


28 July 2011

EY Transaction Tax Alert



This alert summarises the guidelines issued by Ministry of Corporate Affairs to Regional Directors / Registrar of Companies in respect of scheme of arrangement / amalgamation under section 391 - 394 of the Companies Act

Executive Summary

This alert summarizes the guidelines, dated 26 July, 2011, issued by Ministry of Corporate Affairs, Government of India to the Regional Directors ('RD'), Official Liquidator ('OL') and Registrar of Companies ('ROC') in respect of scheme of arrangement / amalgamation under section ('u/s') 391 - 394 of the Companies Act, 1956 ('Cos Act').

Background

Where any Scheme of Arrangement / Amalgamation u/s 391-394 of Cos Act is proposed and a petition for the same is filed before the High Court for its sanction, the High Court is required to serve a notice on RD (on behalf of Central Government), to provide their comments on the proposed scheme.

It has been observed that various RDs follow different practices while sending comments to the High Courts.

In order to rationalize the procedure to be followed by RDs, the Ministry of Corporate Affairs has issued guidelines (vide Circular No - 53 / 2011) detailing: (a) certain steps and timelines to be adhered to by RDs and ROCs; and (b) the key matters to be included in the ROC and RD

examination (provided as annexures to the circular).

Key guidelines

Applicability of the circulars

- ▶ The guidelines specified in circular are issued to all RDs, OLs and ROCs and supersede all previous guidelines issued in this respect.

Procedure along with relevant timelines

- ▶ On receipt of notice from the High Court u/s 394A of the Cos Act, the RD is required to make an entry in a register or in electronic form.
- ▶ On receipt of notice the RD shall:

Give Notice to	Purpose	Timelines
ROC	To seek their comments on the scheme	Within 3 days of receipt of notice
Law ministry / Assistant Solicitor General	Nomination of an advocate	Within 7 days of receipt of notice
Company / Company's Advocate	Furnishing of information including, material of valuation report	Within 5 days of receipt of notice

- ▶ If the company has filed its petition for approval of the scheme electronically with ROC in form 61, then the concerned ROC is required to examine the matter and furnish its report within 7 days of the receipt of such form 61 or the receipt of communication from RD, whichever is earlier. Annexure 1 of the Circular sets out the issues that merits ROC's examination (summarised below).
- ▶ The RD shall finalize his report on the scheme within 7 days of the receipt of information from the company(ies). While doing so, the RD needs to examine the key matters set out in Annexure II of the Circular (summarized below) as well as take into consideration the ROC's report.
- ▶ The aforesaid Report needs to be filed with Court Registry in form of an affidavit, which needs to be signed by both the Standing Counsel of the case as well as the Law Ministry (local branch) for identification purpose.
 - The aforesaid signing process is required to be completed within 5 days of finalizing the affidavit.

Key issues to be examined by ROCs (provided in annexure I to the circular)

- ▶ Filing position of the Company / (ies).
- ▶ Investor grievances, if any.
- ▶ Inspection / investigation / technical scrutiny pending against the Company.
- ▶ Any prosecution pending.
- ▶ The scheme of arrangement / amalgamation.

Key issues to be examined by RDs (provided in annexure II to the circular)

The RD should ensure that all requisite statutory procedure for supporting the schemes has been complied with. Guidelines have prescribed list of issues that need to be examined by RD which inter-alia include the following:

- ▶ Whether companies forming part of scheme, operates in sensitive sectors such as Defense Equipment Manufacturing / Insurance / Telecommunication etc. If so, RD is required to examine that whether notice has been served on the concerned Regulatory Authorities / Ministry.
- ▶ In case of complicated legal / technical issues, RD is required to obtain opinion of Law Ministry/ Government Advocates.

- ▶ Whether the share exchange ratio in the scheme is as per Valuation Report and as per general accepted accounting principles.
- ▶ Whether Accounting Treatment clause in the scheme is as per Accounting Standard- 14 and in tune with the provisions u/s 211 3A / 3C of the Cos Act.
- ▶ Whether the scheme attracts the provisions u/s 77 of Cos Act in respect of buy back of shares.
- ▶ Whether any foreign entity is involved and if so necessary permission is obtained from Regulatory Authorities.
- ▶ Whether any qualification has been made by the Statutory Auditor, and whether company has complied with the provision u/s 217(3) of the Cos Act. Further, the RD report shall include his comment on how such qualification / reservations of the Auditors have been complied with by the company.
- ▶ Where a listed company is merging with an unlisted company RD shall ensure that share of unlisted company gets listed.
- ▶ In case of a listed company, RD to comment on any substantial increase in the promoters holding.
- ▶ RD is also required to comment on whether the scheme is prepared to circumvent any law in the garb of obtaining approval of the High Court. In such a case, RD is specifically

required to bring out his objection in his statement/report/affidavit irrespective of the fact whether Court accepts it or not.

