

## **CC2.1 Chg Company Law**

### **Unit 1: INTRODUCTION TO COMPANY**

Meaning and Definition – Features –, High Lights of Companies Act 2013 - Body Corporate ,Kinds of Companies ( Concept, Definition and Features) – One Person Company, Private Company, Public Company, Company limited by Guarantee, Company limited by Shares, Holding Company, Subsidiary Company, Government Company, Associate Company, Small Company, Foreign Company, Listed Company, Dormant company , Lifting of corporate veil.

### **INTRODUCTION**

We find many business enterprises run on individual proprietorship or partnership basis. In these forms, the owners usually control the functioning of the enterprise and are responsible for its management because law makes no distinction between the entities of owners and that of the firm. The position is different in company form of organisation. Unlike a sole proprietary and partnership organisation, a company enjoys a legal status and entity of its own as distinct from that of its members. In law, this is called the ‘corporate existence’ of the company. Members may come and members may go but the company goes on forever. Since it is created by law, it can be brought to an end by the process of law. The entity of the company is entirely separate from that of its member, it bears its own name and has seal of its own, its asset is separate and distinct from those of its shareholders. Shareholders own the share capital of a company and bear the risks of business but they do not participate in the management of the company directly like the proprietor of the non-corporate business. The system company form of organisation is very useful for large undertakings for which large capital is required, which can be obtained from a large number of people.

Meaning and Definition of Company

Commonly speaking, is a voluntary association of a number of persons formed for carrying on some business and for sharing the profits or losses arising there from.

### **Meaning and Definition**

This definition is widely enough to include –

- (i) Companies registered and regulated under the Companies Act, 1956; and also
- (ii) Companies registered or unregistered and regulated under the Indian Partnership Act, 1932.

As defined by Section 2(20) of the Companies Act, 2013, company means a company incorporated under this Act (the Companies Act, 2013) or any previous company law.

According to Section 2(67) the term “previous company law” means any of the laws specified below:

- (i) Acts relating to companies in force before the Indian Companies Act, 1866 (10 of 1866);
- (ii) the Indian Companies Act, 1866 (10 of 1866);
- (iii) the Indian Companies Act, 1882 (6 of 1882);
- (iv) the Indian Companies Act, 1913 (7 of 1913);
- (v) the Registration of Transferred Companies Ordinance, 1942 (Ord. 54 of 1942);
- (vi) the Companies Act, 1956 (1 of 1956); and
- (vii) any law corresponding to any of the aforesaid Acts or the Ordinances and in force—

(A) in the merged territories or in a Part B State (other than the State of Jammu and Kashmir), or any part thereof, before the extension thereto of the Indian Companies Act, 1913 (7 of 1913); or  
(B) in the State of Jammu and Kashmir, or any part thereof, before the commencement of the Jammu and Kashmir (Extension of Laws) Act, 1956 (62 of 1956), in so far as banking, insurance and financial corporations are concerned, and before the commencement of the Central Laws (Extension to Jammu and Kashmir) Act, 1968 (25 of 1968), in so far as other corporations are concerned;  
(viii) the Portuguese Commercial Code, in so far as it relates to *sociedades anonimas*; and  
(ix) the Registration of Companies (Sikkim) Act, 1961 (Sikkim Act 8 of 1961).

The above definition does not clearly bring out the meaning of a company in terms of its features. In order to bring out the true meaning of a company let us see how a company is defined by celebrated authorities:

**Lord Justice Lindley**, “A company is meant an association of many persons who contribute money or money’s worth to a common stock and employ it in some trade or business, and who share the profit and loss (as the case may be) arising there from. The common stock contributed is denoted in money and is the capital of the company. The persons who contribute it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his share. Shares are always transferable although the right to transfer them is often more or less restricted”.

**According to Chief Justice Marshall of USA**, “A company is a person, artificial, invisible, intangible, and existing only in the contemplation of the law. Being a mere creature of law, it possesses only those properties which the character of its creation of its creation confers upon it either expressly or as incidental to its very existence”.

**Prof. L.H. Haney**, “Company is an artificial person created by law having separated entity with a perpetual succession and common seal”.

The above definition taken together carry out the true meaning of a company in terms of its features that a company, on registration, becomes a body corporate and as a body corporate it acquires a legal status of its own, i.e. status of a juristic person, separate and distinct from its members. It, therefore, becomes the creation with perpetual succession and having a common seal, and law alone can regulate, amend or dissolve it. A, company is, therefore, distinct from its members composing it (This principle is well illustrated in the case of *Salomon vs. Salomon & Co. Ltd.*).

### **CHARACTERISTICS OF A COMPANY**

The most striking characteristics of a company are discussed below:

#### ***(i). Association of many persons***

A company is an association of persons formed for some common purpose. According to Section 3(1), for incorporation of a public company, the minimum number of 7 is required. However, in such cases, no upper limit of number is stipulated. Thus, a public company may have unlimited number of its shareholders (members). In the case of the private company, however, the minimum member of 2 and a maximum number of 200 (excluding the employees shareholders) is prescribed in the Act.

According to Section 464 of the Companies Act, 2013 if an association or partnership firm

carrying on business with more than 100 persons must be registered under the Companies Act, 2013 or under any other law for the time being in force. Section 464 of this Act, does not apply to a Joint Hindu Family carrying in a business.

