

## **All about Incorporation of Section 8 Company**

In India, there are mainly following three (3) types of non-profit organizations i.e.-

- **Section 8 Companies**
- **Societies registered under section 20 of the Societies Registration Act, 1860**
- **Trusts formed under Indian Trusts Act, 1882**

## **Regulatory Framework**

Section 8 companies are regulated through the Companies Act, 2013, accordingly the registration and administration of these companies are regulated only by the Central Government.

Under Schedule VII of the Indian Constitution, the subject 'Trust and Trustees' finds mention at Entry No.10 in the Concurrent List and 'Charities & Charitable Institutions, Charitable and religious endowments and religious institutions' find place at Entry No.28 of the Concurrent list. Therefore, both the Centre and the States are competent to legislate and regulate charitable organisations.

## **Conditions to form Section 8 Company:**

- Its objects should include promotion of commerce, art, science, sports, education, research, social welfare, religion, charity, protection of environment or any such other object;
- The company after incorporation intends to apply its profits, if any, or other income in promoting such objects only; and
- The company intends to prohibit the payment of any dividend to its members.

## **Some important provisions about Section 8 Company:**

- It can be only a Limited Company, Limited by shares or by Guarantee (with or without share capital).
- It can be a Public company or a Private company.
- No addition of its name of the word "Limited" or "Private Limited" is required.
- It can alter the provisions of its MOA/AOA only with the previous approval of the ROC\*.
- As per Rule 8(7) of the Companies (Incorporation) Rules, 2014, for the Companies under Section 8 of the Act, the name shall include the words

foundation, Forum, Association, Federation, Chambers, Confederation, council, Electoral trust and the like etc.

- Articles of Association of a Section 8 Company can have entrenchment clause in terms of provisions of section 5(3).
- A One Person Company (OPC) cannot convert into a Section 8 Company.

***\*Such power is delegated to Regional Director (at new Delhi, Mumbai, Kolkata, Chennai, Ahmedabad, Hyderabad and Shillong) where MOA are changed due to conversion of Section 8 Company into another kind of Company [vide MCA notification dated 19<sup>th</sup> December, 2016].***

### **Who can be a member of Section 8 Company**

- In terms of section 8, any person or an association of persons intending to register a limited liability company for objects specified in section 8(1)(a), subject to the restrictions provided in section 8(1)(b) and (c), can opt to apply for registration of Section 8 Company.
- A partnership firm/LLP can be a member of the Section 8 Company.
- One Person Company cannot become a member of Section 8 Company.

### **Documents required for Incorporation**

- An application in form SPICE+.
- Memorandum of Association (MOA) and Articles of association (AOA) of the proposed Company in prescribed format (Form no. INC – 13).
- A Declaration (on the stamp paper, duly notarized) 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 there under and all the requirements under section 8 have been complied with.
- 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.
- A declaration on stamp paper duly notarized by each of the persons making the application and
- Form no. INC-9 from each subscriber and first directors, on appropriate stamp paper of the State and duly notarized.

### **Shares in demat Form**

Section 8 Company is also required to dematerialize its shares by 30<sup>th</sup> September, 2024 in view of the recent MCA notification no. GSR 802(E) dated 27<sup>th</sup> October 2023.

### **Exemptions to Section 8 Company under CA, 2013**

Exemptions/modifications as provided below shall be applicable to Section 8 Company which has not committed a default in filing its financial statements under section 137 or annual return under Section 92 of the said Act with the Registrar.

<b>S. No.</b>	<b>Sections</b>	<b>Exemptions/Modifications</b>	<b>Provisions and impact of Exemptions/Modifications</b>
<b>1.</b>	<b>2(24)</b>	<b>The provisions of Section 2(24) shall not apply.</b>	<p><b>Section 2(24)</b> <i>“Company Secretary or “Secretary” means a Company Secretary as defined in clause (c) of sub section (1) of Section 2 of the Company Secretaries Act, 1980 who is appointed by a company to perform the functions of a Company Secretary under this Act.”</i></p> <p><i>As per Section 2(1)(c) of Company Secretaries Act 1980, “Company Secretary” means a person who is a member of the Institute.”</i></p> <p><b>Section 8 Companies are not mandatorily required to appoint Company Secretary as defined under Section 2(24) of Companies Act, 2013.</b></p>
<b>2.</b>	<b>2(68)</b>	<b>Requirement of having a minimum paid-up share capital shall not apply.</b>	<p><b>As per Section 2 (68),</b> <i>“Private Company means a company having a minimum paid-up share capital as may be prescribed”.</i></p> <p><b>It is pertinent to mention that earlier there was requirement of minimum paid up capital of Rs. 1 lakh or more. However, by virtue of Companies Amendment Act, 2015 (w.e.f. 29.05.2015), the paid-up share capital requirement of at least Rs. 100,000 is done away with.</b></p>

