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COMPANY FORMATION AND CONVERSION

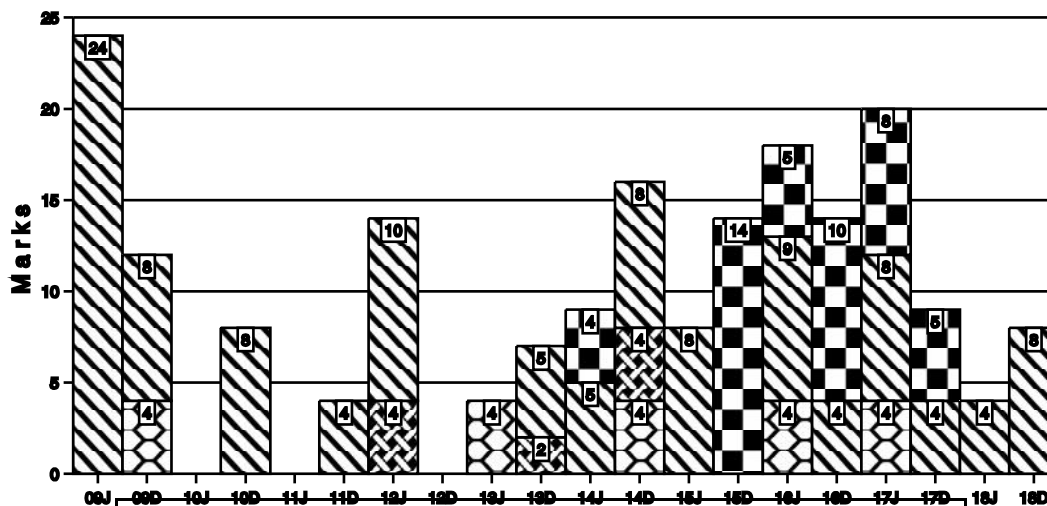
THIS CHAPTER INCLUDES

- Choice of form of Business Entity
- Procedure for Incorporation of Companies
- Procedure for Conversion of Companies
- Procedure for Commencement of Business
- Procedure for ratification of pre-incorporation agreements and contracts

Marks of Objective, Short Notes, Distinguish Between, Descriptive & Practical Questions


Legend



 Objective
  Short Notes
  Distinguish
  Descriptive
  Practical




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CHAPTER AT A GLANCE

Topic	Important Highlight
1. Types of Company	<p>From the point of view of incorporation, companies can be classified as chartered companies, statutory companies and registered companies.</p> <ul style="list-style-type: none"> ✓ Companies can be categorized as unlimited companies, companies limited by guarantee and companies limited by shares. ✓ Companies can also be classified as public companies, private companies, one person companies, small companies, associations not for profit having license under Section 8 of the Act, Government Companies, Foreign Companies, Holding Companies, Subsidiary Companies, Associate Companies, Investment Companies and Producer Companies.
2. Private Company	<p>A private company has been defined under Section 2(68) of the Companies Act, 2013 as a company which has a minimum paid-up capital of ₹ 1,00,000 or such higher paid-up capital as prescribed and by its articles restricts the right to transfer its shares, limits the number of its members to two hundred and prohibits any invitation to the public to subscribe for any securities of the company.</p> <p> Amendment made by Companies (Amendment) Act, 2015: <i>Provides that in Clause (68), the words of one lakhs rupees or higher paid up share capital shall be omitted.</i></p>

3. One Person Company	“One Person Company” means a company which has only one person as a member.
4. “Small Company”	<p>“Small company” means a company, other than a public company, (i) paid-up share capital of which does not exceed ₹ 50,00,000 or such higher amount as may be prescribed which shall not be more than ₹ 5 crores; or (ii) turnover of which as per its last profit and loss account does not exceed ₹ 2 crore or such higher amount as may be prescribed which shall not be more than ₹ 20 crores.</p> <p> Amendment made by Companies (Amendment) Act, 2017:</p> <p>“Small Company means a company, other than a public company,—</p> <ul style="list-style-type: none"> (i) paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than ten crore rupees; and (ii) turnover of which as per profit and loss account for the immediately preceding financial year does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than one hundred crore rupees.”
5. Public Company	<p>A public company is a company which (a) is not a private company (b) has a minimum paid-up share capital of ₹ 5 lakh or such higher paid-up capital, as may be prescribed.</p> <p> Amendment made by Companies (Amendment) Act, 2015:</p> <p><i>Provides that in Clause 71 the words of ₹ 5 lakhs or higher paid up share capital shall be omitted.</i></p>

6. Limited Company	A limited company is a company limited by shares or by guarantee. An unlimited company is a company not having any limit on the liability of its members.
7. Foreign Company	Foreign Company means any company or body corporate incorporated outside India which (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner.
8. Investment Company	Investment Company means a company whose principal business is the acquisition of shares, debentures or other securities.
9. Association not for profit	Section 8(1) permits the registration, under a licence granted by the Central Government, of associations not for profit with limited liability without being required to use the word "Limited" or the words "Private Limited" after their names. The Central Government may grant such a license if: (a) it is intended to form a company for promoting commerce, art, science, sports, education, research, social welfare, religion, charity protection of environment or any such other object; and (b) the company prohibits payment of any dividend to its members but intends to apply its profits or other income in promotion of its objects.
10. Government Companies	A company in which not less than 51% of the paid-up share capital is held by the Central Government, or by any State Government or Governments or partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary company of such a Government Company.

11. Holding Company	<p>As per Section 2 (46), holding company, in relation to one or more other companies, means a company of which such companies are subsidiary companies.</p> <p> Amendment made by Companies (Amendment) Act, 2017:</p> <p><i>For the purposes of this clause, the expression "company" includes any body corporate;"</i></p>
12. Subsidiary Company	<p>Section 2 (87) provides that subsidiary company or subsidiary, in relation to any other company (that is to say the holding company), means a company in which the holding company—</p> <ul style="list-style-type: none"> (i) controls the composition of the Board of Directors; or (ii) exercises or controls more than one-half of the total share capital either at its own or together with one or more of its subsidiary companies.
13. Control	<p>It shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner.</p>
14. Dormant Companies	<p>As per Section 455 (1) where a company is formed and registered under this Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction, such a company or an inactive company may make an application to the Registrar in such manner as may be prescribed for obtaining the status of a dormant company.</p>

15. Associate Company	<p>As per Section 2(6), "Associate Company", in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company.</p> <p> Amendment made by Companies (Amendment) Act, 2017:</p> <p>Section 2(6)</p> <p>(a) <i>the expression "significant influence" means control of at least twenty per cent. of total voting power, or control of or participation in business decisions under an agreement;</i></p> <p>(b) <i>the expression "joint venture" means a joint arrangement whereby the parties that have joint control of the arrangement have rights to the net assets of the arrangement."</i></p>
16. Position of OPC in India under the Companies Act, 2013	<p>As per Section 2(62) of the Companies Act, 2013, "One Person Company" means a company which has only one person as a member.</p> <p>Section 3(1)(c) lays down that a company may be formed for any lawful purpose by one person, where the company to be formed is to be One Person Company that is to say, a private company. In other words, one person company is a kind of private company.</p> <p>A One person company shall have a minimum of one director. Therefore, a One Person Company will be registered as a private company with one member and one director.</p>
17. Procedure for incorporation of a company	<p>(a) Application for Availability of Name of Company;</p> <p>(b) Preparation of Memorandum and Articles of Association;</p> <p>(c) Filing of Documents With Registrar of Companies;</p>

	<ul style="list-style-type: none"> (d) Declaration from the professional; (e) Affidavit from the subscribers to the Memorandum; (f) Furnishing verification of Registered Office (g) Filing of particulars of Subscribers (h) Filing particulars of first directors along with their consent to act as directors (i) Power of Attorney: Execution of power of attorney on a non-judicial stamp paper of a value prescribed in state stamp laws. (j) Issue of Certificate of Incorporation by Registrar.
18. Steps to be taken by a promoter	The first few steps to be taken by a promoter in incorporating a company are to apply for availability of name of company, prepare the memorandum and articles of association and get them vetted, printed, stamped and signed. The promoter should then execute power of attorney and file additional documents as required under section 7 . He should then file statutory declaration and pay the registration fees.
19. Conclusive evidence	The certificate of incorporation is conclusive evidence that everything is in order as regards registration and that the company has come into existence from the earliest moment of the day of incorporation stated therein.
20. Private company to public company	Pass special resolution in general meeting File form INC 27 with Registrar File MGT 14 for special resolution.
21. Public to private company	Pass Special Resolution in general meeting File form INC 27 with Registrar Get NCLT's approval File MGT 14 for special resolution.

22. Conversion of section 8 company to any other kind	<ul style="list-style-type: none"> • Pass special Resolution in general meeting along with MGT 14 • Application to Regional Director in Form INC 18 (copy to be filed with Registrar) Publication of notice (INC 19) in news paper • Declaration to the effect that no dividend/ bonus is paid • NOC from the relevant regulatory authority • No failure in filing financial statement certificate from PCS/CA/CWA for conversion compliance.
23. Conversion of One Person Company to a public company or private company	<ul style="list-style-type: none"> • If the paid up capital of an OPC exceeds ₹ 50,00,000. Or • Its average annual turnover during the relevant period exceeds ₹ 2 crore. Then it shall cease to be entitled to continues as an OPC • Minimum numbers of members and directors has to be increased accordingly. Pass special Resolution in General Meeting to alter MOA & AOA Notice to Registrar within 60 days in INC 5. • Note: Where the paid up share capital of an One Person Company 1 [exceeds fifty lakh rupees and its average annual turnover during the relevant period] exceeds two crore rupees, it shall cease to be entitled to continue as a One Person Company.
24. Conversion of pvt company into One Person Company	<p>Private company other than section 8 company having paid up share capital of ₹ 50,00,000 or less or Average annual turnover during the relevant period is ₹ 2 crore or less</p> <ul style="list-style-type: none"> • Before passing resolution the company shall obtain NOC from members & creditors then pass S/R in General Meeting

	<ul style="list-style-type: none">• The company shall file an application in INC 6 for its Conversion• Declaration by Directors by way of affidavit.
25. Meaning of LLP	Any two or more persons associated for carrying on a lawful business with a view to earn profit may form a limited liability partnership by subscribing their names to an incorporation document and registration with the registrar of companies.
26. Mutual rights and duties of partners	Mutual rights and duties of partners of an Limited Liability Partnership <i>inter se</i> and those of the Limited Liability Partnership and its partners shall be governed by an agreement between the partners.
27. No. of Partners	Every Limited Liability Partnership shall have at least two designated partners who are individuals and atleast one of them shall be a resident of India.
28. LLP Agreement	The mutual rights and duties of the partners of limited liability partnership and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by the limited liability partnership agreement between the partners or between the limited liability partnership and its partners.
29. Solvency	Every limited liability partnership shall file the Statement of Account and Solvency in Form 8 with the Registrar, within a period of thirty days from the end of six months of the financial year to which the Statement of Account and Solvency relates. A limited liability partnership's Statement of Account and Solvency shall be signed on behalf of the limited liability partnership by its designated partners.