***(ii). Registration or Incorporation***

Incorporation is the legal process through which the separate corporate entity of a company is given recognition by law. Most of the companies are brought into existence through this process. To secure incorporation, the promoters prepare necessary documents and file with the Registrar of Joint Stock Companies, a Central Government Official appointed for this purpose. When the application of the company for registration is accepted, it is issued a certificate of Incorporation which gives the company its corporate entity. In some other cases, a company may be set up by a Special Act of Parliament.

***(iii) An Artificial person created by Law***

A Company is an artificial person created by law. It is not a human being but it acts through human beings. It is considered as a legal person which can enter into contracts, possess properties in its own name, sue and can be sued by others etc. It is called an artificial person since it is invisible, intangible, existing only in the contemplation of law. It is capable of enjoying rights and being subject to duties.

***(iv) Separate Legal Entity***

The term 'entity' means something that has a real existence. Accordingly, legal entity implies that a company is attributed with areal existence of its own in the eye of law. Through the grant of legal entity, the company is given a separate and distinct personality from its shareholder who constitutes it. A person can buy, and own shares and also can be a creditor of the company. A company as a distinct and separate person can own property, have rights and be subject to obligations or liabilities. A shareholder cannot be held liable for the acts and debts of the company, even though he holds the entire share capital of the company, as may happen in what is known as 'one Person Company'. Similarly, the shareholders cannot bind the company by their acts; they are not its agent. These points are brought out by the House of Lords in the celebrated case of Salomon vs. Salomon & Company Limited.

In the consequence of the company being an entity separate and distinct from its shareholders, the life of a company is independent of the live of its members. Even if all the members die, the company does not come to an end because of their demise.

***(v) Limited Liability***

The company, being a separate person, is the owner of its assets and bound by its liabilities. The liability of a member as shareholder extends to the contribution to the capital of the company up to the nominal value of the shares held and not paid by him. Members, even as a whole, are neither the owners of the company's undertakings, nor liable for its debts. In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets. This means that the liability of a member is limited. For example, if A holds shares of the total nominal value of 1,000 and has already paid Rs.500/- (or 50% of the value) as part

payment at the time of allotment, he cannot be called upon to pay more than Rs. 500/-, the amount remaining unpaid on his shares. If he holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent. In the case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

***(vi) Perpetual Succession***

An incorporated company never dies, except when it is wound up as per law. A company, being a separate legal person is unaffected by death or departure of any member and it remains the same entity, despite total change in the membership. Perpetual succession, means that the membership of a company may keep changing from time to time, but that shall not affect its continuity. The membership of an incorporated company may change either because one shareholder has sold/transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be a member under some other provisions of the Companies Act. Thus, perpetual succession denotes the ability of a company to maintain its existence by the succession of new individuals who step into the shoes of those who cease to be members of the company. Members may come and go, but the company can go on forever.

***(vii) Common Seal***

A company is an artificial person and does not have a physical presence. Thus, it acts through its Board of Directors for carrying out its activities and entering into various agreements. Such contracts must be under the seal of the company. The common seal is the official signature of the company. A company has a name which is mentioned in the Memorandum of Association. The name of the company must be engraved on the common seal. Any document not bearing the seal of the company may not be accepted as authentic and may not have any legal force.

***(viii). Share Capital***

A company has a capital known as share capital which is divided into the number of shares. A share is the unit of capital possessed by a company. The capital is so divided as to facilitate different owners to contribute to a common capital. There are two types of shares, namely, preference share and equity share. The holders of preference shares enjoy more or less a fixed rate of profit, but they are not allowed to cast votes in the election of directors. On the other hand, the holders of equity share take such profits as the business of the company permits, and the election of directors is mostly done by them. Member does not even have an insurable interest in the property of the company.

***(ix) Transferability of Shares***

The capital of a company is divided into parts, called shares. The shares are said to be movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. When the joint stock companies were established, the object was that their shares should be capable of being easily transferred. Section 44 of the Companies Act, 2013 enunciates the principle by providing that

the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the Articles of Association of the company. If the articles do not provide anything for the transfer of shares and the Regulations contained in Table "F" in Schedule I to the Companies Act, 2013, are also expressly excluded, the transfer of shares will be governed by the general law relating to transfer of movable property. However, as per Section 2(68) there are restrictions with respect to transferability of shares of a Private Limited Company.

***(x) Separate Property***

A company being a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is an artificial person in which all its property is vested, and by which it is controlled, managed and disposed off. Although, a company is owned by a body of person who are called its shareholders or members, but the property of the company is owned by the company itself. No member can claim ownership of the company's property during its existence or in its winding-up and even a member has no insurable interest in the property of the company.

***(xi) Management***

As already noted, the members may derive profits without being burdened with the management of the company. They do not have effective and intimate control over its working and they elect their representatives as Directors or the Board of Directors of the company to conduct corporate functions. In other words, the company is administered and managed by its managerial personnel. For the management of the company, as per section 2(51) of the Companies Act, 2013, "Key Managerial Personnel", in relation to a company, means -

- (i) the Chief Executive Officer or the managing director or the manager;
- (ii) the company secretary;
- (iii) the whole-time director;
- (iv) the Chief Financial Officer; and
- (v) such other officer as may be prescribed.

