

# *Business Restructuring - Income Tax Aspects*

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# Agenda

## Options available for restructuring

- **1 Amalgamation /Merger**
- **2 Demerger**
- **3 Slump Sale**
- **4 Share Acquisition**
- **5 Asset Sale simpliciter**
- **6 Others- Buy back/ Capital Reduction/ Insolvency and Bankruptcy Code**

# Option 1- Amalgamation / Merger

# 1. Amalgamation

## Concept of Merger/ Amalgamation:

Section 230-232 of the Companies Act , 2013 facilitates compromise, arrangement or reconstruction of a business

The term “merger” and “amalgamation” are synonymous

In amalgamation, the undertaking i.e, property, assets and liability of one or more company [*amalgamating company*]are absorbed by an existing or a new company[*amalgamated company*].

The Amalgamating company integrates with amalgamated company and the former is dissolved without windup

## Definitions

The expression ‘amalgamation’ is not defined in the Companies Act, 2013

## Amalgamation-Contd..

### Definition- Section 2(IB) Of the Income tax Act ['ITA']

**Amalgamation"**, in relation to **companies**, means the merger of one or more companies with another company or the merger of two or more companies to form one company....

### Conditions

all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company;

all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company ;

shareholders holding not less than three fourths in value of the shares in the amalgamating company or companies become shareholders of the amalgamated company;

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company

# Amalgamation - Contd...

## Important Judgements

### 1. Amalgamation is a transfer

- *CIT Vs. Grace Collis [2001] 248 ITR 323 [SC]* “ held that amalgamation constitutes transfer under section 2(47) as the rights in the share of the amalgamating company get extinguished.

### 2. Appointed day for the amalgamation

- *Marshall Sons and Co (India) Ltd. Vs. ITO [1997] 223 ITR 809 [SC]*- “held that on which the date is proposed by in the scheme itself and which is sanctioned by the court would be the relevant date.”

### 3. Amalgamating company ceases to exist

- *Maruti Suzuki India Ltd. [2019] 416 ITR 613 [SC]*-” Held that amalgamating entity ceased to exist upon the approved scheme of amalgamation and assessment on the amalgamating company which was no longer in existence was a nullity.

# Amalgamation - Contd...

## Important Judgements- Contd.

### 4. Revised return in case of business reorganization

- *Dalmia Power Ltd.[2020] 420 ITR 339 [SC]-* Court allowed to file revised returns in case of business re-organisation has not been statutory recognised by inserting section 170A of the Act [Finance Act, 2022].

### 5. Amalgamation can be refused in case of tax avoidance

- *Mc Dowell & Co Ltd. Vs. CTO [1985] 154 ITR [SC]-* Court differentiates the Tax Avoidance and Tax Planning
- *Wood Polymer Ltd. & Bengal Hotels Pvt. Ltd.109 ITR 177 [Guj]-* Agreement solely for saving tax can be ignored

# Amalgamation - Contd...

## Key Tax Implications

- No capital gain on transfer of capital assets either in the hands of the amalgamating company or its shareholders- Amalgamated company should be an Indian company [[Section 47\(vi\) and Section 47\(vii\)](#)]
- Actual cost and written down value shall be taken to be same as it would have been if the amalgamating company had continue to hold the capital assets for the purpose of is own business. Depreciation to amalgamated company on the basis of tax written down value in the hands of the amalgamating company [[Explanation 7 to Section 43\(1\) / Explanation 2 to Section 43\(6\)](#)]
- Depreciation in the year of transfer- available pro-rata to the transferor [[Fifth Proviso to Section 32\(1\)](#)]
- Tax holidays - [Section 10A/10B/10AA/80-IB/80-IC/80-IAB](#) not available to the amalgamating company in the year of transfer and available to amalgamated company
- Expenditure on amalgamation - tax deductible in hands of transferee company in five equal installments [[Section 35DD](#)]
- Any cessation of liability of amalgamating company shall be taxed in the hands of the amalgamated company [[Section 41\(1\)](#)]



# Amalgamation - Contd...

## Key Tax Implications

- Period during which the asset was held by the transferor company will be considered for determining holding period [[Section 2\(42A\)](#)]
- Included the period for which the shares in the amalgamating company were held by the assessee on pursuant to transfer [[Section 2\(42A\)](#)]
- Cost of acquisition of asset deemed to be cost to the previous owner [[Section 49\(1\)](#)]

## Treatment of carry forward losses and depreciation

Accumulated business loss and depreciation of the amalgamating company owning an industrial undertaking, or a ship or a hotel with another company shall be deemed to be the accumulated loss and depreciation of the amalgamated company for the previous year in which the amalgamation is effected subject the fulfillment of the following conditions by the amalgamated company : [[Section 72A\(1\)](#)]

hold continuously for a minimum period of five years from the date of amalgamation at least three-fourths in the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation

## Amalgamation - Contd...

continue the business of the amalgamating company for a minimum period of five years from the date of amalgamation

fulfil such other conditions as may be prescribed to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose

**Rule 9C** of the Income-tax Rules prescribes the following further conditions for carry forward or set off of accumulated loss and unabsorbed depreciation in case of amalgamation

