

CHARGES

Meaning/Definition of charge

The term charge has not been defined under the Companies Act, 1956. Section 124 states that the expression "Charge" includes a mortgage.

However, the language of section 125 use the expression "so far as any security on the company's property or undertaking is conferred thereby" makes it clear that a charge is nothing but security of its property by the company in favour of a creditor with the intent of securing his debt.

Types of charges

Basically, there are two types of charges:—

1. *Fixed charge*: A fixed charge is a charge that without more fastens on ascertained and definite property or property capable of being ascertained and defined. A company cannot dispose the property without the consent of the charge holder.
2. *Floating charge*: A floating charge is a charge on the variable property i.e. **the property which keeps on changing**. A special feature of this charge is that it is unidentifiable with respect to the exact property on which the charge would operate until the crystallisation of the charge. **A floating charge is a present security**, which affects all the assets of the company expressed to be included in it. A floating security is **not a future security**; it is a **present security**, which presently affects all assets of the company expressed to be included in it.

These charges may be created in favour of the charge holders as per terms and conditions agreed by them, like:—

- (a) *Pari passu charge*: In *pari passu* charge, security is shared between two or more lenders in proportion of their out standings. It is created with the prior consent of the existing charge holders of the company.
- (b) *Exclusive charge*: In exclusive charge the security on the particular property is provided to a particular lender only.
- (c) *Further charges*: In such cases with the consent of the first charge holders on particular assets may be provided to the further charge holders on the basis of second charge, third charge, etc. It means in case of liquidation of assets the first charge holder shall have right to recover his amount due on the company and any surplus remain on realisation of such properties shall be recovered by the second charge holder and so on.

REGISTRATION OF CHARGES

Charges requiring Registration

As per section 125(4), the following kinds of charges are mandatory and these charges needs to be registered with the Registrar of Companies:—

- (a) A charge for the purpose of securing issue of debentures;
- (b) A charge on uncalled share capital;
- (c) A charge on the immovable property, wherever situated, or any interest therein;
- (d) A charge on any book debts;
- (e) A charge, not being a pledge, on any movable property;
- (f) A floating charge on the undertaking or any property of the company including stock-in-trade;
- (g) A charge on calls made but not paid. Section 14 of the Banking Regulation Act, 1949 debars a bank from creating a charge on any unpaid capital;
- (h) A charge on a ship or any share in a ship;
- (i) A charge on a goodwill, patent or on a license under a patent or on a trademark or on a copyright or license under a copyright.

Registration of charge in connection with the issue of debentures

Section 128 allows registration of certain particulars in case where a company issues a series of debentures and the debenture holders are entitled *pari passu* to the benefit of a charge created for the benefit of debenture holders. The company shall file following particulars with the concerned Registrar of Companies for registration of charge under section 125(4):—

- (1) The total amount secured by the whole series.
- (2) The dates of the resolutions authorising the issue of the series and the date of the covering deed, if any, by which the security is created or defined.
- (3) A general description of the property charged.
- (4) The names of the trustees, if any, for the debenture holders.
- (5) The deed containing the charge or a duly verified copy thereof.
- (6) Particulars as to the amount or rate percent of the commission discount or allowance paid or made in connection with debentures. [Section 129]

Following points shall be noted in this regard:—

- (a) Failure to file particulars of such charge with the Registrar of Companies shall not affect the validity of the debentures issued.
- (b) Debentures may itself contain a charge or give a reference as to any other instrument in this regard.
- (c) The particulars of charge as given above shall be filed together with the deed containing the charge, or a copy of the deed verified in the prescribed manner, or if there is no such deed, one of the debentures of the series.
- (d) The company shall file with the Registrar, particulars of the date and amount of each issue of debentures of series, if there is more than one, but failure to file such particulars shall not affect the validity of the debentures issued.
- (e) Debentures must also be registered under the Indian Registration Act.
- (f) Section 133 requires that the company shall cause a copy of every certificate of registration given under section 132, to be endorsed on every debenture or certificate of debenture stock which is issued by the company and the payment of which is secured by the charge so registered.