***(xii) Capacity to Sue and be sued***

A company is the legal person and has a separate entity of its own. Being a legal person, the company can file suits against in its own name. Similarly, the suits against the company can also be filed in the company's name. Thus, if a case is filed in the court, not by the company as a plaintiff, but by its directors, such suit will not be maintainable in the court (Rajendra Nath Dutta vs. Shibendra Nath Mukherjee). It is interesting to note that a company can open a bank account, can enter into contracts and can exercise all the powers pertaining to the attainment of its objects given in its Memorandum of Association.

***(xiii) Lifting the Corporate Veil***

Lifting the corporate veil means ignoring the separate legal entity of the company and looking behind the real person who are in the control of the company. In other words, where a fraudulent and dishonest use is made of the legal entity, the individuals concerned will not

be allowed to take shelter behind the corporate personality. In this regards the court will break through the corporate veil.

***(xiv) Corporate Social Responsibility (CSR)***

As per section 135 (1) of Companies Act, 2013 (“Companies Act”), every company having net worth of INR 500 crore or more, or turnover of INR 1000 crore or more or net profit of INR 5 crore or more, during the immediately preceding financial Year (FY), shall constitute a Corporate Social Responsibility (CSR) Committee of the Board. The Board of every company shall ensure that at least 2% of the average net profits of the company made during the 3 immediately preceding financial years shall be spent on social welfare activities.

***(xv) Voluntary Association***

A company is a voluntary association of personal formed for some common purpose. It is formed for the accomplishment of some stated goals and whatsoever profit is gained is divided among its shareholders or saved for the future expansion of the company. Only an association formed for charitable purpose (Section 8) were established for no profit motive.

**High Lights of Companies Act 2013**

The new Companies Bill 2012 (Bill) was approved by the Lok Sabha (the lower house of India) on 18 December 2012 and by the Rajya Sabha (the upper house of India) on 9 August 2013. The Bill received presidential assent on 29 August 2013 to become law i.e. (Indian) Companies Act, 2013 (2013 Act). Recently, the Ministry of Corporate Affairs (MCA) has notified a list of provisions (around 98 Sections) of the 2013 Act that came into force with effect from 12 September 2013. Major highlights of the Companies Act 2013 are presented below –

- a) ***Private company can have a maximum of 200 members (earlier limit was up to 50). (Clause 2(68))***
- b) ***The Maximum Number of Directors: The maximum number of directors for a public company has been increased from 12 to 15. In case the company desires to further increase the board size, it may do so by passing a special resolution. The requirement of taking permission of the Central Government as provided in 1956 Act is done away with in 2013 Act. [Section 149(1)]***
- c) ***Number of Directorships: A person cannot be a director (including alternate director) in more than 20 companies out of which he or she cannot be a director of more than 10 public companies.***
- d) ***Resident Director – Every company shall have at least one director who has stayed in India for a total period of not less than 182 days in previous calendar year. {clause 149 (2)}***
- e) ***Women Director – A company, whether a public company or a private concern, will be required to mandatorily appoint at least one woman director if it fulfils any of the following criteria:***

1. *It is a listed company whose securities are listed on any stock exchange.*
  2. *It is a company having paid-up capital of Rupees one hundred crore or more, and a turnover of Rupees three hundred crores or more.*
- f) *Financial Year- Under the 1956 Act, companies were permitted to decide their own financial year. But Companies Act, 2013 Act has taken away this liberty and requires all the companies to have a financial year ending as on the 31st of March.*
- g) *Consolidated financial statements- The 2013 Act now mandates consolidated financial statements (CFS) for any company having a subsidiary or an associate or a joint venture, to prepare and present consolidated financial statements in addition to standalone financial statements.*
- h) *One-person company: The 2013 Act introduces a new type of entity to the existing list i.e. apart from forming a public or private limited company, the 2013 Act enables the formation of a new entity a 'one-person company' (OPC). An OPC means a company with only one person as its member [section 3(1) of 2013 Act].*
- i) *Corporate Social Responsibility (CSR) –The 2013 Act makes an effort to introduce the culture of corporate social responsibility (CSR) in Indian corporate by requiring companies to formulate a corporate social responsibility policy and at least incur a given minimum expenditure on social activities. For companies having networth of Rs. 500 crore or more or turnover of Rs. 1000 crore or more or net profit of Rs. 5 crore or more during any financial year. Above specified company need to spend at least 2% of average net profit of immediately preceding 3 financial years for every financial year.*
- j) *Key Managerial Personal (KMP): KMP is commonly used in investment agreements and now finds a place in the 2013 Act. KMP includes (a) Managing Director (MD) or Chief Executive Officers (CEO); (b) Whole time director; (c) Chief Financial Officer (CFO); (d) Company Secretary (CS) and; (e) such other officer as may be prescribed. 2013 Act requires certain companies to appoint KMPs which will be notified in the Rules. [Section 2(51)]*
- k) *Provisions for compulsory rotation of individual auditors in every five years and of audit firm every 10 years in the listed company & certain other class of companies, as may be prescribed.*
- l) *Internal audit – The 2013 Act now moves a step forward and mandates the appointment of an internal auditor who shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company. The class or classes of companies which shall be required to mandatorily appoint an internal auditor as per the draft rules are as follows:*
- *Every listed company*
  - *Every public company having paid-up share capital of more than 10 crore INR*

