

BUSINESS RESTRUCTURING

Critical aspects and Tax Considerations



Presentation by:

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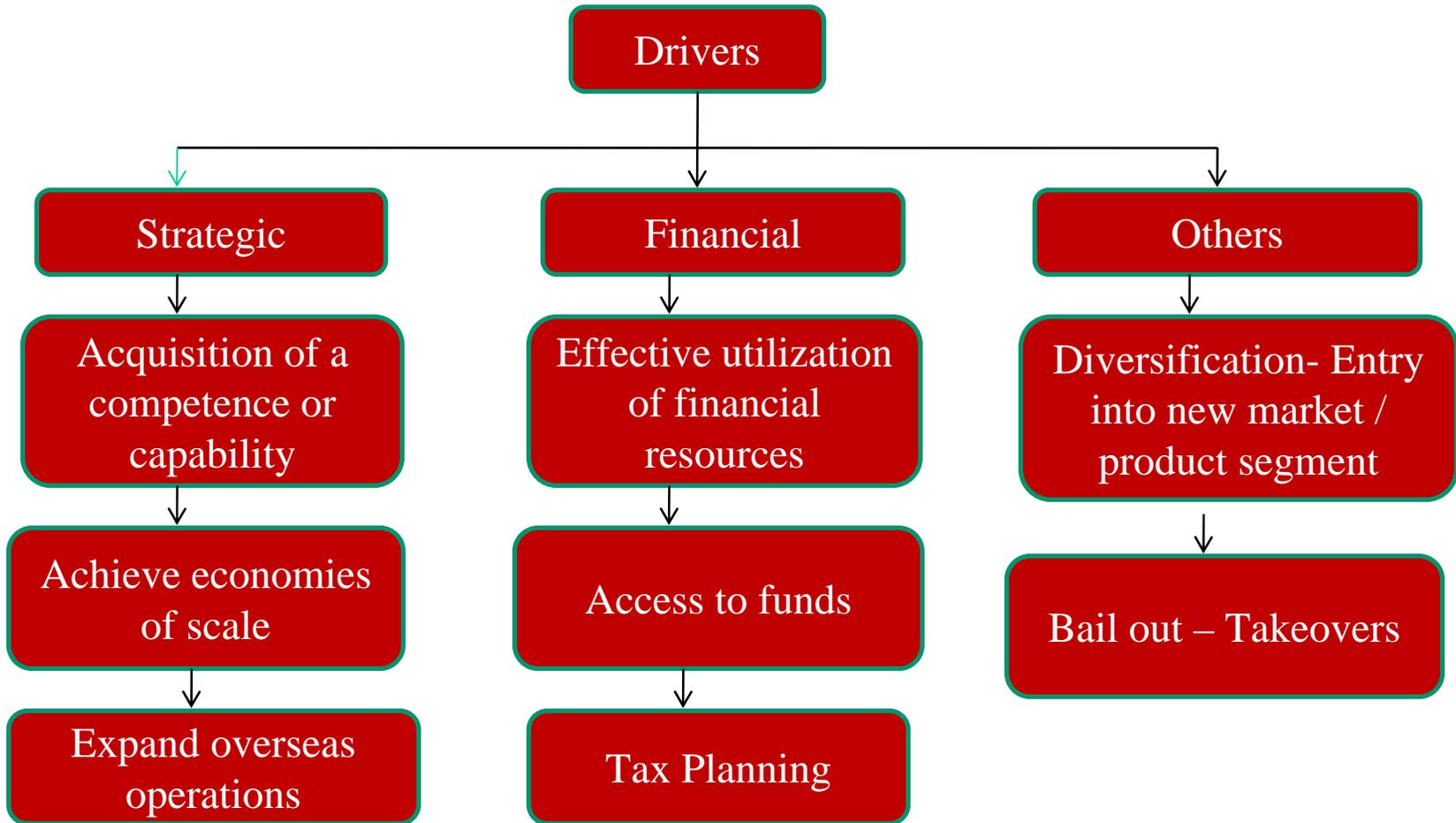
M. Com, CA, LL.B.,

What is “Business Restructuring”

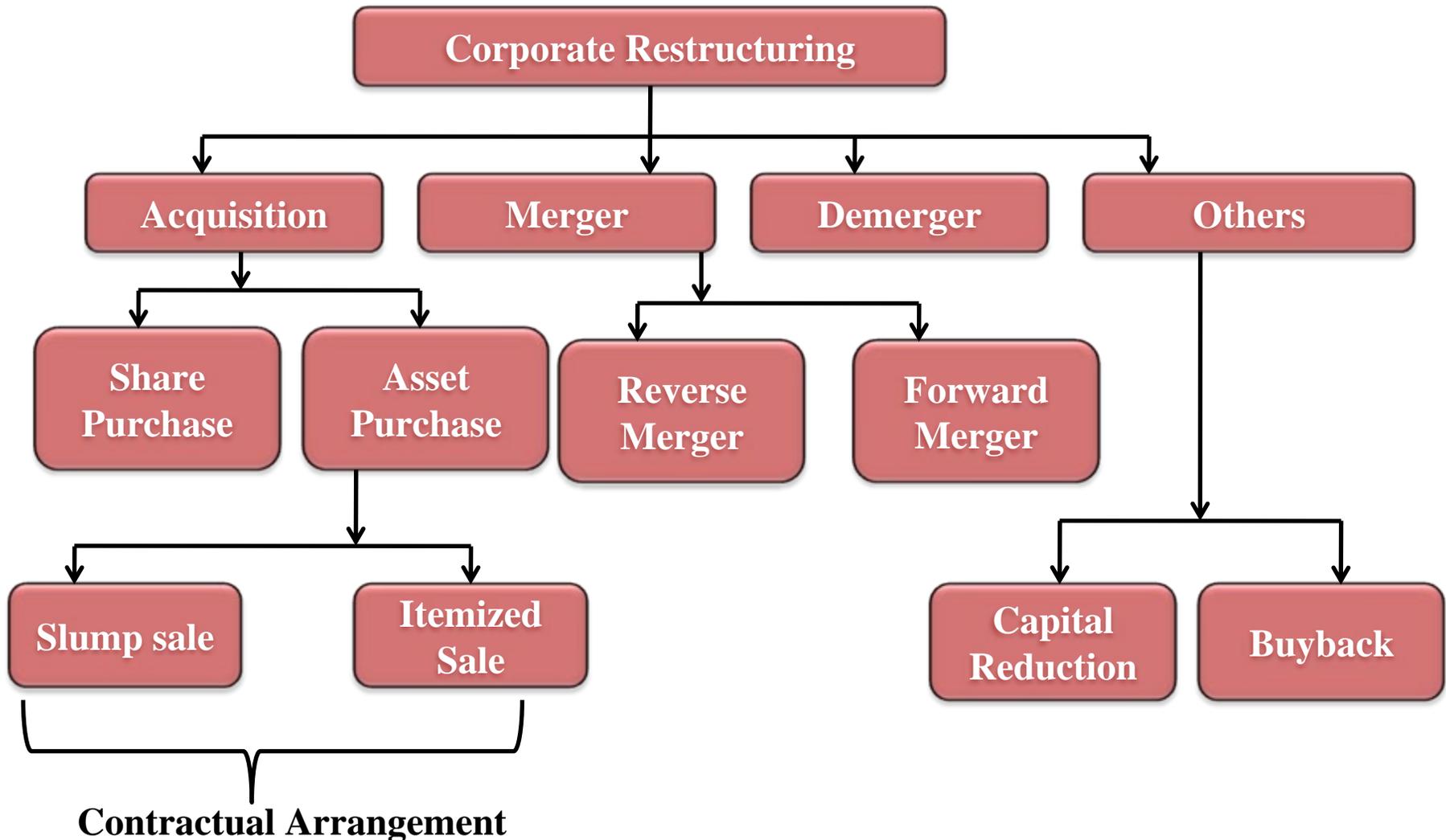
Business Restructuring is the corporate management term for the act of reorganizing the legal, ownership, operational or other structures of a company for the purpose of making it more profitable or better organised for its present needs



