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Analysing developments impacting business

MCA CLARIFIES THE APPOINTED DATE CONUNDRUM

23 August 2019

The Ministry of Corporate Affairs (MCA) vide its circular dated 21 August 2019 (Ref: General Circular No. 09/2019 available at http://www.mca.gov.in/Ministry/pdf/GeneralCircular_21082019.pdf) (General Circular) clarified that appointed date as contemplated under Section 232(6) of the Companies Act 2013 (Act) can either be a specific calendar date or a date based on the trigger of a specific event.

Background:

A scheme of arrangement (Scheme) approved between or among companies is required to comply with the provisions of sections 230-232 of the Act.

Section 232(6) of the Act requires a Scheme filed under sections 230-232 of the Act to:

".....clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date"

Section 232(3) of the Act requires the National Company Law Tribunal (NCLT) to not sanction any Scheme unless a certificate by the company's auditor has been filed with the NCLT stating that the accounting treatment, if any, proposed in the Scheme is in conformity with the accounting standards prescribed under section 133 of the Act.

The Ministry of Corporate Affairs vide its circular dated 16 February 2015 notified Indian Accounting Standards (Ind AS). Ind AS 103 (which deals with 'Business Combinations') provides that for transactions which are not under common control, the accounting is to be done from the 'acquisition date'.

Ind AS 103 provides guidance on what the acquisition date will be. It states that *"the acquirer shall identify the acquisition date, which is the date on which it obtains control of the acquiree."*

The acquirer usually obtains control of the acquiree upon completion of all the conditions precedent mentioned in the transaction document (which document in an arrangement under sections 230-232 of the Act, is the Scheme).

As on the date of approval of the Scheme by the board of directors of such companies undergoing the Scheme, it was impossible for them to predict the exact date on which

all the conditions precedent would get completed. Accordingly, to comply with the provisions of Section 232(6) of the Act as well as Ind AS 103 as notified under Section 133 of the Act, companies have been defining the '*appointed date*' to mean the '*effective date*'. This was palatable to the auditors as well, who confirmed that the accounting treatment stated in the Scheme (in which the '*appointed date*' has been defined to mean the '*effective date*') is in accordance with applicable laws.

However, subsequently, once the matter was before the NCLT and the Regional Director (representing the Central Government), certain benches as well as officers took a divergent view and stated that section 232(6) requires a specific calendar date and objected to such definition of the appointed date.

The clarification was necessary to align the aforesaid divergent views and interpretations expressed by certain benches of the NCLT as also the Regional Directors. The General Circular puts to rest the belief that the aforesaid section made it mandatory for a Scheme to provide a specific calendar date and the same cannot be based on the trigger of a specific event.

MCA Clarification

The MCA in the aforesaid General Circular relying upon judgment of the Supreme Court in the case of Marshall Sons & Co. India Ltd. v ITO [223 ITR 809] and the judgement of the Madras High Court in the case of In Re: Equitas Finance Limited & Ors. [[2017]136CLA48(Mad)], has put to rest the dichotomy created on account of conflicting views taken on two sub sections of section 232 of the Act, namely 232(3) and 232(6).

MCA has issued the following clarifications:

- Companies have the flexibility to choose the '*appointed date*' and same can either be a specific calendar date or a date linked to the occurrence of an event.
- The General Circular states that if '*appointed date*' is a specific calendar date, it may precede the date of filing of the application for the Scheme with the NCLT. While the General Circular recognizes the bottleneck due to differing interpretations, it also cautions against aggressive reading of the provisions. The General Circular states that if the '*appointed date*' is significantly ante-dated beyond a year from the date of filing, the Scheme will have to provide a rationale for it not being against public interest.
- The '*appointed date*' can be based on the occurrence of a trigger event which is key to the proposed Scheme and agreed upon by the parties to the Scheme. This event would have to be indicated in the Scheme itself, upon occurrence of which the Scheme would become effective. However, in case of such event-based date being a date subsequent to the date of filing the order with the Registrar under section 232(5) of the Act, the company is required to file an intimation of the same with the Registrar within 30 days of such scheme coming into force.
- The '*appointed date*' identified under the Scheme shall also be deemed to be the '*acquisition date*' and date of transfer of control for the purpose of accounting standards.

Comments:

The General Circular is a welcome clarification from the MCA. It clarifies that the appointed date can be tied to the occurrence of an event. It reiterates the settled principles of law under various judicial pronouncements by Indian courts that a Scheme is a commercial contract between the companies involved, their shareholders and the

creditors and the courts would not act as a court of appeal and sit in judgment over the commercial wisdom of the concerned parties to the arrangement. Thus, the General Circular will ensure much needed uniformity and consistency of interpretation in sanctioning of Schemes.

- Mehul Shah (Partner), Sanket Shah (Principal Associate) and Aman Yagnik (Senior Associate)

For any queries please contact: editors@khaitanco.com

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Mumbai

One Indiabulls Centre, 13th Floor
Tower 1 841, Senapati Bapat Marg
Mumbai 400 013, India

T: +91 22 6636 5000
E: mumbai@khaitanco.com

New Delhi

Ashoka Estate, 12th Floor
24 Barakhamba Road
New Delhi 110 001, India

T: +91 11 4151 5454
E: delhi@khaitanco.com

Bengaluru

Simal, 2nd Floor
7/1, Ulsoor Road
Bengaluru 560 042, India

T: +91 80 4339 7000
E: bengaluru@khaitanco.com

Kolkata

Emerald House
1 B Old Post Office Street
Kolkata 700 001, India

T: +91 33 2248 7000
E: kolkata@khaitanco.com