

FAST TRACK MERGER UNDER THE COMPANIES ACT, 2013

March 2018

STATUTORY PROVISIONS

- Chapter No. XV - Compromises, Arrangements and Amalgamations of the Companies Act, 2013 (“Act”)
- Applicable Section: **Section 233** (effective from 15.12.2016)
- Applicable Rules: **Rule 25** - Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (effective from 15.12.2016)

WHAT IS A MERGER

- ▶ Definition of Merger: under the Act or the Rules?
- ▶ Combination of two (or more) companies into a new company
- ▶ Combination of one existing company into another existing company.

FAST TRACK MERGER

- ▶ New concept introduced in India under the Companies Act, 2013
- ▶ No requirement of NCLT approval
- ▶ Sanction by jurisdictional Regional Directors based on reports by the Registrar of Companies and Official Liquidator is sufficient
- ▶ Non-existence of such provisions under the old Companies Act
- ▶ Ease of doing business
- ▶ Status in other jurisdictions/ countries

APPLICABILITY

❖ 2 (two) or more Small Companies

- ✓ A small company (Section 2(85)) is a company other than a public company with paid up company not exceeding INR 50 lacs [or such higher amount as may be prescribed not exceeding INR 10 crores] and turnover as per P&L A/c of immediately preceding financial year does not exceed INR 2 crores [or such higher amount as may be prescribed not exceeding INR 100 crores].

❖ Holding and its WOSs

- ✓ A holding company (Section 2(46)) can avail the benefit of this section for merger of its wholly-owned subsidiary (Section 2(87)) into itself. Holding company and its wholly-owned subsidiary: Can be a public or private company or a Section 8 Company.

APPLICABILITY

Contd...

- ❖ **Such other class or classes of companies as may be prescribed:**
 - ✓ Section 233 and the Companies (Compromise, Arrangement and Amalgamations) Rules, 2016 have been enforced effective from 15.12.2016, but such other class or classes of companies not yet notified

STEPS INVOLVED

- ❖ Board Approval to the Scheme
- ❖ Issuance of notice of the proposed scheme
 - ✓ Companies to issue notice (Form CAA-9) of the proposed scheme, inviting objections/ suggestions, from jurisdictional Registrar of Companies (“**RoC**”) and the Official Liquidator (“**OL**”) and to persons affected by the scheme within 30 (thirty) days. (Section 233(1)(a))
- ❖ Declaration of Solvency
 - ✓ Each company to file their respective Declaration of Solvency Statement (Form CAA-10) with the RoC. (Section 233(1)(c) read with Rule 25(2)). Reverse merger not possible.

STEPS INVOLVED

Contd...

❖ Approval of Members

- ✓ Each company to obtain creditors' approval in either of the following manner (Section 233(1)(b) read with Rule 25(3)):
 - By Meeting: Approval by majority representing 90% of the total number of each class of shares in a meeting convened by the company by giving a notice of 21 clear days; or
 - Without Meeting: Approval in writing by majority representing 90% of the total number of each class of shares

❖ Approval of Creditors

- ✓ Each company to obtain creditors' approval in either of the following manner (Section 233(1)(d) read with Rule 25(3)):
 - By Meeting: Approval by majority representing 9/10th in value of creditors or class of creditors in a meeting convened by the company by giving a notice of 21 clear days; or
 - Without Meeting: Approval in writing by majority representing 9/10th in value of creditors or class of creditors

STEPS INVOLVED

Contd...

❖ Notice of meeting of members and creditors

- ✓ Notice given to the shareholders/ creditors to be accompanied by:
 - Copy of the proposed scheme;
 - Statement disclosing the details of merger;
 - Copy of latest audited/ provisional financial statements;
 - Copy of valuation report, if any;
 - Explanation stating the effect of the scheme on creditors, KMPs, Promoters and Non-promoter members and debenture holders and effect on any material interests of the directors or the debenture trustees;
 - Copy of Declaration of Solvency;
 - Any other relevant document.
- ✓ Notice to be published on each company's website, if any. In case of a listed companies, relevant provisions of SEBI LOD Regulations to be complied with. Notice also to be published in newspaper.

STEPS INVOLVED

Contd...

- ❖ Filing of scheme with the RDs (Section 233(2) read with Rule 25(4))
 - ✓ Transferee company to file the approved scheme along with the result of members meeting and approval by creditors in meeting or in writing in Form CAA-11 with the RD within 7 days from the date of the meeting. Transferee company to also file scheme with RoC in Form GNL-1. Form GNL-1 to be accompanied with Form CAA-11 filed with the RD
 - ✓ Transferee Company to deliver a copy of scheme along with Form CAA-11 to OL
- ❖ Approval of Scheme
 - ✓ RoC and OL may give objections or suggestions, if any, to the RD within 30 days. If no objections or suggestions received from RoC and OL, it shall be presumed that they have no objections. If RD is of opinion that the scheme is in public interest or in interest of creditors, the scheme will be confirmed in Form CAA-12. (Section 233(3) read with Rule 25(5))
 - ✓ If objections received from RoC or OL and RD is of opinion that the scheme is not in public interest, it may file an application with jurisdictional NCLT in Form CAA-13 within 60 days requesting NCLT to consider the scheme under Section 232 (Section 233(5) read with Rule 25(6))

STEPS INVOLVED

Contd...

❖ NCLT (Section 233(7))

- ✓ NCLT, for reasons recorded in writing, may consider the scheme as per the procedure under Section 232. NCLT may confirm the scheme by passing such order as it deems fit, subject to dealing with any objections received from RD

❖ Filing of approved scheme (Section 233(7) read with Rule 25(7))

- ✓ The order of RD approving the scheme to be filed in Form INC-28 with the RoC within 30 days

MERITS

- ▶ A welcome move from legislators
- ▶ Removal of administrative barriers
- ▶ Faster disposal rate
- ▶ Reduced burden on NCLT
- ▶ Benefits of reduced costs and resources of companies

ANALYSIS/ IMPLICATIONS

- ▶ Transfer of assets, liabilities, charges, legal proceedings, contracts, etc. on a going concern basis
- ▶ Dissolution of transferor companies without being wound-up deemed to be effective from the date of registration of the Scheme under Sections 233(3)/233(7) (Section 233(8))
- ▶ Only solvent companies can utilize the process under Section 233
- ▶ Is demerger allowed under Section 233?
- ▶ Can companies still opt for process under Sections 230-232?

ANALYSIS/ IMPLICATIONS

Contd...

- ▶ Can a single Scheme be filed for more than two companies involved in the process?
- ▶ Time frame involved?
- ▶ Stamp duty on transfer of assets/ clubbing of authorized share capital (Section 233(11))

Disclaimer

The information contained in this presentation has been compiled by us for informational, educational and discussion purposes only and is neither intended to be nor may be relied on in any manner as an opinion or advice. It may not be relied upon by any other person for any purpose, nor is it to be quoted or referred to in any document or shown to, or filed with any government authority, agency or other official body without our consent. No representation or warranties are made under this presentation and nothing herein shall be construed to amount to an opinion or be binding on any of the persons referred to herein. Further, the applicable laws and regulations are dynamic and are subject to any changes, clarifications and amendments that may be issued by relevant authorities, which may impact this presentation.

DMD

ADVOCATES

Sumit Garg, Principal Associate

30 Nizamuddin (East)

New Delhi – 110013, India

Email: sumit.garg@dumeds.com

Mob : +91 98186 97266

Tel : +91 11 47194400

Fax : +91 11 40506977