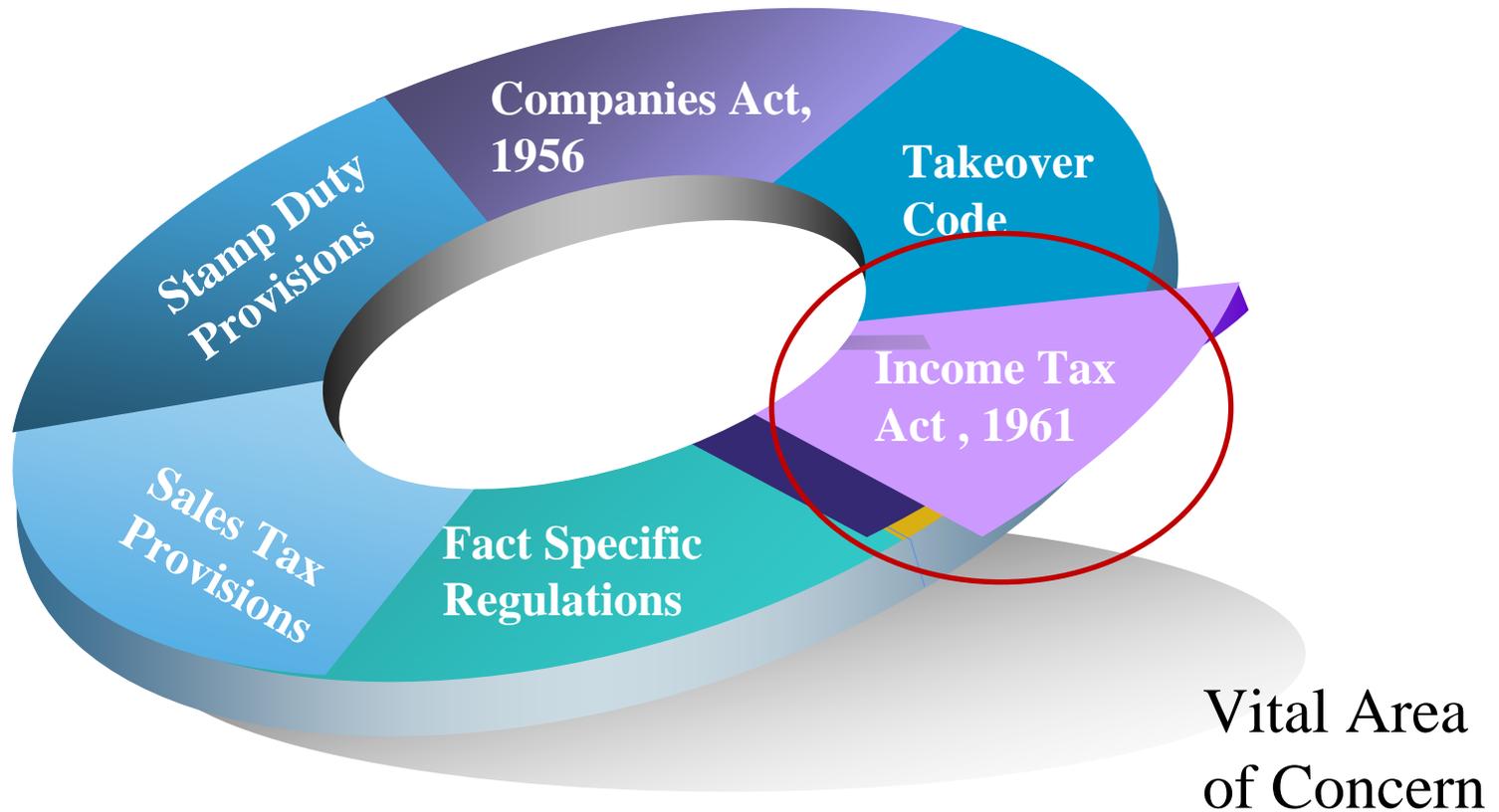
Drivers for Business Restructuring



Key Forms of Corporate Restructuring



Regulatory Framework

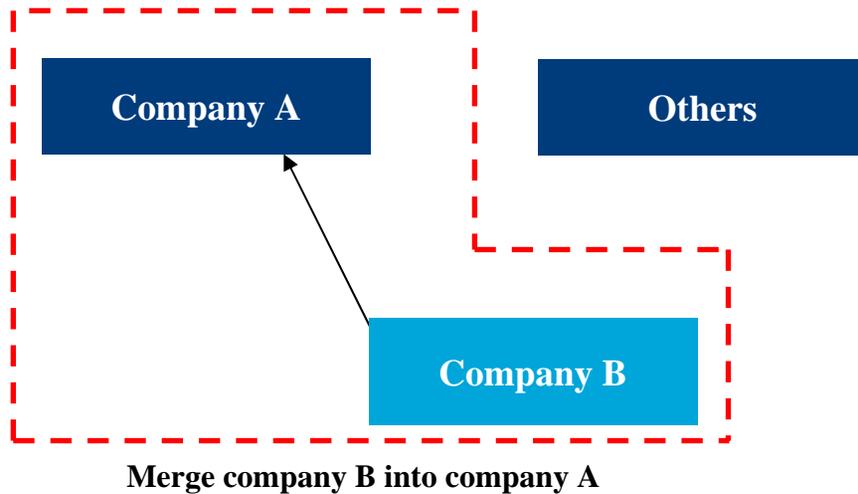


**What is Merger /
Amalgamation ?**



Merger / Amalgamation

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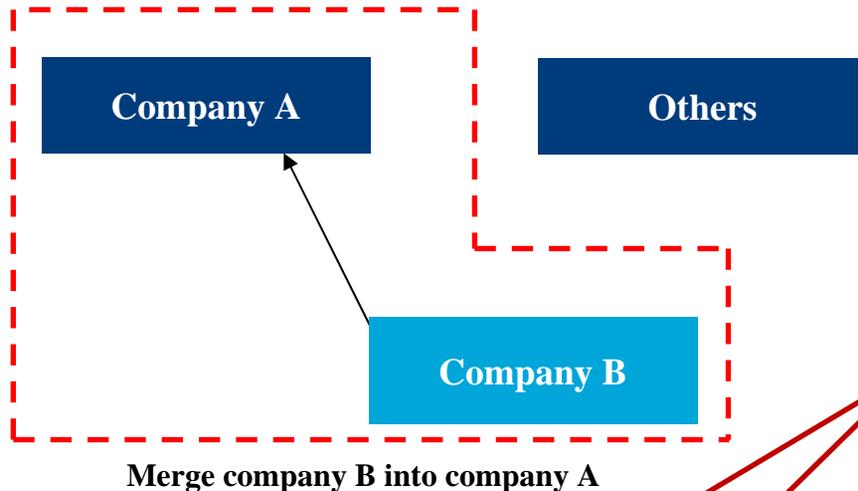


Concept of Merger / Amalgamation:

- Sections 390 to 396A of the Companies Act, 1956 facilitates compromise, arrangement or reconstruction of a business
- The terms “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 winding up

Merger / Amalgamation

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Definition:

- The expression “amalgamation” is not defined in the Companies Act, 1956.
- Section 2 (1B) of the Income Tax Act defines “amalgamation” as under :

“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 :

