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Procedure for commencement of Business under CA 2013

Under Companies Act 2013, the date of incorporation of a company cannot be the date of commencement of business. From the point of commencement of Business companies may be divided into 2 categories:

1. Public and Private Companies not having Share Capital
2. Public and Private Companies having Share Capital

Public and Private Companies not having Share Capital

A private company and a public limited company not having share capital are not required to comply with any other formalities and may commence its business activities immediately after obtaining the certificate of incorporation from the concerned Registrar of Companies.

Public and Private Companies having Share Capital

As per section 11 of Companies Act, 2013, now all newly incorporated Public and Private Companies having Share Capital would be required to obtain certificate of commencement of business from concerned Registrar of Companies before commencing the business or exercise of borrowing powers.

Through this write up we shall discuss another topic i.e. Procedure for commencement of Business under Companies Act, 2013. For statutory provisions related to commencement of Business one should refer the following sources:

1. Section 11 of Companies Act, 2013
2. Rule 24 of Companies (Incorporation) Rules, 2014

"Relevant" Text of Section 11 and Rule 24 are reproduced below for ready reference:

Commencement of business etc

Section 11(1), a company having a share capital shall not commence any business or exercise any borrowing powers unless—

(a) a declaration is filed by a director in such form and verified in such manner as may be prescribed, with the Registrar that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the paid-up share capital of the company is not less than five lakh rupees in case of a public company and not less than one lakh rupees in case of a private company on the date of making of this declaration; and

(b) the company has filed with the Registrar a verification of its registered office as provided in sub-section (2) of section 12.

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(2) If any default is made in complying with the requirements of this section, the company shall be liable to a penalty which may extend to five thousand rupees and every officer who is in default shall be punishable with fine which may extend to one thousand rupees for every day during which the default continues.

(3) Where no declaration has been filed with the Registrar under clause (a) of sub-section (1) within a period of one hundred and eighty days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provisions of sub-section (2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

Rule 24 of Companies (Incorporation) Rules, 2014: Declaration at the time of commencement of business.-

*The declaration filed by a director shall be in **Form No.INC.21** along with the fee as and the contents of the form shall be verified by a Company Secretary in practice or a Chartered Accountant or a Cost Accountant in practice:*

Provided that in the case of a company requiring registration from sectoral regulators such as Reserve Bank of India, Securities and Exchange Board of India etc, the approval from such regulator shall be required.

Position under Erstwhile Companies Act, 1956

Under the erstwhile Companies Act, 1956, a private company could start its business immediately upon receiving certificate of incorporation. Private companies were not required to obtain a certificate of commencement of business from concerned Registrar of Companies under section 149 of Companies Act, 1956.

Compulsory Requirement for obtaining commencement of business certificate under Companies Act, 2013

A Public and Private Limited company having share capital cannot commence business until it has obtained the certificate to commence business (COB) from the concerned Registrar of Companies. Normally a new company will comply with the required formalities and obtain the commencement of business certificate (COB) from the Registrar as soon as possible after formation because it cannot commence any business activities or exercise its borrowing powers without it.

Now under Section 11 of the Companies Act, 2013, a company cannot commence business or exercise any borrowing powers, unless

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- A. A declaration is filed by a director with the Registrar, to the effect that every subscriber to the memorandum has paid the value of the shares agreed to be taken by him and the paid-up share capital of the company is not less than five lakh rupees in case of a public company and not less than one lakh rupees in case of a private company on the date of making of this declaration; and
- B. The company has filed with the Registrar a verification of its registered office as provided in sub-section (2) of section 12.

Consequences of not filing the above declaration

1. **Penal Provision:** As per section 11(2), if any default is made in complying with the requirements of this section, the company shall be liable to a penalty which may extend to five thousand rupees and every officer who is in default shall be punishable with fine which may extend to one thousand rupees for every day during which the default continues.
2. **Removal of name from register of companies:** As per section 11(3) where no declaration has been filed with the Registrar within a period of 180 days of the date of incorporation of the company and the Registrar has reasonable cause to believe that the company is not carrying on any business or operations, he may, without prejudice to the provisions of section 11(2), initiate action for the removal of the name of the company from the register of companies under Chapter XVIII.

ROC form filing for Commencement of business

E-form INC.21 is required to be filed with concerned Registrar of Companies for obtaining approval for commencement of Business and exercise of borrowing powers. This E-form is required to be filed by all companies incorporated under Companies Act 2013. Following documents required to be filed as an attachment of form INC.21:

1. E-form INC.10 of Specimen Signature, which you would have attached with Form INC 1 at the time of incorporation.
2. A declaration on stamp paper of Rs. 20/- signed by the directors. This stamp paper should be in the name of the Company and you may write the following statement on this stamp paper for stamp duty payment related compliance:

"This E- Stamp paper is for E-Form INC.21 (Declaration prior to the commencement of business or exercising borrowing powers) of _____ Private Limited."

3. Board Resolution stating that Company has received the subscription money in full, which will be deposited into company bank account.
4. In case the affairs of the Company is regulated by any sectoral regulator (like RBI in case of NBFI activities), Certificate of Registration issued by the RBI (Only in case of Non-Banking Financial Companies)/ from other regulators must be attached.

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5. You may also attach Bank Account statement as an optional attachment.
6. You may also attach duly certified signed minutes of First Board Meeting of the Company as an optional attachment.

In case ROC finds INC.21, filed by the Company, in order along with all the necessary attachments and related compliance, INC.21 shall get approved and company will get a confirmation mail for approval of INC.21.

SECRETARIAL PRACTICE / DRAFTING

Sample Board Resolution regarding Commencement of Business

“RESOLVED THAT pursuant to section 11 of the Companies Act 2013, Confirmation from the board of Directors of the Company be and is hereby given that the Company has received the Subscribed money in full by way of cash, which will be deposited into bank account once bank account of the company is opened for Commencement of Business.

RESOLVED FURTHER THAT the draft of the declaration in the Form INC-21 made in accordance with the provisions of section 11(1) of the Companies Act, 2013, as placed before the Board duly initialed by the Chairman for the purpose of identification be and is hereby approved and that the same be delivered to the Registrar of Companies, NCT of Delhi and Haryana for obtaining the Certificate of Commencement of Business.

“RESOLVED FURTHER THAT Mr. Manoj Bansal, Director of the Company, be and is hereby authorised to sign the resolution and declaration and digitally sign e-Form INC.21 and file the same with Registrar of Companies, NCT of Delhi and Haryana”.

Disclaimer:

This write up is intended to start academic discussion on few significant interpretations under Companies Act, 2013. It is not intended to be a professional advice and should not be relied upon for real time professional facts. Readers are advised to refer relevant provision of law before applying or accepting any of the point mentioned above. Author accepts no responsibility whatsoever and will not be liable for any losses, claims or damages which may arise because of the contents of this write up.

I am hopeful that this write up would be of some help w.r.t. your professional working and endeavors under Companies Act, 2013. Kindly share your opinion.

Thanks

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