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CROSS BORDER MERGER POLICIES IN INDIAN BUSINESS

(RECENT POLICY CHANGES AND EASES GRANTED TO REGULATORY BARRIERS FOR INDIAN COMPANIES FROM MERGING OR ACQUIRING STAKES IN FOREIGN COMPANIES AND VICE VERSA, AND THEIR LIMITATIONS)

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Abstract

This article will delve into policy and precedent aspects, holistically covering a research on M&A agreements with foreign companies, and vice versa, foreign entities acquiring stakes in Indian companies. Indian company law is governed by the Companies Act, 1956 that until recently, restricted cross border mergers, to preserve Indian ownership in entities within its jurisdiction and for law enforcement to control them. Indian law restricted Foreign companies from acquiring Indian entities, as this could lead to foreign regulation over Indian jurisdictions. This could also be subject to other special laws such as FEMA and FERA, which basically regulate the foreign income or transfer of assets. Each cross border merger involves different implementation strategies and would vary depending upon the facts, kinds and sectors of companies, and geographic jurisdiction with respect to the foreign country wishing to enter the Indian market The new notification is a welcome development from the Ministry of Corporate affairs, and easing restrictions on cross border mergers will make international trade and structuring more efficient and flexible, we could expect complimentary treatments from the foreign jurisdiction as well, a plus point for the Indian business.

Revised Position as per the Companies Act amendment.

The MCA (Ministry of corporate affairs) released the Companies (amalgamation, compromise and arrangements) amendment rules[2] in 2017, that clarified the new flexible position with respect to mergers or amalgamations between a Foreign entity[3] and an Indian company. Two kinds of mergers are envisages, viz., Inbound and Outbound mergers. As their names suggest, an Inbound merger involves an Indian company merging and thereby acquiring complete stakes, assets and liabilities of

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[2] *Companies (amalgamation, compromise and arrangements) amendment rules, MCA GSR 93E*

[3] *Section 2(42) of the Companies Act, 2013*

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a foreign company, hence the resultant company, or the company formed after such a transition, would be under the Indian jurisdiction. On the contrary, An Outbound merger involves a foreign company merging with an Indian company, the resultant company being the foreign company, with foreign control and ownership. The latter transaction was not allowed in the earlier law, but revised and legalised subject to regulatory approvals.

1. Sections 230 (which allows transactional parties to compromise and make arrangements regarding the merger document with the creditors and members), 231 (the power of the companies tribunal to enforce such an arrangement agreed) and Section 232 (involving mergers and acquisitions) of the CA are complied.
2. Approval from the Reserve Bank of India (RBI).
3. Application regarding merger to the tribunal

I. I*n case of a foreign company merging with an Indian company-* The company files an application seeking approval for the merger to the NCLT (National company law Tribunal)

II. I*n case of an Indian company merging with a foreign company-* A declaration to the RBI conjointly with an application with the NCLT, detailing the Valuation conducted by a recognised professional body on the company in accordance with International law.

The Notification further restricts the markets which can venture into the Indian market through a merger

(i) Those jurisdictions who's securities market regulator is a signatory to the International Organisation of Securities commission (multilateral MoU) and signatory to the Bilateral MoU with the SEBI of India.

(ii) Those jurisdictions whose Central reserve bank is a member of the International Settlements Bank (it serves as an international bank of member central banks and its role os to maintain financial and monetary stability within its members, it continually conducts research on monetary policies of its member countries and releases guidelines from time to time, which are deliberated in a meeting of governors of member nations annually)

(iii) Those jurisdictions who are not identified in the public statement of the FATF (financial action task force) (FATF is a powerful international organisation tasked with implementing legal and regulatory measures and even penalise offenders of money laundering, international fraud, terrorist financing, financial terrorism, and other threats to international financial peace)

(iv) Those Jurisdictions having a codified law on Anti Money laundering and provisions regarding the combating of financial terrorism

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Easing restrictions on Foreign transactions

Other regulations governing merger transactions include the FEMA (Foreign exchange management act) and the Foreign exchange management (transfer of issue of foreign securities) regulations in 2004[4](also known as the ODI Guidelines). The RBI in 2018 notified the FEMA (Cross Border mergers) Regulations which included provisions to enable mergers, amalgamations, demergers and other arrangements between Indian and foreign based companies in inbound and outbound transactions, This was a welcome move as it would bring in a massive influx of Foriegn direct investment to the Indian market with the tweaking of these existing policies.