• *Every other public company which has any outstanding loans or borrowings from banks or public financial institutions more than 25 crore INR or which has accepted deposits of more than 25 crore INR at any point of time during the last financial year.*

*m) National Company Law Tribunal - The 2013 Act introduced National Company Law Tribunal and the National Company Law Appellate Tribunal to replace the Company Law Board and Board for Industrial and Financial Reconstruction. They would relieve the Courts of their burden while simultaneously providing specialized justice.*

*n) National Financial Reporting Authority (NFRA)-The 2013 Act requires the constitution of NFRA, which has been bestowed with significant powers not only in issuing the authoritative pronouncements, but also in regulating the audit profession.*

*o) Mergers and acquisitions The 2013 Act has streamlined as well as introduced concepts such as reverse mergers (merger of foreign companies with Indian companies) and squeeze-out provisions, which are significant. The 2013 Act has also introduced the requirement for valuations in several cases, including mergers and acquisitions, by registered valuers.*

*p) Electronic Mode -The 2013 Act proposed E - Governance for various company processes like maintenance and inspection of documents in electronic form, option of keeping of books of accounts in electronic form, financial statements to be placed on company's website, etc.*

### **Body Corporate**

It refers to the an association of person which has-

- (i) been incorporated under some statute,
- (ii) a perpetual succession,
- (iii) a common seal
- (iv) a legal entity apart from the members constituting it.

Thus, the term 'body corporate' or 'corporation' (a word derived from the latin word 'corpus' which means body) is wider in scope than the term company and is used in several sections of the Act to indicate not only a company incorporated in India but also a foreign company.

According to Section 2(11) of the Companies Act, 2013 the term 'body corporate' or 'corporation' includes a company incorporated outside India, but does not include— (i) a co-operative society registered under any law relating to co-operative societies; and (ii) any other body corporate (not being a company as defined in this Act), which the Central Government may, by notification, specify in this behalf.

## **Kinds of Companies (Concept, Definition and Features)**

### **1. One Person Company (OPC)**

As per section 2(62) of the Companies Act, 2013, “One Person Company” means a company which has only one person as a member. Thus one person company is the company where in one person alone holds almost all the shares (almost the entire share capital), and has the controlling power over the company. In fact, the concept of one person company (OPC) has been introduced for the first time in the Act and the said company will be formed as a Private Limited Company.

#### **• Formation of Company**

Section 3(1) of the companies Act, 2013 provides that the following matters are required to be stated in the event of formation of one person company-

- (i) The minimum number of persons required to form an one person company is 1.
- (ii) Only a natural person who is an Indian citizen and resident in India shall be eligible to incorporate a One Person Company.
- (iii) The memorandum of One Person Company shall indicate the name of the other person, with his prior written consent in the prescribed form, who shall, in the event of the subscriber’s death or his incapacity to contract become the member of the company and the written consent of such person shall also be filed with the Registrar at the time of incorporation of the One Person Company along with its memorandum and articles.
- (iv) such other person may withdraw his consent in such manner as may be prescribed.
- (v) the member of One Person Company may at any time change the name of such other person by giving notice in such manner as may be prescribed.
- (vi) it shall be the duty of the member of One Person Company to intimate the company the change, if any, in the name of the other person nominated by him by indicating in the memorandum or otherwise within such time and in such manner as may be prescribed, and the company shall intimate the Registrar any such change within such time and in such manner as may be prescribed.
- (vii) any such change in the name of the person shall not be deemed to be an alteration of the memorandum.
- (viii) According to Section (2), A company formed under section 3(1) may be either—
  - (a) a company limited by shares; or
  - (b) a company limited by guarantee; or
  - (c) an unlimited company.

#### **• According to Section 4 (1) The memorandum of a company shall state—**

- (a) the name of the company with the last word —Private Limited.
- (b) the State in which the registered office of the company is to be situated;
- (c) the objects for which the company is proposed to be incorporated and any matter considered necessary in furtherance thereof;
- (d) the liability of members of the company, whether limited or unlimited with details as specified in Section 4(1)(d),
- (e) the amount of share capital with which the company is to be registered and the division thereof as specified in Section 4(1)(e)(i)
- (f) the number of shares which the subscribers to the memorandum agree to subscribe which shall not be less than one share;
- (g) the number of shares each subscriber to the memorandum intends to take, indicated opposite his name;

(h) in the case of One Person Company, the name of the person who, in the event of death of the subscriber, shall become the member of the company.

- **Exemption of Presenting Cash Flow Statement [section 2(40)]**

According to Section 2(40), an one person company is not required to present Cash Flow statement as a part of Financial statement.

- **Holding Annual general meeting**

According to section 96(1), one person company is not required to hold Annual general meeting.

- **Applicability of Section 122 to One Person Company**

(a) The provisions of section 98 and sections 100 to 111 (both inclusive) shall not apply to a One Person Company.

