

Foreign Companies
and the
Companies Act, 2013

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Foreign Companies and the Companies Act, 2013

The flow.....

- ✓ History of Company Law in India – 100 years
- ✓ Specific Impact of the Companies Act, 2013 on Foreign Companies
- ✓ General Impact of the Companies Act, 2013 on Foreign Companies
- ✓ Questions

History of Company Law in India – 100 years

✓ 1913 Act

- Prior to this was 1850 Act
- Based on English Act
- Decision of English Courts ruled
- Definition of Private Companies introduced
- Start of companies with small capital / family managed businesses
- Was unsatisfactory and amended 14 times till 1951
- Bhabha Committee set up in 1950

History of Company Law in India - 100 years

✓ 1956 Act

- Bhabha committee submits report in 1952
- Act introduced w.e.f. April 01, 1956
- 658 sections and 15 Schedules
- Thereafter amended 18 times till 2006
- Finally on August 30, 2013, replaced by Companies Act, 2013

History of Company Law in India - 100 years

✓ 1960

- Amendments regarding management of companies and remuneration of managers

✓ 1962

- Boards of companies authorized to contribute without any limits to National Defence

✓ 1963

- Tribunal and Company Law Board for dispute redressal

History of Company Law in India – 100 years

✓ 1964

- For effective investigation, protection provided to employees and Govt. Officers (S.635A)

✓ 1965

- Proper maintenance of books, audit and age limit of directors were introduced

✓ 1966

- Inter corporate investments and guarantees equated to inter corporate loans for restrictions

History of Company Law in India - 100 years

✓ 1967

- Abolishes the system and power of Tribunal and restores it to Govt. and Courts.

✓ 1969

- Political contribution debarred
- Abolishes Managing Agents, treasurers and secretaries

History of Company Law in India - 100 years

✓ 1974

- Deemed Public Company
- Rules for acceptance of Deposits
- Separate bank account for unclaimed dividend for Public unlisted companies
- Prohibition of appointment of Sole Selling Agents by Govt.
- Appointment of Secretary

History of Company Law in India - 100 years

✓ 1977

- Acceptance of Deposits provisions relaxed
- Board empowered to make donation for charitable purpose upto Rs.50,000

✓ 1985

- Non Government companies permitted to make Political Contributions, directly or indirectly

History of Company Law in India - 100 years

✓ 1988

- Appointment of Managing Director or Whole Time Director made compulsory for certain size of companies
- Setting up of Company Law Board
- CARO reporting introduced
- Dispensation of approval managerial appointments and remuneration subject to prescribed guidelines

History of Company Law in India - 100 years

✓ 1999

- Buy back of securities permitted
- Issue of Sweat Equity shares enabled
- IEPF proposed
- NACAS proposed
- Companies freed from obtaining Government approval for intercorporate investing /lending

History of Company Law in India - 100 years

✓ 2000

- Minimum capital introduced
- If change of Registered office changes jurisdiction of ROC, RD approval required
- S.43A becomes inoperative
- SEBI's powers strengthened for transfer of securities and non payment of dividend
- Measures to protect small deposit holders' interests.

History of Company Law in India - 100 years

✓ 2002

- Differential dates notified for operation of varied sections.
- NCLT introduced - legal battle continues in Supreme Court

✓ 2006

- Electronic filing introduced
- DIN introduced

History of Company Law in India – 100 years

✓ 2013

- Better Governance
- Increased responsibilities of Directors
- Class Action Suits
- Auditors' responsibility increased
- Stricter Regulatory mechanisms
- Auditing Standards
- Corporate Social Responsibility
- Wider application to private companies
- Ease in conduct of meetings
- Aligned to global legislations

Specific Impact of the Companies Act, 2013 on Foreign Companies

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What is a Foreign Company ?

- ✓ Section 2(42) “foreign company” means any company or **body corporate** incorporated outside India which :-
 - (a) has a place of business in India **whether by itself or through an agent**, physically or **through electronic mode**; and
 - (b) **conducts any business activity in India in any other manner.**

Specific Impact of the Companies Act, 2013 on Foreign Companies

Scope increased to cover body corporates

- ✓ Limited Liability Partnerships brought into the ambit.

What is meant by through an agent?

- ✓ BMW car dealer – would he be covered?
- ✓ Multiple agent
- ✓ Service Provider

Electronic mode?

- ✓ Online selling portals, search engines, data subscription portals, online coaching portals etc.

Specific Impact

Conducts any business activity in India in any other manner

- Too wide!
- Is that the intention?

What are the ramifications?

- Should register itself under the Companies Act, 2013
- Comply with requirements like accounts, audit, inspection etc.
- Would it mean admission of Permanent Establishment in India?

Specific Impact

Indian Subsidiary of Foreign Companies

Are they deemed Public Companies?

Section 2(71): “Public company” means a company which –

(a) is not a private company;

(b) has a minimum paid-up share capital of five lakh rupees or such higher paid-up capital, as may be prescribed:

Provided that a company which is a subsidiary of a company, not being a private company, shall be deemed to be public company for the purposes of this Act even where such subsidiary company continues to be a private company in its articles.

Specific Impact

Indian Subsidiary of Foreign Companies

Are they deemed Public Companies?

Section 2(87): *“Subsidiary company” or “subsidiary”, in relation to any other company (that is to say the holding company), means a company in which the holding company.....*

*Explanation. – For the purposes of this clause, –
(c) the expression “company” includes any body corporate;*

Specific Impact

Indian Subsidiary of Foreign Companies

What is dropped from the Old Act?

