“Appointed Date” vs “Effective Date” which will prevail under Ind AS regime?

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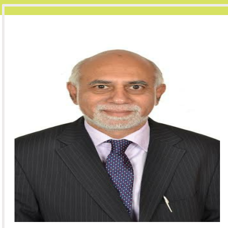

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Generally, the schemes relating to mergers, amalgamations, and demergers have two important dates, i.e., appointed date and effective date. The appointed date is understood as the date from which the scheme comes into force (and is usually specified in the scheme of arrangement), and the effective date is the date when the amalgamation/merger is completed in all respects after having gone through the formalities involved and the transferor company having been liquidated by the Registrar of Companies, which is, generally on the approval of the High Court and filing the necessary documents thereof with the Registrar of Companies. Accounting for amalgamations and demergers has hitherto been governed by Accounting Standard on “Accounting for Amalgamations” (“AS 14”). Now, with effect from April 1, 2016, listed companies falling into certain specified categories have had to migrate to the Indian Accounting Standards.

Indian Accounting Standard 103 (“Ind AS 103”) dealing with “Business Combinations” would be relevant for the purpose of accounting for amalgamations/ demergers, etc. Ind AS 103 has introduced the concept of “acquisition date”.

Paras 8 and 9 of Ind AS 103 deal with determination of acquisition date and read as under:

“Determining the acquisition date

8. The acquirer shall identify the acquisition date, which is the date on which it obtains control of the acquiree.

9. The date on which the acquirer obtains control of the acquiree is generally the date on which the acquirer legally transfers the consideration, acquires the assets and assumes the liabilities of the acquiree—the closing date. However, the acquirer might obtain control on a date that is either earlier or later than the closing date. For example, the acquisition date precedes the closing date if a written agreement provides that the acquirer obtains control of the acquiree on a date before the closing date. An acquirer shall consider all pertinent facts and circumstances in identifying the acquisition date.”(Emphasis supplied)

As per Ind AS 103, the business combination is required to be recorded with effect from the acquisition date, and the acquisition date is the date on which the acquirer obtains control of the acquiree. Para 9 provides that the date when acquirer obtains

control of the acquiree is generally the date when the acquirer legally transfers the consideration, and acquires and assumes the assets and liabilities of the acquiree, which is the closing date.

In many cases, the acquisition date depends on shareholders and regulatory approvals required to transfer the control. Now, where the agreement is conditional upon receiving some form of regulatory approval, and such approval is a substantive hurdle, such as approval of the High Court or the Tribunal, it is being contended by various corners that it may be difficult to say that control is obtained prior to the approval.

Therefore, currently, there is a view floating that under the Ind AS regime, it is the effective date or the closing date that would be the acquisition date, thereby disregarding the concept of “appointed date” as understood by us.

Does this mean that the concept of “appointed date” is now redundant, and the scheme would come into force only when it is passed by the High Court?

In order to deal with the above question, it is relevant to give meaning to the entire language of Paras 8 and 9 of Ind AS 103. Firstly, Para 9 provides that “generally” the closing date, that is the date when the acquirer legally transfers the consideration, and acquires and assumes the assets and liabilities of the acquiree is the date when control is obtained. The word “generally” implies that exceptions are not ruled out.

Secondly, the standard acknowledges that in certain cases, say, by an agreement, the acquirer may obtain control of the acquiree on a date which is either earlier or later than the closing date. A scheme of arrangement between the transferor and transferee companies, which has received the sanction of the High Court is nothing but an agreement, which can provide that control can be obtained on the appointed date, which may be a date other than the closing date.

Thirdly, the Standard specifically states that in determining the acquisition date, all the pertinent facts and circumstances have to be considered. Further, the appointed date in a Scheme is nothing but the intended date of transfer between the parties to the agreement, i.e. the scheme of arrangement. While determining the point of transfer of the business in the case of amalgamation or demerger, would it not be of utmost relevance to consider the intention of the parties to the scheme of arrangement? Also normally, in case of any sale or transfer, the point of transfer is that point when all risks and rewards in relation to ownership are transferred.

Therefore, it is pertinent to note that even Ind AS 103 recognises that it is not an absolute rule that the closing date or effective date would be regarded as the effective date for the scheme of arrangement, and would have to be determined considering all facts and circumstances of the matter, which would include the intention of the parties to the scheme of arrangement. In such a scenario, to say that the concept of appointed date is now redundant would not be appropriate.