(b) According to section 122 (2) The ordinary businesses as mentioned under clause (a) of sub-section (2) of section 102 which a company, other than a One Person Company, is required to transact at its annual general meeting, shall be transacted, in case of One Person Company, as provided in sub-section (3).

(c) According to section 122 (3) For the purposes of section 114, any business which is required to be transacted at an annual general meeting or other general meeting of a company by means of an ordinary or special resolution, it shall be sufficient if, in case of One Person Company, the resolution is communicated by the member to the company and entered in the minutes-book required to be maintained under section 118 and signed and dated by the member and such date shall be deemed to be the date of the meeting for all the purposes under this Act.

(d) According to section 122 (4) Notwithstanding anything in this Act, where there is only one director on the Board of Director of a One Person Company, any business which is required to be transacted at the meeting of the Board of Directors of a company, it shall be sufficient if, in case of such One Person Company, the resolution by 76 such director is entered in the minutes-book required to be maintained under section 118 and signed and dated by such director and such date shall be deemed to be the date of the meeting of the Board of Directors for all the purposes under this Act.

- **Signing of Financial statement [Section 134(1)]**

According to section 134(1) ), the financial statement shall be signed only by one director, for submission to the auditor for his report thereon.

- **Report of the Board of Directors [Section 134(4) ]**

The report of the Board of Directors mean a report containing explanations or comments by the Board on every qualification, reservation or adverse remark or disclaimer made by the auditor in his report.

- **Signing of Board's report and any annexures thereto under sub-section 134 (3)[Section 134 (6)]**

The Board's report and any annexures thereto under section 134 (3) shall be signed by its chairperson of the company if he is authorised by the Board and where he is not so

authorised, shall be signed by at least two directors, one of whom shall be a managing director, or by the director where there is one director.

- **Filing of copy of the financial statement [Section 137(1)]**

a copy of the financial statements duly adopted by its member, along with all the documents which are required to be attached to such financial statements, within one hundred eighty days from the closure of the financial year.

- **Appointment of Auditors by rotation [section 139 (2)]**

The provisions for compulsory rotation of auditor in pursuance of section 139(2) are not applicable to one person companies as apply to listed companies or companies belong to such class or classes of companies as may be prescribed (unless the central Government applies it one person companies through notification).

- **Number of Directors [Section 149(1)(a) & 149(1)(b)]**

The company shall have a minimum one director and maximum of fifteen directors. Only natural person can be a director of an OPC.

The company may appoint more than fifteen directors after passing a special resolution.

- **One Director to be resident in India [Section 149(3)]**

The company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year.

- **Appointment of First Director [Section 152(1)]**

Where no provision is made in the articles of a company for the appointment of the first director, the member shall be deemed to be its first director until the director or directors are duly appointed by the member in accordance with the provisions of this section.

- **Meetings of Board of Directors [section 173(5)]**

If One Person Company has more than 1 director on its Board, the company shall be deemed to have complied with the provisions of this section if at least one meeting of the Board of Directors has been conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days. If One Person Company has only one director, nothing contained in Section 173 shall apply to it and it will not be required to hold any Board Meetings.

- **Contract with the sole member [Section 193(1)]**

An One Person Company limited by shares or by guarantee enters into a contract with the sole member of the company who is also the director of the 121 company, the company shall, unless the contract is in writing, ensure that the terms of the contract or offer are contained in a memorandum or are recorded in the minutes of the first meeting of the Board of Directors of the company held next after entering into contract: Provided that nothing in this sub-section shall apply to contracts entered into by the company in the ordinary course of its business.

- **To inform the Registrar about the contract [Section 193(2)]**

The company shall inform the Registrar about every contract entered into by the company and recorded in the minutes of the meeting of its Board of Directors under section 193(1) within a period of fifteen days of the date of approval by the Board of Directors.

- **Article II (27), II(48) and II (76) especially apply to one person companies having share capital. [Table F of Schedule I]**

## **2. Private Company [Section 2(68)] —**

A private company means a company having a minimum paid-up share capital of one lakh rupees 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 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.

### **Following important point may be noted in connection with the private company:**

- The minimum number of members required to form a private company is 2 [section 3(1)(b)]
- The maximum number of members must not exceed 200(excluding the present or past employees of the company). Where two or more persons hold one or more shares jointly, they shall be treated as one single member. If the director is also employed by the company in another capacity (such as, work manager, sale manager, company secretary), he may be considered as an employee of the company in spite of his directorship and shall not come in counting of maximum number of members.
- Though the companies Act, 2013 provide a revised definition of the term ‘private company’ by increasing the maximum number of members from 50 to 200, any private placement of securities by a company continues to be limited to 50 persons, unless the higher number is separately prescribed (section 42).
- The right of members to transfer their shares is restricted by Articles of Association, i.e. the shares are not fully transferable.
- A private company cannot invite from the general public to subscribe for its securities (i.e. it is prohibited from issuing prospectus). As a result, the membership of a private company is confined, more a less to friends or relatives.
- A private company cannot invite or accept public deposits, public deposit are now specially regulated under chapter v.
- A private company is a limited, then it must add the word ‘Private Limited’ at the end of its name.

