

POST INCORPORATION PROCEDURE

The law was made for one thing alone, for the exploitation of those who don't understand it. - Bertolt Brecht

We hope the articles in this series help you understand law better. The previous issue saw the birth of an “entrepreneurial baby”. Nurturing the baby is more crucial than giving birth. This issue covers the post incorporation procedure and compliances including compliances under Foreign Exchange Management Act (FEMA) in case of non-resident investment.

1. The basic requirement after the incorporation of a company is applying for a Permanent Account Number (PAN) as other statutory registrations are linked to it viz. VAT, Professional Tax, IEC (Import Export Code) etc including opening of a bank account. **The procedure for the same has already been covered in 2nd issue of Entrepreneur's World**
2. The company shall convene its **1st Board Meeting** within 30 days from the date of incorporation broadly to consider the following matters:
 - Taking on record the Certificate of Incorporation
 - Noting of situation of Registered Office address
 - Noting of 1st directors
 - Directors' sitting fees
 - Approval of preliminary expenses
 - Approval for opening of a Current Account
 - Appointment of 1st Statutory Auditors
 - Approval of Common Seal
 - Approval of draft Share Certificates
 - Several other matters
3. After obtaining PAN, the company shall open a Current Account with a bank and the promoters shall contribute the subscription money to the said account. Alternatively amount paid towards legal fees for incorporation and other pre-incorporation expenses can be treated as share subscription amount and shares can be allotted to the promoters against the said amount. However, it must be supported by proper bills / documents.
4. **In case of non-resident investors, the following procedure is involved w.r.t. foreign remittance of subscription amount:**
 - Remittance must be routed through an Authorised Dealer (AD) bank via normal banking channels.
 - Once the remittance by way of Foreign Direct Investment (FDI) is received, the AD bank issues a certificate called Foreign Inward Remittance Certificate (FIRC), which is a proof of inward remittance to India. It normally contains details like name of the beneficiary, name & address of remitter, amount of remittance in foreign currency and equivalent rupee amount, exchange rate applied, purpose of remittance etc.

Generally there is confusion about which bank should issue FIRC in case the inward remittance has come into the beneficiary's account through more than one bank. In our practical experience and as per clarifications received from RBI (Reserve Bank of India) as well as provisions under FEMA, the first bank that receives the inward remittance in convertible foreign exchange must issue the FIRC since it would have the details of the overseas remitting bank.

FIRC assumes great importance in respect of remittances received from outside India. Therefore, it is critical that beneficiaries follow up with the banks and obtain the FIRC immediately after credit of inward remittance. Particular attention needs to be paid to "purpose of Foreign Direct Investment" because any wrong mention of this has serious implications in terms of remittance, usage and accounting of the same.

- After the receipt of FDI, an **initial reporting** must be made to RBI through AD Bank within 30 days from the date of receipt of money. The following documents shall be submitted as a part of reporting:
 - **Annexure 6** [Report by the Indian company receiving amount of consideration for issue of shares/convertible debentures under the FDI Scheme]
 - **Annexure 7** [Know Your Customer (KYC) Form in respect of the non-resident investor]

KYC is a document to be prepared by Indian AD through which the FDI has been received. Information for the same shall be procured from the foreign bank for which the non-resident investors' co-operation and support is very critical. It contains the basic information about non-resident investor viz. name, address, bank account number, period of banking relationship etc. The Responsibility of obtaining KYC lies with the AD bank in India.

Though the document looks simple and responsibility lies with bank, there are lots of practical difficulties while getting KYC. Many banks are ignorant about KYC. Even after rigorous follow up by the company, many times banks would not be able to get the KYC in time which results in delayed reporting. Therefore it is advisable to submit atleast Annexure 6 alongwith FIRC within due date if there is a delay in obtaining KYC.

It would be advisable to explain some of these issues to the non-resident investors right in the beginning so that they can ensure the timely information through their banks. It would also help to set the expectation right from both sides.

- **FIRC** (Foreign Inward Remittance Certificate)

Ref: Section V, 1 (i) of RBI Master Circular No.15/2011-12 dt.1st July, 2011.

5. After receipt of subscription amount, the company shall ensure to allot shares to promoters through a Board Resolution. It is important to note that equity instruments should be issued within 180 days from the date of receipt of inward remittance. In case the company is not

able to issue the shares within the prescribed limit, the consideration amount should be refunded immediately to the non-resident investor.

Alternatively and as per our practical experience, the company can request the RBI to extend the time limit for allotment of shares. Application for time extension should be made before the expiry of 180 days stating the reason for non-allotment of shares. After verifying the request, if RBI feels that the reason given for extension is a genuine one, they may extend the time limit for retention of subscription amount and allotment of shares beyond 180 days.

6. **Allotment of shares to non-resident investors** again involves a reporting mechanism to RBI. Within 30 days from the date of allotment of shares to non-resident investor, **Form FC-GPR Part A** must be submitted to RBI through the AD Bank alongwith the following documents:

- Copy of FIRC
- Certificate from the Company Secretary as per Para 9(1)(B)(i) of Schedule 1 of Notification No. FEMA 20/2000-RB dated May 3, 2000
- Fair Valuation Certificate from the Chartered Accountant.

In terms of Notification No. FEMA 205/2010-RB dated 7th April, 2010 read with AP (DIR) Circular No.49 dated 4th May, 2010, the fair valuation of shares must be done only as per Discounted free Cash Flow (DCF) method.

Ref: Section V, 1 (iii) of RBI Master Circular No.15/2011-12 dt.1st July, 2011.

The reporting issue, though seems routine, assumes great importance not only from compliance perspective but also at the time of repatriation of the capital amount. Non-compliance with provisions under FEMA have either delayed or made it difficult for non-resident investors to repatriate the said investments and shut down operations and move out of the country. The mantra is “**Do it right the first time and every time**” there is an inward remittance of capital. The onus is on the company receiving FDI.

To comply with all the regulations, to avoid all the complications arising from contravention of the provisions of various laws, to save cost as well as time, do seek professional legal assistance that would enable you to focus more on the business.