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CONVERSION OF LLP INTO COMPANY

SERIES 540

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SHORT SUMMARY:

Ministry of Corporate Affairs has passed a notification on 31st May, 2016 in such notification its allowed conversion of LLP into Company. For such conversion there is need to prepare a list of documents and required to file the same with ROC in forms like URC-1, Spice Plus, INC-33 (MoA), INC-34 (AOA), Agile etc. While conversion there is need to consider the implications of income Tax provisions also like Capital Gain. In below mentioned article author attempt to cover up the provisions of Companies Act and capital gain implication while conversion from LLP to Company.

BACKGROUND:

Corporatization is the need of the hour. The entire world is gradually drifting towards one global market without any trade barriers between the countries. With the emergence of corporate work culture and promotional startup benefits, a great chunk of entrepreneurs are looking forward to corporatization. This step can be initiated in 2 ways as enumerated below:

1. Incorporation of a new corporate entity.
2. Conversion of existing entity (e.g. LLP/ Partnership Firm) into a Company.

The 2nd option of conversion of Limited Liability Partnership into a corporate entity might be practical for the existing entities to switch over from one mode of business to another. The process of conversion is a step by step procedure, which is a technical process but if handled with expert knowledge may be time and cost saving, as well.

There were no provisions under Companies act, 2013 regarding Conversion of Limited Liability Partnership into Company. Ministry of Corporate Affairs has passed a notification on 31st May, 2016 in such notification its allowed conversion of LLP into Company.These rules called as "the Companies Authorized to register Amendment Rules, 2016.

Advantages:

No Capital Gain:

The Gujarat High Court (HC) had held in the taxpayer's case that conversion of a firm into a company was not a transfer (even before section 47(xiii) was introduced) and would not be subject to capital gains tax.

Process for Conversion

Note: Foremost Condition for Conversion is "There should be 2 (Two) or more member in the partnership firm at the time of conversion". *This amended provision still not applicable as on 30.04.2018*

First Step:

Hold a meeting of the partners to take assent of majority of its members summoned for the purpose of registering the LLP under Section 366 of the Companies Act, 2013.To authorize one or more partners to take all steps necessary and to execute all papers, deeds, documents etc. pursuant to registration of the LLP as a Company.

LLP Have to apply for Avaibility of the Name in RUN. One of the major advantages is that the business can be run under the same name as that of the LLP (subject to avaibility of name as per Name Avaibility guidelines of Companies Act) except that in addition to the name of the LLP the words 'limited' or 'private limited' has to be added.

SECOND STEP:

On obtaining the approval of Name, file the following below Form along with required documents with the registrar of Companies within 20 days from the date of name approval.

THIRD STEP:

List of Documents required filing with Roc:

E-form URC-1

Company required filing e-form URC- I along with all the below mentioned documents:

i. A list showing the names, addresses, and occupations of all persons named therein as members with details of shares held by them

ii. a list showing the particulars of persons proposed as the first directors of the company

iii. an affidavit from each of the persons proposed as the first directors, that he is not disqualified to be a director under sub-section (1) of section 164 and that all the documents filed with the Registrar for registration of the company contain information that is correct and complete and true to the best of his knowledge and belief

iv. a list containing the names and addresses of the partners of the Limited Liability Partnership

v. Copy of LLP Agreement

vi. a statement of assets and liabilities of the Limited Liability Partnership duly certified by a chartered accountant in practice which is made as on a date not earlier than thirty days of the filing of form no.URC-1

vii. a copy of latest income tax return of the Limited Liability Partnership

viii. an undertaking that the proposed directors shall comply with the requirements of Indian Stamp Act, 1899 (2 of "1899)

ix. written consent or No Objection Certificate from all the secured creditors of the applicant

x. written consent from the majority of Partners

xi. Publication of advertisement seeking objections from public atleast 21 days before filing of form.