30. Accounts Audited	A limited liability partnership whose turnover exceed forty lakh rupees, in any financial year or whose contribution exceed twenty-five lakh rupees shall be required to get its accounts audited.
31. Annual Return	Every limited liability partnership shall file an annual return with the Registrar in Form 11 .
32. Foreign LLP	As per Rule 34(1) of the LLP Rules, a foreign limited liability partnership shall, within thirty days of establishing a place of business in India, file with the Registrar in Form 27 — (a) a copy of the certificate of incorporation; (b) the full address of the registered or principal office of the limited liability partnership in the country of its incorporation; (c) the full address of the office of the limited liability partnership in India which is to be deemed as its principal place of business in India; (d) list of partners and designated partners, if any and the names and addresses of two or more persons resident in India, authorized to accept on behalf of the limited liability partnership, service of process and any notices.

List of Important Form (Companies Act, 2013)

Form No.	Form Type	Purpose of Form as per Companies Act, 2013	Important Section	Important Rule
INC-1	e-Form	Application for reservation of Name	4(4)	8,9
SPICE-32	e-Form	One Person Company – Application for incorporation	3(1), 7(1)	4,10,12,15

INC-3	e-Form	One Person Company – Nominee Consent Form	3(1)	4(2), (3), (4), (5), (6)
INC-4	e-Form	One Person Company – Change in Member/Nominee	3(1)	4(4), (5), (6)
INC-5	e-Form	One Person Company - Intimation of exceeding threshold	–	6 (4)
INC-6	e-Form	One Person Company – Application for Conversion	18	7 (4)
INC-7	e-Form	Applicant for incorporation of Company (Other than OPC)	7(1)	10, 12, 14, 15
INC-8	Physical Form	Declaration	7(1)(b)	14
INC-9	Physical Form	Affidavit	7(1)(c)	15
INC-10	Physical Form	Form for verification of signature of subscribers	–	16 (1) (q)
INC-11	Physical Form	Certificate of Incorporation	7(2)	8
INC-12	Physical Form	Application for grant of License under section 8	8(1), 8(5)	19, 20
INC-13	Physical Form	Memorandum of Association	–	19 (2)
INC-14	Physical Form	Declaration	7(1)(b)	19 (3), (b)
INC-15	Physical Form	Declaration	–	19 (3)(d)
INC-16	Physical Form	Licence under Section 8(1) of the Companies Act, 2013	–	20

INC-17	Physical Form	Licence under Section 8(5) of the Companies Act, 2013	–	20
INC-18	e-Form	Application to Regional Director for conversion of Section 8 company into company of any other kind	8 (4) (ii)	21(3)
INC-19	Physical Form	Notice	–	22
INC - 20	e-Form	Intimation to Registrar of revocation/surrender of license issued under section 8	8(4), 8(6)	23
INC - 21	e-Form	Declaration prior to the commencement of business or exercising borrowing powers	11(1)(a)	24
INC - 22	e-Form	Notice of situation or change of situation of registered office	12(2), (4)	25, 27
INC - 23	e-Form	Application to the Regional Director for approval to shift the Registered Office from one state to another state or from jurisdiction of one Registrar to another Registrar within the same State	12 (5), 13(4)	28,30
INC - 24	e-Form	Application for approval of Central Government for change of name	13 (2)	29 (2)
INC - 25	Physical Form	Certificate of Incorporation pursuant to change of name	–	29
INC - 26	Physical Form	Advertisement to be published in the newspaper for License for existing companies	–	30

INC - 27	e-Form	Conversion of public company into private company or private company into public company	14	33
INC - 28	e-Form	Notice of Order of the Tribunal or any other competent authority	–	–

SHORT NOTES

2009 - Dec [8] Write a note on the following:

- (i) One person company

(4 marks)

Answer :

Section 2(62) of the Companies Act, 2013 define “one person company” as a company which has only one person as member. OPC is a sub – domain of Private Company as per **Section 2(68)**.

Rule 3 of the Companies (Incorporation) Rules 2014 say, only a natural person who is an Indian citizen and resident in India:

- (a) shall be eligible to incorporate a One Person Company;
(b) shall be a nominee for the sole member of a One Person Company.

A person can incorporate only one “One Person Company”.

- The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of that One Person Company.
- The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in **Form SPICE-32** along with consent of such nominee obtained in **Form INC – 3** and fee as provided in the **Companies (Registration offices and fees) Rules, 2014** shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles.
- **SPICE-32** is form for incorporation of one person company. The form is similar to **Form INC – 7** except this form contain Nomination details and particulars of nominee.

Attachments:

- (i) Memorandum of Association
- (ii) Articles of Association
- (iii) Proof of identity of the member and the nominee
- (iv) Residential proof of the member and the nominee
- (v) Copy of PAN card of member and nominee
- (vi) Consent of Nominee in **Form INC – 3**
- (vii) Declaration from the subscriber and first Director to the memorandum in **Form INC – 9**
- (viii) List of all the companies (specifying their CIN) having the same registered office address, if any;
- (ix) Specimen Signature in **Form INC – 10**
- (x) Entrenched Articles of Association
- (xi) Proof of Registered Office address (Conveyance/ Lease deed/Rent Agreement etc. along with rent receipts)
- (xii) Copies of the utility bills (not older than two months)
- (xiii) Proof that the Company is permitted to use the address as the registered office of the Company if the same is owned by any other entity/Person (not taken on lease by company)
- (xiv) Consent from Director
- (xv) Optional Attachments.

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2013 - June [8] Write a note on the following:

- (i) Ministry of Corporate Affairs Circular No. 6/2011 dated 8th March, 2011 in the matter of a foreign company establishing business in India.

(4 marks)

Answer:

As per **Section 2 (42)** “foreign company” means any company or body corporate incorporated outside India which:

- (1) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (2) conducts any business activity in India in any other manner.

Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration:

- (a) a certified copy of the charter, statute or memorandum and articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not in English language, a certified translation thereof in the English language;
 - (b) the full address of the registered or principal office of the company;
 - (c) a list of the directors and secretary of the company with particulars;
 - (d) the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
 - (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
 - (f) particulars of opening and closing of a place of business in India on earlier occasions;
 - (g) declaration that none of the directors of the company or authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; or
 - (h) other prescribed particulars.
- The Foreign Company shall, within a period of thirty days of establishment of its place of business in India, file **Form FC – 1** of the **Companies (Registration of Foreign Companies) Rules 2014**. Along with the **Companies Act, 2013** provision of **Foreign Exchange Management Act, 1999** and regulations made thereunder shall also be applicable.
 - Regulatory provisions under **Foreign Exchange Management (Establishment in India of Branch or Office or other place of business) Regulations, 2016**. A foreign company or individual planning to set up business operations in India can do so through a Liaison Office/Representative Office, Project Office or a Branch Office. The **FEMA (Establishment in India of Branch or Office or other place of business) Regulations, 2016** govern the opening and operation of such offices.

- Accordingly, Companies incorporated outside India, desirous of opening a Liaison/Branch office in India have to make an application in **form FNC-1**. It may be noted that RBI has authorized AD Category I bank to forward **FNC-1** along with the necessary enclosures along with the comments and recommendations to –
- The Chief Manager-in-charge, Reserve Bank of India Foreign Exchange Department Foreign Investment Division Central Office, Mumbai-400001.

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2014 - Dec [3A] (Or) Write a note on the following:

- (iv) One person company (OPC)

(4 marks)

Answer:

Please refer 2009 - Dec [8] (i) on page no. 29

—— Space to write important points for revision ———

2016 - June [3A] (Or) Write a note on the following:

- (iii) Limited liability partnership (LLP)

(4 marks)

Answer:

Limited Liability Partnership (LLP):

LLP is an alternative business vehicle that gives the benefits of limited liability company and flexibility of a partnership firm. Since, LLP contains elements of both 'a corporate structure' as well as 'partnership firm structures' it is many a times termed as hybrid of a company and partnership. LLP is a separate legal entity which can continue its existence irrespective of changes in its partners. LLP is an incorporated partnership formed and registered under the Limited Liability Partnership Act, 2008.

Owing to flexibility in its structure and operation, LLP is useful for small and medium enterprises, in general, and for the enterprises in services sector, in particular. LLP is also a very suitable for professionals like Company Secretaries, Chartered Accountants, Cost Accountants, Advocates etc., as itself them to form multi-disciplinary limited liability partnership firms.

—— Space to write important points for revision ———

2017 - June [3A] (Or) Write note on the following:

(iv) 'SPICE'.

(4 marks)

Answer:

SPICE

Ministry of Corporate Affairs vide notification dated 1st October, 2016 has issued the Companies (Incorporation) Fourth Amendment Rules, 2016 which introduced 'Simplified Proforma for Incorporating Company Electronically (SPICE)', as simplified integrated process for incorporation of the company under the Government Process Re-engineering (GPR) initiative.