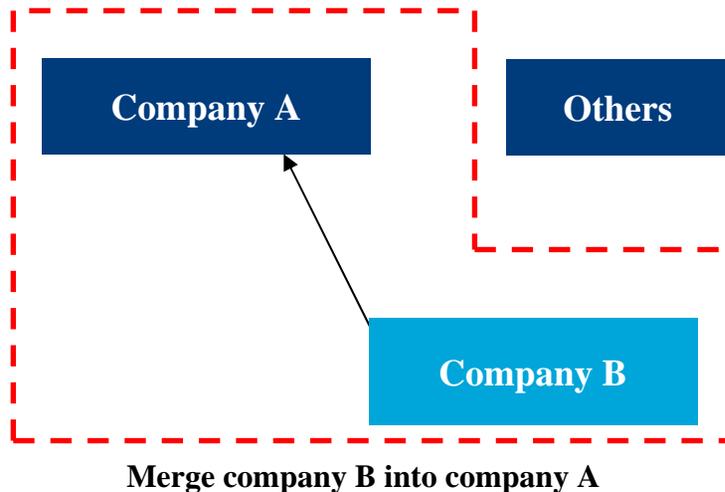
- All properties to be transferred to the amalgamated company
- All liabilities to be transferred to the amalgamated company
- Shareholders holding at least 3/4th in value of shares of the amalgamating company should become shareholders of the amalgamated company

Amalgamation in relation to companies only covered and not with reference to other forms of legal entities like partnership, proprietorship etc

Merger / Amalgamation



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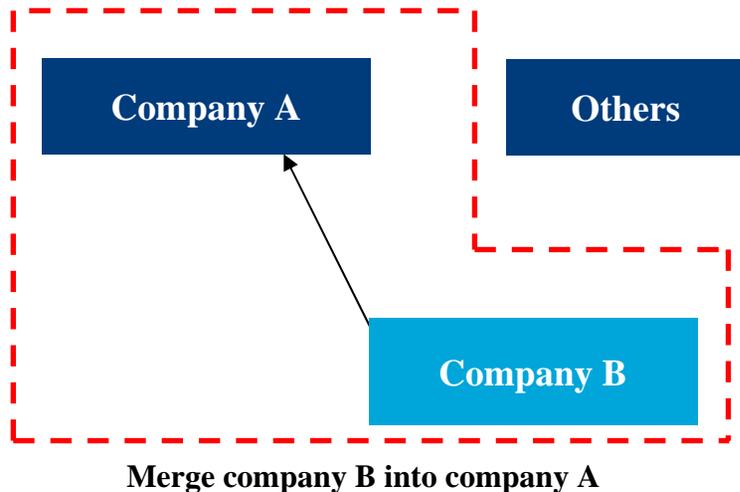


Key tax implications:

- No capital gain on transfer of capital assets either in the hands of the amalgamating company or its shareholders [Section 47(vi) and Section 47(vii)];
- Depreciation in the year of transfer – available pro rata to the transferor – Methodology to compute number of days [Fifth Proviso to Section 32(1)]
- 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)]
- 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)]
- Period during which the asset was held by the transferor company will be considered for determining holding period [Section 2(42A)]

Merger / Amalgamation

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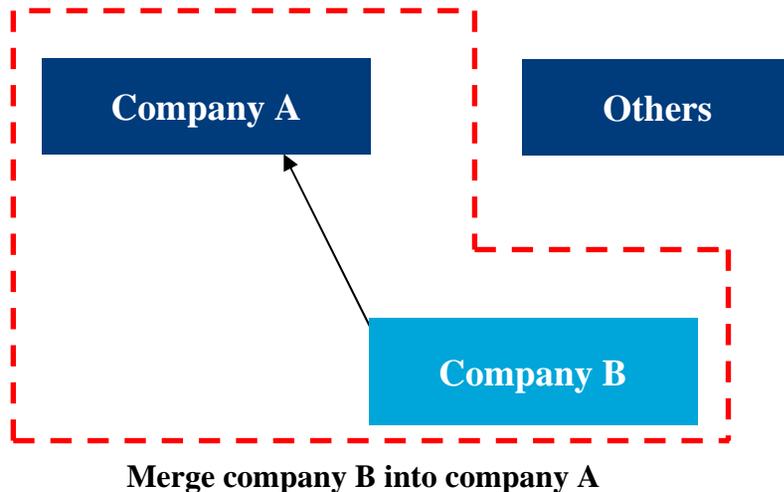


Key tax implications:

- Cost of acquisition of asset deemed to be cost to the previous owner [Section 49(1)]
- Accumulated business loss and depreciation of the amalgamating company owning an industrial undertaking, hotel or of a banking company shall be deemed to be the accumulated loss and depreciation of the **amalgamated company** or specified bank for the previous year in which the amalgamation is effected subject the fulfillment of the following conditions by the amalgamated company : [Section 72A]
 - ✓ 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
 - ✓ 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

Merger / Amalgamation

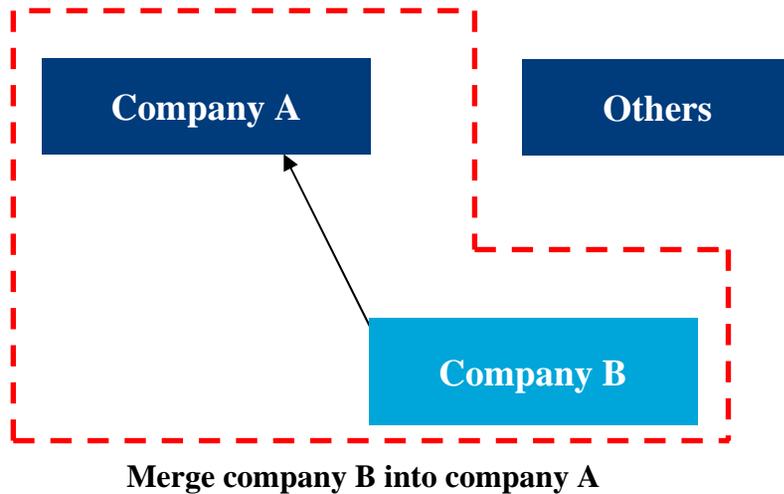
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Key tax implications:

- **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:
 - ✓ 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

Merger / Amalgamation



Key tax implications:

- 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

Tax Issues in Mergers

Contd...



- **CONSIDERATION**
- **DEPRECIATION ON GOODWIL**
- **INDEXATION ON SHARES**
- **CARRY FORWARD AND SET OFF OF MAT CREDIT**
- **CARRY FORWARD OF LOSSES**

Tax Issues in Mergers

Contd...

CONSIDERATION



- **Would issuance of bonds / debentures alongwith the shares of the amalgamated company as consideration would be in consonance with the provisions of Section 47(vii) of the Income Tax Act ?**
 - ✓ Section 47(vii) held not applicable where the shareholder of the amalgamating company is allotted bonds or debentures in exchange of shares in the amalgamating company - CIT vs. Gautam Sarabhai Trust : 173 ITR 216 (Guj.)
 - ✓ On amalgamation, rights of shareholder of the amalgamating company in the capital asset, i.e., the shares stand extinguished, resulting in a transfer under section 2(47) of the Income Tax Act.- CIT vs. Mrs. Grace Collis and Ors. : 248 ITR 323 (SC)

Tax Issues in Mergers

Contd...

DEPRECIATION



- Whether the amalgamated company can claim depreciation on the goodwill, accounted as a balancing factor while merging the accounts of the amalgamating company into the amalgamated company (i.e., excess consideration paid by the amalgamated company over and above the excess of assets over liabilities), being commercial right of similar nature as enumerated in section 32 ?