It is true that “appointed date” has not been defined at any place under AS 14 or under the Companies Act, 1956 (“the 1956 Act”). However, it was always understood to mean the date provided in the scheme which is the intended date for the scheme to be operative from. The Supreme Court in the case of Marshall Sons & Co. (India) Ltd. V. Income Tax Officer (223 ITR 809) explained the date from which an amalgamation

would take effect. The relevant extract of the decision is reproduced hereunder:

"Every scheme of amalgamation has to necessarily provide a date with effect from which the amalgamation/transfer shall take place. The scheme concerned herein does so provide, viz., 1-1-1982. It is true that while sanctioning the scheme, it is open to the Court to modify the said date and prescribe such date of amalgamation/transfer as it thinks appropriate in the facts and circumstances of the case. If the Court so specifies a date, there is little doubt that such date would be the date of amalgamation/date of transfer. But where the Court does not prescribe any specific date but merely sanctions the scheme presented to it - as has happened in this case - it should follow that the date of amalgamation/date of transfer is the date specified in the scheme as \'the transfer date\'. It cannot be otherwise. It must be remembered that before applying to the Court under section 391(1), a scheme has to be framed and such scheme has to contain a date of amalgamation/transfer. The proceedings before the Court may take some time; indeed, they are bound to take some time because several steps provided by sections 391 to 394A and the relevant Rules have to be followed and complied with. During the period, the proceedings are pending before the Court, both the amalgamating units, i.e., the transferor company and transferee company may carry on business, as has happened in this case but normally provision is made for this aspect also in the scheme of amalgamation. In the scheme before us, clause 6(b) does expressly provide that with effect from the transfer date, the transferor company (subsidiary company) shall be deemed to have carried on the business for and on behalf of the transferee company (holding company) with all attendant consequences. It is equally relevant to notice that the Courts have not only sanctioned the scheme in this case but have also not specified any other date as the date of transfer/amalgamation. In such a situation, it would not be reasonable to say that the scheme of amalgamation takes effect on and from the date of the order sanctioning the scheme. We are, therefore, of the opinion that the notices issued by the ITO (impugned in the writ petition) were not warranted in law. The business carried on by the transferor company (subsidiary company) should be deemed to have been carried on for and on behalf of the transferee company. This is the necessary and the logical consequence of the Court sanctioning the scheme of amalgamation as presented to it. The order of the Court sanctioning the scheme, the filing of the certified copies of the orders of the Court before the Registrar of Companies, the allotment of shares, etc., may have all taken place subsequent to the date of amalgamation/transfer, yet the date of amalgamation in the circumstances of this case would be 1-1-1982."

In fact, even in the context of a private agreement of transfer, the Supreme Court in the case of Dalmia Cement Ltd v. CIT (237 ITR 617)(SC) held that the relevant date of transfer is the date mentioned in the agreement, even though the actual transfer happened on a later date. The relevant extract of the decision is reproduced hereunder:

"The sale transaction in fact has taken place and as such, there being any contingency, as was there at the earlier point of time, does not arise. The event has taken place and the Supplemental Agreement dated 02-11-1962 makes the situation clear and categorical. The parties agreed the relevant date to be 30-09-1962 and not the completion of sale. Clause 3 of the agreement of which, the High Court made a special reference and interpreted that by reason of the contingent event which would be subsequent to the accrual of profits, the profit cannot but be treated to be in the hands of the assessee, does not withstand the test of correctness. The High Court has not

attached any importance to the event which stands completed by reason of the sale agreement. There is no question of enabling the assessee to retain the profit in its own hand after the 'sale agreement'. The event as noticed above has taken place and by reason of the event and in terms of the provisions of the agreement the question of tracing the profit in the hands of the assessee does not and cannot arise. In any event profits of a business do not accrue from day-to-day but at the end of the accounting year. Profits were ascertained on 30-9-1964 when the property was transferred, as such for the year 1965-66, as noted above, question of profit accruing to the assessee does not arise. As a matter of fact, the profit stands diverted to the purchaser in terms of and in accordance with the agreement dated 24-07-1962 read with Supplemental Agreement dated 02-11-1962 and the date of actual transfer of the factory in question which, in fact, has taken place on 30-09-1964 does not alter the situation"

(emphasis supplied)

Therefore, if a view is taken that all schemes of arrangement would take effect from the effective date only, it would result in complete disregard of the ratio laid down by the Apex Court in the abovementioned decisions.

One may argue that the above decisions were rendered in the context of the Income-tax Act, 1961 ("the Income tax Act"), and should be relevant only from the purview of the Income-tax Act, and therefore, the "appointed date" would be relevant for the purpose of tax. In this context, it should be noted that if a scheme is regarded as operative from a different date for the purpose of tax and a different date for the purpose of accounts, it would result in sheer confusion and complete absurdity.