Rule 38 has been inserted in the Incorporation rules to introduce the following e-forms:

- (a) e-Form INC 32 as a single application for Reservation of name, Incorporation of a new Company, Application for PAN and TAN and Application for Allotment of DIN;
- (b) e-Form INC 33 for filing e-Memorandum of Association;
- (c) e-Form INC 34 for filing e-Articles of Association.

— Space to write important points for revision —

DISTINGUISH BETWEEN

2012 - June [2] Distinguish between the following :

(v) 'A company limited by guarantee' and 'an unlimited liability company'.

(4 marks)

Answer:

- **A company limited by guarantee:** As per **Section 2(21) of Companies Act, 2013** it is a company where liability of members is limited by its memorandum of association as per the undertaking of respective members in the memorandum.

- This undertaking is for making contribution to company asset in the event of winding up.
- Both the memorandum and the articles must state the number of members with which the company is proposed to be incorporated.
- A company limited by guarantee can have shares also but it is not mandatory.
- It can be incorporated even on the basis of guarantee. It can be a public company or a private company.
- **An unlimited liability company:** As per **Section 2(92) of Companies Act, 2013**, an unlimited liability company is one where the members' liability is not limited. In the event of winding up, the members shall have to pay from its personal property and the entire personal property may be used up.
- However, the liability of the members is only to the company and not to creditors/lenders and it is only the liquidator who can call for amounts from the members to treat company's debts and obligations.
- This type of companies can also have share capital.
- The Articles of this type of companies must have their distinct regulations and should mention the number of members with which they are incorporated.

———— Space to write important points for revision —————

2013 - Dec [2] (c) Distinguish between the following:

- (i) 'Holding company' and 'subsidiary company'.

(2 marks)

Answer :


Subsidiary Company: A company is called subsidiary company of another company when control is imposed by another company, **[Section 2 (87) of Companies Act, 2013]**.

A company shall be subsidiary of another only if any one or more of the following conditions are fulfilled:

- (i) Where the composition of its Board of Directors is controlled by the other company.

- (ii) Where the other company holds more than half of its equity share capital or company holds more than half voting power of such company.

Holding Company:- Holding company is that who controls another companies or company. In other words holding company holds the Board of Directors or majority of shares of other company (**Section 2 (46) of Companies Act, 2013**).

 **Amendment made by Companies (Amendment) Act, 2017:**
For the purposes of this clause, the expression "company" includes anybody corporate;”

———— Space to write important points for revision ————

2014 - Dec [2] Distinguish between the following:

- (b) ‘Private company’ and ‘small company’.

(4 marks)

Answer:

Private Company

As per **Section 2(68) of the Companies Act, 2013**, “private company” means a company having a minimum paid- up share capital of ₹ 1 lakh or such higher paid-up share capital as may be prescribed and which by its articles,:

- (i) restricts the right to transfer its shares;
- (ii) except in case of One Person Company, limits the number of its members to two hundred:

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:

Provided further that the following persons shall not be included in the number of members:

- (a) persons who are in the employment of the company; and
- (b) 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

- (iii) prohibits any invitation to the public to subscribe for any securities of the company.

✍ **Amendment made by Companies (Amendment) Act, 2015:**
*Provides that in **Clause (68)**, the words of one lakhs rupees or higher paid up share capital shall be omitted.*

Small Company

As per **Section 2(85)** “small company” means a company, other than a public company:

- (i) paid-up share capital of which does not exceed ₹ **50** lakhs or such higher amount as may be prescribed which shall not be more than ₹ **5** crores; or
- (ii) turnover of which as per its last profit and loss account does not exceed ₹ **2** crores or such higher amount as may be prescribed which shall not be more than ₹ **20** crores:

Provided that nothing in this definition shall apply to:

- (a) a holding company or a subsidiary company;
- (b) a company registered under **Section 8**; or
- (c) a company or body corporate governed by any special Act.

✍ **Amendment made by Companies (Amendment) Act, 2017:**
“Small Company means a company, other than a public company,—

- (i) *paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than **ten crore rupees**; and*
- (ii) *turnover of which as **per profit and loss account for the immediately preceding financial year** does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than **one hundred crore rupees**.”*

— Space to write important points for revision —

DESCRIPTIVE QUESTIONS

2009 - June [5] (b) Enumerate the procedure for conversion of a public company into a private company. **(8 marks)**

Answer :

The procedure for conversion of a public company into a private company are:

1. Hold a meeting of its Board of Directors to consider and approve the proposal for conversion of public company into private company. The following resolutions must be passed at the meeting.
 - (i) To approve the proposal for conversion of the company into private company.
 - (ii) To fix time, date and venue for holding an extraordinary General Meeting of the company.
 - (iii) To approve notice, for the General Meeting alongwith the explanatory statement.
 - (iv) To authorize Company Secretary or some competent officer to issue the notice of General Meeting on behalf of the Board.
2. **Hold the General Meeting and pass the following resolutions:**
 - (i) Special resolution for altering the articles of the company, as required **under Section 14 of the Companies Act, 2013** so as to include therein restrictions, limitations and prohibition specified in **Section 2(68) of the Act** converting a public company into a private company.
 - (ii) File **Form MGT 14** alongwith certified copy of the Special Resolution & Explanatory statement alongwith the filing fees within **30** days of passing of the special resolution with ROC.
Also wherever free transferability of securities is mentioned in the Articles it has to be suitably altered by putting restrictions on free transferability.
 - (iii) Get the fresh stationary printed.
 - (iv) Also the sign Board be changed accordingly.

- (v) Issue public notice for such change.
- (vi) Make application to Central Government in **Form INC 27** alongwith the following:
 - (a) A copy of Special Resolution.
 - (b) A printed copy of the unaltered copy of memorandum & Articles of Associations
 - (c) Certified true copy of the Audited Financial Statement of latest year.
 - (d) Certified true copy of the Minutes of General Meeting at which Special Resolution was passed.
 - (e) Consent in writing from substantial creditors for conversion.
- (vii) File altered copy of Articles duly approved by Central Government with Registrar of Companies within one month.
Surrender to Registrar, the certificate of incorporation and the Registrar then issued fresh certificate for such conversion.

— Space to write important points for revision —

2009 - June [6] (a) Describe the basic features of limited liability partnership (LLP) and distinguish it from normal partnership. **(8 marks)**

Answer :

The salient features of the Limited Liability Partnership are as follows:

1. The LLP is a body corporate and a legal entity separate from its partners. Any two or more person associated for carrying on a lawful business with a view to earn profit, may by subscribing their names to an incorporation document and filing the same with the Registrar to form a Limited Liability Partnership. The LLP will have perpetual succession.
2. Subject to the provisions of the legislation the mutual rights and duties of partners of an LLP inter se and those of the LLP and its partners shall be governed by an agreement between partners or between the LLP and the partners. There would be flexibility to Revise the agreement as per their choice. In the absence of any such agreement the mutual rights or duties shall be governed by the provision of the legislation.

3. The LLP will be a legal entity, liable to the full extent of its assets with the liability of the partners being limited to their agreed contribution in the LLP which may be tangible or intangible in nature or both tangible or intangible in nature. No partners would be liable on account of the independent or unauthorized acts of other partners or their misconduct.
4. Every LLP shall have at least two partners or shall also have at least two individuals as designated partners of whom at least one shall be resident in India. The duties and obligations of designated partners shall be as provided in the law.
5. The LLP shall be under an obligation to maintain financial statement reflecting true and fair views of its state of affairs. A statement of accounts and solvency shall be filed by every LLP with the Registrar every year. The accounts of LLPs shall also be audited subject to any class of LLPs being exempted from this requirement by the Central Government.
6. The Central Government shall have powers to investigate the affairs of an LLP, if required by appointment of competent inspector for the purpose.
7. The **Indian Partnership Act, 1932** shall not be applicable to LLPs. In accordance with the provision of the legislation, the **Indian Partnership Act, 1932**, shall not be applicable to LLPs.
8. The Central Government has framed rules for carrying out the provision of the proposed legislation.

—— Space to write important points for revision ———

2009 - June [7] (a) You are a Practicing Company Secretary. One of your clients abroad wants to establish a place of business in India for a company incorporated abroad in which he is a Whole-time Director. Prepare a note for his information indicating the procedure involved to set-up a place of business in India. **(8 marks)**

Answer :

- If Whole-time Director of foreign company is willing to establish a place of business within India, then pursuant to **Section 380 of the Companies Act, 2013. FC -1 (Registration of Foreign Companies) Rules, 2014** is required to be delivered to Registrar of Companies within **30** days of the establishment of the place of business for its registration.
- In such e-form, some of the important details like
 - (a) address and state of principal place of business in India,
 - (b) date of its establishment,
 - (c) full address of principal office of foreign company,
 - (d) type of office and main division of business activity,
 - (e) details of persons resident in India and authorized to accept on behalf of company

The following documents are required to be attached-

- Charter, statutes or memorandum and articles of association or other instrument constituting or setting out the constitution of the company. If the documents are not in English language then it should be translated in English language.
- Details of directors (individuals as well as bodies corporate).
- Approval letter from Reserve Bank of India for the setting up of business in India.
- Power of attorney or board resolution in favour of the authorised representatives.

The form is required to be signed digitally by the authorized representative of the foreign company.

The details of directors, Secretary and body corporate should contain the following particulars:

(a) with respect to each director -

- (i) In the case of an individual, his present name, former name (if any) and surname, his usual residential address, his nationality of origin, (if other than nationality) and his business occupation, if any or if he has no business occupation but holds any other directorship or directorships, particulars of that directorship or of some one of those directorships; and

- (ii) In the case of a body corporate, its corporate name and registered or principal office and the full name, address, nationality and nationality of origin, (if different from that nationality) of each of its directors.

(b) with respect to the secretary or where there are joint secretaries with respect to each of them-

- (i) In the case of an individual, his present name, former name (if any) and surname and his usual residential address; and
- (ii) In the case of a body corporate, its corporate name and registered or principal office.