[Refer : A.P. Paper Mills Ltd. vs. Asstt. CIT (2010) 128 TTJ (Hyd) 596 : (2010) 33 DTR (Hyd) 148- Goodwill is a commercial right of similar nature as enumerated in section 32

CIT vs. Hindustan Coca Cola Beverages (P) Ltd.: 331 ITR 192(Del HC)- commercial rights of similar nature, i.e., know-how, patent, copyrights, trademarks, licences, franchises

B. Raveendran Pillai vs. CIT : 237 CTR 80 (Ker. HC) and Kotak Forex Brokerage Ltd. vs. ACIT : 33 SOT 237 (Mum.) - Any right which is obtained for carrying on the business effectively and profitably has to fall within the meaning of intangible asset.

Contrary view : Borkar Packaging (P) Ltd. vs ACIT 131 TTJ 99 (ITAT (Panaji)); R.G. Keswani vs. ACIT : 120 TTJ 1081 (ITAT Mum)]

INDEXATION

- **Whether the indexation will be available from the date of acquisition of shares in amalgamating company or date of acquisition of shares in amalgamated company?**
- ✓ **Kotak Mahindra Bank Ltd. v. ACIT: 2009 TIOL 383 ITAT MUM-** Where the shares transferred to a 100% subsidiary company were exempt under section 47, the indexation of cost has to be taken from the date of first holding of shares by the holding company.
- ✓ **DCIT vs. Manjula J. Shah : 35 SOT 105 / 318 ITR (AT) 417 (Mum.)(SB)** [affirmed by Bombay High Court: 2011-TIOL-808-HC-MUM-IT]- Capital asset transferred by way of gift - held that indexation of cost in the hands of donee from the date of holding of asset in the hands of donor



Tax Issues in Mergers

Contd...

MAT



- **Whether, pursuant to the amalgamation, the amalgamated company would be entitled to carry forward and set off of credit of Minimum Alternate Tax available to the amalgamating company under section 115JAA of the Income Tax Act.**

[Refer: SKOL Breweries Ltd. v. ACIT, 28 ITAT India 998 (Mum.) ITA No. 313/Mum./07 A.Y. 2003-04 dated 15-5-2008]

- **Whether the benefit of carry forward and set off of unabsorbed book losses and depreciation of the amalgamating company would be available against the book profits of the amalgamated company under section 115JB(2) ?**

[Refer: VST Tillers & Tractors Ltd.: 2009 TIOL 26 Bang.– where condition of section 72A fulfilled]

Tax Issues in Mergers

Contd...

CARRY FORWARD OF LOSSES



- **Whether service industry (say, hospitals) can be considered as an “industrial undertaking” ?**

[Refer : ACIT vs. Apollo Hospitals Enterprises Ltd. : 300 ITR 167 (Chennai HC)]

- **Accumulated losses can be carried forward for a period of 8 years from the appointed date, i.e. the date of amalgamation. Thus, if seven years have already elapsed, accumulated losses will be carried forward for the next eight years (in total for 15 years)?**

[Refer : Supreme Industries Ltd. vs DCIT : 2007 17 SOT 476 (Mum ITAT)- relates to investment allowance under s.32A]

Tax Issues in Mergers

CARRY FORWARD OF LOSSES



- **What if a private company having losses merges with another company - whether section 72A will override section 79 ?**

[The provisions of section 79 of the Income Tax Act would not apply in a situation where a private company/company in which public are not substantially interested merges into another company, in which case provisions of section 72A of the Income Tax Act should be applicable.

The provisions of section 72A being specifically related to amalgamations, would cover all cases of amalgamation and override all other provisions to the extent contrary to the provisions of that section. The section also contains a non-obstante clause overriding all other provisions of the Income Tax Act.

The provisions of section 72A were enacted for the objective of promoting better utilisation of resources to make the country globally competitive will have to be construed in a liberal manner to further that objective

If the provisions of section 79 are interpreted in a manner so as to override the provisions of section 72A of the Income Tax Act, it would result in denial of the benefit of carry forward and set off of losses in all cases of mergers of a private company with another company, which intention is not suggested or supported from any provisions of the Income Tax Act or any other provisions and aids which can be used for interpretation of that section]

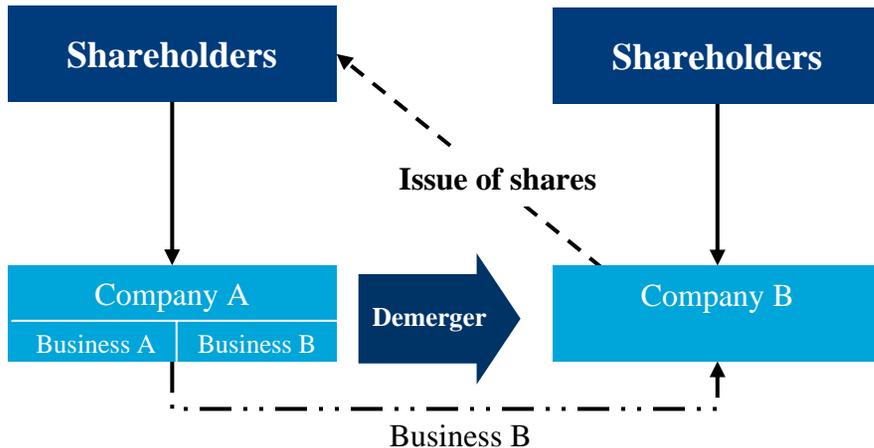
What is De-merger ?



Demerger

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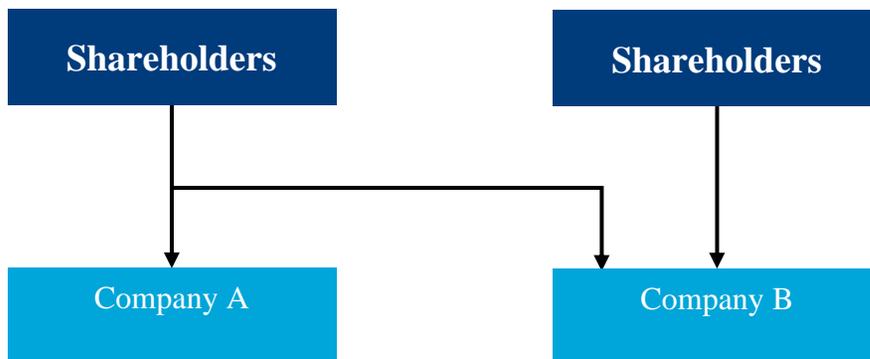
The Transaction



Definition of “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*”

Resulting Structure

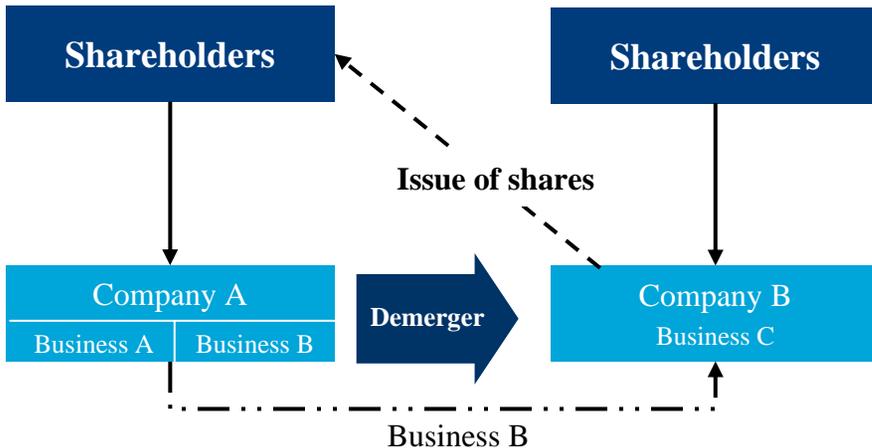


Conditions :

