

Cross Boarder Merger- An Advance Move For Indian Company

By maintaining its persistence efforts in making India as an active participant in development of world economy, the Central Government (Ministry of Corporate Affairs), has notified section 234 of the Companies Act, 2013 with effect from April 13, 2017 which states provisions for cross boarder merger. In order to supplement the said section, the MCA has also notified corresponding amendments to the Companies (Compromises, Arrangements and Amalgamations) Rules 2016, by inserting a new Rule 25A to be effective on and from 13 April 2017. Through this article we try to provide you a quick peep into the newly notified section 234.

Cross Boarder Merger- newly permitted arena for Indian Company:

With effect of this notification, an inbound merger as well as outbound merger will be possible, while the former covers a merger of foreign company into an Indian company, where an Indian company turned out to be the continuing company and the later covers the merger of an Indian company into foreign company, where the foreign company will be the continuing company.

The permitted jurisdiction for cross border merger:

The notified section 234 has permitted certain jurisdictions where the Indian company may merger with the surviving foreign company, these include:

whose securities market regulator is a signatory to the International Organisation of Securities Commission's Multilateral Memorandum of Understanding (MoU) (Appendix A signatories) or a signatory to the bilateral MoU with Securities and Exchange Board of India (SEBI); or

Whose central bank is a member of the Bank for International Settlements; and a jurisdiction which is not identified in the public statement of Financial Action Task Force (FATF) as:

- i. a jurisdiction having strategic 'Anti-Money Laundering or Combating the Financing of Terrorism' deficiencies to which counter measures apply; or
- ii. a jurisdiction that has not made sufficient progress in addressing the deficiencies or has not committed to an action plan developed with the FATF to address the deficiencies.

The prominent provisions of section 234:

The provisions as provided under Sections 230 to 232 of 2013 Act (which are applicable in case of a merger of Indian companies) and the corresponding provisions under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 to be complied with in the case of cross border mergers.

Key Compliance checks for cross border merger:

- i. the transferee company should ensure that its valuation is:
 - conducted by such valuers who are members of recognised professional body in their country, and
 - in accordance with internationally accepted principles on accounting and valuation.
- ii. The valuation declaration has to be filed along the application to Reserve Bank India for prior approval.
- iii. Prior approval of Reserve Bank of India, before filing an application with the National Company Law Tribunal under section 230-232 of the Act.
- iv. The consideration for merger to the shareholders of the Indian merging company may be paid in cash or depository receipts or partly in cash and partly in depository receipts.
- v. Other compliances pertaining to conducting meeting of shareholders/creditors, notification to Income-tax authorities along with other sector specific regulators etc.

In Conclusion:

The Central Government has positively addressed the need of letting the Indian company to merge or amalgamate with the foreign company for exploring new avenues of business, however, there are still some points which need a

consideration in the notified section and rules thereunder, for instance there is a requirement of introduction of necessary changes in the Income Tax Act, Foreign Exchange Management Act and provisions relating to Indian Depository Receipt to enable merger of an Indian Company with foreign entity. Secondly, the tax implication on capital gains arising out of outbound merger need to be introduced in Income tax law. Lastly, the notified section speak much about cross border merger, however, there is no provision for effectuating the demerger of such foreign company. Nonetheless, the ministry may introduce the appropriate changes after encounter them in eventual face of implementation of notified section.

The link to the notification effecting section 234 of the Companies Act, 2013-
http://www.mca.gov.in/Ministry/pdf/section234Notification_14042017.pdf

The link to the relevant rule 25A in the Companies (Compromises, Arrangements and Amalgamations) Rules 2016-
http://www.mca.gov.in/Ministry/pdf/CompaniesCompromises_14042017.pdf