound to pay Income Tax under IT Act on lines similar to general partnerships. They are not required to pay dividend distribution tax or surcharge.