Provisions under FEMA (Establishment in India or Branch of Office or other place of business) Regulation, 2016.

A foreign company or individual desiring to set up business operations in India can do so through a Liaison Office/Representative Office, Project Office or a Branch Office. The **FEMA (Establishment in India of Branch or Office or other place of business) Regulation, 2016** governs the opening and operation of such offices.

Accordingly, companies incorporated outside India, desirous of opening a Liaison/ Branch office in India have to make an application in **form FNC-1**. It may be noted that RBI has authorized AD Category I bank to forward **FNC-1** along with the necessary enclosures along with the comments and recommendations to

The Chief Manager-in-charge
Reserve Bank of India
Foreign Exchange Department
Foreign Investment Division
Central Office Mumbai - 400001

—— Space to write important points for revision ———

2009 - Dec [5] (a) What is a 'foreign company' and 'foreign controlled company'? State the legal requirements a foreign company should comply with relating to delivery of documents to the Registrar of Companies, if it wishes to establish a place of business in India under the Companies Act, 2013.

(8 marks)

Answer :

- As per **Section 2(42) of Companies Act, 2013** A foreign company means a company incorporated outside India and having a place of business in India, whatever be the pattern of their holding.
- However, as per **Section 379 of the Companies Act, 2013**, where not less than **50%** paid-up capital of foreign company is held by one or more citizens of India or by one or more bodies corporate incorporated in India, whether singly or in aggregate, such company shall comply with the provisions of the **Companies Act, 2013**, as if it were a company incorporated in India.

“A foreign controlled company”, however means a company in which the majority shareholding and voting power is in the hands of foreign individuals and/or bodies corporate.

Filing of returns and documents (Section 380 of Companies Act, 2013):

Foreign companies which establish a place of business in India must within one month from that date file with the ROC:

- (1) a certified copy of the charter, statutes or memorandum and articles of the company or other instrument defining its constitution with a certified translation of the documents in the English language if they are not in that language.
- (2) the full address of the Registered or principal office of the company;
- (3) a list of directors giving with respect to each of the directors who are individuals, his name and surname, former name and surname, usual residential address and nationality;
- (4) the present name and surname, former name and surname and usual residential address of the Secretary, if he is an individual and if a body corporate its corporate name and its registered office or principal office and if a firm, the partners of which are joint secretaries, the name and principal office of the firm;
- (5) the names, addresses of persons resident in India and authorized to accept service of documents, notices and processes on behalf of the company; and
- (6) the address of the principal place of business in India (**Section 380**).

*A foreign company should deliver to the ROC within the prescribed time, a return containing particulars of any changes or alterations in any of the particulars mentioned above (**Section 380**).*

— Space to write important points for revision —

2010 - Dec [7] (a) Enumerate the procedure for conversion of a public company into a private company. **(8 marks)**

Answer :

Please refer 2009 - June [5] (b) on page no. 37

— Space to write important points for revision —

2011 - Dec [2] Explain the following pair of terms to bring out their distinctions:

(v) 'Section 8 company' and 'producer company'.

(4 marks)

Answer:

Section 8 of Company :

- (a) Company should be formed for promoting commerce, art, science, religion, charity or any other useful object.
- (b) The company should use its profit/income for the promotion of its objects and prohibits payment of dividend to its members.
- (c) The Central Government may grant licence on such conditions and regulation, as it think fit.
- (d) **Section 8** permits a limited liability company, to be registered without using the words Ltd. or Pvt. Ltd. in its name, under a special licence granted by the Central Government, provided it is a company formed not for profit.

Note: Revocation of licence: *If any of the above conditions are contravened the licence shall be revoked.*

A licenced company cannot alter the object Clause of its memorandum of Association without the approval of Central Government signified in writing.

Producer Company : As per **Section 581 A(1) (Section 465 of Companies Act, 2013*)** producer company means a body corporate having objects or activities specified in **Section 581 B (Section 465 of Companies Act, 2013*)** and registered as producer company under this Act.

The term producer has been defined as “Any person engaged in any activity connected with or relatable to any primary produce” which in turn encompasses agricultural and farm activities resulting in production or in aid of production produce of cottage industries; handloom and handicraft etc.

- (a) Of producer company can be formed by any ten or more individual each of whom will be a producer or any two or more producer institution or combination of ten or more individuals and producer institutions.
- (b) It has to use the word ‘producer company limited’ as the last words of its name.
- (c) It will be limited liability of the company.
- (d) It is not to hold a license from the Central Government but have to get registered as producer company.

—— Space to write important points for revision ———

2012 - June [4] (a) Bring out the procedure for incorporation of a company as subsidiary of an existing company. **(8 marks)**

(c) Do you agree with the following statements? Give brief reason(s) in support of your answer :

- (i) In a scheme of amalgamation, shareholders of Company-A were offered shares of Company-B in lieu of shares held by them in Company-A. Can the offer letter issued by Company-B to the shareholders of the Company-A be regarded as prospectus?

(2 marks)

Answer :

(a) As per **Section 2(87) of Companies Act, 2013** a company shall be deemed to be a subsidiary of another if:

- (i) That other Company controls the composition of its Board of Director or

* Yet to be notified

- (ii) For the purpose of control the company should hold more than half in nominal value of the equity shares of another company.
- (iii) Exercises or controls more than half the total voting power of another company.

**Amendment made by Companies (Amendment) Act, 2017:**

In Section 2 in clause (87)—

- (a) in sub-clause (ii), for the words "total share capital", the words "total voting power" shall be substituted;

Procedure for the formation and registration of its subsidiary company:-

- (1) To call a meeting of the Board of Directors.
- (2) Selecting the name of the company.
- (3) Ascertaining its name availability from ROC.
- (4) Drafting and printing of memorandum and Articles of Association.
- (5) Stamping of memorandum and Articles.
- (6) Dating of memorandum and Articles.
- (7) **E-form INC 10, INC 9, INC 8, INC 22, DIR 12** are then filed within ROC for Registration alongwith the prescribed registration fees and fees for filling of forms as per the rates contained in **Section 403 of Companies Act, 2013**.
- (8) The Registrar of company, will scrutinize them and if they are found complete in all respects. The Registrar will register the company.
- (9) After the registration of the company the Registrar will issue under his hand and seal of his office the certificate of incorporation in the name of the company.

Answer:

- (c) (i) No, the offer letter issued by company-B to the shareholders of company-A cannot be regarded as a prospectus.
As per **Section 2(70) of Companies Act, 2013** define the prospectus as any document described or issued as prospectus and includes any notice, circular or other documents inviting offers from the public for subscription or purchase of share of body corporate.

—— Space to write important points for revision ———

2013 - Dec [1] {C} Attempt the following:

- (i) Draft a resolution with associated requirements altering articles of association of the company to include restrictions as specified in Section 2(68) converting DJA Limited into DJA Private Limited.

(5 marks)

Answer :

Body to consider the resolution: General Meeting

Type of resolution: Special Resolution

“RESOLVED THAT -

- (i) pursuant to proviso to **Section 14 of the Companies Act, 2013** and subject to the approval of the Central Government, the company be and is hereby converted into a private company.
- (ii) the articles of association of the company be and are hereby altered by inserting the following new article as article No.....after article No.....:

“Article No.....

The company is a private company and accordingly -

- (a) limits the number of its members to two hundred 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;
- (b) prohibits any invitation to the public to subscribe for any shares in, or debentures of the company;
- (c) restricts the right to transfer its shares, provided that where two or more persons hold one or more shares in the company jointly, they shall, for the purposes of this article, treated as a single member; and
- (d) prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.
- (iii) the name of the company be and is hereby accordingly changed from DJA Limited to DJA Private Limited.

- (iv) the secretary of the company be and is hereby authorised to make an application in e-form No. **INC- 27** as prescribed in the Companies (Central Government's) General Rules along with the prescribed enclosures and the prescribed application fee, to the concerned Registrar of Companies.

—— Space to write important points for revision ———

2014 - June [1] (d) Associations registered under Section 8 enjoy all the privileges of a limited company. Comment. **(5 marks)**

Answer:

- As per **Section 4 of Companies Act, 2013**, it is necessary that the name of every company shall have the last words as “Limited”, if the company is registered with a limited liability.
- However, **Section 8** permits the registration, under a license granted by the Central Government, of associations not for profit with limited liability without being required to use the word “Limited” or the words “Private Limited” after their names.
- The company is registered without paying any stamp duty on its Memorandum and Articles.
- On registration, the Association enjoys all the privileges of a limited company and is subject to all its obligations, except, those in respect of which exemption by a special or general order is granted by the Central Government.

A license may be granted by the Central Government under **Section 8 of Companies Act, 2013** on such conditions and subject to such regulations as it thinks fit and those conditions and regulations shall be binding on the body to which the license is granted.

An association registered under the Act, which has been granted a license **under Sub-section (1) Section 8** is subject to all the obligations under the Act, except where the Central Government has issued some notifications directing exemption, to such licensed companies from various provisions of the Act.

—— Space to write important points for revision ———

2014 - Dec [2A] (Or) (i) The promoters of a public limited company want to insert a clause in the articles of association of the company giving power of expulsion of a member to the Board of directors, where the directors are of the view that the activities or conduct of such a member is detrimental to the interest of the company. Is it a right step? Explain. **(4 marks)**

Answer:

A question had arisen as to whether a public limited company has powers to insert a clause in its articles of association relating to expulsion of a member by the Board of Directors of the company where the directors are of the view that the activities or conduct of such a member is detrimental to the interests of the company.

