



BCAS Study Circle Meet
Finance, Corporate and Allied Laws Study Circle

Fast Tracker Merger
by CA Ankit Davda

Monday, November 18, 2024
5.30 PM to 7.30 PM

The views expressed herein are strictly personal in nature and do not amount to views of the organization that the presenter is/was associated with. The contents of this document are for educational purposes only and do not amount to professional advice. No reliance should be placed on this document for any purpose.

Contents

- **Overview of key provisions under CA 2013**
 - Mergers, Amalgamation, Demerger etc.
- **CA 2013 : Fast Track Merger provisions**
- **Other Key Areas for Evaluation**
- **Few practical / operational challenges**
- **Q&A – along the way**

Overview of key provisions under CA 2013

- Companies Act, 2013
- **Chapter XV - Compromises, Arrangements and Amalgamations**
 - provides **comprehensive framework** for enabling M&A involving corporate entities
- Scheme of arrangement – Sec 230 to 232 – **NCLT approval route**
 - **Widely used** statutory framework
 - Sec 230 - Power to Compromise or make Arrangements with Creditors and Members
 - Sec 231 - Power of Tribunal to enforce Compromise or Arrangement
 - **Sec 232 - Merger and amalgamation of the companies**
- Section 233 – **Fast track route** without NCLT intervention for certain specified companies
 - Useful for smaller / closely held companies
 - Simplified process – designed to make **doing business in India easier**
- Sec 234 – Merger and amalgamation of company **with Foreign Company**
 - Outbound and inbound **mergers are permissible subject to RBI approval**



CA 2013 Provisions: Fast Track Merger

- Section 233 of CA 2013
- Key elements of a Scheme of Arrangement document
- Rule 25 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (“**CAA Rules**”)

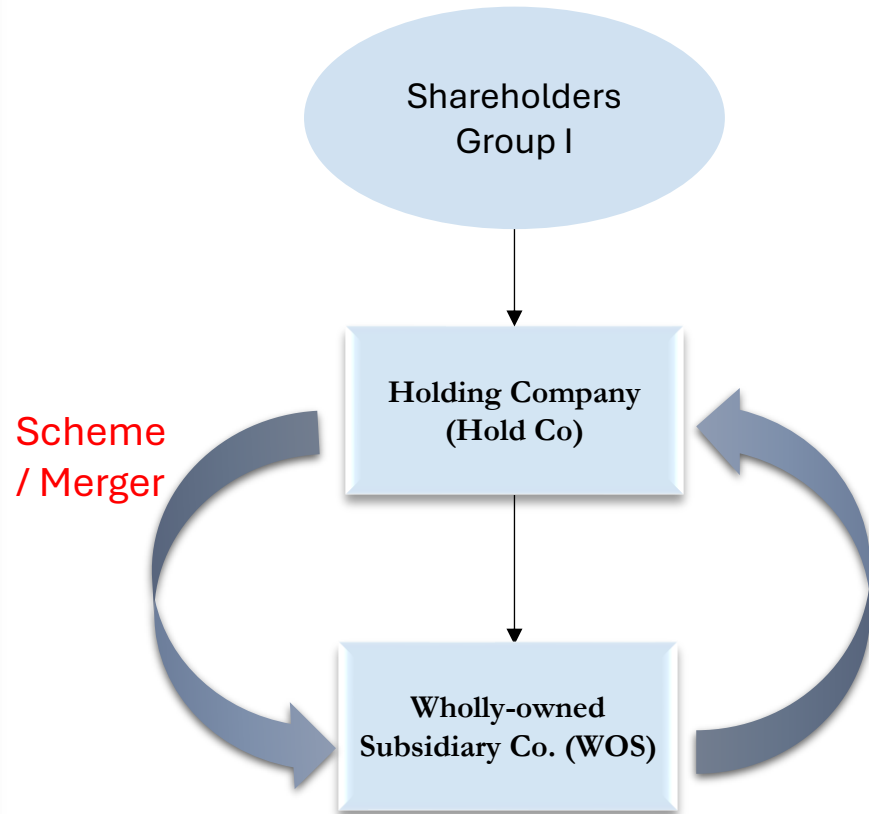
Fast Track Merger under CA 2013

- **Merger or Amalgamation of Certain Companies**
 - New provision introduced under CA 2013 – commonly known as **Fast Track Merger (FTM)**
 - As per Section 233(12): includes demerger and other compromise or arrangement