3.	2(71)	Requirement of having minimum paid-up share capital shall not apply.	<p>As per section 2 (71), “<i>Public Company means a company which has a minimum paid-up share capital as may be prescribed</i>”.</p> <p><b>It is pertinent to mention that earlier there was requirement of minimum paid up capital of Rs. 5 lakh or more for public companies. However, by virtue of Companies Amendment Act, 2015 (w.e.f. 29.05.2015), the paid-up share capital requirement of at least Rs. 500,000 is done away with.</b></p>
4.	96 (2)	<p>In sub-Section (2), after the provision and before the explanation, the following proviso shall be inserted, namely:</p> <p><b>“Provided further that the time, date and place of each annual general meeting are decided upon before-hand by the directions, if any, given in this regard by the company in its general meeting.”</b></p>	<p>Section 96 (2): “<i>Every annual general meeting shall be called during business hours, that is, between 9 a.m. and 6 p.m. on any day that is not a National Holiday and shall be held either at the registered office of the company or at some other place within the city, town or village in which the registered office of the company is situate.</i></p> <p><i>Provided that annual general meeting of an unlisted company may be held at any place in India if consent is given in writing or by electronic mode by the members in advance.</i></p> <p><i>Provided that the Central Government may exempt any company from the provisions of this sub-section subject to such conditions as it may impose.</i></p> <p><b>“Provided further that the time, date and place of each annual general meeting are decided upon before-hand by the directions, if any, given in this regard by the company in its general meeting.”</b></p>

			<p>Explanation: For the purposes of this sub-section, “National Holiday means and includes a day declared as National Holiday by the Central Government.”</p> <p><i>There is some ambiguity in the aforesaid proviso as applicable to Section 8 Companies and further clarification is required.</i></p>
5.	101(1)	In sub-Section (1), for the words “twenty-one days”, the words “fourteen days” shall be applicable	<p>Whereas in order to call general meeting of a company, not less than clear 21 days’ notice in writing/electronic mode is required.</p> <p><b>General Meetings of a Section 8 Company can be called with notice of clear 14 days instead of 21 days.</b></p> <p><i>Section 101 (1): A general meeting of a company may be called by giving not less than clear twenty-one days’ notice either in writing or through electronic mode in such manner as may be prescribed.</i></p>
6.	118	The section shall not apply as a whole except that minutes may be recorded within 30 days of the conclusion of every meeting in case of companies where articles of association provided for confirmation of minutes by circulation.	<p>Section 118 has various provisions to comply with. However, these requirements are not applicable for Section 8 Companies except recoding of minutes within 30 days of conclusion of every meeting in case of companies where articles of association provided for confirmation of minutes by circulation.</p>
7.	136 (1)	For the words “twenty-one days” the words “fourteen days” shall be substituted	<p>In alignment of the the relief granted u/s 101, which provides that notice of general meeting can be sent before clear 14 days before the meeting, amendment has also been made in Section 136 in respect of copies of</p>

			<p><b>financial statements and documents to be annexed thereto, which can be sent to the members 14 days before the meeting instead of 21 days.</b></p> <p><i>Section 136 (1): “Without prejudice to the provisions of section 101, a copy of the financial statements, including consolidated financial statements, if any, auditor’s report and every other document required by law to be annexed or attached to the financial statements, which are to be laid before a company in its general meeting, shall be sent to every member of the company, to every trustee for the debenture-holder of any debentures issued by the company, and to all persons other than such member or trustee, being the person so entitled, not less than twenty-one days before the date of the meeting.”</i></p>
8.	149(1)(b) and first proviso	Shall not apply	<p><b>There is no maximum limit for appointment of Directors in Section 8 Companies.</b></p> <p><i>Section 149 (1): Every company shall have a Board of Directors consisting of individuals as directors and shall have:</i></p> <p><i>(a) a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company; and</i></p> <p><i>(b) a maximum of fifteen directors:</i></p> <p><i>Provided that a company may appoint more than fifteen directors after passing a special resolution.</i></p>
9.	Sub sections (4), (5),	Shall not apply	<ul style="list-style-type: none"> <li><b>Requirement of minimum number of Independent Directors (149 (4), (5)),</b></li> </ul>