### For Amalgamated Company

- the amalgamated company shall achieve a level of production at least 50% of the installed capacity of the amalgamating industrial undertaking before the end of the four years from the date of amalgamation and the said minimum level of production should continue till the end of five years from the date of amalgamation
- the Central Government has powers to relax the above condition in case of genuine difficulty faced by the amalgamated company
- a certificate in Form No. 62 of the Income-tax Rules, duly verified by an accountant shall be furnished to the assessing officer in this regard

# Amalgamation – Contd...

## Key Tax Implications

### For Amalgamating Company

The benefit of carry forward and set off of accumulated losses and unabsorbed depreciation of the **amalgamating company** owning an industrial undertaking would be available to the amalgamated company only if the following additional conditions are fulfilled :

the amalgamating company should have been engaged in the business for at **least three years** during which the accumulated loss has occurred or the unabsorbed depreciation has accumulated, and

the amalgamating company has held continuously as on the date of the amalgamation at **least three- fourths** of the book value of fixed assets held by it two years prior to the date of amalgamation

## Option 2- De-merger

## 2. Demerger

Section 2(19AA) of the Income Tax Act defines “demerger” as under

“demerger”, in relation to the companies, means the transfer, pursuant to a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956, by a demerged company of its one or more undertakings to any resulting company... ....

### Conditions:

- All properties/liabilities of transferred undertaking become properties / liabilities of resulting company
- The transfer of properties/liabilities is at book value [Except for Ind As Companies]
- Discharge of consideration by issue of shares to shareholders of demerged company on proportionate basis
- Shareholders holding 3/4th or more in value of shares in the demerged company become shareholders in resulting company
- Transfer of undertaking is on a “going concern basis”
- Conditions to be notified u/s 72(A)(5) have to be fulfilled. [No conditions have been issued till date]

## 2. Demerger

### Undertaking includes - [\[Explanation 1 to Section 2\(19AA\)\]](#)

- any part of an undertaking, or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting business activity.
- further [Indo Rama Textiles Ltd. 212 Taxman \[Del-HC\]](#)

## Demerger - Contd....

### Key Tax Implications:

- No capital gain on transfer of capital assets where resulting company is an Indian company [[Section 47\(vib\)](#)]
- No capital gain on issuance of shares by the resulting company to the shareholders of demerged company [[Section 47\(vid\)](#)]
- Cost of shares in resulting company = (Cost of shares in demerged company) × (Net Book Value of assets transferred / Net Worth of demerged company pre-demerger) [[Section 49\(2C\)](#)]
- No deemed dividend implications on issue of shares by resulting company [[Clause \(v\) to section 2\(22\)](#)]
- Resulting company chargeable to tax as successor in business [[Section 41\(1\)](#)]
- Actual cost of transferred assets in the hands of Resulting company = Cost in the hands of Demerged company [[Explanation 7A to section 43\(1\)](#)]
- Depreciation in respect of assets transferred to be apportioned in the ratio of number of days used by demerged / resulting company [[sixth Proviso to section 32,](#)]

## Demerger - Contd...

### Key Tax Implications:

- WDV of the block of assets in the hands of transferor company shall be reduced by WDV of the assets transferred in demerger [[Explanation 2A to section 43\(6\)](#)]
- WDV of depreciable assets in the case of resulting company to be taken as the WDV as per Income Tax records at the time of demerger [[Explanation 2B to section 43\(6\)](#)]
- Loans/borrowings not specifically relatable to the transferred undertaking to be apportioned in the ratio of assets transferred to total value of the assets. [[Explanation 2 to section 2\(19AA\)](#)]
- Transfer of accumulated loss and unabsorbed depreciation to resulting company allowed [[Section 72A](#)]
- Conditions notified u/s 72A(5) to be fulfilled [[No conditions prescribed as yet](#)]
- Change in value of assets on account of revaluation to be ignored



## Option 3- Slump Sale

## 3. Slump Sale

Section 2(42C) of the Income tax act defines slump sale;

Slump sale means transfer of one or more undertaking by any means for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer.

The term “undertaking” includes “part of the undertaking” but whatever undertaking is transferred, it must constitute as a business unit to be carried on without any interruption [\[Refer Indo Rama Textile \[Delhi HC\]](#)

- The consideration for such transfer may be discharged by transferee company in any mode [\[Overruled by Finance Act, 2021 Bharat Bijlee Ltd. Vs. ACIT \[2014-BOM HC\]](#)
- Consideration is received by transferor company and not its shareholders
- The cost of acquisition of undertaking can be apportioned on the assets forming part of the undertaking at values as determined by independent valuers

Cost so apportioned by the transferee company will be considered for depreciation under section 32 of the Income Tax Act as regards depreciable assets.