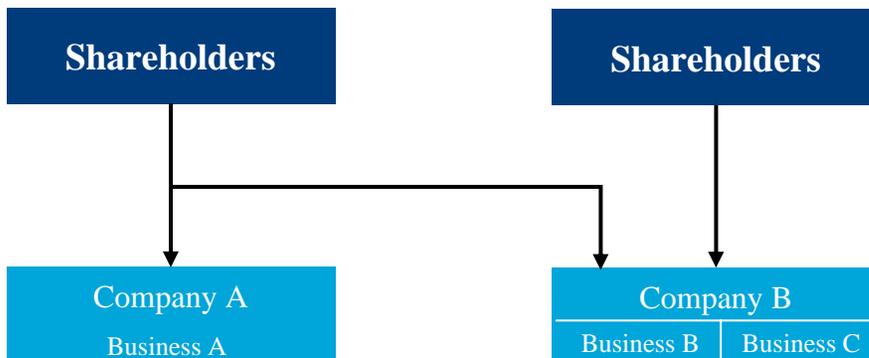
- All properties / liabilities of transferred undertaking become properties / liabilities of resulting company
- The transfer of properties / liabilities is at book value
- Discharge of consideration by issue of shares to shareholders of demerged company on proportionate basis
- Shareholders holding 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”

Demerger

Contd...



Resulting Structure

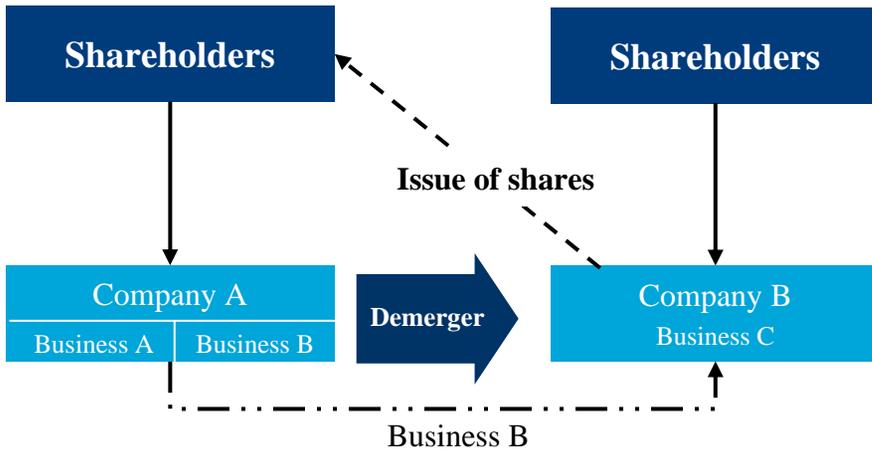


Key tax implications:

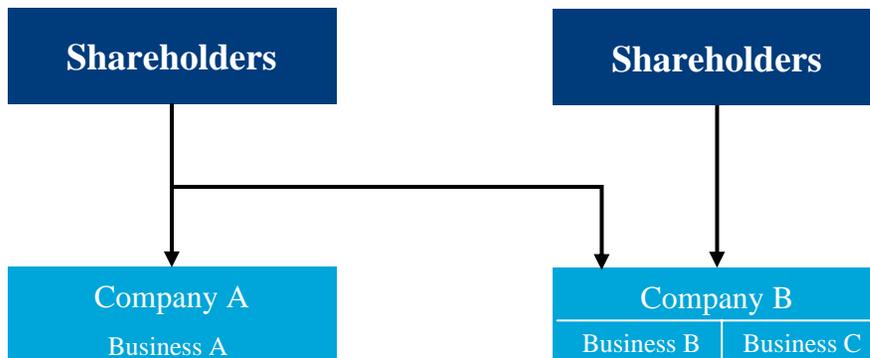
- No capital gain on transfer of capital assets where resulting company is Indian company [Section 47(vib)]
- No capital gain on issuance of shares by the resulting company to the shareholders of demerged company [Section 47(vid)]
- Cost of shares in resulting company = (Cost of shares in demerged company) x (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)]

Demerger

Contd...



Resulting Structure

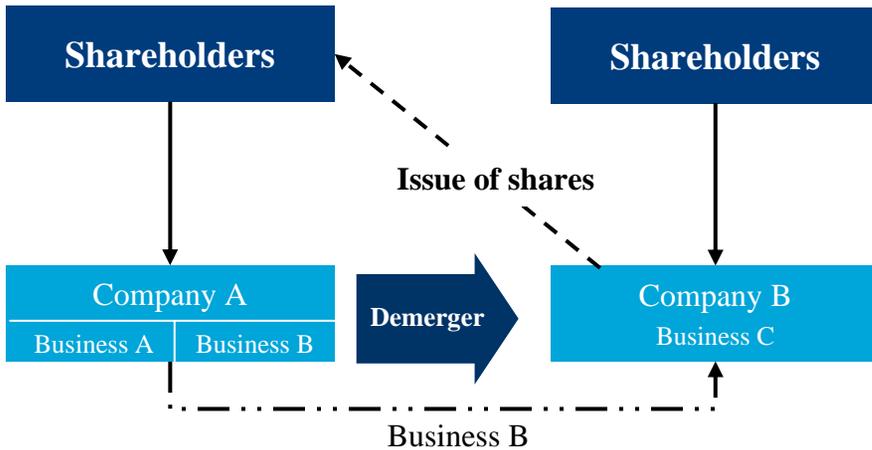


Key tax implications:

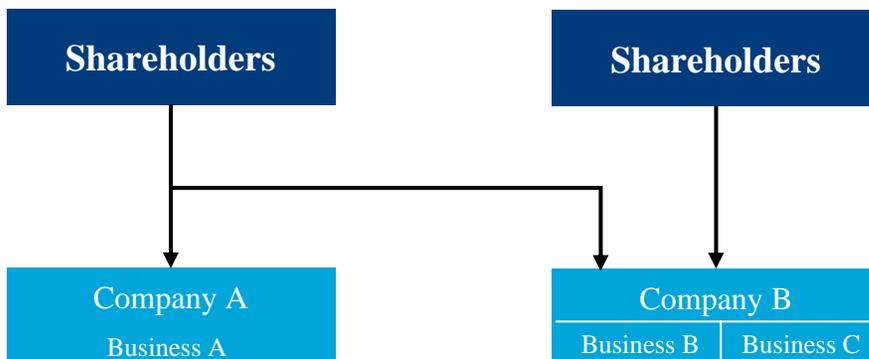
- Depreciation in respect of assets transferred to be apportioned in the ratio of number of days used by demerged / resulting company
- WDV of the block of assets in the hands of transferor company shall be reduced by WDV of the assets transferred in demerger [Explanation 2A to section 43(6)]
- WDV of depreciable assets in the case of resulting company to be taken as the WDV as per Income Tax records at the time of demerger
- Loans/borrowings not specifically relatable to the transferred undertaking to be apportioned in the ratio of assets transferred to total value of the assets

Demerger

Contd...



Resulting Structure



Key tax implications:

- 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]
- Undertaking includes -
 - any part of an undertaking
 - a unit or division of an undertaking
 - a business activity as a whole
- Change in value of assets on account of revaluation to be ignored

Demerger

Contd...