- The then Department of Company Affairs (Now Ministry of Corporate Affairs) clarified that an article for expulsion of a member is opposed to the fundamental principles of the Company Jurisprudence and is *ultra vires* the company, the reason being that such a provision militates against the provisions of the Companies Act relating to the rights of a member in a company.
- According to **Section 6 of the Companies Act**, the Act overrides the memorandum and articles of association and any provision contained in these documents repugnant to the provisions of the Companies Act, is void.
- The erstwhile Department of Company Affairs has, therefore, clarified that any assumption of the powers by the Board of Directors to expel a member by alteration of articles of association shall be illegal and void. **(Circular No. 32/7 dated November 1, 1975).**

— Space to write important points for revision —

2014 - Dec [6] (a) A foreign company proposes to establish a place of business in New Delhi. Explain the requirements and compliances to be made in this regard. Whether the directors of the company are required to obtain DIN? **(4 marks)**

Answer:

Procedure to Register a Foreign Company in India:

As per **Section 2 (42)** “foreign company” means any company or body corporate incorporated outside India which:

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner;

Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration:

- (a) a certified copy of the charter, statute or memorandum and articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not in English language, a certified translation thereof in the English language;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and secretary of the company with particulars;
- (d) the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
- (f) particulars of opening and closing of a place of business in India on earlier occasions;
- (g) declaration that none of the directors of the company or authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; or
- (h) other prescribed particulars.

The directors of Foreign Company are not required to obtain DIN.

— Space to write important points for revision —

2015 - June [2] (d) Explain the provisions governing one person company (OPC). Can a person incorporate more than one OPC? **(4 marks)**

Answer:

- **Section 2(62) of the Companies Act, 2013** defines “one person company” as a company which has only one person as member. OPC is a sub – domain of Private Company as per **Section 2(68)**.
- **Rule 3 of the Companies (Incorporation) Rules, 2014** say, only a natural person who is an Indian citizen and resident in India:
 - (a) shall be eligible to incorporate a One Person Company;
 - (b) shall be a nominee for the sole member of a One Person Company.

Note: A person can incorporate only one “One Person Company”. The subscriber to the memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of that One Person Company.

- The name of the person nominated shall be mentioned in the memorandum of One Person Company and such nomination in **Form SPICE-32** along with consent of such nominee obtained in **Form INC – 3** and fee as provided in the **Companies (Registration offices and fees) Rules, 2014** shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles.
- **Form SPICE-32** is form for incorporation of one person company.
- The form is similar to **Form INC – 7** except this form contain Nomination details and particulars of nominee.

Attachments:

- (i) Memorandum of Association
- (ii) Articles of Association
- (iii) Proof of identity of the member and the nominee
- (iv) Residential proof of the member and the nominee
- (v) Copy of PAN card of member and nominee
- (vi) Consent of Nominee in **Form INC – 3**
- (vii) Declaration from the subscriber and first Director to the memorandum in **Form INC – 9**

- (viii) List of all the companies (specifying their CIN) having the same registered office address, if any;
- (ix) Specimen Signature in **Form INC – 10**
- (x) Entrenched Articles of Association
- (xi) Proof of Registered Office address (Conveyance/ Lease deed/Rent Agreement etc. along with rent receipts)
- (xii) Copies of the utility bills (not older than two months)
- (xiii) Proof that the Company is permitted to use the address as the registered office of the Company if the same is owned by any other entity/Person (not taken on lease by company)
- (xiv) Consent from Director
- (xv) Optional Attachments

No, a person cannot incorporate more than one OPC.

—— Space to write important points for revision ———

2015 - June [3] (d) BST is a company incorporated as a company not for profit under Section 8 of the Companies Act, 2013. The Board of BST has decided to convert the same into a public company under Section 2(71). Explain the procedure governing conversion of BST into BST Ltd.

(4 marks)

Answer:

Conversion of BST into BST Ltd.

1. A BST company registered under **Section 8** which intends to convert itself into a BST Ltd. shall pass a special resolution at a general meeting for approving such conversion.
2. The explanatory statement annexed to the notice convening the general meeting shall set out in detail the reasons for opting for such conversion including the following, namely:
 - (a) The date of incorporation of the company;
 - (b) The principal objects of the company as set out in the memorandum of association;
 - (c) The reasons as to why the activities for achieving the objects of the company cannot be carried on in the current structure i.e. as a **Section 8** company;

- (d) If the principal or main objects of the company are proposed to be altered, what would be the altered objects and the reasons for the alteration;
 - (e) Details of impact of the proposed conversion on the members of the company including details of any benefits that may accrue to the members as a result of the conversion.
3. A certified true copy of the special resolution along with a copy of the Notice convening the meeting including the explanatory statement shall be filed with the Registrar in **Form No. MGT.14** along with the fee.
 4. The BST shall file an application in **Form No. INC.18** with the Regional Director with the fee along with a certified true copy of the special resolution and a copy of the Notice convening the meeting including the explanatory statement for approval for converting itself into a company of any other kind.
 5. A copy of the application with annexures as filed with the Regional Director shall also be filed with the Registrar.
 6. The BST shall, within a week from the date of submitting the application to the Regional Director, publish a notice at its own expense and a copy of the notice, as published, shall be sent forthwith to the Regional Director and the said notice shall be in **Form No. INC.19** and shall be published:
 - (a) at least once in a vernacular newspaper in the principal vernacular language of the district in which the registered office of the company is situated and having a wide circulation in that district and at least once in English language in an English newspaper having a wide circulation in that district.
 - (b) On the website of the BST, if any and as may be notified or directed by the Central Government.
 7. The Board of Directors shall give a declaration to the effect that no portion of the income or property of the company has been or shall be paid or transferred directly or indirectly by way of dividend or bonus or otherwise to persons who are or have been members of the company or to any one or more of them or to any persons claiming through any one or more of them.

8. The BST shall attach with the application a certificate from practicing Chartered Accountant or Company Secretary in practice or Cost Accountant in practice certifying that the conditions laid down in the Act and these rules relating to conversion of a company registered under **Section 8** into any other kind of company, have been complied with.
9. The Regional Director may require the applicant to furnish the approval or concurrence of any particular authority for grant of his approval for the conversion and he may also obtain the report from the Registrar.
10. On receipt of the approval of the Regional Director,
 - (i) The BST shall convene a general meeting of its members to pass a special resolution for amending its memorandum of association and articles of association as required under the Act consequent to the conversion of the **Section 8** company into a company of any other kind;
 - (ii) The BST shall thereafter file with the Registrar:
 - (a) A certified copy of the approval of the Regional Director within thirty days from the date of receipt of the order in **Form No. INC. 20** along with the fee.
11. On receipt of the documents as mentioned above, the Registrar shall register the documents and issue the fresh Certificate of Incorporation.

— Space to write important points for revision —

2016 - June [1] (a) A group of persons desirous of forming a company wants to know the procedure for getting the name of the company approved by the Registrar of Companies. Advise the group about the e-form to be used and the procedure to be followed by the applicant group in this regard.

(5 marks)

Answer:

As per **Section 4(4)** of **Companies Act, 2013** read with **Rule 9** of the **Companies (Incorporation) Rules, 2014**, an application for the reservation of a name shall be made in **Form No. Run Service** along with the fee as provided in the **Companies (Registration Offices and Fees) Rules, 2014**.

Promoters may propose upto six names in order of preference for the proposed company and secure the name availability by making an

application to the Registrar of Companies of the State in which they want to have the proposed company incorporated. The proposed name should not be undesirable name in terms of **Rule 8 of Companies (Incorporation) Rules, 2014**.

While applying for a name in the **Form INC – 1**, using Digital Signature Certificate (DSC), the applicant shall be required to verify that:

- (i) He is a promoter (proposed first subscriber to the MoA) and is authorised by the other proposed first subscribers to sign and submit the application.
- (ii) He has gone through the provisions of **Companies Act, 2013**, the Rules there under and prescribed guidelines framed there under in respect of reservation of name, understood the meaning thereof.
- (iii) He has used the search facilities available on the portal of the Ministry of Corporate Affairs (MCA) i.e., www.mca.gov.in/MCA21 for checking the resemblance of the proposed name(s) with the companies and Limited Liability Partnerships (LLPs) respectively already registered or the names already approved. He has also used the search facility for checking the resemblances of the proposed names with registered or applied trademarks.
- (iv) The proposed name(s) is/are not in violation of the provisions of **Emblems and Names (Prevention of Improper Use) Act, 1950** as amended from time to time.
- (v) The proposed name is not offensive to any section of people, e.g., proposed name does not contain profanity or words or phrases that are generally considered a slur against an ethnic group, religion, gender or heredity.
- (vi) The proposed name(s) is not such that its use by the company will constitute an offence under any law for the time being in force.
- (vii) He has complied with all the mandated requirements of the respective Act/regulator, such as IRDA, RBI, SEBI, MCA etc. (applicable only in case proposed name includes words like Insurance, Bank, Stock Exchange, Venture Capital, Asset Management, Nidhi, Mutual Fund, Finance, Investment, Leasing, Hire purchase etc. or any combination thereof)

- (viii) To the best of his knowledge and belief, the information given in the application and its attachments is correct and complete, and nothing relevant to this form has been suppressed.
- (ix) He undertakes to be fully responsible for the consequences, in case the name is subsequently found to be in contravention of **Section 4** of the Act, rules made there under and the prescribed guidelines.

Following documents have to be attached to **INC – 1**:

- (i) Copy of Board resolution of the existing company or foreign holding company as a proof of no objection.
- (ii) Copy of direction from Central Government, if name is changed due to direction received from the Central Government.
- (iii) Trademark or authorisation to use trade mark, if the name of the company is based on trade mark or application for deed of assignment or a copy of application of registered trademark.
- (iv) In case the proposed name contains such word or expression for which the approval of Central Government is required, a copy of Central Government's approval.
- (v) Proof of relation.
- (vi) In principal approval from the concerned regulator wherever applicable.
- (vii) NOC from sole proprietor / partners/ other associates.
- (viii) NOC from existing company.
- (ix) Copy of affidavit in case of proposed name includes phrase 'Electoral Trust'.
- (x) Resolution of unregistered companies in case of Chapter XXI (Part I) companies.
- (xi) Order of competent authority.
- (xii) NOC as required in **Rule 8(4)**.

The name, if made available to the applicant, shall be reserved for sixty days from the date of approval. If, the proposed company has not been incorporated within such period, the name allotted shall lapse and will be made available for other applicants.