## Slump Sale - Contd...

### Key Tax Implications:

Capital gain on transfer of undertaking under slump sale [\[Sec. 50B\]](#)

**Capital gains** = Full value of consideration *[fair market value]* - Net worth of undertaking *[cost of acquisition]*

**Net worth** = Aggregate value of WDV of the block of assets and book value of other assets of the undertaking  
- Value of liabilities of undertaking

- Change in value of assets on revaluation be ignored for computing net worth
- Benefit of indexation not available

**Losses and unabsorbed depreciation** - Remain with the transferor company

- The slump sale of the undertaking shall give rise to long term capital gains where the undertaking is held for more than thirty six months preceding the date of its transfer and short term capital gains will result if the undertaking is held for less than thirty six months

# Option 4- Share Acquisition

## 4. Share Acquisition

### Key Tax Implications:

One of the most commonly resorted to methods of acquisition is share acquisition, which involves the acquisition of the shares of the company in which the target business is vested.

- **For Buyer's perspective**
- The major tax implications of share acquisitions are: (i) liability to tax on capital gains, if any, and (ii) liability under [Section 56\(2\)\(x\) of the ITA](#), if any
- Where any person receives any property, other than immovable property, including shares of a company, without consideration, or for a consideration which is less than the FMV (computed as per Rule 11UA of the ITR) of the property by an amount exceeding INR 50,000, the differential between the FMV and the consideration is taxable in the hands of the recipient under head 'income from other sources' [\[Section 56\(2\)\(x\)\]](#)
- The term 'capital asset' to include property of any kind held by the taxpayer, whether or not connected with his business or profession, but does not include any stock-in-trade or personal assets subject to certain exceptions. [\[Section 2\(14\)\]](#)

## Share Acquisition - Contd...

### Key Tax Implications:

- In case of change in shareholding for companies [>51%]- not being a company in which public are substantially interested- carried forward of losses does not allowed [\[Section 79\]](#).
- For Seller's perspective
- Where the shares are held as capital assets, profits and gains arising from the transfer of the shares will be chargeable to tax under the head 'capital gain' according to [Section 45 of the ITA](#).
- Provides that where the sales consideration on transfer of unlisted shares is less than their fair market value ("FMV"), computed as per Rule 11UA of the Income tax Rules, 1962 ("ITR"), the FMV is deemed to be the Full value of consideration in the hands of the transferor. [\[Section 50CA\]](#)

## Option 5- Asset sale-simpliciter

## 5.Asset Sale- Simpliciter

An asset sale is an itemized sale or piece-meal sale of identified assets of a company. As compared to a slump sale, an asset sale offers the seller / buyer the flexibility to cherry pick assets or liabilities to be transferred depending on commercial considerations.

The buyer pays for each asset separately which is accounted for in that manner in the books of the seller. In an itemized sale of assets, for determining taxability of capital gains, a distinction is drawn between depreciable and non-depreciable assets.

### Key Tax Implications:

#### Capital Gain chargeable for ;

Non-depreciable Assets [\[Section 45 and 48\]](#)

Depreciable assets [\[Section 50\]](#)



## Option 6- Others

## 6. Other Options- *Buy back of shares (i)*

### Buy back of shares

#### In Company's hands

- Buy back also refer to as share repurchase i.e when a company purchase its own shares [\[Section 68 of CA, 2013\]](#)
- The company has to pay tax on distributed income [*@ 20% plus SC*] [\[Section 115QA\]](#)
- [Section 56\(2\)\(x\)](#) is not applicable incase of buy back of shares- as shares get extinguished does not represent the property [\[Vora Financial Services-Mum- ITAT\]](#)

#### In Shareholders hand

- No deemed dividend in the hands of shareholders [\[Section 2\(22\)\(iv\)\]](#)
- Distributed income as referred in section 115QA in the hands of shareholders is exempt [\[Section 10\(34A\)\]](#)

## Others - Capital reduction (ii)

### Capital Reduction

#### Taxable at the hands of share holders-

Capital reduction will be treated as transfer as per Section 2(47)- [Kartikeya V Sarabhai vs.CIT \[SC\]\[1997\]](#)

As per section 2(22)(d) any distribution to its shareholders by a company on the reduction of its capital, to the extent to which the company possesses accumulated profits, whether such accumulated profits have been capitalised or not, amounts to dividend

Distribution over and above the accumulated profits would be chargeable to capital gain tax - [CIT vs. Narasimhan \(G\) \[SC\]](#)

## Others – Insolvency and Bankruptcy Code (iii)

### Insolvency and Bankruptcy Code, 2016 [IBC]

IBC was introduced in 2016 with a view to streamline the corporate insolvency resolution / liquidation process and improve India's ease of doing business competence.

Section 238 of the IBC, override the all other laws

#### Key tax implications

Section 79 of the ITA was amended to not apply to cases where the shareholding of a corporate taxpayer changes pursuant to a resolution plan approved under the IBC, after allowing the tax authorities a reasonable opportunity of being heard in this regard.

Section 115JB of the ITA was amended to provide that for determining the 'book profits' (for levy of MAT) of a company against whom an application for corporate insolvency resolution was admitted by the NCLT, deduction of the aggregate amount of brought forward losses and unabsorbed depreciation would be allowed.

In this regard, it is pertinent to note that in case of regular corporate taxpayers, a deduction of lower of (i) the brought forward losses or (ii) unabsorbed depreciation is allowed for the purpose of determining the 'book profits'.

*Thank You*

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