	(6), (7), (8), (9), (10), (11), clause (i) of sub section (12) and sub section (13) of section 149		<ul style="list-style-type: none"> <li>• Independent Director as defined in the definition of Independent Director (149 (6)),</li> <li>• Declaration (regarding circumstances/change in circumstance which may affect his status) by Independent Director (149(7)),</li> <li>• Applicability of Schedule IV to the Company and Independent Director (149(8)),</li> <li>• Entitlements to Independent Director (149(9))</li> <li>• Tenure of Independent Director (149(10) &amp; (11))</li> <li>• Liability of Independent Director (149(12)(i))</li> <li>• Inapplicability of Section 152 (6) &amp; (7) to Independent Directors (149(13))</li> </ul>
10	Section 150	Shall not apply	Section 150: Manner of selection of Independent Directors and maintenance of databank of Independent Directors.
11	Proviso to 152(5)	Shall not apply	<p><b>Proviso to Section 152(5):</b> <i>“Provided that in the case of appointment of an independent director in the general meeting, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment.”</i></p> <p>As the provisions relating to appointment of Independent Director are not applicable to Section 8 Company, accordingly, the said proviso is also not applicable.</p>



12	Section 160	Shall not apply to companies where articles provide for election of Directors by Ballot	<p>Section 160: “A person who is not a retiring director in terms of section 152 shall, subject to the provisions of this Act, be eligible for appointment to the office of a director at any general meeting, if he, or some member intending to propose him as a director, has, not less than fourteen days before the meeting, left at the registered office of the company, a notice in writing under his hand signifying his candidature as a director or, as the case may be, the intention of such member to propose him as a candidate for that office, along with the deposit of one lakh rupees or such higher amount as may be prescribed which shall be refunded to such person or, as the case may be, to the member, if the person proposed gets elected as a director or gets more than 25 % of total valid votes cast either on show of hands or on poll on such resolution”.</p> <p><b>In respect of the said section, a circular no. 38/2014 dated 14.10.2014 has also been issued by MCA in which it has been clarified that in respect of cases pertaining to director appointment under Section 160 of Companies Act, 2013, the Board of directors of a section 8 company shall decide as to whether the deposit made by or on behalf of the person failing to secure more than twenty-five percent of the valid votes is to be forfeited or refunded.</b></p>
13	165(1)	Shall not apply	<p>Section 165 (1): “No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time.</p>



			<p><i>Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.</i></p> <p><i>Explanation I: For reckoning the limit of public companies in which a person can be appointed as director, directorship in private companies that are either holding or subsidiary company of a public company shall be included.</i></p> <p><i>Explanation 2: for reckoning the limit of directorships of twenty companies, the directorships in a dormant company shall not be included.”</i></p> <p><b><i>A person appointed as Director in 20 Companies can still be appointed as a Director in Section 8 Company.</i></b></p>
14	173(1)	<p><b>Shall only apply to the extent that the Board of Directors, of such Companies shall hold at least one meeting within every 6 calendar months.</b></p>	<p><b>Section 8 company is not required to hold first BM within 30 days as the said meeting and the subsequent meetings can be held once in every 6 calendar months.</b></p> <p><b>Section 173:</b> <i>“Every company shall hold the first meeting of the Board of Directors within thirty days of the date of its incorporation and thereafter hold a minimum number of four meetings of its Board of Directors every year in such a manner that not more than one hundred and twenty days shall intervene between two consecutive meetings of the Board.”</i></p>
15	174(1)	<p><b>In the sub-section (1):</b>  <b>(a) For the words “one-third of its total strength or two directors, whichever is higher” the words “either</b></p>	<p><b>Section 174 (1):</b> <i>“The quorum for a meeting of the Board of Directors of a company shall be one third of its total strength or two directors, whichever is higher; and the participation of the</i></p>