— Space to write important points for revision —

2016 - June [2] (a) A group of persons, called promoters have submitted an application to the Registrar of Companies, New Delhi for getting a company incorporated as a public company. Pending the Registrar's decision of granting certificate of incorporation, the promoters enter into certain contracts for the purchase of some assets for the proposed company. Explain the legal position of promoters' liability and the liability of the proposed company after its incorporation, in this regard. **(4 marks)**

Answer:

After submitting the application for incorporation of Company, it is likely that Registrar may take time to register the company. In the meanwhile, the promoters may enter into contracts on behalf of proposed company, like purchase of land, ordering machinery, employing key personnel, investment tie up etc. and also incur expenses relating to incorporation of the company. These must be ratified on the incorporation of the company.

The Articles must authorize the directors to pay the expenses relating to registration of the company. The directors do not have any implied power to incur pre – incorporation expenses.

As per **Section 15 of Specific Relief Act, 1963**; if promoters have made a contract before incorporation of a company for the purpose of the proposed company, and if the contract is warranted by the terms of incorporation, the company may adopt and enforce the contract. The term 'warranted by the terms of incorporation' means 'within the scope of the company's objects as stated in the memorandum of the company'. Thus, the contract should be for the purposes of the company. As per **Section 19 of Specific Relief Act, 1963**, if the pre – incorporation contract is adopted or accepted by the company after its incorporation and if it is within the terms of incorporation, the other party can also enforce the contract, if such acceptance was communicated to other party to the contract.

However, pre-incorporation contracts are not binding upon the company, if these are not adopted or accepted by the company after its incorporation. Adoption or acceptance of contracts practically means ratification of contract. A Board resolution should be passed for adoption of pre-incorporation contracts at the first Board Meeting of the company. On passing such resolution, the contract shall be binding on the company.

In case of a public company, a copy of resolution has to be filed with the concerned ROC along with the statement in lieu of prospectus in **Form PAS - 2**. The form should be digitally signed by the managing director or director or manager or secretary of the company duly authorised by the Board of Directors.

—— Space to write important points for revision ———

2016 - Dec [2] (b) Promoters of a company to be formed enter into certain contracts for purchase of land, building and machinery. On incorporation of the company, promoters want the company to undertake the liability towards the payments to be made for the above.

Examining the provisions of the Companies Act, 2013, decide whether the company be held liable for the payments for the contracts entered into by the promoters before incorporation of the company. **(4 marks)**

Answer:

During the pendency of the incorporation of the company or while taking procedural steps for the incorporation of the company which may take time, promoters may enter into contracts on behalf of the proposed company, like purchase of land, ordering machinery, employing key personnel, investment tie up etc. and also incur expenses relating to incorporation of the company. The same must be ratified on the incorporation of the company since these are the pre-incorporation agreements and contacts.

The Articles of the company must authorize the directors to pay the expenses relating to registration of the company. However, pre-incorporation contracts are not binding upon the company, if the same are not adopted or accepted by the company after its incorporation.

In accordance with the provisions of the **Specific Relief Act, 1963**, as contained **under section 15** of the said Act, if promoters have made a contract before incorporation of a company for the purpose of the proposed company, and if the contract is warranted by the terms of incorporation, the company may adopt and enforce the contract. The term 'warranted by terms of incorporation' means 'within the scope of the company's objects as stated in the memorandum of the company'. Thus, the contract should be for the purposes of the company. As per **Section 19 of the Specific Relief Act, 1963**,

if the pre-incorporation contract is adopted or accepted by the company after its incorporation and if it is within the terms of incorporation, the other party can also enforce the contract, if such acceptance (adoption) was communicated to other party to the contract.

Hence, if the provisions are therein the object clause of the Memorandum of Association of the company empowering for the same and the Articles of Association of the company empowers to the directors to adopt such pre-incorporation contracts in the board meeting then on passing of the board resolution to that effect in the first board meeting after the incorporation of the company based on the statement containing the details of pre-incorporation contracts prepared for the approval of the board meeting, then the said resolution will bind the company.

If the above procedure has been followed by the promoters of the company then the company will be held liable for the payments for the contracts entered into by the promoters before incorporation of the company otherwise not.

—— Space to write important points for revision ———

2017 - June [3] (d) “A Company being an artificial person having status in the eyes of the law,” in light to this statement, please comment whether a Company Incorporated in India is having the status of a Citizen of this Country? **(4 marks)**

Answer:

According to the Citizenship Act, 1955 only a person can be citizen of India. Definition of person given in **Clause (f) of sub-section (1) of Section 2** of that Act does not include any company or association or, body of individuals, whether incorporate or not.

In the case of *British India Steam Navigation Co. Ltd. v. Jasjit Singh*, AIR, 1964, S.C. 1451: (1964), the Supreme Court held that Shipping Corporation of India Ltd. cannot claim to be a citizen of India, and as such, is not entitled to rely upon Article 19.

—— Space to write important points for revision ———

2017 - June [6] (b) Weak Ltd. is interested in obtaining the status of a dormant company, as they have not been carrying on operation for the past two years. Explain the enabling conditions to be fulfilled for applying to be a Dormant Company. **(4 marks)**

Answer:

Section 455 read with **Rule 3** of the Companies (Miscellaneous) Rules, 2014 provides for the application for obtaining status of dormant company and its enabling conditions:

For the purposes of **sub-section (1) of Section 455**, a company may make an application in Form MSC-1 along with such fee as provided in the Companies (Registration Offices and Fees) **Rules, 2014** to the Registrar for obtaining the status of a Dormant Company in accordance with the provisions of **Section 455** after passing a special resolution to this effect in the general meeting of the company or after issuing a notice to all the shareholders of the company for this purpose and obtaining consent of at least 3/4th shareholders (in value):

Provided that a company shall be eligible to apply under this rule only, if:

- (i) no inspection, inquiry or investigation has been ordered or taken up or carried out against the company;
- (ii) no prosecution has been initiated and pending against the company under any law;
- (iii) the company is neither having any public deposits which are outstanding nor the company is in default in payment thereof or interest thereon;
- (iv) the company is not having any outstanding loan, whether secured or unsecured:
Provided that if there is any outstanding unsecured loan, the company may apply under this rule after obtaining concurrence of the lender and enclosing the same with Form MSC-1;
- (v) there is no dispute in the management or ownership of the company and a certificate in this regard is enclosed with Form MSC-1;

- (vi) the company does not have any outstanding statutory taxes, dues, duties, etc. payable to the Central Government or any State Government or local authorities etc.;
- (vii) the company has not defaulted in the payment of workmen's dues;
- (viii) the securities of the company are not listed on any stock exchange within or outside India.

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2017 - Dec [5] (b) Enumerate the conditions specified under Rule 4 and Rule 5 of the Nidhi Rules 2014 for registration of a Nidhi Company under the provisions of Companies Act, 2013. **(4 marks)**

Answer

According to Rule 4 of Nidhi Rules, 2014, a Nidhi Company shall be a public company and must have a minimum paid up equity share capital of five lakh rupees. The Nidhi Company shall have only one object in its memorandum that is of cultivating the habit of thrift and savings amongst its members, receiving deposits from, and lending to, its members only, for their mutual benefit. Every Company incorporated as a "Nidhi" shall have the last words 'Nidhi Limited' as part of its name.

Rule 5 states that, every Nidhi shall, within a period of one year from the commencement of these rules, ensure the following:

- (i) That it has not less than two hundred members.
- (ii) Net Owned Funds of ten lakh rupees or more.
- (iii) Unencumbered Term Deposits of not less than ten percent of the outstanding deposits as specified in Rule 14.
- (iv) Ratio of Net Owned Funds to deposits of not more than 1:20.

The process of incorporation of a Nidhi company is same as of incorporation of a public company limited by shares.

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2018 - June [2A] (Or) (iii) KMP Systems Pvt. Ltd. continues to retain its status as a Private Limited Company. What are restrictions which will remain imposed on it under the provisions of the Companies Act, 2013.

(4 marks)

Answer:

Restrictions which will remain imposed on private company are as under:

In terms of Section 2(68), “private company” means a company having a minimum paid-up share capital as may be prescribed, and which by its articles,:

- (i) restricts the right to transfer its shares;
- (ii) except in case of One Person Company, limits the number of its members to two hundred:

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

Provided further that:

- (a) persons who are in the employment of the company; and
- (b) 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, shall not be included in the number of members; and
- (iii) prohibits any invitation to the public to subscribe for any securities of the company;

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2018 - Dec [6] (a) Draft a resolution by shareholders of X Ltd. to convert the company into a private company. **(8 marks)**

PRACTICAL QUESTIONS

2014 - June [4] (d) Beach SA, a company incorporated in France, wants to set-up a branch in India. Advise Beach SA, regarding provisions to be complied with. Will it make any difference if 50% of the paid-up share capital of Beach SA, is held by Indian citizens? **(4 marks)**

Answer:

Section 380 of Companies Act, 2013 lays down that every foreign company which establishes a place of business in India must, within **30** days of the establishment of such place of business, file with the Registrar of Companies at New Delhi and also with the Registrar of Companies of the State in which such place of business is situated:

- (a) a certified copy of the charter, statutes or memorandum and articles of the company or other instrument constituting or defining the constitution of the company; and if the instrument is not in the English language, a certified translation thereof;
- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors of the company and its secretary with full particulars of their names, nationality, their addresses and business occupations;
- (d) the names and addresses of one or more persons resident in India who are authorised to accept service of process and any notices or other documents required to be served on the company; and
- (e) the full address of the principal place of business in India.

Approval letter from Reserve Bank of India for the setting up of business in India is required to be attached.

*When **50%** of the paid up capital is held by Indian Citizens, they should comply with such of the provisions of the Act as may prescribed by Central Government with regard to the business carried on in India, as if it were a company incorporated in India.*

—— Space to write important points for revision ——

2015 - Dec [1] (a) Your client Vivek wants to form a private company with a share capital of ₹ 50,000. Examining the relevant provisions of the Companies Act, 2013, advise Vivek on the following issues with proper justification:

- (i) Whether Vivek will be successful in the formation of the proposed company?
- (ii) Whether public can be invited for subscribing to the share capital of the proposed company?