- **Section 233(1):**
 - **Notwithstanding** the provisions of **section 230** and **section 232**,
 - a **scheme of merger or amalgamation** may be entered into between
 - two or more **small companies** or
 - between a **holding company and its wholly-owned subsidiary company**
 - or such **other class or classes of companies** as may be prescribed,
 - subject to **provisions of Section 233(1)(a) to (d)**.

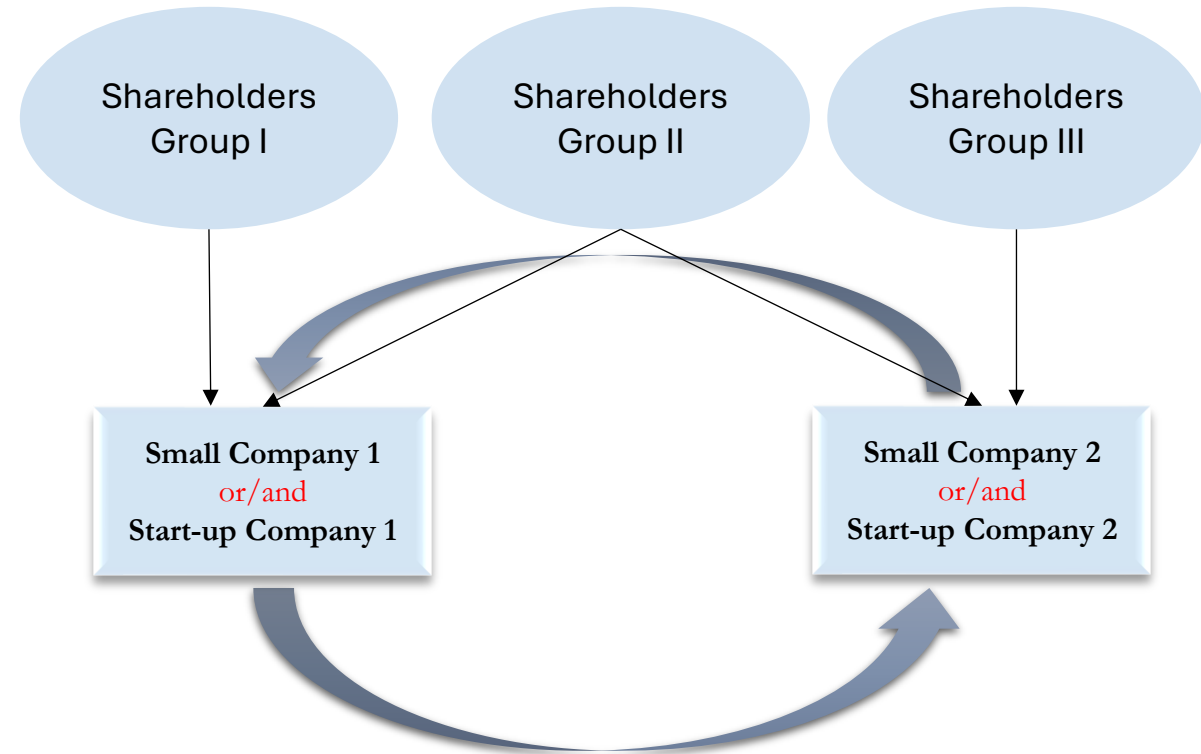
- **Rule 25(1A) of CAA Rules**
 - two or more start-up companies;
 - one or more start-up company with one or more small company

