



PRIMER ON APPLICABILITY OF COMPANIES ACT, 2013 ON FOREIGN COMPANY

Normally, the term Foreign Company is understood from a common man's view to denote a company which is incorporated and or operated outside the country. However, in order to be engaged in a business in India, it is not necessary that a company must be incorporated or registered in India.

The Companies Act, 2013 ("the Act") provides that a foreign company which is having a place of business in India and / or carries on its business in India, will require such foreign company to complete certain formalities and continue to comply with the requirements under the said Act.

A foreign company simply put is a company or a body corporate incorporated outside India which either:

- 1) does not do business in India or
- 2) which has a place of business in India and / or does business activity in India.

While Act does not concern a foreign company which has no place of business or does not have business activity in India, foreign companies which have a place of business in India or carrying on business activity in India, can fall under the following two categories:



- a) a foreign company in which more than 50% capital is held by citizens of India or by companies or by bodies corporate incorporated in India so therefore or
- b) a foreign company in which capital is not held/ held less than 50% by citizens of India or by companies or by bodies corporate incorporated in India.

Hence, the Act requires two kinds of foreign companies to be regulated:

- (i) a foreign company having a place of business and or doing business in India and
- (ii) a foreign company doing business in India in which more than half of its capital is held by Indian citizens or companies or bodies corporate incorporated in India.

One many wonder as to why further classification as regards ownership of a foreign company is required. In respect of a foreign company, where more than half of its capital is held by Indian citizens or companies or bodies corporate incorporated in India, the Act empowers the Government to prescribe such of those provisions of the Act as regards business carried on by it in India, to be applicable and required to be complied by such foreign company, as if it were a company incorporated in India. Hence based on the nature of ownership of a foreign company, further compliance of provisions of the Act can be made applicable for such foreign companies which have a place of business or doing business in India.

As regards the foreign company, the place of business need not necessarily be a physical office in India. It could simply operate through electronic means or mode and the foreign company could operate such place of business by itself or through an agent.

Carrying on business on electronic mode means carrying out electronically, whether main server is installed in India or not, including, but not limited to business to business and business to consumer transactions, data interchange and other digital supply transactions and includes

- (i) offering to accept deposits or inviting deposits or accepting deposits or subscriptions in securities, in India or from citizens of India;
- (ii) financial settlements, web-based marketing, advisory and transactional services, database services and products, supply chain management;
- (iii) online services such as telemarketing, telecommuting, telemedicine, education and information research;
- (iv) all related data communication services; and



whether conducted by e-mail, mobile devices, social media, cloud computing, document management, voice or data transmission or otherwise.

A foreign company having a share transfer or a share registration office in India is also deemed to have place of business in India

Once a foreign company meets the above ingredients, further classification or categorization will be required to be done in order to find out whether the not less than 50% of the capital of the foreign company is held by Indian citizens or companies or bodies corporate incorporated in India in order to assess other compliances, if any notified by the Government under the Act.

Therefore, foreign companies desirous of entering market in India must first apply mind on the compliance requirements under the Companies Act, so that they are not running into any difficulty after establishing their business activities.

There are two major consequences under the Companies Act if a foreign company to which chapter XXII applies fails to comply with the provisions. Firstly, the contravention is a punishable offence as stated in Section 392. Secondly, the validity of contracts / dealings / transactions entered into by the company or its liability to be sued in respect thereof, shall not get affected, but the 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 the company complies with the provisions of this Act as applicable to it. This provision creates a legal disability to enforcing valid contracts if a foreign company has been in default in complying with the provisions of the Companies Act, 2013. However, this disability will automatically get removed upon compliance of the applicable provisions. Similar legal disability could be found under Section 69 of the Indian Partnership Act, 1932, though on some other ground stated therein. This legal disability will continue to apply even if such contracts are sought to be enforced through arbitrations outside the country.

You would have noticed that by a Notification dated 5th August 2021 issued by the Ministry of Corporate Affairs, the Government of India had granted exemption to companies incorporated or to be incorporated outside India (this expression obviously includes foreign companies too) from the applicability of provisions of Sections 387 to 392 of the Companies Act, 2013 (both inclusive) relating to offering for subscription in the securities, requirements related to the prospectus, and all matters incidental thereto in the International Financial Services Centres set up under section 18 of the Special Economic Zones Act, 2005 (28 of 2005).

In addition to the above, a foreign company proposing to establish a place of business in India is required to comply with the Foreign Exchange Management (Establishment in India or a Branch Office or Liaison Office or a Project Office or any other Place of Business) Regulations, 2016.



However, no such approval is required for establishing a branch office in the Special Economic Zones to undertake manufacturing or service activities subject to the conditions that:

- (i) Such branch office functions in those sectors where 100% Foreign Direct Investment is permitted;
- (ii) Such branch office complies with Chapter XXII of the Act as detailed above; and
- (iii) Such branch offices function on a stand-alone basis.

Foreign companies can make use of Make in India Scheme promoted by Ministry of Commerce and Industry, Government of India to set up manufacturing units in India under the 27 focus sectors identified under the said Scheme. This primer will help such foreign companies in understanding the scope of applicable law as regards entity registration and regulation in India.

Therefore, we advise foreign companies to note these important requirements and act in terms of the applicable law.

CENTRAL OFFICE	BRANCH OFFICE	BRANCH OFFICE
Indus Chamber No.101, Govt Arts College Road, Coimbatore – 641018. Tel No: - (0422)2302868, 4952868 Email: info@ksrandco.in Linked in: gene@ksrandco.in	Flat No.1, 26/27, Venkatesham Flat, Gopal Street, T-Nagar, Chennai – 600 017. Tel No: - (044)24337620, Email: chennai@ksrandco.in	S-311, 3 rd Floor, South Block, Manipal Centre, No.47, Dickenson Road. Bangalore – 560042, Tel No: - 9901400995 Email: bangalore@ksrandco.in