- (iii) Whether registration of articles of association of the proposed company is mandatory?
- (iv) Whether Vivek will be able to convert the proposed private company into 'one person company' at a later date, if need be?
- (v) As regards to stamp duty state whether it will make any difference if the proposed company is incorporated in the State of Haryana or in the State of Kerala. **(5 marks)**

Answer:

- (i) **Section 2(68) of the Companies Act, 2013** defines the term 'private company' to mean a company having a minimum paid-up share capital as may be prescribed, and which by its Articles:
 - (i) restricts the right to transfer its shares;
 - (ii) except in case of One Person Company, limits the number of its members to two hundred and
 - (iii) prohibits any invitation to the public to subscribe for any securities of the company.Accordingly, since there is no requirement of minimum share capital, Vivek will be successful in the formation of the proposed company on complying with other provisions of the **Companies Act, 2013**.
- (ii) In view of **Section 2(68)** defining the term 'private company' which prohibits any invitation to the public to subscribe for any securities of the company, the proposed company cannot invite for subscribing share capital.
- (iii) Yes, registration of Articles of Association of the proposed company is mandatory. **Section 7 of the Companies Act, 2013** deals with incorporation of company. **Section 7(1)** requires *inter-alia* to file Memorandum and Articles of the company duly signed by all the subscribers to the memorandum. **Section 7(2)** provides that the Registrar on the basis of documents and information filed shall register all the documents and issue a certificate of incorporation to the effect that the proposed company is incorporated under this Act.
- (iv) Yes, **Section 18** read with **Rule 7 of the Companies (Incorporation) Rules, 2014** provides that a private company other than a company registered under **Section 8** of the Act having paid up share capital of fifty lakhs rupees or less and average annual turnover during the

relevant period is two crore rupees or less may convert itself into One Person Company by passing a special resolution in the general meeting. Before passing such resolution, the company shall obtain no objection in writing from members and creditors.

- (v) Yes, Stamp duty on Incorporation documents (**Form 1**, MoA, AoA) is state subject under Constitution. Accordingly, each state has provided different rate of stamp duty for incorporation documents in the relevant Stamp Act/Rules of the concerned State/Union Territory Government.

—— Space to write important points for revision ———

2015 - Dec [1] (c) William & Company, a company incorporated in U.K., decides to set-up its corporate office in Mumbai. Accordingly, the Board of Directors of the company passes a resolution.

The Board seeks your advice on the procedure to be adopted to carry out the proposal of the company. Advise the Board about the procedure to be followed and forms and documents the company is required to file with the Registrar of Companies. **(5 marks)**

Answer:

As per **Section 2(42) of the Companies Act, 2013** “Foreign Company” means any company or body corporate incorporated outside India which:

- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and
- (b) conducts any business activity in India in any other manner.

Accordingly, William & Company, a company incorporated in U.K. in case, it sets up its corporate office in Mumbai would be termed as a ‘Foreign Company’ under the **Companies Act, 2013**. Accordingly, the following procedure would be required to comply with.

Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration

[Section 380(1)] :

- (a) a certified copy of the charter, statute or Memorandum and Articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not in English language, a certified translation thereof in the English language;

- (b) the full address of the registered or principal office of the company;
- (c) a list of the directors and secretary of the company with particulars;
- (d) the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
- (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;
- (f) particulars of opening and closing of a place of business in India on earlier occasions;
- (g) declaration that none of the directors of the company or authorised representatives in India has ever been convicted or debarred from formation of companies and management in India or Abroad; or
- (h) other prescribed particulars.

In addition to above, a list of Directors and Secretary of Company, needs to be delivered to the Registrar (**Rule 3**) of **Companies (Registration of Foreign Companies) Rules, 2014**.

The Foreign Company shall, within a period of thirty days of establishment of its place of business in India, file **Form FC-1** of the **Companies (Registration of Foreign Companies) Rules, 2014** and the application shall also be supported with an attested copy of approval from Reserve Bank of India under Foreign Exchange Management Act or Regulations and also from other Regulators, if any.

— Space to write important points for revision —

2015 - Dec [2] (a) Rohan, a person resident in India, has been running a hotel as a sole proprietor. He now wants to convert his business into a 'one person company' (OPC) as permissible under the provisions of the Companies Act, 2013 and seeks your advice in this regard. Advise him on the procedure to be followed for conversion of his business into an OPC. What shall be your advice if Rohan is a non-resident Indian? Whether a partnership firm can form an OPC? **(4 marks)**

Answer:

One Person Company:

Section 2(62) of the Companies Act, 2013 define “one person company” as a company which has only one person as member. OPC is a sub-domain of Private Company as per **Section 2(68)**.

Rule 3 of the Companies (Incorporation) Rules, 2014 say, only a natural person who is an Indian citizen and resident in India:

- (a) shall be eligible to incorporate a One Person Company;
- (b) shall be a nominee for the sole member of a One Person Company.

A person can incorporate only one “One Person Company”.

The subscriber to the Memorandum of a One Person Company shall nominate a person, after obtaining prior written consent of such person, who shall, in the event of the subscriber’s death or his incapacity to contract, become the member of that One Person Company. The name of the person nominated shall be mentioned in the Memorandum of One Person Company and such nomination in **Form INC – 2** along with consent of such nominee obtained in **Form INC – 3** and fee as provided in the **Companies (Registration Offices and Fees) Rules, 2014** shall be filed with the Registrar at the time of incorporation of the company along with its memorandum and articles.

Form SPICE-32 is form for incorporation of one person company. The form is similar to **Form INC – 7** except this form contain Nomination details and particulars of nominee.

Attachments:

- i. Memorandum of Association
- ii. Articles of Association
- iii. Proof of identity of the member and the nominee
- iv. Residential proof of the member and the nominee
- v. Copy of PAN Card of member and nominee
- vi. Consent of Nominee in **Form INC – 3**
- vii. Declaration from the subscriber and first Director to the memorandum in **Form INC – 9**
- viii. List of all the companies (specifying their CIN) having the same registered office address, if any;

- ix. Specimen Signature in **Form INC – 10**
- x. Entrenched Articles of Association
- xi. Proof of Registered Office address (Conveyance/Lease deed/Rent Agreement etc. along with rent receipts)
- xii. Copies of the utility bills (not older than two months)
- xiii. Proof that the Company is permitted to use the address as the registered office of the Company if the same is owned by any other entity/Person (not taken on lease by company)
- xiv. Consent from Director
- xv. Optional Attachments.

Note: In the given case, only a natural person who is an Indian citizen and resident in India shall be eligible to incorporate a one person company. In the given case Rohan is a non-resident than it can not be form OPC and a partnership firm cannot form OPC.

— Space to write important points for revision —

2016 - June [1] (d) Good Homes Ltd. was registered as a public company with 195 members as follows:

	No. of members
Directors and their relatives	35
Employees	12
Ex-employees	08
(shares were allotted when they were employees)	
Others	<u>140</u>
Total number of members	<u>195</u>

Board of Directors of the company takes a decision to convert the company into a private company. Being a Company Secretary in Practice, the Board of Directors seeks your advice about the steps to be taken for conversion of the company into a private company including reduction in the number of members, if necessary, as per the Companies Act, 2013. Advise the Board.

(5 marks)

Answer:

A private company as per **Section 2(68)** cannot have more than **200** members. As per the requirement of the section present and former employees of the company are not to be counted for the purpose of **200** members. Hence, in the given question, the number of members of public company which is proposed to be converted into a private company is less than **200**. Therefore, it may be converted into private company.

The procedure for converting a public company into a private company is as under:

- (i) Passing a special resolution authorizing the conversion and altering the articles so as to include therein the restrictions specified in **Section 2 (68)**.
- (ii) Within **30** days of passing of the special resolution, **Form MGT – 14** with a copy of resolution along with explanatory statement under **Section 173** and amended copy of Article of Association as attachment along with prescribed filing fees payable.
- (iii) Changing the name clause of the Memorandum of the company.
- (iv) Obtaining the approval of the Tribunal as required by **Section 14(1)**. Application in **Form INC – 27** along with minutes of members meeting within **3** months from the date of passing of special resolution for alteration of articles to be sent for obtaining approval of Central Government.
- (v) Filing of the documents along with a printed copy of the articles as altered with the Registrar within **15** days. [**Section 14 (2)**].

—— Space to write important points for revision ———

2016 - Dec [1] (a) Watson Ltd., a company incorporated in Australia, has a place of business through an agent in Mumbai. The agent transacts the business on behalf of the company through electronic mode. As regards Watson Ltd., answer the following:

- (i) Whether Watson Ltd. shall be called a foreign company within the meaning of the Companies Act, 2013?

- (ii) What are the regulatory requirements under the Companies Act, 2013 to be complied with by such a company which has established its place of business in India?
- (iii) State the regulatory provisions under the Foreign Exchange Management (Establishment in India of Branch or Office or other Place of Business) Regulations, 2016. **(5 marks)**

Answer:

- (a)** (i) In accordance with the provisions of the **Companies Act, 2013**, as contained **under Section 2(42)** 'foreign company' means any company or body corporate incorporated outside India which:
- (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode;
 - (b) conducts any business activity in India in any other manner.
- In this case since the foreign company (incorporated in Australia) transacts its business through an agent by electronic mode in Mumbai, it is a foreign company.
- (ii) Every foreign company shall, within thirty days of the establishment of its place of business in India, deliver to the Registrar for registration **[Section 380(1)]**:
- (a) a certified copy of the charter, statute or memorandum and articles of the company or other instrument constituting or defining the constitution of the company and if the instrument is not in English language, a certified translation thereof in the English language;
 - (b) the full address of the registered or principal office of the company;
 - (c) a list of the directors and secretary of the company with particulars;
 - (d) the names and addresses of one or more persons resident in India authorised to accept on behalf of the company service of process and any notices or other documents required to be served on the company;
 - (e) the full address of the office of the company in India which is deemed to be its principal place of business in India;

- (f) particulars of opening and closing of a place of business in India on earlier occasions;
- (g) declaration that none of the directors of the company or authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; or
- (h) other prescribed particulars.