xii. a statement specifying the following particulars:—
   - the nominal share capital of the company and the number of shares into which it is divided;
   - the number of shares taken and the amount paid on each share;
   - the name of the company, with the addition of the word "Limited" or "Private Limited" as the case may require, as the last word or words thereof;

E-form INC- 33 / INC-33 / INC-34

Applicant is required to file e-form Spice Plus/ INC-33/ INC-34/ Agile along with URC-1 as linked form with all the attachment as required in normal Incorporation of Company like:

- INC-9 Affidavit / declaration by first subscriber(s) and director(s) (on duly authorized Stamp Papers).
- DIR-2 declaration from first Directors along with Copy of Proof of Identity and residential address.
- NOC from the owner of the property.
- Proof of Office address (Conveyance/ Lease deed/ Rent Agreement etc. along with rent receipts);
- Copy of the utility bills (not older than two months)
- In case of subscribers/ Director does not have a DIN, it is mandatory to attach: Proof of identity and residential address of the subscribers
- All the Subscribers should have Digital Signature.

E-FORM – AGILE (SINGLE WINDOW FORM):

Earlier if a Person had to incorporate Company then it had to apply for the DIN, Approval of the Name Avaibility, Separate form for first Director, Registered office address, PAN, TAN etc. But this form is a single window of clearances for Incorporation of Company.

This form can be used for the following purposes:

- Application of DIN (up to 3 Directors)
- Application for Avaibility of Name
- No need to file separate form for first Director (DIR-12)

- No need to file separate form for address of registered office (INC-22)
- No need to file separate form for PAN & TAN
- No need to file separate form for GST
- No need to separately apply for Bank Account

FOURTH STEP

Preparation of MOA & AOA:

- After proper filing of SPICE form applicant has to download the e-form INC-33 (MOA) and IN-34 (AOA) form the MCA site. After downloading of form, fill all the information in the forms as per requirement of Table A to J of Schedule I.
- After completely filing of the form affix DSC of all the subscribers and professional on subscriber sheet of the MOA & AOA.

FIFTH STEP

Fill details of PAN & TAN:

- It is mandatory to mention the details of PAN & TAN in the Incorporation Form INC-32. Link to find out 'Area Code' to file PAN & TAN are given in Help Kit of SPICE Form.

SIXTH STEP

Fill details of GST in AGILE:

- It is mandatory to mention details of GST in AGILE form. If company wants to apply select yes otherwise select No and file the form.

SEVENTH STEP

Submission of URC-1, Spice Plus, 33, 34, AGILE on MCA-:

- Once all the 5 forms ready with the applicant, upload all three documents Linked form on MCA website and make the payment of the same.

EIGHTH STEP

Certificate of Incorporation-:

- Incorporation certificate shall be generated containing details of CIN, PAN & TAN and GST/ Bank Account.

Conclusion :

There are various ways of converting a firm to a company, viz; slump sale, itemized sale, admitting the company as a partner, dissolution thereof and on dissolution, business being taken over by the company etc.,

In view of the choices available. Conversion should be made in a manner appropriate to a particular situation and in a way which is most beneficial.

INCOME TAX- CAPITAL GAIN RULINGS ON CONVERSION:

In decision of the Bombay High Court in CIT v Texspin Engineering and Manufacturing Co. (2003) 263 ITR 345 (Bom) has held that such conversion of firm into company by following the route under Part-IX of the Companies Act, 1956, does not occasion capital gains, since there is no transfer involved in such a case. The High Court after considering the provisions of Companies Act, provisions of income tax relating to capital gains and relying on the ratio of Malbar Fisheries Company v CIT (1979) 120 ITR 49 (SC), CIT Vs. George Henderson & Co Ltd (1967) 66 ITR 622 (SC), CIT Vs. Gillanders Arbuthnot & Co (1973) 87 ITR 407 (SC), held that, when a firm is registered as a company, as per the procedure prescribed under Part IX of the Companies Act, no capital gains arise to the firm. When a partnership firm is treated as limited company, under Part IX of the Companies Act, the properties of the erstwhile firm vests in the limited company as they exist. There is no dissolution of the firm. Hence section 45 (1) of the Income Tax Act is not applicable. When shares of the Company are allotted to partners in consideration of capital standing in their accounts in the firm, there is no transfer of capital assets as contemplated under section 2(47)(iii) of the Income Tax Act (i.e. compulsory acquisition, thereof under any law), as partners are getting their own right to share Capital.