- **Whether the scheme of arrangement approved by the High Court can be considered as instrument for avoidance of tax?**

[Refer : ACIT vs. TVS Motors Co. Ltd. : 137 TTJ 220 - where the scheme has been sanctioned, it cannot be argued that there is any motive to avoid tax]

- **Whether a scheme of demerger for ‘nil’ consideration could be sanctioned under the provisions of the Income Tax Act and Indian Corporate Law ?**

[The Gujarat High Court in the case of Vodafone Essar Gujarat Limited (Guj. HC): 239 CTR 229 rejected the scheme of demerger. The High Court further held that the scheme was nothing but a device /conduit having the sole purpose of avoiding and evading taxes including income tax, stamp duty, registration charges and VAT. It was observed that the purpose, being tax avoidance, was explicit from the facts that different accounting treatments are accorded to transferor companies having a positive net worth in comparison to ones which have negative net worth with an intention to maximize tax avoidance]

Demerger



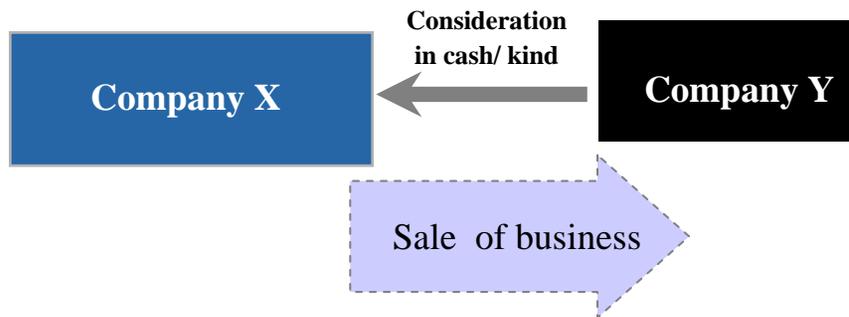
- Whether taxes, benefits under sections 115JAA relating to MAT , etc. would be apportioned and be available to the resulting company?
- Whether demerger of Investments would be considered tax neutral demerger as envisaged under section 2(19AA) of the Income Tax Act ?
- In the event the said arrangement is not regarded as “demerger” under the Income Tax Act, then what would be the tax implications in the hands of the demerged company and its shareholders?

What is slump sale ?



Slump Sale

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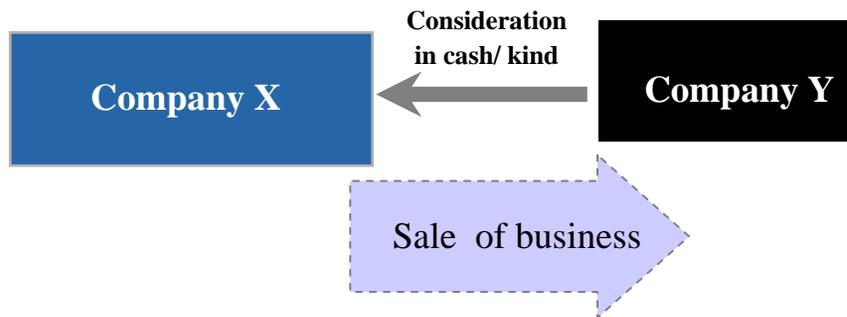


Concept of “Slump Sale”:

- Slump sale means sale of an undertaking for a lumpsum consideration without assigning values to the individual assets and liabilities it comprises of
- 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
- The consideration for such transfer may be discharged by transferee company in any mode
- 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

Slump Sale

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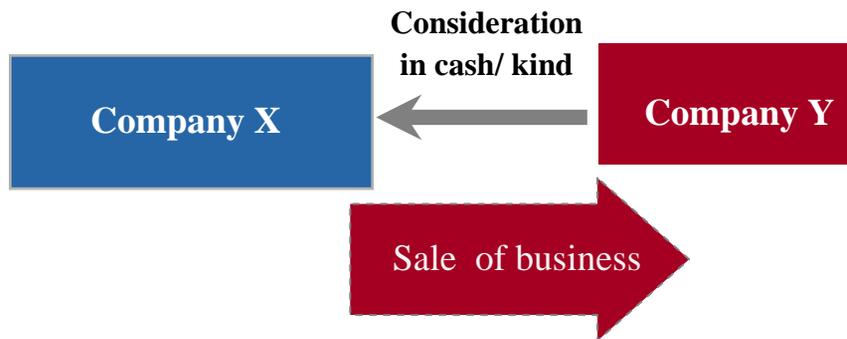


Concept of “Slump Sale”:

- Cost so apportioned by the transferee company will be considered for depreciation under section 32 of the Income Tax Act as regards depreciable assets.
- Other pertinent aspects :
 - Not subject to High Court approval
 - Lesser time frame
 - Simple to implement
- Consideration for transfer of undertaking is subject to commercial negotiations and can be structured in a tax efficient manner

Slump Sale

Contd...



Key tax implications:

- Capital gain on transfer of undertaking under slump sale [Sec. 50B]
- Capital gains = Full value of consideration – Networth of undertaking
- 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

Slump Sale

Contd...



- **Whether “undertaking” is a capital asset ?**

[Refer : The Supreme Court in the case of R.C. Cooper V. UOI : AIR 1970 SC 564 (610) held that the undertaking is distinct from the various assets which comprise the undertaking. The aforesaid principle has now been statutorily recognised]

- **If the value of the assets transferred in a slump sale is less than the liabilities, whether the net worth for the purposes of section 50B of the Income Tax Act would be taken as “negative” or “nil” ?**

[Refer :Zuari Industries Ltd. v. ACIT: 298 ITR (AT) 97; Paperbase Co. Ltd. v. ACIT: 2008 19 SOT 163; Dana Corporation (AAR): 321 ITR 178]

Slump Sale

Contd...



- **Whether in a slump sale some of the assets could be retained by the transferor?**

[Refer : If some assets are retained by the transferor / liabilities not taken over by the transferee, the same does not militate against the concept of slump sale. : CIT v F.X. Periera and Sons Pvt. Ltd.: 184 ITR 461 (Ker.) ; Premier Automobiles Ltd. v. ITO: 264 ITR 193 (Mum.); ACIT v. Raka Food Products Ltd. : 277 ITR 261 (Mad) ; CIT v. Max India Ltd.: 319 ITR 68 (P&H) (SLP dismissed by Supreme Court) ; DCIT v. Mahalasa Gases & Chemicals Pvt. Ltd.: 84 TTJ 992 (Bang.); Rallis India v. DCIT : 53 ITD 381 (Cal.) ; Coromandel Fertilisers Ltd. vs. DCIT : 90 ITD 344 (Hyd) ; ECE Industries Limited v. DCIT (Del.): 111 ITD 11 (Del.); Rohan Software (P.) Ltd. v. ITO: 115 ITD 302 (Mum.) ; DCIT vs. ICI India Limited : 23 SOT 58 (Calcutta)]

- **Whether provisions of section 50C would become applicable where value of land and building is specified in a slump sale?**

Slump Sale

Contd...