According to **Section 380(3) of the Companies Act, 2013** and **Rule 3(3) of the Companies (Registration of Foreign Companies) Rules, 2014** where any alteration is made or occurs in the document delivered to the Registrar for registration under **Sub-section (1) of Section 380**, the foreign company shall file with the Registrar, a return in **Form FC-2** along with the fee as provided in the **Companies (Registration Offices and Fees) Rules, 2014** containing the particulars of the alteration, within a period of thirty days from the date on which the alteration was made or occurred.

- (iii) A foreign company or individual planning to set up business operations in India can do so through a Liaison Office/Representative Office, Project Office or a Branch Office. The Foreign Exchange Management (Establishment in India of Branch and Office or Other Place of Business) **Regulations, 2016** govern the opening and operation of such offices Accordingly, Companies incorporated outside India, desirous of opening a Liaison Office or Branch Office in India have to make an application in **Form FNC1** through an **AD Category I** bank which is authorized by RBI to forward such application to the Chief-Manager-in-charge of RBI Foreign Exchange Department, FDI division, Central Office, Mumbai-400001.

— Space to write important points for revision —

2016 - Dec [1] (b) Ruchi (Pvt.) Ltd., a company incorporated under the provisions of the Companies Act, 2013, gives you the following information:

Paid-up equity share capital	₹ 40 lakh
Average annual turnover during the last 3 years	₹ 1 crore

The Board of Directors of the company decides to convert the company into a One Person Company (OPC). Examining the provisions of the Companies Act, 2013, advise the Board about the statutory requirements to be complied with for giving effect to the Board's proposal.

(5 marks)

Answer:

In terms of **Rule 7** of Companies (Incorporation) **Rules, 2014** a private company other than a company registered under **section 8 of the Companies Act, 2013**, having paid-up share capital of ₹ 50 lacs or less or average annual turnover during the relevant period is ₹ 2 crore or less may convert itself into One Person Company by passing a special resolution in the general meeting.

Before passing such resolution, the company shall obtain No Objection in writing from members and creditors. The OPC shall file copy of the special resolution with the Registrar of Companies within 30 days from the date of passing such resolution in **Form No. MGT-14**.

The company shall file an application in **Form No. INC-6** for its conversion into OPC along with fees as provided in the Companies (Registration Offices and Fees) **Rules, 2014**, by attaching the following documents, viz.:

1. The directors of the company shall give a declaration by way of affidavit duly sworn in confirming that all members and creditors of the company have given their consent for conversion, the paid-up share capital of the company is ₹ 50 lacs or less and average annual turnover is less than ₹ 2 crore, as the case may be.
2. The list of members and list of directors.
3. The latest Audited Financial Statement, and
4. The copy of No Objection letter of secured creditors.

On being satisfied with compliance of above-mentioned requirements, the Registrar shall issue the Certificate of Incorporation in the same manner as its first registration.

Accordingly, since the paid-up equity share capital and an average annual turnover of the company are within the prescribed limits as referred above, it can be converted into an OPC, by following the procedure as stated

above (**Rule 7 of Companies (Incorporation) Rules, 2014** and also by alteration of Memorandum and Articles of Association of the company as per the provisions of **Section 18 of the Companies Act, 2013**).

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2017 - June [2A] (Or) (i) A Ltd. has entered into a contract with B Ltd. by which the former will reserve 25% of their output to be sold to B Ltd. or to a buyer at the direction of B Ltd. Can B Ltd. be called an associate company of A Ltd.?

Also determine, if S Private Ltd. with a paid-up share capital of ₹ 45 lakh and annual turnover of ₹ 175 lakh, is a wholly owned subsidiary of H Ltd., a listed company. Can S Ltd. be called a small company? **(4 marks)**

Answer:

According to Section 2(6) of the Companies Act, 2013 “associate company”, in relation to another company, means a company in which that other company has a significant influence, but which is not a subsidiary company of the company having such influence and includes a joint venture company. “Significant influence” means control of at least 20% of total share capital, or of business decisions under an agreement.

In the instant case, B Ltd. controls more than 20% of the sale and disposal of the output of A Ltd. Thus, A Ltd. is the associate of B Ltd. But A Ltd. neither influences the business decision of B Ltd. in any manner nor does it control 20% of the total share capital of B Ltd. Hence, B Ltd. cannot be called an associate of A Ltd.

Section 2(85) of the Act defines a “small company” as a company, other than a public company:

- (i) paid-up share capital of which does not exceed **fifty lakh** rupees or such higher amount as may be prescribed which shall not be more than **ten crore** rupees; and
- (ii) turnover of which as per its last profit and loss account does not exceed **two crore** rupees or such higher amount as may be prescribed which shall not be more than **one hundred crore** rupees.

**Amendment made by Companies (Amendment) Act, 2017:**

“Small Company means a company, other than a public company,—

- (i) *paid-up share capital of which does not exceed fifty lakh rupees or such higher amount as may be prescribed which shall not be more than **ten crore rupees**; and*
- (ii) *turnover of which as **per profit and loss account for the immediately preceding financial year** does not exceed two crore rupees or such higher amount as may be prescribed which shall not be more than **one hundred crore rupees**.”*

However, the definition excludes a holding company or a subsidiary company; a company registered **under section 8**; or a company or body corporate governed by any special Act.

In the instant case, S Private Ltd. satisfies the turnover and paid-up share capital criteria to be a small company, but being a subsidiary of H Ltd., falls under the exclusions to the definition and hence, is not a small company.

—— Space to write important points for revision ——

2017 - June [5] (b) Explain the provisions to determine in what circumstances an Individual will be considered as a promoter of the Company, if Kundan has been identified as a promoter in the recent annual return of the Company, please comment whether Kundan will be considered as a promoter of that Company? In the event of a mis-statement in the prospectus of the company, what will be the civil liability of Kundan?

(4 marks)

Answer:

As per **Section 2(69) of the Companies Act, 2013**, ‘promoter’ means a person:

- (i) who has been named as such in a prospectus or is identified by the company in the annual return; or
- (ii) who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- (iii) in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act:

Provided that nothing in sub-clause (c) shall apply to a person who is acting merely in a professional capacity.

Since, Kundan has been identified as a promoter in the recent annual return of the company which falls within the ambit of the definition of promoter, hence he is promoter of that Company.

Section 35(1) of the Act provides that where a person has subscribed for securities of a company acting on any statement included, or the inclusion or omission of any matter, in the prospectus which is misleading and has sustained any loss or damage as a consequence thereof, the company and every person who is a promoter of the company shall without prejudice to any punishment to which any person may be liable under **Section 36** to pay compensation to every person who has sustained such loss or damage.

Here in the given case, if Kundan makes such misleading information or statement in the prospectus, he will be held liable for the loss or damage occurred as a consequence of such misleading information and be liable to pay compensation to every person who has sustained such loss or damage. However, he can escape his liability if he proves that the prospectus was issued without his knowledge or consent and that on becoming aware of its issue, he forthwith gave a reasonable public notice that it was issued without his knowledge or consent.

—— Space to write important points for revision ———

2017 - Dec [1] (d) Goodwill Electronics OPC incorporated on 1st July, 2015 as a One Person Company with an authorized and paid up share capital of rupees forty lakhs recorded turnover of rupees forty five lakhs in the first nine months ended 31-3-2016 and ₹ 135 lakhs during the next nine months ended 31-12-2016. Having seen the fast growing potential of his business in the IT-ES sector, Mr. Victor, promoter and sole director of the Company desires to make further investment of ₹ 50 lakhs from his friends. He seeks your advice on the following:

- (i) Whether Mr. Victor can issue shares to his friends without changing the constitution of the Company; **(1 mark)**

- (ii) If his friends desire to invest in the share capital of the Company to help Mr. Victor expand the business, how he can make further issue of shares to his friends; **(3 marks)**
- (iii) Whether Mr. Victor can include two or three of his friends as directors of the Company to support him in the management of the Company. **(1 mark)**

Answer:

- (i) In the given case, Mr. Victor cannot issue shares to his friends without changing the constitution of the Company. Goodwill Electronics is an OPC and Mr. Victor is the sole member and director of the said OPC. As per provisions of Companies Act, 2013 OPC can't have more than one shareholder. To accept share capital from his friends he has to convert the OPC either into a Private company or Public Company.

As per Rule 3(7) of Companies (Incorporation) Rules, 2014, an OPC cannot convert voluntarily into any kind of company unless two years are expired from the date of incorporation.

However, in case such One Person Company, exceeds its paid up share capital beyond fifty lakh rupees or its average annual turnover during the relevant period exceeds two crore rupees, then in such case it have to get converted to other forms of Company at any time i.e. before the expiry of the two years also.

- (ii) Once the OPC gets converted to other form of Company in compliance with Rule 3 (7) of the Companies (Incorporation) Rules, 2014 then Mr. Victor can accept the investment in the nature of share capital from his friends by making further issue of shares through private placement by complying with the provisions of Section 42 read with relevant rules made thereunder.
- (iii) Mr. Victor can include two or three of his friends as directors of the Company so as to support him in the management of the Company subject to the maximum number of directors i.e. 15 as stated in Section 149 (1) (b) of the Companies Act or such other larger no. of directors after passing a special resolution in this regard.

— Space to write important points for revision —

1.60**Scanner CS Prof. Prog. M-I Paper-1 (2013 Syllabus)**

Repeatedly Asked Questions		
No.	Question	Frequency
1	Enumerate the procedure for conversion of a public company into a private company. 09 - June [5] (b), 10 - Dec [7] (a)	2 Times
2	One person company (OPC) . 09 - Dec [8] (i), 14 - Dec [3A] (Or) (iv)	2 Times