CA Amit Mahajan

COMPANIES INCORPORATED OUTSIDE INDIA (FOREIGN COMPANY)

Section Summary

Section Summary	
Section Numbers	Content
379	Application Of Act To Foreign Companies
380	Documents, Etc., To Be Delivered To Registrar By Foreign Companies
381	Accounts Of Foreign Company
382	Display Of Name, Etc., Of Foreign Company
383	Service On Foreign Company
384	Debentures, Annual Return, Registration Of Charges, Books Of Account And Their Inspection
385	Fee For Registration Of Documents
386	Interpretation
387	Dating Of Prospectus And Particulars To Be Contained Therein
388	Provisions As To Expert's Consent And Allotment
389	Registration Of Prospectus
390	Offer Of Indian Depository Receipts
391	Application Of Sections 34 To 36 And Chapter XX
392	Punishment For Contravention
393	Company's Failure To Comply With Provisions Of This Chapter Not To Affect Validity Of Contracts, Etc

Definition of Foreign Company

Any Co or Body Corporate (BC) incorporated outside India which-

a). Has a place of business in India whether by itself or through an agent, physically or through electronic mode &

b) Conducts any business activity in India in any other manner Branch Offices = reflection of the Parent Co's office



Sec 379 – Application of Act to foreign companies

- 1. Section 380 to 386 & Section 392 and 393 = applicable to foreign companies
- 2. If > 50% of PUSC of company is held (singly or in aggregate) by
 - 1 or more Indian citizens
 - 1 or more Companies / BCs incorporated in India
 - 1 or more Indian citizens and 1 or more BCs incorporated in India
- 3. Such companies shall comply with provisions of CA, 2013 as if such companies are incorporated in India



Sec 380 – Documents to be delivered to ROC by foreign companies

- Every foreign company shall deliver the following documents to ROC for registration –
 - Certified copy of the charter, statutes or MOA and AOA, of the company or other instrument defining the constitution of the company.
 If the instrument is not in English a certified translation thereof in the English language
 - Full address of Registered Office or Principal Office

- Full address of Principal Place of business in India
- Name & Address of 1 or more persons resident in India authorized to accept on behalf of Co service of process & any notices
- Particulars of opening and closing of a place of business in India on earlier occasion(s)
- List of Directors & Secretary of Co
- Declaration that none of directors have ever been convicted or debarred from formation of companies & management in India or abroad
- Time limit < <u>30 days</u> of establishment of place of business in India by Foreign Company (Form FC-1)
- Alterations in documents submitted Intimate ROC < 30 days of such change in Form FC-2
- 4. Docs to be delivered to ROC having jurisdiction over New Delhi + Prescribed fees
- If any Foreign Co ceases to have a place of business in India give notice to ROC. From that day notice – any obligation of Co to deliver any doc to ROC – ceases provided it has no other place of business in India

Sec 381 – Accounts of the foreign companies

- Every foreign company prepare and file with ROC P&L and B/S
- If not in English a certified transltion in English to be annexed
- Time limit for filing with ROC every calendar year
- List of places of business established in India as at the date of Balance Sheet – to be filed with ROC

Preparation of Financial Statement

- To be prepared in Form **Schedule III**
- All necessary documents required for prep of FS to be annexed with FS
- All documents of CFS of parent foreign company as submitted by the company to the prescribed authority (outside India in the country of incorporation)
 - Along with FS, Company to file
 - Statement of **RPT**
 - Statement of repatriation of profits
 - Statement of transfer of funds (including dividends)
- **Time limit for filing** 6 months from end of FY + ROC may extend it by 3m (Period not exceeding 3 months)
- Audit Accounts of Indian business operations –to be audited by a practicing CA / Firm / LLP



Sec 382 - Display of names of foreign company

 Duty of FC to exhibit its name etc outside place of business in India 1. NAME | 2. COUNTRY OF INCORPORATION | 3. FACT THAT THE LIABILITY OF MEMBERS IF LIMITED

<u>To be written in</u>

- Letters easily legible in English character
- Legible character of one of the local languages
- Every foreign company shall exhibit in legible English character 1. NAME
 | 2. COUNTRY OF INCORPORATION | 3. FACT THAT THE LIABILITY OF
 MEMBERS IF LIMITEDIn all business letters / bill heads / letter papers /
 notices / other official publications of the company



Sec 383 – Service of documents on foreign company

Any document required to be served on a foreign company shall be deemed to be sufficiently served if -

- It is addressed to any person whose name and address have been delivered to ROC u/s 380 AND
- 2. left at, or sent by post to, address which has been so delivered to Registrar or by electronic mode



Sec 384 – Debentures, annual return, registration of charges, books of account and their inspection

- Provisions of Sec 70 (Issue of Debentures) to be applied mutatis mutandis to foreign company
- Provisions of Sec 92 and Sec 135 with certain modification shall apply to Foreign Company
 - Foreign company to prepare Annual Return
 - AR filed with ROC < 60 days of last day of FY
- Provisions of section 128 (Books of account, etc., to be kept by company) shall apply to a foreign company (w.r.t. its Indian business)
- Provisions of registration of charge Applicable to FC
- Provisions of Inspection, Inquiry, investigation Applicable to FC



As per this chapter – if there is any requirement of payment of fees – such fees to be paid to ROC



Sec 386 – Interpretation

- "Certified" means certified in the prescribed manner to be a true copy or a correct translation;
- "Director", in relation to a foreign company, includes any person in accordance with whose directions or instructions the Board of Directors of the company is accustomed to act; and
- 3. "Place of business" includes a share transfer or registration office.

