

Formation of companies with charitable objects, etc. (Sec 8)

Continued from 19th edition

5. Revocation of license and consequent orders

The Central Government has the powers to revoke the license granted to a company registered under this section if:

- a. the company contravenes any of the requirements of this section or
- b. the company contravenes any of the conditions subject to which a license is issued or
- c. the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest,

The Central Government may then, by the same order, direct the company to convert its status and change its name to add the word “Limited” or the words “Private Limited”. This revocation of license is without any prejudice to any other action against the company under this Act. Hence, in case any other provision of the Act is being violated, liability for the same may devolve despite of such revocation of license.

In keeping with the principles of natural justice, before making such order the company shall be given a reasonable opportunity of being heard.

The said Order may provide for a direction to the effect that the Company be wound up or amalgamated with another Section 8 Company provided that such direction is in public interest. The provisions contained in sub-section (8) are of an overriding nature which is evident from the phrase ‘notwithstanding anything to the contrary contained in this Act’.

Such order may provide for forming a single company wherein the Central Government may provide for constitution of the Company, properties, powers, rights, interest, authorities and privileges and with liabilities, duties and obligations as are being specified.

Where the licence granted to a company registered under section 8 has been revoked, the company shall apply to the Registrar in Form INC – 20 along with the fee to convert its status and change of name.

The powers of the Central Government regarding the revocation are delegated to the Regional Director vide Notification S.O. 1352 (E) dated 21st May, 2014 .

6. Special Provisions for amalgamation and winding up

Sub-section of (9) and (10) Section 8 provides for certain specific provisions for amalgamation and winding up of Section 8 Companies. These provisions are made to ensure that the overall scheme of a Section 8 Company, which is not distributing the surplus to the residual claimants, is not defeated. A company registered under this section shall amalgamate only with another company registered under this section and having similar objects.

After winding up of the Company, the residual surplus is to be transferred to another Section 8 company having similar objects. The Tribunal also have the powers to order for transfer of such surplus to Rehabilitation and Insolvency Fund formed under section 269.

7. License For Existing Companies

For conversion of an existing Company, the provisions are contained in sub-section (3) of Section 8 read with Rule 19. For the conversion, the Company shall have the objects specified in clause (a) of sub-section (1) and with the restrictions and prohibitions as mentioned in clauses (b) and (c) of sub-section (1). Such Company which is desirous of being registered under Section 8, without the addition to its name of the word “Limited” or as the case may be, the words “Private Limited”, shall make an application in Form INC - 12 along with the fee as provided in the Companies (Registration Offices and Fees) Rules, 2014 to the Registrar for a licence under sub-section (5) of section 8. [Rule 20(1)]

The application under sub-rule (1), shall be accompanied by the following documents, namely:-

- A. the memorandum and articles of association of the company;

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- B. the declaration as given in Form No. INC.14 by an Advocate, a Chartered accountant, Cost Accountant or Company Secretary in Practice, that the memorandum and articles of association have been drawn up in conformity with the provisions of section 8 and rules made thereunder and that all the requirements of the Act and the rules made thereunder relating to registration of the company under section 8 and matters incidental or supplemental thereto have been complied with;
- C. For each of the two financial years immediately preceding the date of the application, or when the company has functioned only for one financial year, for such year (i) the financial statements, (ii) the Board's reports, and (iii) the audit reports, relating to existing companies
- D. a statement showing in detail the assets (with the values thereof), and the liabilities of the company, as on the date of the application or within thirty days preceding that date;
- E. an estimate of the future annual income and expenditure of the company for next three years, specifying the sources of the income and the objects of the expenditure;
- F. the certified copy of the resolutions passed in general/ board meetings approving registration of the company under section 8; and
- G. a declaration by each of the persons making the application in Form INC – 15. [Rule20(2)]

The company is required to publish a notice in Form INC-26 at own expense, within a week from the date of making the application to the Registrar. A copy of the notice so published, shall be sent forthwith to the Registrar 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 proposed company is to be situated or is situated, and circulating in that district, and at least once in English language in an English newspaper circulating in that district; and
- B. on the websites as may be notified by the Central Government.

The Registrar may require the applicant to furnish the approval or concurrence of any appropriate authority, regulatory body, department or Ministry of the Central Government or the State Government(s). The Registrar shall, after considering the objections, if any, received by it within thirty days from the date of publication of notice, and after consulting any authority, regulatory body, Department or Ministry of the Central Government or the State Government(s), as it may, in its discretion, decide whether the licence should or should not be granted. The licence shall be in Form INC – 16 or Form INC – 17, as the case may be, and the Registrar shall have power to include in the licence such other conditions as may be deemed necessary by him. [Rule 20(6)]

The Registrar may direct the company to insert in its memorandum, or in its articles, or partly in one and partly in the other, such conditions of the license as may be specified by the Registrar in this behalf. [Rule 20(7)] It should be noted that provisions are made for grant of a license of a company. In case any other entity is desirous of being converted into a Section 8 Company, it should first be converted into a Company and then make an application for grant of license.