A company shall not be required to cause a certificate of registration to be endorsed on any debenture or certificate of debenture stock issued by the company, before the charge was created. [Proviso to section 133]

If any person knowingly delivers, or authorises or permits the delivery of any debenture or certificate of debenture stock which is required to be endorsed with a copy of a certificate of registration, as stated above, without the copy being so endorsed upon it, he shall, without prejudice to any other liability, be punishable with fine which may extend to rupees ten thousand.

Prescribed forms

The new prescribed e-Form 8 & 10 *vide* Companies (Central Government's) General Rules and Forms (Amendment) Rules, 2006 (Form 13 omitted) along with the instruments evidencing the charge shall be filed in on line basis to the MCA/ROC, under the digital signatures of both the company and the creditor along with the requisite fee.

Time-limit for filing of e-Form 8 & 10

E-Form 8 with complete requirement must be filed within a period of 30 days from the date of creation u/s 125 or modification of charge u/s 135 on online basis with the RoC.

The particulars of charges in connection with issue of debentures of a series shall be filed with Registrar of Companies in Form 10, along with copy of instrument creating the charge and with the required filing fees as per Schedule X to the Companies Act, 1956, within a period of 30 days after the execution of deed containing the charge or if there is no such deed, after the execution of any debentures of the series.

The concerned RoC may allow filing requisite particulars within a period of thirty days next following the expiry of initial thirty days after the date of creation or modification of charge subject to payment of such additional fee not exceeding ten times the amount of fee specified in Schedule X of the Companies Act. However, it is expected that only one time additional filing fee shall be charged by the computer as penalty.

Responsibility for filing particulars for registration of charge

It shall be the duty of a company to file with the Registrar, for registration, the particulars of every charge created by the company, and of every issue of debentures of a series, requiring registration under Part V of the Companies Act.

Particulars for registration of any charge may also be filed by any person interested therein. In this connection, it may be noted that section 134(2) provides that where registration is affected on the application of some person other than the company, that person shall be entitled to recover from the company, the amount of any fees properly paid by him to the Registrar.

Effects of registration of charge

Once the particulars of charge has been registered by the Registrar of Companies, it has the following effects:—

- (a) that while dealing with the company in respect of any property subject to a registered charge, the dealer is deemed to have notice of such charge as from the date of such registration.
- (b) Where any person acquires a property or any part thereof, or any share or interest therein, which is subject to charge under section 125(4) and charge has been registered with Registrar, the acquirer shall be deemed to have notice of the charge as from the date of such registration. [Section 126]

Consequences and penalties of non-filing/registration of particulars of charge with Registrar

It is a duty of company to file the particular of charges with the Registrar within the stipulated time for registration of particulars of charges. However, the interested parties to the charge may also file these particulars with the Registrar within the stipulated time.

In case of non-filing and registration of these particulars the following consequences shall arise:—

- (a) all the charges covered under section 125(4) shall become void unless registered by the Registrar and when a charge becomes void under section 125, the money secured thereby shall immediately become payable by the company;
- (b) the charge will be void as against the liquidator (in the event of the company being wound up) and against the creditors, if any, so far as the company is concerned, the charge will be good and it can be enforced so long as the company does not go into liquidation;
- (c) the security becomes void but non-registration does not affect any contract or obligation of the company as to repayment of the money secured by the charge;
- (d) the company, and every officer of the company or other person who is in default, shall be punishable with fine which may extend to Rs. 5,000 for every day during which the default continues [section 142(1)]. A further fine of Rs. 10,000 may also be imposed on the company and every officer of the company who is in default of any other requirements of the Act concerning registration of a charge created by company. [Section 142(2)]

MODIFICATION OF CHARGES

Applicability of provisions relating to modification of charge

Section 135 provides that the provisions of Part V of the Companies Act, 1956 as to registration of charge shall apply to modification of the charge. It can, therefore, be inferred that the provisions relating to certificate of registration of charge, etc., will also apply to modification of charge. In case of modification of charge, the particulars are also required to be furnished in E-Form 8.

Some of the instances of modification are as follows:

1. Change in the interest rate amount
2. Enhancement or reduction of secured borrowing
3. Modification due to operation of law
4. Transfer or assignment of rights by charge-holder

Filing of e-Form 8 or 10 for modification of charge

A company is obliged to file particulars for modification of charge in proper manner in e-Form together with the instruments evidencing for modification of charge alongwith the adequate filing fees, within 30 days from the date of modification in the existing charge.