A. *Transfer of securities in Inbound Mergers.*

As a contractual consideration, the Indian company in such mergers would issue or cause transfer go securities to all shareholders of the transferor(the foreign entity who is transferring its assets and liabilities in the merger). Different provisions exist if the foreign company itself is part of a Joint Venture agreement (50 50 agreements) where it would have to comply with the regulations under section 6 and 7 of the ODI guidelines, when one or more subsidiaries of the JV is acquired by the resultant Indian company.

Result of merger- vesting of assets and liabilities

a. The debts and guarantees of the transferor company would become the debts/ guarantees of the resultant Indian company, within a timeline of two years to comply with the external commercial borrowing guidelines. End use restrictions would not apply

b. Any assets to be transferred shall be done under the act and regulations, when not permitted, shall be sold, whose proceeds would be sent back to India via banks. This comes with a limitation period of 2 years.

c. The resultant company is only permitted to open a foreign bank account for a period of two years from the date of sanction from the NCLT.

d. Valuation of the resultant company would be done in a accordance with rule 25A of the 2016 Rules by registered and recognised valuers in accordance with International principles

[4] *Foreign Exchange Management (Transfer or Issue of Any Foreign Security) (Amendment) Regulations, 2004 120/ RB-2004*

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B. *Transfer of securities in Outbound Mergers*

As a consideration, the foreign company must transfer securities to the Indian company shareholders which may include even no residents of India, but only Indian residents would be subject to the ODi guidelines for acquisition.
The NCLT before approving the transaction, must consider the validity of the Cross border merger as per the laws of the foreign body jurisdiction, also subject to the Cross Border merger regulation rules, which shall have the affect of approval from the RBI.

Vesting of assets, liabilities
a. The debts and guarantees would be repaid as per the strategy sanctioned by the NCLT. They would not acquire any liability not in concordance with the regulations. A NOC (no objection certificate) must be obtained from the creditors of the Indian company in India regarding the same
b. Any transfer of assets shall be done in accordance with the Act or regulations, but the sanctioned scheme of the NCLT shall be followed if the resultant company cannot acquire the assets, and the proceeds would be sent back to India via Banking channels. This is subject to a limitation period of 2 years.
c. For a maximum of 2 years, the resultant company may open a special NRRA account (Non resident Rupee account) for overseeing the transactions.
d. *Continual Compliance-* The resultant company would have to furnish certain reprovers prescribed by the RBI, after discussing with the Govt. of India

M&A are one of the most high quality ways for the expansion of enterprise operators by way in which the company will both leverage its total compatibility for a selected sector of expertise but also may venture into unexplored lines of sectors. The recent spike in such transactions even during the covid hard times is noteworthy. The unpredictability of the covid pandemic in such a time made it extremely hard for business to asses their potential in their enterprise

However, as is the tagline in the business world, necessity creates inventions and adverse times only bring more possibilities not only in the business sector but innovation in the technology sector of the world. I believe that in the post corona opening, companies would also approach acquisitions and mergers with a **humanitarian cooperative sense,** while making profits for themselves, bailing out struggling businesses to give them a second chance acquiring bad business, and also aiding mid

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level businessmen. This is likely, in my opinion to put immense pressure on such financial institutions to leverage their funds. For a successful M&A, the organisations involved would have to look out for their business possibilities and mitigate related dangers. For danger or risk control, enterprises would have to put more emphasis on due diligence, valuation and criminal documentation.

Conclusion

To conclude, it could be said that the corporate quarter of India is really shifting in the direction of globalisation and with the aid of the state through such amendments to law favouring venture, we might really achieve the goal of being a truly developed nation by 2026 which we strive for. As mentioned in this article, the enactment itself of the new Companies Act of 2013 couples with the addition of Rule 25A to the Companies guidelines published in 2017 has eased foreign and Indian venture into respective markets which has brought in much needed FDI investments in such harsh times. Such amendments must also be enacted into the Competition and Tax Laws.

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