- **Whether the benefit under sections 80-IB, 80-IC, 10AA, 10B etc of the Income Tax Act would continue to be available to transferee company after slump sale of the undertaking ?**

[Refer : In various sections, viz., 15C of 1922 Act, 80J, 80HH, 80I, 80-IA and 80-IB, 10A, 10B emphasis is on conferring tax benefit on the profits derived from an **industrial undertaking**; Circular F.No. 15/5/63-IT (A-I) dated 13-12-1963; CIT v P.K. Engg. & Forging Pvt Ltd: 87 Taxman 101 (Cal HC), A.G.S. Tiber & Chemical Industries Pvt Ltd v. CIT: 233 ITR 207(Mad HC); CIT v. M/s Silical Metallurgic Ltd.: 324 ITR 29 (Madras HC); Tech Books Electronics Services (P) Ltd V. ACIT: 100 ITD 125 (Del.); Bullet International vs. ITO: ITA No. 526/Del/2008 /2008-TIOL-265-ITAT-DEL]

- **Whether it is open to the Revenue Authorities to substitute actual sale consideration arising on slump sale of a business?**

[Refer : CIT V. Gillanders Arbuthnot & Co.: 87 ITR 407 (SC); CIT v. Shivakami Co. P. Ltd. 159 ITR 71 (SC)]

Slump Sale



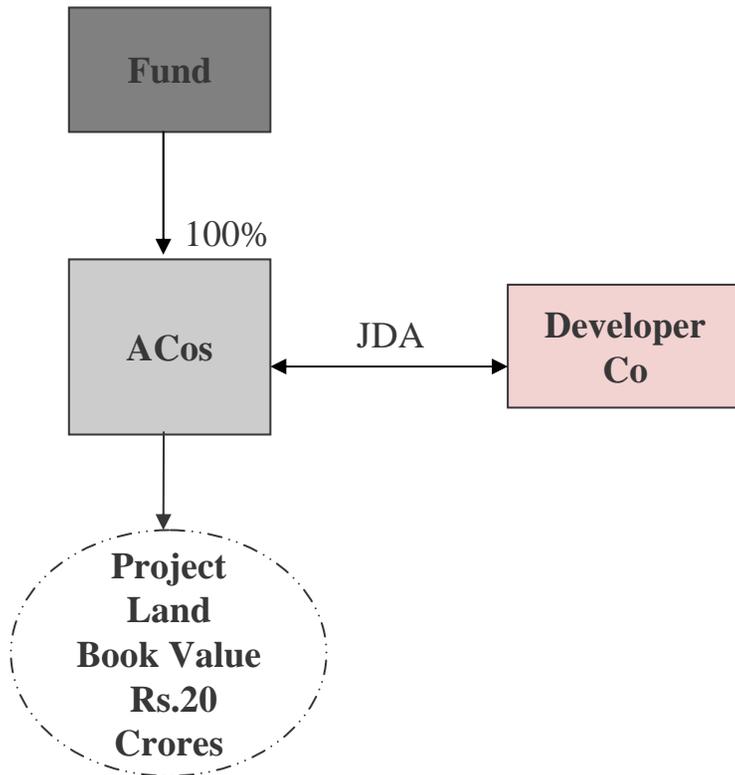
- **Whether transfer of undertaking in exchange for shares / bonds/ debentures would be considered to be slump sale ?**

[Recently , the Mumbai bench of Tribunal in the case of Bharat Bijilee Limited vs. ACIT (ITA No. 6410/ Mum/ 2008/ 2011-TIOL-197-ITAT-MUM) held that where bonds / preference shares are issued in consideration for transfer of an undertaking, the transaction is not a sale but an exchange, and therefore, provisions of section 2(42C) read with section 50B of the Income Tax Act relating to computation of capital gains in case of slump sale are not applicable to such transfer.

The Tribunal further held that since the cost of acquisition of business as a going concern was not ascertainable, the computation mechanism fails, and therefore, such transfer was not liable to tax under section 45 of the Income Tax Act also]

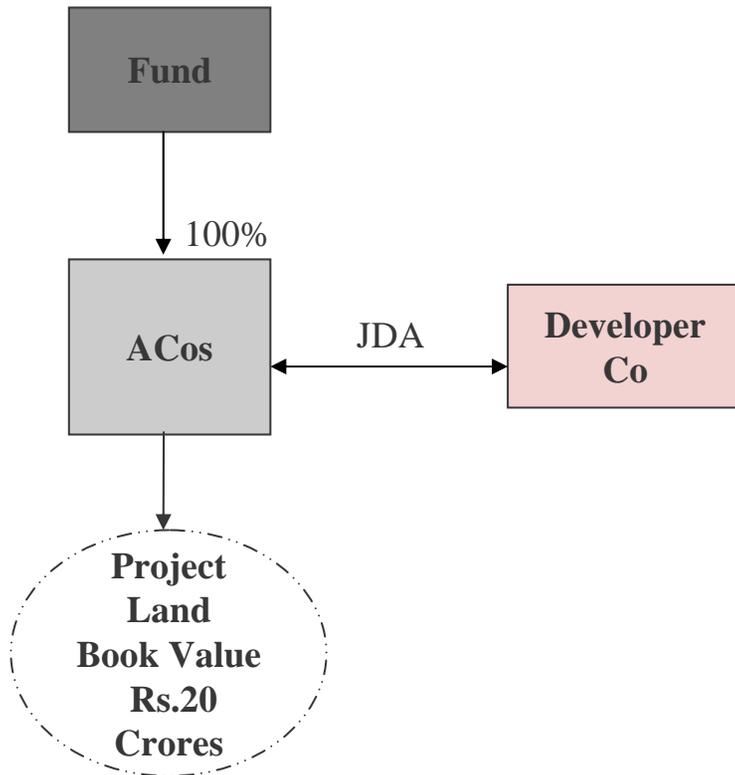
Case Studies

Case Study –I – Facts



- Fund, a Trust, is registered with SEBI, holding entire share capital of the real estate companies (“ACos”) in India at Rs. 20 crores each in its balance sheet, being the cost of acquisition of such shares.
- ACos took unsecured loans amounting to Rs.20 crores from the Fund on which no interest is payable by ACos to the Fund as per the terms of loan agreement.
- ACos owned piece of land (“**Project land**”), as stock in trade, in Gurgaon, Hyderabad and Chennai. The total book value of project land in the books of ACos is appearing at Rs.20 crores (market value is 80 crores).
- ACos entered into JDA with Developer Co for development of project land.

Case Study –I – Key Commercial Terms



- Under the JDA, ACos is entitled to receive certain portion of the total saleable area of the Group Housing Scheme and the balance developed area belonged to Developer Co.
- ACos/its affiliates were liable to incur expense of Rs. 20 crores on construction in terms of JDA
- The share of builtup saleable area belonging to ACos would be sold at Rs. 100 crores (i.e. Rs. 80 crores of market value of land and Rs. 20 crores would be the cost of construction)

Case Study –I – Key Challenges / Issues

- Land sitting at historical cost
- Sale of built up area and subsequent distribution of dividend to result in substantial taxes

Devising a tax efficient structure for revaluing the cost of land

Devising a tax efficient structure for sale of built up area



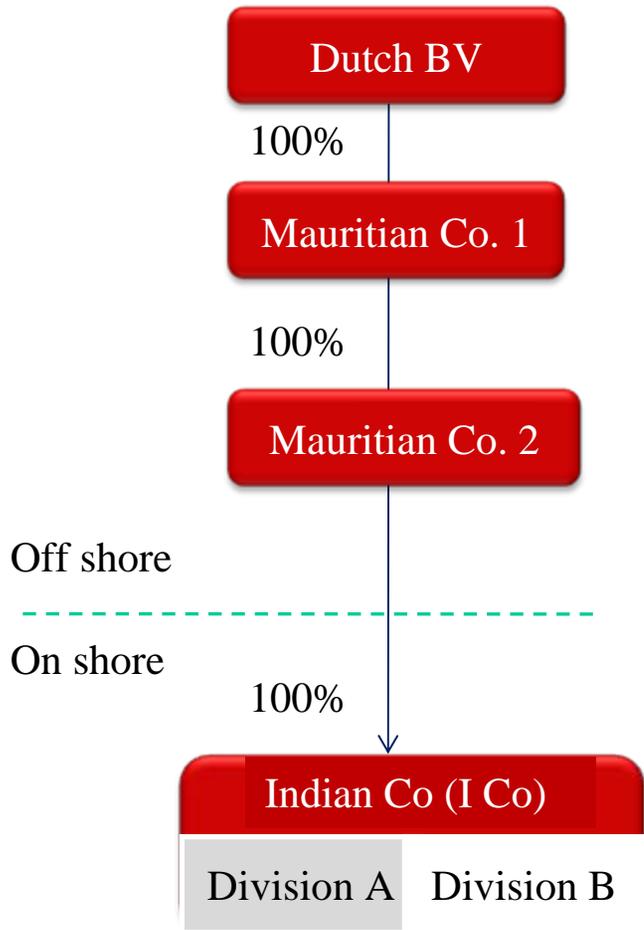
Case Study –I – Possible Option / Solution

