

**Companies Act, 2013**

**Impact on Business Restructuring**

**September 6, 2014**



# **Schemes of Arrangement**



## Schemes of Arrangement

- Process and provisions more detailed, comprehensive and transparent
- Approving authority National Company Law Tribunal and not High Court
- Merger of listed company with unlisted company – exit opportunity to dissenting shareholders - Contradiction to SEBI regulations, which require mandatory listing in such situations
- Demerger not specifically mentioned or defined but covered (Section 232 (1) (b))
- Certificate by the company's auditor to be filed NCLT to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under Section 133

## Schemes of Arrangement

- Can a company demerge its division to a foreign company?
- Fast track merger – between “small companies” and “holding and wholly owned subsidiary” – will it be really fast track?
- Exit to dissenting shareholders and takeover offer
- Purchase of minority shareholders – obligation of the acquirer acquires 90% or more – still squeeze out not possible - Price of acquisition determined by a registered valuer

## Schemes of Arrangement

- Cross border merger - If merging Indian company has real estate, then what would be the impact under FEMA and Stamp duty Act?
- Enhanced disclosure - Notice and documents to be also uploaded on company's website, Yearly reporting in a statement with ROC until completion of scheme
- Voting through postal ballot (including e-voting) – Godrej Industries Case!
- Time bound representation from various authorities
- Difficult to raise objections to schemes - Objections to be by not less than 10% shareholders and 5% debt
- Dispensation of creditors' meeting – if 90% in value agree by affidavit
- Restriction on treasury stocks

## Slump Sale

- Clear definition of “Undertaking” and “substantially the whole of the undertaking” (s. 180 (1) (a))
  - “Undertaking” means an undertaking in which the investment of the company exceeds 20% of its net worth as per preceding financial year’s audited balance sheet *or* which generates 20% of the total income of the company during the previous financial year
  - “Substantially the whole of the undertaking” means 20% or more of the value of the undertaking as per the audited balance sheet of the preceding financial year
- Applicable to private companies as well

## Slump Sale

- Board's approval followed by shareholders approval by special resolution by postal ballot
- Whether holding of “shares or securities” constitute an “undertaking”?
- Whether *mortgaging* of the whole or substantially the whole of its undertaking *for obtaining loans or other financial assistance* covered by Section 180 and treated as a sale of undertaking?

# Are you my subsidiary?



- Test of subsidiary is exercise or control of > 50% of the **total share capital** instead of > 50% **equity** share capital (s. 2(87))
- So an investor holding CCPs of a greater amount than equity shareholders may become the holding company of its portfolio entity?
- PE investors not registered as companies under 2013 Act also covered?
- 50% test can be satisfied directly or together with other subsidiaries (s. 2(87))
- Holding of CCDs does not trigger the provision
- Whether foreign holding companies included? Section 4(7) gone!



## **(Don't) Buy back**

- One year period between 2 buybacks, whether buyback is 10% or 25% (s. 68(2) *proviso*)
- Difficulty in closely held company persist with 15 days offer period
- Fines and imprisonment term increased for contravention (s. 68 (11))
  - Company liable for fine from Rs. 1 lac to 3 lacs
  - Officer in default liable - imprisonment upto 3 months & fine upto 3 lacs
- Liberalisation - earlier buyback not permitted in case of default on debentures or preference shares or dividend payment - now permitted if default remedied and buyback after 3 years (s.70(1) (c) *proviso*)

## **(Don't) Buy back**

- Amounts have to be transferred to Capital Redemption Account in case of buy back from the Securities Premium Account also (s. 69(1))
- Meaning of audited accounts not older than 6 months in (Rule 17 of Companies (Share Capital and Debentures) Rules, 2014)?
- Additional disclosures in explanatory statement calling EGM (Rule 17 of Companies (Share Capital and Debentures) Rules, 2014)
  - Auditor's report to state : audited accounts used for calculation w.r.t buy back are not more than six months old from the date of offer document
  - Disclosure of aggregate shareholding of directors and KMP
  - Disclosure of share bought/sold in the preceding 12 (earlier 6) months
  - Board's confirmation that no defaults in interest payment on deposit/debentures and dividend payment on shares



**Thank You**

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