

First Notes



MCA clarifies 'appointed date' and 'acquisition date' in a scheme of arrangement

9 September 2019

First Notes on

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Sector

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Relevant to

All

Audit committee

CFO

Others

Transition

Immediately

Within the next three months

Post three months but within six months

Post six months

Forthcoming requirement

Background

Requirements of the Companies Act, 2013 (2013 Act)

Currently, a company undertaking a scheme of arrangement is governed by the provisions of Section 230 and 232 of the 2013 Act. Different forms of arrangements which may be taken up by companies under Section 230 and 232 of the 2013 Act are as follows:

- Reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods
- Reduction of share capital
- Corporate debt restructuring (consented by not less than 75 per cent of the secured creditors)
- Buy-back of securities
- Take-over offer
- Merger/amalgamation of any two or more companies
- Demerger/division of companies.

The above schemes of arrangement are required to be approved by the National Company Law Tribunal (NCLT).

In case the scheme filed with NCLT relates to:

- Reconstruction of the company or merger/amalgamation between companies and
- It involves transfer of undertaking, property or liabilities of one company to another or is proposed to be divided among and transferred to two or more companies

then, as per Section 232(6) of the 2013 Act, the scheme should indicate an *appointed date* from which it would be deemed to be effective. However, the term 'appointed date' has not been defined under the 2013 Act.

When NCLT approves a scheme, then the order of the NCLT is required to be filed with the Registrar of Companies (ROC) within 30 days of the receipt of certified copy of the order as per Section 232(5) of the 2013 Act.

Requirements of the 2013 Act (cont.)

No compromise or arrangement would be sanctioned by the NCLT unless a certificate by the company's auditor has been filed with the 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 of the 2013 Act.

Requirements of Indian Accounting Standards (Ind AS)

It is important to note that as per the requirements of Ind AS 103, *Business Combinations*, an acquirer needs to identify an 'acquisition date' which is the date on which it obtains control of an acquiree. Such a date is generally the closing date on which the acquirer legally transfers the consideration, acquires the assets and assumes the liabilities of the acquiree.

However, an acquirer could obtain control on a date earlier or later than the closing date (e.g. a written agreement provides that the acquirer obtains control of the acquiree on a date before closing date).



Issue under consideration

The Ministry of Corporate Affairs (MCA) received various queries on determination of 'appointed date' and 'acquisition date' such as whether it is mandatory to indicate a specific calendar date as 'appointed date' in a scheme of arrangement. Also, whether acquisition date for the purpose of Ind AS 103 would be the appointed date as referred in Section 232(6) of the 2013 Act.

New development – MCA clarification

On 21 August 2019, the MCA issued a circular (no.09/2019) and clarified that the provision of Section 232(6) of the 2013 Act is an enabling provision which allows the companies in the scheme to decide and agree upon an appointed date from which the scheme should come into force. Accordingly, the concerned companies can choose and state the agreed appointed date in the scheme.

An appointed date could be a specific calendar date or it could be tied to the occurrence of an event, such as grant of license by a competent authority or fulfilment of any preconditions agreed upon by the parties, or meeting any other requirement as agreed upon between the parties which are relevant to the scheme.

The MCA considered the following two court judgements for the purpose of providing clarification:

- **Appointed date to be stated in the scheme:** The Supreme Court (SC), in the case of *Marshall & Co. India Ltd. vs. ITO*, held that every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer should take place. Such date may precede the date of sanctioning of the scheme by the court, the date of filing of certified copies of the orders of the court before the ROC and the date of allotment of shares. Therefore as per the SC judgement, the scheme would be given effect from the appointed date (transfer date) itself.
- **Appointed date need not be a specific calendar date:** The Madras High Court (HC), in the matter of amalgamation of *Equitas Housing Finance Limited and Equitas Micro Finance Limited with Equitas Finance Limited*, held that the provisions of Section 394(1) of the Companies Act, 1956 (corresponding to Section 232 of the 2013 Act) provided enough leeway to a company to delay the date on which the scheme of amalgamation should take effect and tie the same to the occurrence of an event. Therefore, in the said case, the HC rejected the argument that the appointed date in the scheme should necessarily be a specific calendar date.

Accordingly, based on the above, the MCA provided following clarification:

In case the scheme specifies a calendar date as an appointed date



The appointed date may precede the date of filing of the application for scheme of merger/amalgamation with NCLT. However, if the appointed date is significantly ante-dated beyond a year from the date of filing, the justification for the same has to be specifically provided in the scheme which should not be against the public interest.

In case the appointed date is based on occurrence of an event



The scheme may identify the appointed date based on the occurrence of a trigger event which is key to the proposed scheme and agreed upon by the parties to the scheme. The event on the occurrence of which the scheme would become effective should be indicated in the scheme. In case such event based date is a date subsequent to the date of filing the order with the ROC under Section 232(5) of the 2013 Act, then the company should file an intimation of the same with the ROC within 30 days of such scheme coming into force.

MCA clarification (cont.)

Appointed date and acquisition date



The MCA also clarified that appointed date identified in the scheme would be deemed to be the acquisition date and date of transfer of control for the purpose of conforming to accounting standards (including Ind AS 103).

Our comments

The MCA clarification is expected to bring uniformity in practices followed by companies in India in determining the 'appointed date' while undertaking schemes of amalgamation/merger. As per the clarification, companies would identify an appointed date which could be a specific calendar date or can also be based on occurrence of an event which is key to the proposed scheme. Further, the date specified in the scheme could also be different from the date of order of the NCLT approving the scheme.