4 (7) A private company, being a subsidiary of a body corporate incorporated outside India, which, if incorporated in India, would be a public company within the meaning of this Act, shall be deemed for the purposes of this Act to be a subsidiary of a public company if the entire share capital in that private company is not held by that body corporate whether alone or together with one or more other bodies corporate incorporated outside India.

Specific Impact

Areas of concern:

- ✓ Whether private subsidiary of a foreign public company is deemed to be a public company?
- ✓ Whether the deemed public companies are viewed by the law as public companies and are subject to all compliances applicable to public companies, even though these companies may be operating as private companies do?
- ✓ Impact on Foreign Direct Investment?

Specific Impact of the Companies Act, 2013 on Foreign Companies

Interpretations on deemed public company

Option 1 - A literal and technical interpretation of the 2013 Act would suggest that a subsidiary of a foreign company will not fall within the purview of the definition of a public company in section 2(87) and hence it will continue its status as a private company

Option 2: A broader interpretation of the 2013 Act would suggest that a private subsidiary of a public company (whether Indian or foreign) would be deemed to be a public company

Specific Impact

Cross Border Mergers

- ✓ Section 234 of the new Act permits cross-border mergers i.e., merger of Indian and foreign companies. This was not permitted under the Old Act.
- ✓ Reserve Bank of India ("**RBI**") will play a significant role in such mergers as the approving authority along with Central Government.
- ✓ Foreign company to comply with the provisions relating to valuation of assets by registered valuers along with pricing guidelines as per FDI policy

Comparison chart

Particulars	Companies Act, 2013	Companies Act, 1956
Documents required for registration	<ul style="list-style-type: none">• Particulars of opening and closing of place of business in India on earlier occasion or occasions• Director declaration for non conviction/ not being debarred	No such information was required to be submitted

Comparison chart

Particulars	Companies Act, 2013	Companies Act, 1956
Nature of capital	Permitted to invite public in India by issuing prospectus to subscribe to their securities	Permitted issue of shares and debentures only
Change in particulars of statute, charter, directors, secretary, registered address of foreign company	ROC to be intimated within 30 days of such change	Act did not specify any time. However relevant rules prescribed the same

Comparison chart

Particulars	Companies Act, 2013	Companies Act, 1956
Service of documents	Can be served through electronic mode	Had to be served only through physical mode
Accounts of foreign company	Additional disclosure of related party transactions is required	No such requirement
Punishment for contravention	<ul style="list-style-type: none"> • Penalty amounts has been significantly increased • Imprisonment for continuing default 	Penalty amount was very nominal

Specific Impact of the Companies Act, 2013 on Foreign Companies

✓ Positive impacts

- Employee stock options may also be granted to directors, officers and employees of holding or subsidiary of the Company
- Allows a subsidiary company to hold shares in its holding company: even if Holding or subsidiary is beneficiary of the same
- Service of documents on foreign company can now also be served through any electronic mode

Specific Impact of the Companies Act, 2013 on Foreign Companies

Areas of concern:

- ✓ Whether an Indian subsidiary of a foreign company has to consolidate its parent's financial statements (including cash flow statement) with its own?
- ✓ Financial Year
Whether foreign companies are required to follow financial year ending March 31?

Specific Impact of the Companies Act, 2013 on Foreign Companies

Areas of concern:

✓ Interested shareholders not to vote – How to deal with contracts between holding company and subsidiary company?

✓ Rotation of auditors

Foreign companies prefer their MNC auditors' to be auditors for the group entity. Auditors' of subsidiary company will be subject to rotation

Specific Impact of the Companies Act, 2013 on Foreign Companies

Areas of concern:

- ✓ Investment through more than two layers of investment companies is not permitted.

Whether acquisition of a foreign company which has investment subsidiary beyond 2 layers as per the relevant foreign law?

- ✓ Loans (as also guarantees/securities in respect thereof) and investments by a private company or by a holding company to or in its wholly owned subsidiary would also be covered by the provisions.

Specific Impact of the Companies Act, 2013 on Foreign Companies

Areas of concern:

- ✓ Whether foreign companies are required to comply with board meeting and AGM requirements?
- ✓ Extension of applicability of the 'winding up' provisions to closure of place of business in India for foreign entities

Closure of the place of business in India by any foreign company would require a prior approval from a Tribunal

General Impact of the Companies Act, 2013 on Foreign Companies

General Impact of the Companies Act, 2013 on Foreign Companies

- ✓ Positive impacts
 - Company can maintain minutes and registers in electronic form
 - Financial Statement should include Cash Flow Statement
 - Key Managerial Personnel in relation to a company includes Company Secretary and Chief Financial Officer
 - Appointment of Women director

General Impact of the Companies Act, 2013 on Foreign Companies

✓ Positive impacts

- Number of members has been increased from 50 to 200 in Private Companies
- Remuneration includes perquisites as defined under the Income-tax Act, 1961
- Limits for political contribution by Company have been increased to 7.5% from 5 %
- Right to file class action suit

General Impact of the Companies Act, 2013 on Foreign Companies

✓ Negative impacts

- Certain powers which under section 293 of the Companies Act, 1956 can be exercised by Board with the approval of general meeting only, are now applicable to Private Companies also
- No Company shall give any loan or provide any security or guarantee in connection with loan to a Director or any other person in whom he is interested

General Impact of the Companies Act, 2013 on Foreign Companies

✓ Negative impacts

- At least one Director should be a person who has stayed in India for a total period of not less than 182 days in the previous calendar year
- Mandatory CSR (Corporate Social Responsibility) contribution

Questions?

Thank You

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