8. Conversion into another kind of company

A company registered under section 8 which intends to convert itself into a company of any other kind shall pass a special resolution at a general meeting for approving such conversion. 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) what are the privileges or concessions currently enjoyed by the company, such as tax exemptions, approvals for receiving donations or contributions including foreign contributions, land and other immovable properties, if any, that were acquired by the company at concessional rates or prices or gratuitously and, if so, the market prices prevalent at the time of acquisition and the price that was paid by the company, details of any donations or bequests received by the company with conditions attached to their utilization etc.
- (f) 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. [Rule 21(2)]

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 MGT – 14 along with the fee.

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The company shall file an application in Form INC – 18 with the RD 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 and the company shall also attach the proof of serving of the notice served to all the authorities mentioned in sub – rule (2) of rule 22.

A copy of the application with annexures as filed with the RD shall also be filed with the Registrar.

The company shall publish a notice at its own expense, and a copy of the notice, as published, shall be sent forthwith to the RD within a week from the date of submitting the application to the RD and the said notice shall be in Form 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; and
- (b) on the website of the company, if any, and as may be notified or directed by the Central Government.

The company shall send a copy of the notice, simultaneously with its publication, together with a copy of the application and all attachments by registered post or hand delivery, to the Chief Commissioner of Income Tax having jurisdiction over the company, Income Tax Officer who has jurisdiction over the company, the Charity Commissioner, the Chief Secretary of the State in which the registered office of the company is situated, any organisation or Department of the Central Government or State Government or other authority under whose jurisdiction the company has been operating and if any of these authorities wish to make any representation to RD, it shall do so within sixty days of the receipt of the notice, after giving an opportunity to the Company. The copy of proof of serving such notice shall be attached to the application.

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.

Where the company has obtained any special status, privilege, exemption, benefit or grant(s) from any authority such as Income Tax Department, Charity Commissioner or any organisation or Department of Central Government, State Government, Municipal Body or any recognized authority, a “No Objection Certificate” must be obtained, where the terms

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of the said special privilege requires. The same shall be filed with the RD, along with the application.

The company should have filed all its financial statements and Annual Returns upto the financial year preceding the submission of the application to the RD and all other returns required to be filed under the Act up to the date of submitting the application to the RD and in the event the application is made after the expiry of three months from the date of preceding financial year to which the financial statement has been filed, a statement of the financial position duly certified by chartered accountant made up to a date not preceding thirty days of filing the application shall be attached.

The company 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.

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.

On receipt of the application, and on being satisfied, the RD shall issue an order approving the conversion of the company into a company of any other kind subject to such terms and conditions as may be imposed in the facts and circumstances of each case including the following conditions, namely: -

- (a) the company shall give up and shall not claim, with effect from the date its conversion takes effect, any special status, exemptions or privileges that it enjoyed by virtue of having been registered under the provisions of section 8;
- (b) if the company had acquired any immovable property free of cost or at a concessional cost from any government or authority, it may be required to pay the difference between the cost at which it acquired such property and the market price of such property at the time of conversion either to the government or to the authority that provided the immovable property;
- (c) any accumulated profit or unutilised income of the company brought forward from previous years shall be first utilized to settle all outstanding statutory dues, amounts due to lenders claims of creditors, suppliers, service providers and others including employees and lastly any loans advanced by the promoters or members or any other amounts due to them and the balance, if any, shall be transferred to the Investor Education and Protection Fund within thirty days of receiving the approval for conversion;

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Before imposing the conditions or rejecting the application, the company shall be given a reasonable opportunity of being heard by the RD.

On receipt of the approval of the RD,

(a) the company 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;

(b) the Company shall thereafter file with the Registrar.-

- (i) a certified copy of the approval of the RD within thirty days from the date of receipt of the order in Form No.INC.20 along with the fee;
- (ii) amended memorandum of association and articles of association of the company.
- (iii) declaration by the directors that the conditions, if any imposed by the RD have been fully complied with

On receipt of the documents referred to in sub rule (10) above, the Registrar shall register the documents and issue the fresh Certificate of Incorporation.

9. Offence and Compoundability

For an offence by a Company in complying with the provisions of this Section be punishable with a minimum fine of Rs. 10,00,000/- which may extend to Rs. 1,00,00,000/- This liability is without prejudice to other liability arising under the provisions of the Act. For the directors and every officer of the company who is in default, the punishment may be imprisonment for a term which may extend to 3 years or with a minimum fine which shall not be less Rs. 25,000/- but which may extend to Rs. 25,00,000/- or with both. The liability for the officer in default arises under Section 447 where the affairs of the company were conducted fraudulently.

The offences by the Company and the Officer (for offences other than Section 447) are Compoundable.

Concluded
