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The Companies Act, 2013 has provided various new definitions and new provisions which did not exist in the erstwhile Companies Act, 1956. Such new concepts have been introduced in view of the global corporate governance trends and to make the Companies accountable for their stakeholders.

InSync in this edition aims at explaining the latest notifications passed by the Ministry of Corporate Affairs.

Commencement of Inbound and Outbound Mergers In India

The Ministry of Corporate Affairs ("MCA") vide its notification dated April 13th, 2017, has notified the provisions of Section 234 of the Companies Act, 2013. Section 234 deals with the merger of foreign companies with Indian Companies and vice versa. The corporate world had been long waiting for this notification as the rest of the sections relating to mergers have already been notified.

MCA has further notified the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017, vide its notification dated 13.04.2017, which lays down the procedure for mergers under Section 234 of the said Act.

Section 234.

Merger or amalgamation of a company with foreign company: The captioned section states that its provisions shall apply to schemes of mergers and amalgamations between companies registered under this Act and companies incorporated in the jurisdictions of such countries which may be notified from time to time by the Central Government. It further defines the meaning of a foreign company as, "*the expression –foreign company means any company or body corporate incorporated outside India whether having a place of business in India or not.*"

The Provisions of the captioned section further states that the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in

The notification and rules shall come from 13.04.2017

Now cross border mergers have been made possible in India

Prior approval of RBI is required by the foreign company before merging with an Indian company and vice versa

The provisions of Section 230-232 shall apply on such cross border mergers

Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose.

Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017

The captioned rules state that a foreign company incorporated outside India may merge with an Indian Company only after obtaining prior approval from the Reserve Bank of India ("RBI") and after complying with the provisions of Section 230 to 232 of the Companies Act, 2017.

These rules further state that the transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and such valuation shall be in accordance with the internationally accepted principles on accounting and valuation. A declaration to this effect is necessary for obtaining the approval of RBI.

Conclusion

The notification and the rules come at a welcome time as the Indian economy is already expecting a huge surge in foreign investment in the country. However, there are still various uncertainties regarding the judicial strength of NCLT in order to handle such complicated cross border mergers. Only time will tell if such progressive laws can be implemented as efficiently as desired or not.

This exemption shall be available for a period of 5 years from the dated of the notification i.e. 27.03.2017

Where the value of assets involved in the merger is not more than rupees three hundred and fifty crores in India or turnover of not more

Exemption notification from the Competition Commission of India

The Ministry of Corporate Affairs has vide its notification dated 27.03.2017 has issued an exemption notification to certain mergers or amalgamations from the provisions of Section 5 of the Competition Act, 2002.

Section 5 of the Competition Act, 2002 relates to the regulation of combinations. Any combination falling within the scope of the said provision has to acquire a prior approval of the Competition Commission of India ("CCI"). But after the aforesaid notification, certain mergers or amalgamations or acquisitions have been exempted from the umbrella of Section 5 of the said Act.

than rupees one thousand crores in India, from the provisions of section 5 of the said Act

The turnover of the business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company

The value of assets shall include the brand value, value of goodwill, or value of copyright, patent, trademark etc.

New Thresholds Fixed

The aforesaid notification exempts the enterprises being party to the following:-

a) Acquisitions referred to in clause (a) of section 5 of the Competition Act.

b) acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, referred to in clause (b) of section 5 of the Competition Act.

c) any merger or amalgamation, referred to in clause (c) of section 5 of the Competition Act

where the value of assets being acquired, taken control of, merged or amalgamated is not more than rupees three hundred and fifty crores in India or turnover of not more than rupees one thousand crores in India, from the provisions of section 5 of the said Act for a period of five years from the date of publication of this notification in the official gazette.

Valuation of Assets and Liabilities

The aforesaid notification states that where a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise, the value of assets of the said portion or division or business and or attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under section 5 of the Act. The value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layoutdesign or similar other commercial rights, if any, referred to in sub-section (5) of section 3. The turnover of the said portion or division or business shall be as certified by the statutory auditor on the basis of the last available audited accounts of the company.

Conclusion

This exemption notification is being considered as a

progressive one by the experts of the field. It will reduce the compliance burden on the Companies and should further help in speeding up the process of such mergers or amalgamations or acquisitions, as the case may be.

For any clarification or delineation, feel free to contact us.



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