Case studies I



Scenario I: Merger of WOS into Hold Co

Scenario II: Merger of Hold Co into WOS

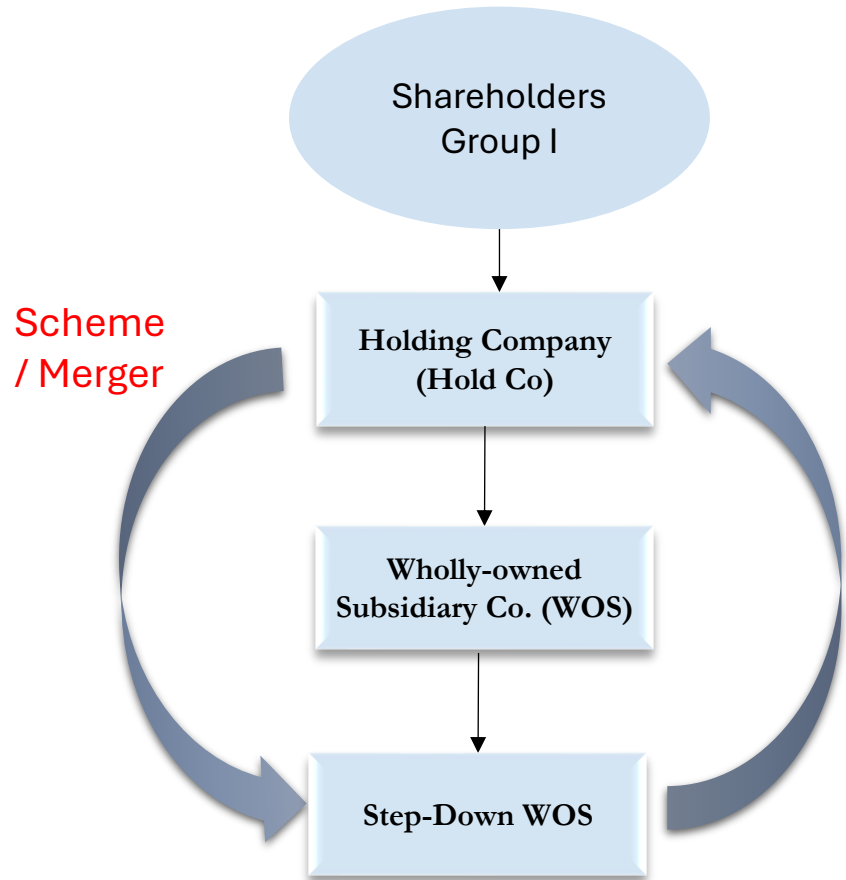


Scenario III: Merger between Small Companies

Scenario IV: Merger between Start-up Companies

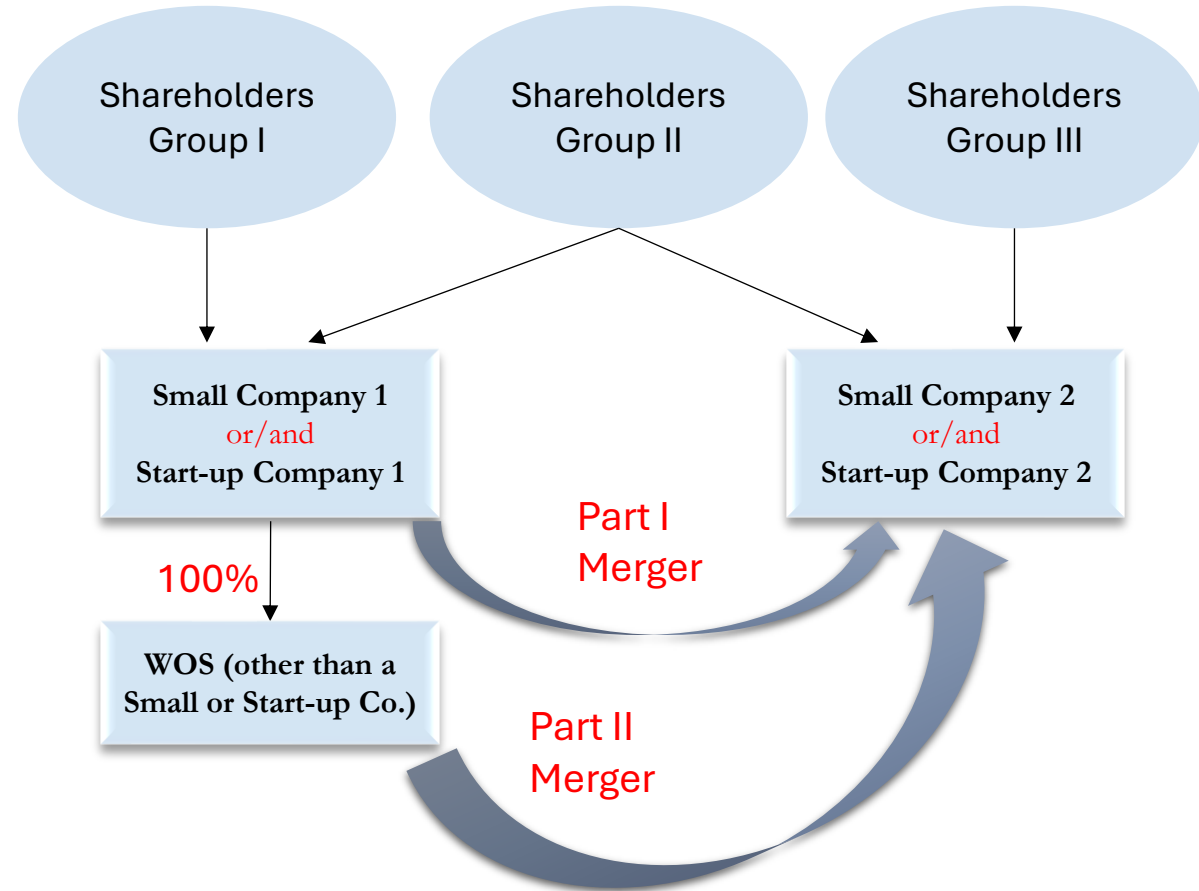
Scenario V: Merger between one or more Small Companies and/or one or more Start-up Companies

Case studies II



Scenario VI: Merger of Step-Down WOS into Hold Co

Scenario VII: Merger of Hold Co into Step-Down WOS



Scenario VIII: Composite Scheme – i) Part I Merger between Small / Start-up Co; and ii) Part II Merger of WOS (Large Co.) into such merged Small / Start-up Co.

Key elements of a Scheme of Arrangement

- **Scheme of Arrangement - document**
 - a **contractual document** between the Companies involved and their shareholders, creditors
- **Brief background about Companies involved**
 - Transferor and Transferee Company
- **Rationale of the scheme** - Objectives / need for scheme of arrangement
- **Definitions**
 - Appointed Date to Effective Date
- **Transfer** of Undertaking, all assets and liabilities, contracts, employees, litigations etc
- Share exchange ratio – valuation of businesses / entities – by **Registered Valuer**
- Accounting Treatment – **certificate by Statutory Auditor**
- Aggregation of **authorised share capital**
- **Dissolution** of the transferor company without winding-up
- Subject to contractual and regulatory approvals - **Single Window clearance**