		<p>eight members or twenty-five per cent of its total strength whichever is less” shall be substituted.</p> <p>(b) The following proviso shall be inserted, namely:          “Provided that the quorum shall not be less than 2 members”.</p>	<p><i>directors by video conferencing or by other audio visual means shall also be counted for the purposes of quorum under this sub-section.”</i></p> <p><b>Quorum requirement in respect of Board Meetings of Section 8 Companies has been changed as 8 directors or 25% of total strength whichever is less, subject to minimum of 2 directors.</b></p>
16	177 (2)	<p>The words “with independent directors forming a majority” shall be omitted</p>	<p><b>Section 177 (2): “The Audit Committee shall consist of a minimum of three directors with independent directors forming a majority.”</b></p> <p><b>Majority of Independent Directors are not required for Audit Committee of Section 8 Company.</b></p>
17	178	<p>Shall not apply</p>	<p><b>Constitution of Nomination and Remuneration Committee is not required in case of Section 8 Company.</b></p>
18	179	<p>Matters referred to in clause (d), (e) and (f) of sub section (3) may be decided by the Board by circulation instead of at a meeting</p>	<p><i>Section 179 (3): The Board of Directors of a company shall exercise the following powers on behalf of the company by means of resolutions passed at meetings of the Board, namely:</i></p> <p><i>(d) to borrow monies;</i></p> <p><i>(e) to invest the funds of the company;</i></p> <p><i>(f) to grant loans or give guarantee or provide security in respect of loans;</i></p>
19	184 (2)	<p>Shall apply only if the transaction with reference to Section 188 on the basis of terms &amp; conditions of the contract or arrangement exceeds One Lakh Rupees.</p>	<p><b>Section 184 (2): “Every director of a company who is in any way, whether directly or indirectly, concerned or interested in a contract or arrangement or proposed contract or arrangement entered into or to be entered into:</b></p>

			<p>(a) <i>with a body corporate in which such director or such director in association with any other director, holds more than two per cent shareholding of that body corporate, or is a promoter, manager, Chief Executive Officer of that body corporate;</i></p> <p>(b) <i>with a firm or other entity in which, such director is a partner, owner or member, as the case may be, shall disclose the nature of his concern or interest at the meeting of the Board in which the contract or arrangement is discussed and shall not participate in such meeting”</i></p> <p><b>The Director of a Section 8 company, being an interested director, whether directly or indirectly, is required to disclose his interest in a transaction, arrangement or contract and abstain from participating in the relevant Board meeting if the value of such transaction exceeds Rs. 1 Lakh.</b></p>
20	186(7)	<p><b>In sub-Section (7), the following proviso shall be inserted, namely:</b></p> <p><b>Provided that nothing contained in this sub section shall apply to a company in which twenty-six per cent or more of the paid-up share capital is held by the Central Government or one or more State Governments or both, in respect of loans provided by such company for funding Industrial Research and Development projects in furtherance of its objects as stated in its memorandum of association.</b></p>	<p><b>Section 186 (7):</b> “<i>No loan shall be given under this section at a rate of interest lower than the prevailing yield of one year, three year, five year or ten year Government Security closest to the tenor of the loan.</i>”</p> <p><b>Loan on lower interest rate can be given if twenty-six per cent or more of the paid-up share capital is held by the Central Government or one or more State Governments or both and if loans provided by such company for funding Industrial Research and Development projects in furtherance</b></p>

			of its objects as stated in its memorandum of association.
21	189	Shall apply only if the transaction with reference to section 188 on the basis of terms and conditions of contract or arrangement exceeds one lakh rupees.	<i>Section 189-Register of Contracts or Arrangements in which Directors are interested</i>

### **Revocation of License**

The RD (*powers delegated to RD at Mumbai, Kolkata, Chennai, New Delhi, Ahmedabad, Hyderabad and Shillong, vide MCA notification dated 19<sup>th</sup> December, 2016*), may, by order, revoke the license granted to a company registered under this section if the company contravenes any of the requirements of this section or any of the conditions subject to which a license is issued or the affairs of the company are conducted fraudulently or in a manner violative of the objects of the company or prejudicial to public interest, and without prejudice to any other action against the company under this Act, direct the company to convert its status and change its name to add the word “Limited” or the words “Private Limited”, as the case may be, to its name.

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