Appointed date as specific calendar date

In case the appointed date specified in the scheme is ante-dated beyond a year from the date of filing of the scheme, then the company is required to disclose the reasons for the chosen date in the scheme itself which should not be prejudicial to the public interest. For instance, if the scheme has been filed with the NCLT on 1 September 2019 whereas the appointed date specified in the scheme is 30 July 2018, then in such a case, the reasons for the chosen appointed date need to be provided in the scheme. It should be also ensured the stated reasons are not against the public interest.

Appointed date based on occurrence of an event

In case the appointed date is based on occurrence of an event which is subsequent to the date of filing of order of NCLT approving the scheme, then the company is required to file an intimation with the ROC within 30 days from the effective date (i.e. appointed date) of the scheme.

Appointed date deemed to be the acquisition date

Another important clarification provided by the MCA relates to the 'appointed date' being the 'acquisition date' and date of transfer of control for the purpose of business combinations. However, in certain cases, schemes could be drafted in such a way that companies would need to consider the facts and circumstances of schemes to analyse whether the effective date mentioned in the scheme is same as the appointed date.

Similar guidance was provided by the Ind AS Transition Facilitation Group (ITFG) of the Institute of Chartered Accountants of India (ICAI) in its clarifications' bulletin 12 (dated 23 October 2017)¹. The bulletin, *inter alia*, considered a situation where pursuant to a court scheme, a company gets merged with another company with an appointed date approved by the NCLT. In this case the appointed date was prior to Ind AS implementation date for the company.

Further, in accordance with the requirements of 2013 Act (proviso to Section 232(3)), no compromise or arrangement would be sanctioned by the NCLT unless a certificate by the company's auditor has been filed with the 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 of the 2013 Act.

In the above situation, ITFG clarified that if the NCLT approves the scheme with a different appointed date as compared to the acquisition date as per Ind AS 103, then the appointed date approved by the NCLT would be considered as the acquisition date for business combinations. The company would be required to provide appropriate disclosures and the auditor would need to consider the requirements of relevant auditing standards when issuing its certificate.

It is important to note that, for business combinations under common control the guidance in Appendix C to Ind AS 103 requires that financial information in the financial statements in respect of prior periods should be restated as if the business combination had occurred from the beginning of the preceding period in the financial statements, irrespective of actual date of combination. However, if business combination had occurred after that date, the prior period information shall be restated only from that date. In a business combination under common control, companies do not experience a change in control, and hence, accounting is as per pooling-of-interests method. Therefore, one could argue that the MCA clarification on appointed date applies only to business combinations that are not under common control and accounting of business combinations in common control will continue as per Appendix C to Ind AS 103. MCA should clarify the applicability of this clarification on business combinations under common control.

¹Also refer to KPMG in India's IFRS Notes on 'ITFG issues clarifications bulletin 12' dated 8 November 2017.

Our comments (cont.)

Applicability

The clarifications generally become effective immediately. Accordingly, it is unclear whether a revised scheme of arrangement would be required to be filed by the companies whose scheme is pending for approval by the NCLT in order to confirm to the requirements specified in the circular. MCA should consider providing clarity to this extent.

Ind AS vis-à-vis International Financial Reporting Standards (IFRS)

Under IFRS, an entity cannot decide an appointed date in a business combination. The 'date of acquisition' is the date on which the acquirer obtains control of the acquiree. In certain business combinations, it will require a careful analysis of the facts and circumstances, and judgement will be required to determine the date of acquisition.

Under IFRS, the date of acquisition will usually be the closing date - i.e. the date on which the consideration is legally transferred and when the assets are acquired and liabilities are assumed - but this will depend on the facts and circumstances of each case. Determining the date of acquisition is important because it is the date on which the fair value of the consideration transferred and of the assets acquired and liabilities assumed is determined, and the date on which non-controlling interest and goodwill are measured and recognised. It is also only from this date that the results of the acquiree are included in the consolidated financial statements of the acquirer.

While under Ind AS, as per guidance given by MCA the appointed date would be considered as date of acquisition of a business combination.

Impact on auditor's report

Auditors would need to evaluate the impact on auditor's report while accounting for business combinations as per appointed date due to clarification provided by MCA.



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Missed an issue of Accounting and Auditing Update or First Notes



Issue no. 37 – August 2019

The topics covered in this issue are:

- Key Audit Matters – an analysis of Nifty 50 companies
- Impact of Supreme Court judgement on contribution to provident fund
- SEBI norms relating to insider trading
- Regulatory updates.



The Companies (Amendment) Act, 2019 received Presidential assent

16 August 2019

On 25 July 2019, the Companies (Amendment) Bill, 2019 was presented in the Lok Sabha to replace the Companies (Amendment) Second Ordinance, 2019 (second ordinance). After much deliberations, on 26 July 2019, Lok Sabha passed the Companies (Amendment) Bill, 2019 and on 27 July 2019 it was passed by the Rajya Sabha. On 31 July 2019, the Companies (Amendment) Act, 2019 received the assent of the President of India. Accordingly, the second ordinance stands repealed.

The Companies (Amendment) Act, 2019 incorporates most of the amendments made by the second ordinance and incorporates certain other amendments to the 2013 Act.

This issue of First Notes provides an overview of the key amendments made by the Companies (Amendment) Act, 2019.



Voices on Reporting

KPMG in India is pleased to present Voices on Reporting (VOR) – a series of knowledge sharing calls to discuss current and emerging issues relating to financial reporting.

A special session of VOR webinar was held on 22 August 2019 to discuss key implementation challenges with practical examples arising from application of Ind AS 116, *Leases* from the perspective of the technology sector.

Click here to access the [audio recording](#) (mp3) and [presentation](#) (pdf).

Feedback/queries can be sent to aaupdate@kpmg.com

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