Amendment to Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016: Provisions for Merger of Foreign Holding Companies with Indian Subsidiaries

Introduction

The Ministry of Corporate Affairs ("**MCA**"), vide Notification No. G.S.R. 555(E) dated September 09, 2024, has introduced amendment to the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, primarily to introduce a new sub-rule (5) to Rule 25A, which governs mergers or amalgamations between a foreign holding company incorporated outside India and its wholly-owned subsidiary incorporated in India. These rules are effective from September 17, 2024.

Amendments

Sub-rule (5) was inserted in Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, to regulate mergers or amalgamations between a foreign transferor company (incorporated outside India) being a holding company and its Indian transferee company (a wholly-owned subsidiary incorporated in India). This amendment introduces a set of procedural and regulatory requirements that must be followed for such mergers or amalgamations. The conditions specified under sub-rule (5) include the following:

i. **Prior approval from the Reserve Bank of India (RBI)**

To ensure regulatory oversight and safeguard the interests of stakeholders, it is mandatory for both the foreign transferor holding company and the Indian transferee subsidiary company to obtain prior approval from the Reserve Bank of India ("**RBI**") before proceeding with the merger or amalgamation. The RBI's approval is a critical step to assess compliance with the applicable provisions of the Foreign Exchange Management Act, 1999, and other relevant regulations governing cross-border mergers.

ii. Compliance with Section 233 of the Companies Act, 2013

The transferee Indian company is required to ensure strict compliance with the provisions of Section 233 of the Companies Act, 2013 ("**Companies Act, 2013**"), which provides a streamlined and fast-track process for mergers and amalgamations involving certain classes of companies. Section 233 of the Companies Act, 2013 lays down simplified procedures that reduce procedural complexities, subject to compliance with conditions specified therein. The transferee company must adhere to the requirements of this section to facilitate the approval and consummation of the merger or amalgamation.

iii. Application to the Central Government under Section 233 of the Companies Act, 2013

The transferee Indian company is also obligated to submit an application to the Central Government in accordance with the provisions of Section 233 of the Companies Act, 2013. This application is to be made after obtaining RBI approval and fulfilling the requirements prescribed under Section 233 of the Companies Act, 2013. Additionally, the procedures laid down under Rule 25 of the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, shall be followed while filing the application. This ensures that all necessary compliances and approvals are obtained before proceeding with the merger or amalgamation.

iv. Declaration at the Application Stage

As per the amended provision, the declaration referred to in sub-rule (4) of Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016 shall be duly furnished at the stage of filing the application under Section 233 of the Companies Act, 2013. This declaration serves as an assurance that the proposed merger or amalgamation complies with the relevant statutory provisions and that all necessary approvals have been obtained. The declaration must be submitted along with the application to the Central Government to demonstrate compliance and establish that the merger or amalgamation is be ing conducted in accordance with the law.

Conclusion

The insertion of sub-rule (5) in Rule 25A of the Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016, introduces a structured framework for mergers or amalgamations between a foreign holding company and its wholly-owned Indian subsidiary. By mandating prior approval from RBI, ensuring compliance with Section 233 of the Companies Act, 2013, and aligning the application process with Rule 25, the amendment aims to streamline regulatory oversight and safeguard the interests of all stakeholders involved in such cross-border transactions.

Kerala State Electricity Board Judgment: Legal Scrutiny of State Government Directives under Section 108 of the Electricity Act,

Introduction

In a landmark judgment in the case of *Kerala State Electricity Board Ltd. v. Jhabua Power Limited and Ors.* ("**Kerala State Electricity Board Judgment**"), the Hon'ble Supreme Court of India ("**Supreme Court**") has provided important clarification on the relationship between State Governments and State Electricity Regulatory Commissions ("**SERCs**"). The Hon'ble Supreme Court ruled that entities such as SERCs, including the Kerala State Electricity Board Limited ("**KSEBL**") in the present matter, are not bound by the policy directives issued under Section 108 of the Electricity Act, 2003 ("**Act**").