In Well Pack Packaging Vs. Dy. CIT (2003) 78 TTJ (Ahd.) 448, also the same view was taken that, corporatisation of the firm under the part IX route did not attract liability to Capital Gains in the hands of the firm.

In ValiPattabhiramRoa v ShriRamanujaGinnning&Rice Factory (P) Ltd. (1986) 60 Comp cas 568 (AP), the Court has held that there is no transfer under general law if the constitution of the firm is changed to that of a company by registering it under Part IX of the Companies Act, as there shall be statutory vesting of title of all the properties of the firm in the newly incorporated company without any need for a separate conveyance.

QUICK QUESTION - CONVERSION

i. **How to file the Conversion form in case of more than 7 partners in the LLP?**

In case of more than 7 partners in the LLP at the time of conversion into Company then Company have to file Scan copy of Physically prepared MOA & AOA.

In above mentioned situation company have to file 1. URC-1 and 2. INC-32. No need of INC-33 and INC 34 in the above mentioned situations.

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ii. **Whether at the time of Conversion whether Latest deed shall be attached in the form URC-1?**

As per Rules, at the time of Conversion LLP have to file "copies of the principal and all subsequent deeds including the latest deed" with the ROC in e-form URC-1

iii. **Whether e-MOA & AOA can be file in case of MOA & AOA is signed by a person at a place outside of India?**

In case of incorporation of a company where any of the subscribers of the MOA/AOA is signing at a place outside India, MOA & AOA shall be filled with INC 32 in the respective format as specified in Table A to J in Schedule I without filing form INC 33 and INC 34. (Means Physical attachment of MOA & AOA in e-form INC 32)

iv. **How many DIN can be apply through SPICE Form?**

Maximum 3 (Three) DIN can be apply through SPICE form.

If applicant want to incorporation Company with more than 3 Directors and more than 3 persons doesn't have DIN. In such situation applicant have to incorporate Company with 3 Directors and have to appoint new directors later on after incorporation.

v. **Whether there is need to file any separate form for PAN & TAN?**

No need to file any separate form. Details in relation to Area Code and other details shall be mention in the form INC-32 itself and PAN & TAN shall be generate with Certificate of Incorporation.

CAUTION TO BE TAKEN BY PROFESSIONALS

1. **Obtain engagement letter from subscriber: -** As per certification in e-form SPICE i.e. INC-32, a professional declares that he has been engaged for the purpose of certification Therefore it is advisable to obtain an engagement letter.

2. **Verification of original records pertaining to registered office**: - As per certification in e-form Spice i.e. INC-32, a professional declares that he has verified all the particulars(including attachments) from original records.

3. **Ensure all attachments are clear enough to read**: - As per certification in e-form Spice i.e. INC-32, a professional declares that all attachments are completely and legibly attached.

4. **Ensure registered office of the company is functioning for the business purposes of the company:** As per certification in e-form Spice i.e. INC-32, a professional declares that he has personally visited the registered office.

5. Take a declaration to the effect that all the original documents have been handed over after incorporation. Since as per section 7(4) copies all documents/information as originally filed should be preserved at the registered office of the company, therefore a professional should take a declaration while handing over the incorporation documents.

6. **MCA Circular 10/2014: - According to this circular ROC/RD in case of** omission of material fact or submission of false/incomplete/ misleading information can after giving opportunity to explain refer the matter toe-governance division of MCA, which in turn may initiate proceedings under section 447 and/or ask the respective professional institute to take requisite disciplinary action.

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