- If the private company does not comply with any of the restriction contained in the Articles of Association, it ceases to enjoy some of the privileges granted to a private company.
- A private company must have at least 2 director [section 149(1) (a)].
- The legal position (i.e. status) of a private company is similar to that of a public company. In the eye the law, the company is a distinct person and separate from its members [Re. Smith & Fawcett Ltd.].

### **Clarification on restriction of private company**

#### **(a). Restriction on Transfer of Shares**

The right to transfer of shares is contained in the Article of Association of a private company so as to confine ownership of the company to friend or relative. Such right of transfer of shares is restricted in the following manner:

- (i) By authorising the director to refuse transfer of shares to persons whom they do not approve, or
- (ii) By compelling the shareholders to offer their shares to the existing shareholders first. It may be noted that it can only restrict the right of sale to a member. On this consideration, the articles usually provide that before selling or transferring their shares, the director must be communicated in writing of such intention of the shareholders.
- (iii) By specifying the method of calculating the price at which the shares may be sold or transferred by one member to another, it is usually to be determined either by the auditor of the company or by the company at a general meeting.
- (iv) By providing that the shareholders who are employees of the company shall offer the shares to specified persons or class of persons when they leave the service of the company.

#### **(b). Limitation of Membership**

The Articles of Association of private company must contain a provision where by the company limits the number of members to 200. In counting the maximum number of shareholders (i.e. limit of 200) joint shareholder are taken as a single member. However, the counting of members does not include present employees who are members and ex-employees who were members while in that employment and continue to be members after ceasing of employment. If the director is also employed by the company in another capacity such as, work manager, sale manager, company secretary etc. he may be considered as an employee of the company in spite of his directorship and shall not come in counting of maximum number of members.

#### **(c) Prohibition on making invitation to the public**

The Articles of Association of private company must prohibit any invitation to the public to subscribe for any of its securities. Such a prohibition is necessary for the substance of the private character of the company. But according to Section 42, a private company may make an offer and invitation of securities by way of private placement. However, if such

offer/allotment is made to more than 50 persons in a financial year (excluding Qualified Institutional Buyers or Employee Stock Option Scheme), then the same shall be deemed to be an offer to the public and shall accordingly be governed by the provisions of Part I of this Chapter related to prospectus shall apply.

The term "private placement" means any offer of securities or invitation to subscribe securities to a select group of persons by a company (other than by way of public offer) through issue of a private placement offer letter and which satisfies the conditions specified in section 42.

Similarly, an offer of securities by the directors to their friends by a document marked "Private and confidential not for publication" is not an invitation to the public [Sharewell vs. Combined Incandescent Metals Syndicate].

In Booth vs. New Africander Gold Mining Co.Ltd., where an offer by the liquidator of an old company of shares in a new company was made, it was held that it was not an offer to the public.

On the other hand, the invitation to be regarded as an invitation to the public must have been issued-

- (i) by the company itself (Burrows vs. Metabele Gold Refs & Estates Co. Ltd.)
- (ii) to any persons who freely chooses to apply for the securities or to a considerable class of persons selected as being the most likely subscribers (Nash vs. Lynde).

### **3. Public Company [Section( 71)]**

Public company means a company which—

- (a) is not a private company;
- (b) has a minimum paid-up share capital of Rs 5,00,000 or such higher paid up capital as may be prescribed.

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

***Following important point may be noted in connection with the private company:***

- The minimum number of members required to form a public company is 7 [section 3(1)(a)]
- There is no restriction on maximum number of members. However the maximum number of members depends upon the number of shares allotted.
- The share or debentures of company are movable property transferable in a manner provided in the Article of a company [section 44]
- It can invite offers from general public to subscribe for its securities.
- It can invite or accept deposits from persons other than its members subject to compliance with the requirement provided in section 73(2) and subject to such rules as Central Government may, in consultation with the Reserve Bank of India, prescribe

- A private company which is subsidiary of a public company shall be deemed to be a public company even where such subsidiary company continues to be a private company as per its Articles of Association,
- A public Company may be (a) Company Limited by shares or (b) Company limited by guarantee or (c) an unlimited company.
- . In case a public company is a limited, then it must add the word ‘ Limited’ at the end of its name.
- A public Company may be (a) listed public Company or (b) an unlisted public Company

According to Section 2(52) of the Companies Act, 2013, a ‘listed company’ means a company which has any of its securities listed on any recognised stock exchange. An ‘unlisted company’ is one whose securities are not listed in any recognised stock exchange.

- A public company must have at least 3 director [section 149(1) (a)].

#### **4. Company limited by Guarantee [section 2(21)]**

A company limited by guarantee means a company having the liability of its members limited by the memorandum to such amount as the members may respectively undertake to contribute to the assets of the company in the event of its being wound up [section 2(21)]. It may be noted that the companies limited by guarantee are generally non-trading companies. They are not formed for the purpose of earning profits but for the promotion of art, science, culture, charity, sports, commerce or for some similar purpose. The companies Limited by guarantee may be either ‘private’ or ‘public’ companies. Such a company may or may not have share capital.

- ***Types of Company Limited by Guarantee***

***(a). Company Limited by Guarantee having Share Capital*** : The liability of its members is limited to the following two amounts:

- (i). the amount (if any) remaining unpaid on the shares held by them.
- (ii). the amount guaranteed by them.