Be that as it may, it is relevant to note that the Indian Accounting Standards have been notified under the Companies Act, 2013 ("the 2013 Act"). Attention is invited to the relevant extract of section 232 of the Act, which deals with mergers and acquisitions under the Companies Act, 2013

"Section 232 (6) - The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such dateand not at a date subsequent to the appointed date."

Therefore, under the 2013 Act, a scheme of arrangement is required to provide an appointed date, which would be the date from which the scheme shall be deemed to be effective. While admittedly, this section of the 2013 Act has not yet been enforced, it is, going forward going to be the relevant provision on the subject. Further, under all schemes under the 1956 Act, (atleast prior to Ind AS) the concept of appointed date was always accepted, without any doubt. This further leads us to believe that even under the post Ind AS regime, the appointed date provided for the scheme would be the acquisition date or the date from which the scheme would be operative, even though it may not coincide with the effective date.

Attention is also invited to MCA Notification G.S.R. 111(E) dated February 16, 2015 for Ind AS implementation, wherein it is provided that the Indian Accounting standards are required to be in conformity with the provisions of the applicable law. It also provides that in the case of conflict, the lawshould prevail

The relevant extract of is as under:

General Instruction. - (1) Indian Accounting Standards, which are specified, are intended to be in conformity with the provisions of applicable laws. However, if due to subsequent amendments in the law, a particular Indian Accounting Standard is found to be not in conformity with such law, the provisions of the said law shall prevail and the financial statements shall be prepared in conformity with such law.

(Emphasis supplied)

If a view is taken that Ind AS provides that an amalgamation/ demerger is effective only from the date when the approval of High Court is obtained, it would be in disregard to the express provisions of section 232(6) of the Act (when notified), and the appointed date mentioned in accordance with section 232(6) would be ignored, rendering the provision redundant.

Further, if the language of Paras 8 and 9 of Ind AS 103 is interpreted to mean the effective date only, it would be in contravention of the decision of the Supreme Court in the case of Marshall sons (supra) and Dalmia Cement (supra), and therefore, such an interpretation can under no circumstances be regarded as in conformity with the law.

Also, once a scheme is approved by the High Court specifying the appointed date from when the scheme would be operative, it is uncertain that accounting standards that have been introduced through a notification can override what the scheme provides.

Also, due regard would have to be given toRule 4A of the Companies (Accounts) Rules, 2014 (as amended) which reads as under:

"4A. Forms and items contained in financial statements.- The financial statements shall be in the form specified in Schedule III to the Act and comply with Accounting Standards or Indian Accounting standards as applicable

Provided that the items contained in the financial statements shall be prepared in accordance with the definitions and other requirements specified in the Accounting Standards or the Indian Accounting Standards, as the case may be."

Therefore, companies that are required to follow Ind AS will face a dilemma as to whether they should account for the scheme of arrangement from the appointed date as specified in the scheme, or from the effective date, which is one of the interpretations of the term "acquisition date" under Ind AS 103, compliance with which is required as per Rule 4A of the Companies (Accounts) Rules, 2014.

Another hurdle that would be that as per SEBI circular dated CIR/CFD/CMD/16/2015 dated November 30, 2015 and Draft Rules for Compromises, Arrangements and Amalgamations under Companies Act, 2013, an auditor's certificate is required to be submitted that the accounting treatment contained in the scheme is in compliance with the applicable accounting standards.

Therefore, if Para 8 and 9 of Ind AS is interpreted to mean that acquisition date is intended to mean the effective date, the question would loom as to whether the requirement laid down under the SEBI Circular, Companies (Accounts) Rules, 2014, and

Draft Rules would be fulfilled when the scheme provides for a different date as the appointed date.

Another interesting issue is that the roadmap for implementation of Ind AS has been laid down in the phased manner. Therefore, while Ind AS is applicable to a certain set of companies at a point of time, it is not applicable to others. Therefore, those companies to which the Ind AS regime has not yet been made applicable would continue to account for its transaction based on appointed date concepts following AS 14. On the other hand, companies following Ind AS would account for the transaction in accordance with Ind AS 103, which has the acquisition date controversy. A question remains open as to what would happen in a case where Ind AS is applicable to only one of the acquirer or the acquiree.

It is bizarre that the law would create such a dichotomy just because of the applicability of Accounting Standards.

Therefore, to interpret that the Ind AS regime has done away with the concept of appointed date would be incorrect, and even after Ind AS – 103, schemes of arrangement should provide for appointed date which should be regarded as acquisition date, needless to add, after considering the circumstances of the case.