SATISFACTION OF CHARGE

Satisfaction of charge (Section-138)

Satisfaction of charge is another important aspect relating to debts created by a charge. In case of a full and complete payment of the secured charge registered with the Registrar of Companies, it is required to file particulars for satisfaction of charge in e-Form 17 with the Registrar of Companies electronically within 30 days from the date of satisfaction or payment of full and final amount to the charge holder.

It is a duty cast on companies to intimate to the concerned Registrar of Companies about payment in full of any charge relating to the company.

Prescribed Form

It shall be the duty of a company to file form-17 with the Registrar for registration, the particulars of satisfaction of charge by the company and of every issue of debentures of a series satisfied.

Registration of satisfaction of charge by the Registrar

If e-Form 17 is signed by both the parties and is electronically filed with Registrar the satisfaction of charge shall be registered by it and a certificate to that effect shall be given to the representative of the company or may be sent by post.

Certificate for satisfaction of charge

Section 140 provides that where the Registrar enters a memorandum of satisfaction in whole or in part, in pursuance of section 138 or 139, he shall furnish the company with a copy of the memorandum.

REGISTER OF CHARGES

Register of charges

The Registrar of Companies is required to maintain a Register of charges, separately, in respect of each company pursuant to the provisions of section 130 of the Companies Act, 1956. The Registrar of Companies shall cause to be kept a register containing the particulars of all the charges requiring registration under Part V of the Act. Following provisions should be taken into consideration in this regard:—

- (i) *Requirement of Registrar to maintain Register of charges:* As per section 130(1) it is a duty of the Registrar of Companies to keep a Register of charges of each company containing the particulars of all the charges requiring registration under Part V of the Companies Act, 1956.
- (ii) *Obligation on company to forward necessary particulars to Registrar:* As per section 130(1A) every company is under an obligation to forward to the Registrar the

particulars of the charges as are specified in sections 128 and 129 in the case of a charge to the benefit of which the holder of a series of debentures are entitled and in case of other charge particulars as given below, in such form and manner as prescribed and after payment of such fee as given in Schedule X of the Companies Act, 1956, being entered in the Register kept under sub-section (1) of section 130.

Details of particulars required to be filed with the Registrar for making entry in the Register of charges are as under:—

- (1) if the charge is created by the company, the date of its creation, and if the charge was existing on property acquired by the company, the date of the acquisition of the property;
- (2) the amount secured by the charge;
- (3) short particulars of the property charged; and
- (4) the persons entitled to the charge.

Physical inspection of Register of charges at the Registrar's Office u/s 130

Section 130(3) provides that the Register of charges kept in pursuance of section 130 shall be open to inspection by any person on payment of fee of rupees fifty for each inspection. Under the electronic filing system introduced by the Registrar the inspection of charges may be made on payment of required fee on the portal of the Registrar by a registered user as per procedure given on the web site www.mca.gov.in.

Register of charges maintained by a company

Section 143 provides for the Register of charges to be maintained by a company, at its registered office. Section 143(1) says that every company shall keep at its registered office a Register of charges and enter therein all particulars of charges specifically affecting property of the company and all floating charges on the undertaking or on any property of the company. Section 136 stipulates that in the case of a series of uniform debentures, it shall be sufficient if a copy of one debenture of the series is kept at the registered office of the company. Following particulars shall be recorded in the Register of charges, to be kept by the company, in respect of each and every charge:—

- (i) a short description of the property charged;
- (ii) the amount of the charge; and
- (iii) except in the case of securities to bearer, the names of the persons entitled to the charge.

If any officer of the company knowingly omits, or willfully authorises or permits the omission of the entries required to be made in pursuance of section 143(1), he shall be punishable with fine upto rupees five thousand.

Powers of the Company Law Board/Central Government to condone delay

Under section 141 the Central Government has been vested with power to condone delay and grant extension of time for filing the particulars of charges or for the registration of the charge or for giving of intimation of payment or satisfaction, if such delay was due to inadvertence or to some other sufficient cause.

Inadvertence would cover the cases of negligence and carelessness, when it is not actuated by any fraudulent or improper motive. Delay in filing the particulars of a charge created due to inaction could not be condoned.

The Central Government also has the power to order rectification of the Register of charges in respect of any omission or mis-statement in the register.