FTM : Key provisions and procedures

Section	Provision	Rules
233(1)(a)	<ul style="list-style-type: none"> ▪ notice of the proposed scheme inviting objections or suggestions ▪ from ROC and Official Liquidator ▪ or persons affected by the scheme ▪ within 30 days, to be issued by the companies involved 	Rule 25(1) : Notice to be given in Form No. CAA.9 <ul style="list-style-type: none"> ➤ RD, ITD, GST, Sectoral Regulators
233(1)(c)	<ul style="list-style-type: none"> ▪ Each companies files a declaration of solvency ▪ with jurisdictional ROC ➤ Positive net worth of all the companies mandatory 	Rule 25(2) : To be filed in Form No. CAA.10 <ul style="list-style-type: none"> • before convening the meeting
233(1)(b)	<ul style="list-style-type: none"> ▪ objections and suggestions received are considered ▪ by the companies in their respective general meetings; ▪ scheme is approved by the members at a general meeting ▪ holding at least 90% of the total number of shares ➤ 90% of total outstanding shares difficult to meet often 	Rule 25(3): Notice to be accompanied by: <ul style="list-style-type: none"> (a) statement u/s. 230(3) read with Rule 6(3) (b) Declaration of Solvency (c) Copy of the Scheme
233(1)(d)	<ul style="list-style-type: none"> ▪ the scheme is approved by majority (>50%) representing nine-tenths (90%) in value of the creditors ▪ in a meeting convened by giving a notice of 21 days or ▪ otherwise approved in writing ➤ Higher approval threshold – written consents possible 	

