

Company Law Notes

Chapter -3 Incorporation of a Company

Promotion: It means the preliminary steps undertaken by the promoters to bring a company into existence.

Promoter:-[Section 2(69)]-

Definition: It means a person

- Who has been named in prospectus or is identified by the company in annual return.
- Who has control over the affairs of the company, directly or indirectly.
- In accordance with whose advice, directions or instructions the BOD is accustomed to act.

Meaning: It is a person or a group of persons who generates the idea of incorporating a company and takes all the effective steps to incorporate it.

Legal position of the promoter:-

1. **Not an agent:** - He cannot be an agent of the company which he promotes because his principle (company) does not exist at the time when he acts on its behalf.
2. **Not a trustee:** - A promoter is not the trustee of the company because there cannot be any trust before company comes into existence.
3. **Fiduciary position/relation to the company:** - The promoters stand in the fiduciary relation to the company i.e. a relation of trust, confidence and good faith.

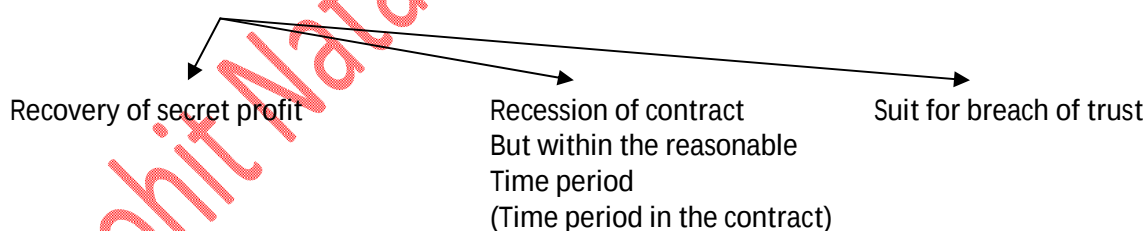
Hence, a promoter is neither an agent nor a trustee of the company but he is in a fiduciary relationship with the company.

Duties of promoters:-

- To disclose all the material facts in relation to the formation of the company
- Not to make any secret profit directly or indirectly.
- To disclose his personal interest in any transaction or contract entered into by the company
- Not to sell own property without informing the company.
- To make full & true disclosure of the property bought.
- Not to make any unfair use of the position.

Remedies available to the company:-

When the promoter makes a secret profit then the following remedies are available to the company.



Remuneration to promoters/ reimbursement expenses:-

The promoter shall have no right

- To receive any remuneration
- To recover the expenses incurred by them on incorporation.

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Note:-

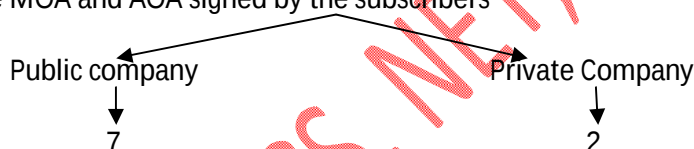
1. In reference to the point 1 & 2 the promoters are eligible if it is mentioned in the contract.
2. Even where the article also provides that company shall be liable to pay remuneration or reimbursement of expenses to the promoters, THEN ALSO, the company is not at all bound by such provision.

Mode of payment of remuneration:-

- Lump sum payment
- Issue of shares at discount
- Right to subscribe for company's shares in future at a fixed price
- Purchase of property of promoter at a high price. (Difference is taken as remuneration)
- Payment of commission on the shares sold by promoters

Incorporation of a company/ Procedure of registration:-[Section 12]

1. Decide the type of the company which is to be incorporated.
2. Decide the place of registered office of the company i.e. the state in which the registered office of the company will be situated.
3. Availability of name:-
 - An application in Form No. 1A shall be made to the registrar with the prescribed fee [Rs 1000] for ascertaining the availability of the proposed name i.e. six names in the order of preference.
 - ROC shall inform whether the proposed name is available or not within 7 days of the receipt of application.
 - Such name shall be adopted by the company within 60 days of the approval.
4. Draft the memorandum of association and article of association, printing of the same and vetting of the same with ROC.
5. Both the documents must be stamped and dated. [dating should be made after the date of stamping]
6. Get the MOA and AOA signed by the subscribers



Along with the name address occupation description in the presence of at least witness.

7. Documents required to be filed with the registrar.
 - MOA
 - AOA
 - A statutory declaration stating that all the legal requirement relating to the registration of company have been complied with (form 1). It must be signed by practicing CA, CS, high court and Supreme Court advocate.
 - List of the directors and their written consent.
 - A written and signed undertaking by the directors to take the qualification share if, articles provide.
 - A Copy of the agreement which the company purposes to enter into with an individual for an appointment as managing director, whole time director or manager.
8. Documents to be field with ROC before incorporation or within 30 days of incorporation:-
 - Address of the registered office. Form-18
 - Particulars of directors and secretary. Form-32
9. If the registrar satisfied that all the requirement have been duly complied with, then the registrar shall retain and register the documents filed with him.
10. On registration, the registrar shall issue a certificate of incorporation of the company.