Stage No.	Stages	Key Benefit
I	Setting up of the SPV as WOS of the Fund	<ul style="list-style-type: none"> ▪ No tax implications at this stages
II	Conversion of Loan into preference shares of ACos at Rs. 20 crores	<ul style="list-style-type: none"> ▪ Fund to ensure compliance with SEBI Venture Capital Fund Guidelines
III	Transfer of equity shares (held for more than 12 months) and preference shares held in A. Co to SPV by the Fund in lieu of OCDs at fair value	<ul style="list-style-type: none"> ▪ Section 56(2)(viia) would apply ▪ Tax levied @ 20% (plus applicable surcharge and education cess)

Case Study –I – Possible Option / Solution

Stage No.	Stages	Key Benefit
IV	Composite Scheme of Arrangement under section 391-394 read with Section 100 for reduction of shares capital (preference and equity), to the extent of 99.9% of share capital of ACo. and distribution of rights held in land as consideration to SPV, being the shareholders	<ul style="list-style-type: none"> ▪ No capital gains incidence since sale consideration (value of land) would be equal to the COA of the shares
V	Sale of built up area	<ul style="list-style-type: none"> ▪ No business income since value of built up area (80+20) would be equal to the sale consideration
Vi	Redemption of the OCD at par held by the Fund	<ul style="list-style-type: none"> ▪ No DDT leviable

Case Study –II – Facts



- I Co., an Indian company, had two divisions, namely Division A and Division B and was dealing in wholesale trading business.
- I Co. procured products for trading from a company incorporated under the laws of Isle of Man, to which no payment was made by for past one year. The said amount of Rs. 80 crores was shown under the head “Current Liabilities-Creditors” and the same was not payable by I Co.
- I Co. possessed accumulated losses of approx Rs. 60 crores
- A Private Equity Investor, resident of India, intended to invest in I Co. and take over the management

Case Study –II – Key Challenges / Issues

A

- Carried forward unabsorbed losses continue to be available to I Co.

B

- Huge outstanding debt owed to IoM company standing in the books of I Co. to be wiped off

C

- Minimal FEMA compliances

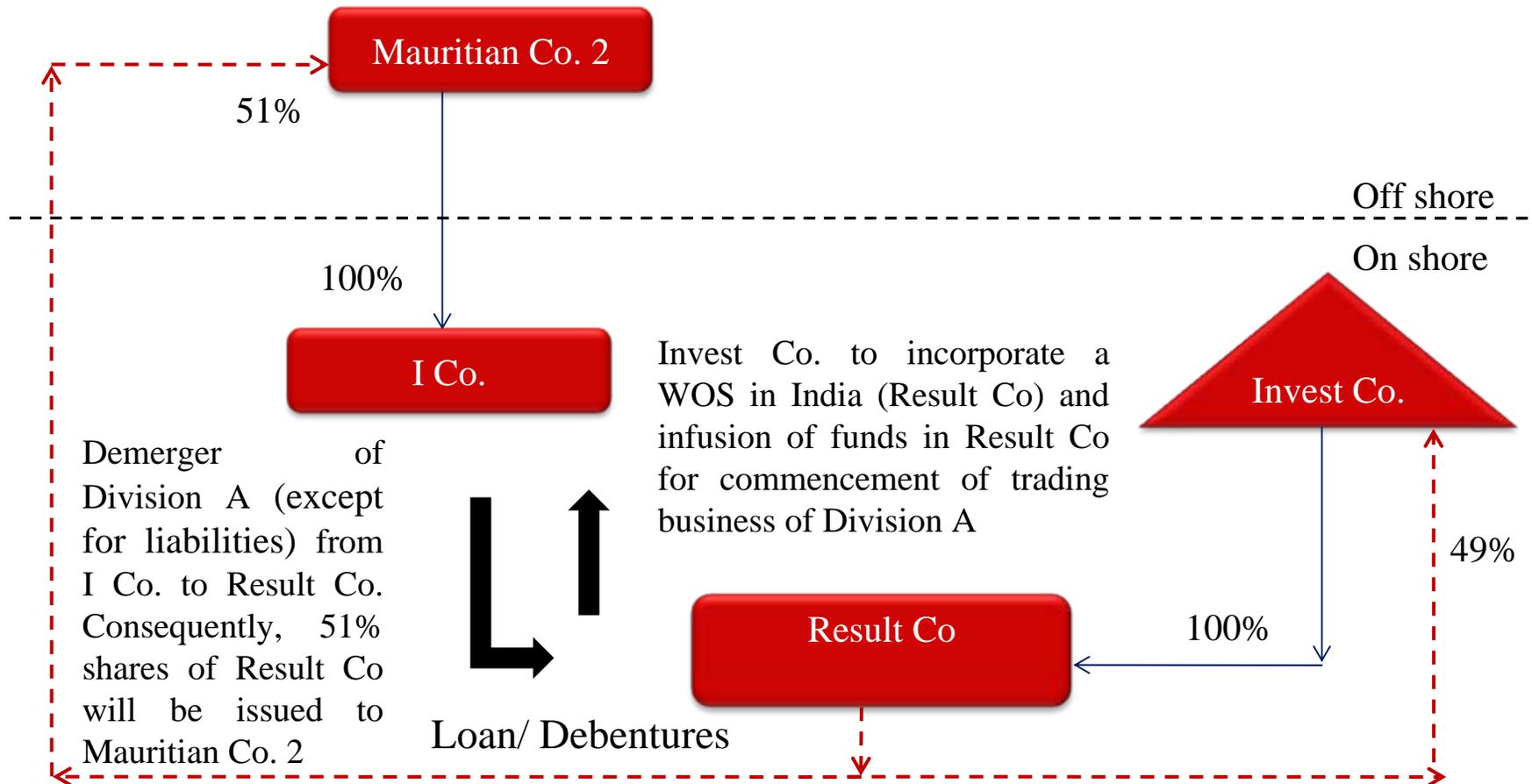
D

- Ensure that the funds are infused into I Co. at the earliest for carrying out its operations

E

- To give control of Division A business to Investor

Case Study –II – Possible Option / Solution



Case Study –II –Possible Option / Solution

No.	Stages	Key Benefit
I	<ul style="list-style-type: none"> • Invest Co. to set up WOS in India and infuse funds in the same • Invest Co, through Result Co, to invest funds in I Co. in the form of loan / debentures to fulfill the working capital requirement of trading business till the time demerger is given effect to 	<ul style="list-style-type: none"> ▪ No tax implications at this stages ▪ Since the appointed date would be retrospective, there would be no major implications on grant of loan or subscription to Debentures of I Co.
II	<p>Constitution of the Board of I Co. to be changed in accordance with the shareholders' agreement to be entered into between the parties</p>	<p>The provisions of section 79 of the Income tax Act would not get invoked since the said section does not specify change in directorship or change in management as a trigger</p>
III	<p>Demerger of part of Division A (except for liabilities) from I Co. to Result Co.</p>	<ul style="list-style-type: none"> (a) Inter company transactions of loan /debentures would stand cancelled (b) no levy of capital gains since demerger would be tax neutral (c) carry forward and set off of unabsorbed losses would be available for unexpired period

THANK YOU

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