Our Comments

- ▶ The Circular is an endeavour to bring rationalisation in RD and ROC procedures under the S.391-394 process, and lays out definitive timelines to be adhered by RDs/ROCs for submitting the report to the High Court against the notice served u/s 394A of the Cos Act.
- ▶ It attempts to provide guidance with respect to the framework that can be used by RDs/ROCs for reviewing the schemes of arrangement / amalgamation.
- ▶ The guideline inter alia seeks to lay emphasis on matters such as serving timely notices to the concerned regulatory authorities in case of scheme involving companies in sensitive sectors, scrutiny of the valuation forming part of the scheme and more active role of Law Ministry, including providing guidance on the technical / legal issues associated with the Scheme.

Our offices

Ahmedabad

2nd floor, Shivalik Ishaan
Near CN Vidhyalaya Ambawadi
Ahmedabad - 380 015
Tel: + 91 79 6608 3800
Fax: + 91 79 6608 3900

Bengaluru

"UB City", Canberra Block
12th & 13th floor
No.24 Vittal Mallya Road
Bengaluru - 560 001
Tel: + 91 80 4027 5000
+ 91 80 6727 5000
Fax: + 91 80 2210 6000 (12th floor)
+ 91 80 2224 0695 (13th floor)

Chennai

TPL House, 2nd floor
No. 3 Cenotaph Road Teynampet
Chennai - 600 018
Tel: + 91 44 6632 8400
Fax: + 91 44 2431 1450

Hyderabad

205, 2nd floor
Ashoka Bhoopal Chambers
Sardar Patel Road
Secunderabad - 500 003
Tel: + 91 40 6627 4000
Fax: + 91 40 2789 8851

Oval Office, 18, iLabs Centre
HITECH City, Madhapur
Hyderabad - 500081
Tel: + 91 40 6736 2000
Fax: + 91 40 6736 2200

Kochi

9th Floor, Abad Nucleus
NH-49, Maradu PO
Kochi -682304
Tel: +91 484 3044000
Fax: +91 484 2705393

Kolkata

22 Camac Street
Block 'C', 3rd floor
Kolkata - 700 016
Tel: + 91 33 6615 3400
Fax: + 91 33 2281 7750

Mumbai

14th floor, The Ruby,
Dadar, Mumbai - 400 028.
Tel: + 91 22 6192 0000
Fax: + 91 22 6192 1000

6th Floor, Express Towers,
Nariman Point,
Mumbai - 400 021
Tel: + 91 22 6657 9200
Fax: + 91 22 2287 6401

Block B-2, 5th Floor
Nirlon Knowledge Park
Off. Western Express Highway
Goregaon (E), Mumbai - 400 063.
Tel: + 91 22 6749 8000
Fax: + 91 22 6749 8200

NCR

Golf View Corporate Tower B
Near DLF Golf Course Sector 42
Gurgaon - 122002
Tel: + 91 124 464 4000
Fax: + 91 124 464 4050

6th floor, HT House
18-20 Kasturba Gandhi Marg
New Delhi - 110 001
Tel: + 91 11 4363 3000
Fax: + 91 11 4363 3200

4th & 5th Floor, Plot No 2B, Tower 2,
Sector 126, NOIDA 201 304
Gautam Budh Nagar, U.P. India
Tel: + 91 120 671 7000
Fax: + 91 120 671 7171

Pune

C-401, 4th floor Panchshil Tech Park
Yerwada (Near Don Bosco School)
Pune - 411 006
Tel: + 91 20 6603 6000
Fax: + 91 20 6601 5900

Ernst & Young Pvt. Ltd.

Assurance | Tax | Transactions | Advisory

About Ernst & Young

Ernst & Young is a global leader in assurance, tax, transaction and advisory services. Worldwide, our 141,000 people are united by our shared values and an unwavering commitment to quality. We make a difference by helping our people, our clients and our wider communities achieve their potential.

For more information, please visit

www.ey.com/india

Ernst & Young refers to the global organization of member firms of Ernst & Young Global Limited, each of which is a separate legal entity. Ernst & Young Global Limited, a UK company limited by guarantee, does not provide services to clients. Ernst & Young Private Limited is one of the Indian client serving member firms of Ernst & Young Global Limited.

Ernst & Young Pvt. Ltd is a company registered under the Companies Act, 1956 having its registered office at 22, Camac Street, Block C, 3rd Floor, Kolkata- 700016

© 2011 Ernst & Young Pvt. Ltd.
All Rights Reserved.

Information in this publication is intended to provide only a general outline of the subjects covered. It should neither be regarded as comprehensive nor sufficient for making decisions, nor should it be used in place of professional advice. Ernst & Young Pvt. Ltd. accepts no responsibility for any loss arising from any action taken or not taken by anyone using this material.