Background: Dispute Over Power Procurement and Regulatory Approval in Kerala State Electricity Board Judgment

The dispute centers on the procurement of power by KSEBL through a competitive bidding process under Section 63 of the Act. KSEBL issued two (2) separate tenders, one for 450 MW and another for 400 MW of power. However, the initial bidders ("**L1 Bidders**") did not offer the full quantities required. Thereafter, KSEBL invited additional bidders to match the tariffs quoted by the L1 Bidders for the remaining quantities. While no bidders matched in the first tender, several bidders agreed to match the tariffs in the second tender, leading KSEBL to accept a total of 865 MW, which exceeded the original 450 MW and 400 MW requirements in the tenders.

Subsequently, KSEBL entered into seven (7) Power Supply Agreements ("**PSAs**") with various generators and sought approval from the Ld. Kerala State Electricity Regulatory Commission ("**KSERC**") for the tariffs in the PSAs. Ld. KSERC, however, approved only the tariffs from the L1 Bidders and rejected the tariffs from the additional bidders, citing deviations from the standard bidding guidelines issued by the Ministry of Power, Government of India. Ld. KSERC also pointed out that KSEBL had not obtained prior approval from the Ld. KSERC or the Central Government for these deviations.

The matter was brought before the Hon'ble Appellate Tribunal for Electricity ("**APTEL**") and later escalated to the Hon'ble Supreme Court of India ('**Supreme Court**"), where Ld. KSERC upheld its position, arguing that the tariff set by KSEBL lacked transparency and deviated from the standard bidding process. While the appeal was still pending before Hon'ble APTEL, the Government of Kerala ("**State Government**") invoked Section 108 of the Act on October 10, 2023, issuing a policy directive urging Ld. KSERC to approve the PSAs in the public interest. In response, KSEBL filed a review petition before Ld. KSERC, which, on December 29, 2023, approved four (4) of the PSAs, citing the

public interest emphasized by the State Government's directive. Ld. KSERC argued that it was bound by the State Government's directive and that the directions fell within the scope of "any other sufficient reasons" to review its prior decision under the Code of Civil Procedure, 1908 ("**CPC**"). Two (2) generators challenged the review order before Hon'ble APTEL, claiming it violated procedural requirements under Order XLVII Rule 1 of the CPC and Section 94 of the Act. The Hon'ble APTEL, in its ruling on July 26, 2024 ("**APTEL Order**"), sided with the generators, setting aside Ld. KSERC's order, and the matter was subsequently brought before the Hon'ble Supreme Court for final resolution.

Kerala State Electricity Board Judgment: Boundaries of Policy Directions under Section 108 of the Electricity Act, 2003

The issue before the Hon'ble Supreme Court was whether the SERCs are bound by policy directions issued by the State or Central Government under Section 108 of the Act. The Hon'ble Supreme Court clarified that while the SERCs should be guided by such policy directions, they are not automatically bound by them, as Section 108 only requires the SERCs to be "guided" and does not impinge upon the regulatory or adjudicatory functions vested in the SERCs. This interpretation was supported by the language in Section 11 of the Act, which mandates that generating companies operate under government directions only in extraordinary circumstances, further reinforcing that SERCs retain their discretion to exercise quasi-judicial powers independently.

The Hon'ble Supreme Court also reviewed the APTEL Order which set aside Ld. KSERC's review order. It found that Ld. KSERC's decision, which relied solely on the State Government's directions and the purported public interest, did not meet the legal criteria for a review under Section 94(f) of the Act and Order XLVII Rule 1 of CPC. As a result, the Hon'ble Supreme Court upheld the APTEL Order, but simultaneously allowed for the restoration of the original appeal filed against Ld. KSERC's order, directing Hon'ble APTEL to reconsider it on other grounds raised before the appeal was withdrawn.

Conclusion:

The Kerala State Electricity Board Judgement reinforces the principle of separation of powers within the regulatory framework of the electricity sector. By affirming the independence of SERCs, the Hon'ble Supreme Court ensured that regulatory decisions should be isolated from political or governmental pressures, fostering a fair and transparent environment for energy regulation. This decision not only clarifies the legal relationship between governmental directives and regulatory autonomy but also strengthens the credibility and effectiveness of regulatory bodies in overseeing the electricity sector.

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