

LEX NEWSLETTER ZONE

Corporate Bytes

- ~ Introduction of Single Master Form and Entity Master Form.
- ~ Mandatory Dematerialization of Shares of Unlisted Companies – Ministry Of Corporate Affairs.
- ~ Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 .

Reserve Bank of India

✚ Introduction of Single Master Form and Entity Master Form

Reserve Bank of India recently vide circular A.P (DIR Series) Circular No. 30 simplified the reporting complexities under Foreign Exchange and Management Act, 1999 (FEMA). The Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2017 (FEMA 2017) provides for 12 different forms as requisite for the purpose of reporting for any foreign investment in India. These reporting of foreign investment are a complicated and cumbersome process making it a deterrent one for both foreign investors and Indian entities.

This Circular has brought in two Master Form namely:

(a) Single Master Form (SMF)

RBI through its "Statement on Developmental and Regulatory Policies" dated April 05, 2018 stated that the reporting of the above

transactions resulting in foreign investment are in a disintegrated manner across various platforms/modes. The Reserve Bank plans to introduce an online reporting by June 30, 2018 via a Single Master Form which would subsume all reporting requirements, irrespective of the instrument through which the foreign investment is made. This Form was brought in pursuance of this policy announcement.

SMF is an online Filing applicable to all the Indian entities including Indian Companies, Limited Liability Partnerships (LLP), Real Estate Investment Trusts (REITs), Infrastructure Investment Trusts (InvIts) and Alternate Investment Funds (AIFs). It is pertinent to note that out of 12 forms, SMF only subsumes the following forms:

- i. Issue of capital instruments by an Indian company to a person resident outside India i.e. Form FC-GPR
- ii. transfer of capital instruments between a person resident outside India and a person resident in India i.e. Form FC-TRS
- iii. FDI in LLP through capital contribution and profit shares i.e. Form LLP-I
- iv. Disinvestment/ transfer of capital contribution and profit shares in LLP i.e. Form LLP – II
- v. Issue of ESOPs / sweat equity shares/ shares against exercise of ESOP by an Indian company to an employee resident outside India i.e. ESOP
- vi. Issue or transfer of convertible notes, i.e., Form CN

- vii. Issue or transfer of depository receipts, i.e., Form DRR
- viii. Reporting of downstream investment (indirect foreign investment) in a company or LLP i.e., Form DI
- ix. Reporting of investment by a person resident outside India in an Investment vehicle i.e., Form InVi

Four forms that remain outside the framework of SMF, are Advance Remittance Form, Annual Return on Foreign Liabilities and Assets, Form LEC (FII) and Form LEC (NRI).

We have observed that the format of SMF can be divided into three parts based on the type of details to be submitted. While the first and last part deals with common information the second part deals with specific information pertaining to the mode or instrument through which the foreign investment is made.

While we presently have a draft SMF to refer and review, it would be interesting to see what the final draft consist of for the future of foreign investment reporting in India.

(b) Entity Master Form

While the wait for final SMF is continuing, RBI has announced opening an interface wherein all Indian entities, including Indian company and LLPs, are directed to input the data on total foreign investment received by such entities till date. The interface is to be active on the website of RBI from June 28, 2018 to July 12, 2018.

All Indian entities which do not comply with this pre-requisite will not be permitted to receive any foreign investment (including indirect foreign investment) going forward and will be declared non-compliant with FEMA and regulations made thereunder.

This is a step by RBI as a diligence method on all Indian entities which have any form of foreign investment to ascertain whether they

have complied with reporting requirements under FEMA till date. This is done with the intention to secure all the data on the online platform. While there is very short time (15 days) provided for entities to upload information on EMF, all the requisite information details have been already intimated so that entities are ready with them in the interim. This seems to be a welcoming and complimentary step towards Government's Ease of Doing Business Policy.

Mandatory Dematerialization of Shares of Unlisted Companies

The Ministry of Corporate Affairs (MCA) has recently initiated a new rule in the Companies Act, 2013 wherein it has made it mandatory for all the Unlisted Public Limited Companies to dematerialize their shareholdings. This move is initiated with a view to enhance Corporate Governance by ensuring greater financial transparency.

The main objective behind initiating this move is to prevent evasion of tax through creation of shell companies and opaque structures which are highly prevalent in the Unlisted Public Limited Companies. With a view to curb tax evasion, and to trace the beneficial owners of shares and to lift the veil on opaque structures and benami ownership, the MCA has made amendments to the existing Companies Act, 2013 by way of passing of the Companies (Amendment) Act, 2017. The amendment has introduced new provisions relating to beneficial ownership and has substituted Section 90 of the principal legislation. The new law prescribes penalties for failure to disclose beneficial ownership.