Further, to qualify as a 'foreign company' a company must have the following features:

- a) it must be incorporated outside India; and
- b) it should have a place of business in India.
- c) That place of business may be either in its own name or through an agent or may even be through the electronic mode; and
- d) It must conduct a business activity of any nature in India.
 - (i) Therefore, a company incorporated outside India having a share registration office at Mumbai will be treated as a foreign company provided it conducts any business activity in India.
 - (ii) In the case of a company incorporated in Singapore for the purpose of carrying on business in Singapore, it will not fall within the definition of a foreign company. Its incorporation outside India by Indian citizen is immaterial. In order to be a foreign company it has to have a place of business in India and must also conduct a business activity in India

Sec 386 – Interpretation

1. Prospectus should not issued, circulated and distributed unless it is dated and signed

CA Amit Mahajan

Additional notes

- 2. It should contain the following particulars
 - 1. The instrument constituting or defining the constitution of the company
 - 2. The enactments or provisions by or under which the incorporation of the company was effected
 - 3. Address in India where the said instrument, enactments or provisions and if the same are not in the English language, a certified translation thereof in the English language can be inspected;
 - 4. Date on which and the country in which the company would be or was incorporated; and
 - 5. Whether the company has established a place of business in India and, if so, the address of its principal office in India
- No waiver of compliance in prospectus Section does not provide any exception w.r.t. the non-compliance of the requirements stated under section 387 (1) by any person responsible for issuing or circulating prospectus

4. Application form to be accompanied with prospectus

- No person shall issue to any person in India a form of application of securities unless the form is issued with a prospectus which complies with the provisions of this Act
- However this requirement is NA = if it is shown that the form of application was issued in connection with a bona fide invitation to a person to enter into an underwriting agreement w.r.t. securities NON APPLICABILITY
 - Company incorporated o/s India (whether or not it has a place of business in India) OR
 - Company to be incorporated o/s India (whether or not it will establish a place of business in India)

CA Amit Mahajan

Additional notes

Sec 388 – Provisions as to expert's consent and allotment

Where prospectus includes statement purporting to be made by an expert – prospectus shall not be issued, circulated, distributed if –

- 1. Expert has not given his consent to issue prospectus
- 2. Expert withdrawn his consent before delivery of prospectus for registration
- 3. Prospectus does not contain a statement that expert has given and not withdrawn his consent

If the prospectus does not have the effect, where an application is made in pursuance thereof, of rendering all persons concerned bound by all the provisions of section 33 (Issue of application forms for securities) and section 40 (Securities to be dealt with in stock exchanges)

A statement shall be deemed to be included in a prospectus, if it is contained in any report or memorandum appearing on the face thereof or by reference incorporated therein or issued therewith

Sec 389 – Registration of prospectus

Prospectus shall not be issued, circulated or distributed unless

- A certified copy of prospectus is delivered to ROC for registration
- Prospectus states on the face of it that copy has been delivered to ROC
- Expert's consent is attached to the prospectus

Documents to be annexed to prospectus -

- Consent from expert
- Contracts for appointment of MD / Manager
- Other material contracts not entered in ordinary course of business but within preceding 2 years
- Copy of underwriting agreement
- POA, if prospectus is signed by authorized person

Manner of certification

Copy shall be certified by CP and 2 other directors of the company

CA Amit Makajan

Sec 390 – Offer of Indian Depository Receipts

CG may make rules applicable to offer of IDR & manner in which IDR shall be dealt with in depository mode & by custodian & underwriters

According to Rule 13 of the Companies (Registration of Foreign Companies) Rules, 2014, no company incorporated or to be incorporated outside India, whether the company has or has not established, or may or may not establish, any place of business in India shall make an issue of Indian Depository Receipts (IDRs) unless it complies with the conditions mentioned under this rule, in addition to the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2009 and any directions issued by the Reserve Bank of India



Sec 391 - Application Of Sections 34 To 36 And Chapter XX

According to sub-section (1), the provisions of sections 34 to 36 (both inclusive) shall apply to—

- 1. Issue of a prospectus by a company incorporated outside India under section 389 as they apply to prospectus issued by an Indian company;
- 2. Issue of IDR by a foreign company
- Section 34 deals with criminal liability for mis-statements in prospectus.
- Section 35 deals with Civil Liability for mis-statement in prospectus.
- Section 36 deals with punishment for fraudulently inducing persons to invest money
- Chapter XX Provisions of winding up of a company



Sec 393 – Company's failure to comply with provisions of this chapter not to affect validity of contracts etc

If company fails to comply with the provisions of this chapter - consequences shall be as under

- Validity of any contract, dealing or transaction entered into by the company shall not be affected
- Company may be sued w.r.t. such contracts
- If provisions of CA, 2013 not complied = Company shall not be entitled to bring any suit, claim any set-off, make any counter-claim or institute any legal proceeding in respect of any such contract, dealing or transaction – until provisions are satisfied



Rule 12 Of Companies (Registration Of Foreign Companies) Rules, 2014

Action for Improper Use or Description as Foreign Company: It states that if any person or persons trade or carry on business in any manner under any name or title or description as a foreign company registered under the Act or the rules made thereunder, that person or each of those persons shall, unless duly registered as foreign company under the Act and rules made thereunder, shall be liable for investigation under section 210 of the Act and action consequent upon that investigation shall be taken against that person