However, the liability in respect of guaranteed amount can be called only at the time of winding up of the company and not during the life time of the company.

***(b) Company Limited by Guarantee not having Share Capital:*** The liability of the members is limited to such amount as they undertake to contribute to the assets of the company in the event of its being wound up. The guaranteed amount may differ from the member to member. But the liability of the members can be enforced only at the time of winding up of the company and not during the life time of the company.

## **5. Company limited by Shares [section 2(22)]**

As per section 2(22), “company limited by shares” means a company having the liability of its members limited by the memorandum to the amount, if any, unpaid on the shares respectively held by them. Accordingly, no member of a company limited by shares, can be called upon to pay more than the nominal value of the shares held by him. If his shares are fully paid-up, he has nothing more to pay. But in the case of partly-paid shares, the unpaid portion is payable at any time during the existence of the company on a call being made, whether the company is a going concern or is being wound up. This is the essence of a company limited by shares and is the most common form in existence.

If the shares are fully paid, i.e, all the amount of the shares has already been paid, then the liability of the member is nil. The companies limited by shares are may be either public companies or private companies.

*The important feature of a company limited by shares may, therefore, summed up as under:*

- The liability of its members is limited to the amount unpaid, if any, on the shares held by them.
- The nominal amount (face value) of share must be stated in the Memorandum of Association.
- It may be either public companies or private companies.
- The liability of the members can be enforced during the life time of the company (by the Board of Directors) or during the winding up of the company (by the liquidator).

## **6. Holding Company [section 2(46)]**

A company is known as the holding company of another company if it has control over that other company. 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.

## **7. Subsidiary Company [Section 2 (87)]**

A company is known as a subsidiary company of another company when the control is exercised by the latter (called holding company) over the former called a subsidiary company.

It may be noted that the ‘holding’ and ‘subsidiary’ companies are relative terms. A company is the holding company of another if the other is its subsidiary.

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—

(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:

Provided that such class or classes of holding companies, shall not have layers of subsidiaries beyond the prescribed limit. (Proviso to be notified)

For the above purpose,—

(a) a company shall be deemed to be a subsidiary company of the holding company even if the control referred to in sub-clause (i) or sub-clause (ii) is of another subsidiary company of the holding company;

(b) the composition of a company's Board of Directors shall be deemed to be controlled by another company if that other company by exercise of some power exercisable by it at its discretion can appoint or remove all or a majority of the directors;

(c) the expression "company" includes any body corporate;

(d) 'layer' in relation to the holding company means its subsidiary or 'subsidiaries'.

### **8. Government Company on [Section 2(45)]**

Section 2(45) defines a "Government Company" as any company in which not less than fifty one per cent. 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.

### **9. Associate Company [Section 2(6)]**

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.

Explanation to section 2(6) provides that "significant influence" means control of at least twenty per cent. of total share capital, or of business decisions under an agreement.

Thus, a company is regarded as an associate company of the other, if the other company has a significant influence over such company or is a joint venture company. Beside, a control of at least 20% of total share capital of a company is considered as significant influence over such company.

### **10. Small Company [Section 2(85)]**

According to Section 2(85), '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 five crore rupees; or

(ii) (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 twenty crore rupees.

Provided that nothing in this clause 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.

### **Relaxation to Small Company under the Companies Act, 2013 :**

(i). Annual Return: According to Section 92, the annual return of a small company shall be signed by the company secretary, or where there is no company secretary, by the director of the company.

(ii). Holding of Board Meeting : According to Section 173, in case of the small company one meeting of the Board of Directors has to be conducted in each half of a calendar year and the gap between the two meetings is not less than ninety days

(iii). Short form of merger: According to Section 233, a holding- subsidiary (wholly-owned) and small companies merger has been simplified and does not require the detailed process of Tribunal's approval.

### **11. Foreign Company [section 2(42)]**

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.

Section 376 of the Companies Act, 2013 provides further that when a foreign company, which has been carrying on business in India, ceases to carry on such business in India, it may be wound up as an unregistered company under Sections 375 to 378 of the Act, even though the company has been dissolved or ceased to exist under the laws of the country in which it was incorporate

Section 379 provides that where not less than 50% of the paid-up share capital, whether equity or preference or partly equity and partly preference of a 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 the aggregate, such company shall comply with such of the provisions of this Act, as may be prescribed by the Central Government with regard to the business carried on by it in India, as if it were a company incorporated in India.

Section 380 of the Act 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 for registration:

- (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 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 containing such particulars as may be prescribed;
- (d) the name and address or 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 occasion or occasions;
- (g) declaration that none of the directors of the company or the authorised representative in India has ever been convicted or debarred from formation of companies and management in India or abroad; and
- (h) any other information as may be prescribed.

Every foreign company has to ensure that the name of the company, the country of incorporation, the fact of limited liability of members is exhibited in the specified places or documents as required under Section 382.

Section 381 requires a Foreign Company to maintain books of Account and file a copy of balance sheet and profit and loss account in prescribed form with ROC every calendar year. These accounts should be accompanied by list of place of business established by the foreign company in India.