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Effects of incorporation [section 34]:-

- The company becomes body corporate.
- The company acquires a legal recognition i.e. exist in the eyes of law.
- A company gets a name.
- It comes into existence from the date of incorporation.
- The objects of the company are laid down.

A certificate of incorporation is a conclusive evidence because of the following matter:-[Section 35]

- All the requirement of the act have been complied with in respect of registration & matter precedent and incidental thereto
- Matter precedent means the matters which are related to the pre-incorporation.
- Incidental means matters which are linked and connected with provisional contract.
- An association is a company authorized to be registered under companies act 2013.

Meaning of Conclusive Evidence:-

It means that no enquiry shall be allowed to be made regarding the correctness or incorrectness of any particulars contains in the certificate of incorporation.

OR

The certificate of incorporation can't be challenge in any court or tribunal on any grounds what so ever once issued.

Certificate of incorporation shall remain valid even in the following cases:-

- Where one person has signed on behalf of all subscribers.
- Where all the signatories to MOA are minors
- Where all the signatures on MOA are forged
- Where illegal object are incorporated in object clause

CASE LAW

Jubilee cotton mills

V/s

Lewis

Pre-Incorporation or Preliminary Contract:-

Definition- It means a contract entered into by the promoters on the behalf of the proposed company i.e. before the incorporation of the company. These contracts are usually made by the promoters to acquire some property or rights for the proposed company.

Rules regarding the pre-incorporation contract-

(A)When company adopts a pre-incorporation contract

- The contract can be enforced by the company.
- The contract becomes binding on the company.
- The promoters are not personally liable.

(B) When company does not adopts

- It shall not bind the company
- If the company takes some benefits of the pre-incorporation contract then also it is not bound by it.

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- A company cannot ratify a pre-incorporation contract.
- A company cannot enforce a pre-incorporation contract after the incorporation i.e. a company cannot sue the other party to the contract.
- The promoters are personally liable.

Note:-

- Ratification means to give formally consent. In terms of company law, ratification means to give formally consent with retrospective effect.
- Since, ratification has retrospective effect if the company were allowed to ratify the contract then it would mean as if it contracted on the day the contract was formed.
- Therefore the company contracted before it was formed which is impossible.

When the liability of the promoter ceases:-

The company has accepted/adopted the pre-incorporation contract after the incorporation of the company.
AND

The company has communicated such acceptance to the other party.

Hence, a fresh contract has been entered into by the company and the other party.

Provisional contract [section 149]:- When a public limited company makes a contract after its incorporation but before obtaining the certificate of commencement of business then such a contract is known as provisional contract.

Note:- A provisional contract becomes binding on the company when it obtains the certificate of commencement of business.

Non – Applicable for

- A company having no share capital
- Private co.

Pre-incorporation contract	Provisional contract
It means a contract entered into by the promoters on the behalf of the proposed company i.e. before the incorporation of the company.	When a public company makes a contract after its incorporation but before obtaining the certificate of commencement of business then such contract is known as provisional contract.
These are entered by both private and public company.	These are entered by public company only.
Such contract are legally not binding on the company	Contract arthritically become binding without any ratification
Promoters are personally liable for this contract	Company is personally liable
It is made before incorporation	It is made after incorporation but before commencement of business.

Certificate of commencement of business:-[Section 149]

A public company cannot commence any business until it has obtained the certificate of commencement of business.

(A) The company has issued prospectus:-

- The company must have received the minimum subscription (90% of the issued capital) and the share must have been allotted upto the amount of minimum subscription.
- The company must have received the amount due on application and allotment from every director or manager.

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- The company shall have to refund the entire amount if it fails to obtain the permission for shares to be dealt in or stock exchange.
- The company shall file a declaration with the registrar that all the legal requirement have been duly complied with.

(B) The company has issued the statement in lieu of prospectus :-

- The company has file a statement in lieu of prospectus to the registrar
- The company must have received the amount due on application an allotment from every director or manager.
- The company shall file a declaration the registrar that all the legal require have been duly complied with.

Note:-

- A public company must obtain the certified of commencement of business within one year of its incorporation
- If a company does not commence its business within a year of its incorporation or suspend business for the whole year then the company may be wound up by the court.
- If a company goes into liquidation before it obtains a certificate of commencement of business then provisional contracts are not enforceable.