Any Share Transfers made when held in dematerialized form can be easily traced as the transaction is carried out electronically thereby preventing fraudulent practices such as tax evasion and benami transactions.

Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018.

The President Of India on June 6, 2018 has promulgated an ordinance known as the Insolvency and Bankruptcy Code (Amendment) Ordinance, 2018 with a view to balance the interests of various stakeholders in the Code, especially the interests of home buyers and micro, small and medium enterprises, promoting resolution over liquidation of corporate debtor by lowering the voting threshold of committee of creditors and streamlining provisions relating to eligibility of resolution applicants.

The Ordinance shows the government's efforts to resolve issues that were coming in the way of smooth working of the IBC. The Ordinance plugs in loopholes in the IBC that have drawn criticism in the recent past and had also resulted in the pendency of matters before judicial forums.

The notable amendments brought into effect by the Ordinance are as follows:

The definition of "financial debt" has been expanded to include any amount raised from an allottee under a real estate project which shall be deemed to be an amount having the commercial effect of a borrowing for the purposes of Section 5(8) (f) of the IBC.

The Ordinance provides significant relief to home buyers by recognizing their status as Financial Creditors. This would give them due representation in the Committee of Creditors (CoC) and make them an integral part of the decision making process. It will also enable home buyers to invoke Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) against errant developers.

In light of several parties invoking section 142 of the Constitution of India before the Hon'ble Supreme Court and with an objective to reduce burden of judicial forums, the Ordinance allows withdrawal of applications admitted under section 7, 9 or 10 of IBC with approval of ninety percent voting share of committee of creditors (CoC). (section 12A);

In order to avoid misuse of moratorium under section 14 of the IBC, the Ordinance has kept the corporate guarantors out of moratorium and thus not extended this protection to them. (section 14 (3)(b));

Another major beneficiary would be Micro, Small and Medium Sector Enterprises (MSME), which form the backbone of the Indian economy as the biggest employer, next only to the agriculture sector. Recognizing the importance of MSME Sector in terms of employment generation and economic growth, the Ordinance empowers the Government to provide them with a special dispensation under the Code. The immediate benefit it provides is that, it does not disqualify the promoter to bid for his enterprise undergoing Corporate Insolvency Resolution Process (CIRP) provided he is not a wilful defaulter and does not attract other disqualifications not related to default. It also empowers the Central Government to allow further exemptions or modifications with respect to the MSME Sector, if required, in public interest.

In order to protect the sanctity of the CIRP, the Ordinance lays down a strict procedure if an applicant wants to withdraw a case after its admission under IBC 2016. Henceforth, such withdrawal would be permissible only with the approval of the Committee of Creditors with 90 percent of the voting share. Furthermore, such withdrawal will only be permissible before publication of notice inviting Expressions of Interest (Eoi). In other words, there can be no withdrawal once the commercial process of

Eols and bids commences. Separately, the Regulations will bring in further clarity by laying down mandatory timelines, processes and procedures for corporate insolvency resolution process. Some of the specific issues that would be addressed include non-entertainment of late bids, no negotiation with the late bidders and a well laid down procedure for maximizing value of assets.

With the objective of giving impetus to resolution as opposed to liquidation of corporate debtors, the threshold of voting percentage needed for taking major decisions by the CoC, such as approval of resolution plan has been reduced from 75% to 66% (section 12 (2), 22(2), 27 (2), 28 (3), 30 (4) and 33). Similarly, for taking routine decisions to run the corporate debtor as a going concern, the voting threshold now stands reduced to 51% (section 21 (8)). The objective behind this amendment seems to be to avoid unfortunate situations of liquidation where even though the proposed resolution plan was approved by a majority of the CoC members, the corporate debtor still went into liquidation as the voting percentage fell slightly short of the 75% figure and also to ensure that the routine decisions are not held up in the absence of 3/4th majority;

The introduction of a new Section 25A mandating that the authorized representative of a creditor have the right to participate and

vote in CoC meetings aims to curtail situations where the representatives of creditors do not possess the requisite authority to vote on the agenda of CoC meetings;

The above mentioned changes are expected to further strengthen the Insolvency Resolution Framework in the country and produce better outcomes in terms of resolution as opposed to liquidation, time taken, cost incurred and recovery rate.

Disclaimer

King Stubb & Kasiva ("KSK") Newsletters are meant for informational purpose only and does not purport to be advice or opinion, legal or otherwise, whatsoever. The information provided is not intended to create an attorney-client relationship and not for advertising or soliciting. KSK does not intend to advertise its services or solicit work through this update. KSK or its associates are not responsible for any error or omission in this newsletter or for any action taken based on its contents. Unsolicited mails or information sent to KSK will not be treated as confidential and do not create attorney-client relationship with KSK. © 2017-18 King Stubb & Kasiva, India. All rights reserved.