**As regards the applicability of the provisions of the Companies Act, 2013 to foreign companies the following provisions of section 384 are to be noted:**

- (i) The provisions of section 71 shall apply mutatis mutandis to a foreign company.
- (ii) The provisions of Section 92 regarding (filing of annual returns) shall, subject to such exceptions, modifications or adaptations as may be made therein by the rules made under the Act, apply to a foreign company as they apply to a company incorporated in India.
- (iii) The provisions of Section 128 relating to the (to the extent of requiring it to maintain at its principal place of business in India books of account with respect to moneys received and spent, sales and purchase made and assets and liabilities, in the course of or in relation to its business in India), Section 209A (inspection of accounts), Section 233A (Special audit), Section 233B (audit of cost accounts), Section 234-246 (investigations), so far as may be, apply only to the Indian business of a foreign company having an established place of business in India as they apply to a company incorporated in India.
- (iv) The provisions of Chapter VI (Registration of Charges) shall apply mutatis mutandis to charges on properties which are created or acquired by any foreign company.
- (v) The provisions of Chapter XIV (Inspection, Inquiry and Investigation) shall apply mutatis mutandis to the Indian business of a foreign company as they apply to a company incorporated in India.

**12. Listed Company [Section 2(52)]**

‘listed company’ means a company which has any of its securities listed on any recognised stock exchange.

**13. Dormant company [Section 455]**

The Companies Act, 2013 has recognized a new set of companies called as dormant companies.

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.

Explanation appended to section 455(1) says that for the purposes of this section,—

(i) “inactive company” means a company which has not been carrying on any business or operation, or has not made any significant accounting transaction during the last two financial years, or has not filed financial statements and annual returns during the last two financial years;

(ii) “significant accounting transaction” means any transaction other than—

(a) payment of fees by a company to the Registrar;

(b) payments made by it to fulfil the requirements of this Act or any other law;

(c) allotment of shares to fulfil the requirements of this Act; and

(d) payments for maintenance of its office and records.

As per section 455(2), the Registrar on consideration of the application shall allow the status of a dormant company to the applicant and issue a certificate in such form as may be prescribed to that effect.

Section 455(3) provides that the Registrar shall maintain a register of dormant companies in such form as may be prescribed.

According to section 455(4), in case of a company which has not filed financial statements or annual returns for two financial years consecutively, the Registrar shall issue a notice to that company and enter the name of such company in the register maintained for dormant companies.

Further a dormant company shall have such minimum number of directors, file such documents and pay such annual fee as may be prescribed to the Registrar to retain its dormant status in the register and may become an active company on an application made in this behalf accompanied by such documents and fee as may be prescribed. [Section 455(5)]

The Registrar shall strike off the name of a dormant company from the register of dormant companies, which has failed to comply with the requirements of this section. [Section 455(6)]

### **Lifting of corporate veil.**

In Salomon vs. Salomon & Co. Ltd, it is laid down that as soon as a company is incorporated, a veil or line of demarcation is created between the company and its member. After the incorporation, a company becomes legal person separate and distinct from its members. It has a corporate personality of its own with rights, duties, and liabilities separate from those of its individual members. Thus, a veil of incorporation exists between the company and its members and due to this a company is not identified with its members. In order to protect themselves from liabilities of the company, its members often take shelter of the corporate veil. Sometimes this corporate veil is used as a vehicle of fraud or evasion of tax and statutory provisions. To prevent unjust and fraudulent acts, it becomes necessary to lift the veil or disregard the corporate personality to look into the realities behind the legal facade and to hold the individual members of the company liable for its acts or liabilities.

The cases in which the corporate veil is lifted i.e. the separate legal entity of the company is ignored, may be discussed under the following two heads:

- (i) Express Statutory provisions
- (ii) Judicial Interpretation.

#### **(i) Cases under Express Statutory Provisions**

The Companies Act, 2013 has been integrated with various provisions which tend to point out the person who's liable for any such improper/illegal activity. These persons are more often referred as "officer who is in default" under Section 2(60) of the Act, which includes people such as directors or key-managerial positions.

Example:

- A. Misstatement in Prospectus [Section 35]
- B. Refund application money [Section 39(5)]
- C. Registered office of the company [Section 12]
- D. Financial Statement of Holding Company and its Subsidiaries [Section 129]
- E. Investigation of Affairs of a Company [Section 219]
- F. Investigation of ownership of company [Section 216].
- G. Fraudulent conduct of Business [Section 339]
- H. Non payment of Income Tax [Section 179 of the IT,1961]
- I. Ultra Vires Act.

**(ii) Cases under Judicial interpretations**

Though the Legislature has attempted to insert numerous provisions in the Act to make sure guilty person is pointed out as veil is pierced, there are instances where Judiciary has played it's part better and kept a check that no guilty person, due to a mere technicality, walks free.

Example:

- A. Tax Evasion [ Re. Dinshaw Maneckjee Petti ]
- B. Prevention of fraud and improper conduct [Gilford Motor Co Ltd vs. Horne, Workmen vs. Associated Rubbers India Ltd.]
- C. Determination of character of the company [Dailmer Co Ltd vs. Continental Tyres & Rubber Co Ltd. ]
- D. Company acting as an agent of its members [Re. F.G. Films Ltd.]
- E .Avoidance of Welfare Legislation [Workmen of Associated Rubber Industry Ltd. Vs. Associated Rubber Industry Ltd.]