FTM : Key provisions and procedures

Section	Provision	Rules
233(2) Application to RD, ROC, OL	<ul style="list-style-type: none"> Transferee company shall file a copy of the scheme so approved with the Central Government (RD), ROC and OL in the manner <u>as may be prescribed</u> 	<p>Rule 25(4)(a) :</p> <ul style="list-style-type: none"> To be filed in Form No. CAA.11 within 7 days of conclusion of meeting of members and creditors along with report of result of each of meetings <p>Rule 25(4)(b) :</p> <ul style="list-style-type: none"> Form No. CAA.11 along with copy of Scheme also to be filed with: <ul style="list-style-type: none"> ROC in Form No. GNL-1 OL through hand delivery or registered / speed post
233(3) Approval of the Scheme by RD	<ul style="list-style-type: none"> On receipt of the scheme, if ROC or OL has no objections or suggestions to the Scheme CG shall register the same and issue a confirmation thereof to the Companies 	<p>Rule 25(5) : In such a case,</p> <ul style="list-style-type: none"> If no objections or suggestions is received from ROC or OL within 30 days of receipt of Scheme and CG is of opinion that the scheme is in public interest or in the interest of creditors within 15 days of expiry of 30 days, issue a confirmation order of such scheme in Form No. CAA.12 <p>➤ Deemed approval within 60 days</p>

FTM : Key provisions and procedures

Section	Provision	Rules
233(4) Objections from ROC / OL	<ul style="list-style-type: none"> ▪ If ROC or OL has any objections or suggestions to the Scheme, ▪ he may communicate the same in writing to CG within 30 days 	<p>Rule 25(6)(a) :</p> <ul style="list-style-type: none"> ▪ If such objections or suggestions of ROC or OL are not sustainable and ▪ CG is of the opinion that the scheme is in the public interest or in the interest of creditors ▪ it may within a period of 30 days, issue a confirmation order of such scheme in Form No. CAA.12
233(5) Reference application by RD to NCLT	<ul style="list-style-type: none"> ▪ If CG, after receiving the objections or suggestions or for any reason ▪ is of the opinion that the scheme is not in the public interest or in the interest of creditors ▪ it may file an application before the NCLT within a period of 60 days ▪ stating its objections and requesting that the NCLT may consider the scheme under <u>section 232</u> 	<p>Rule 25(6)(b) : Similar language as used in section</p> <p><u>Additionally:</u></p> <ul style="list-style-type: none"> ▪ application before the NCLT to be filed in Form No. CAA.13 ➤ Deemed approval within 60 days, if confirmation order is not issued under Rule 25(6)(a) or application is not filed under Rule 25(6)(b) within 60 days ➤ <u>Confirmation order shall be issued accordingly</u>

FTM : Key provisions and procedures

Section	Provision	Rules
233(6) NCLT decision on the Scheme	<ul style="list-style-type: none">On receipt of an application from the <u>CG or from any person</u>,if the NCLT, for reasons to be recorded in writing,is of the opinion that the scheme should be considered as per the procedure laid down in <u>section 232</u>, the NCLT may direct accordingly <u>or</u>it may confirm the scheme by passing such order as it deems fit:	NA
233(7) Approval of the Scheme by NCLT to be informed to ROC	<ul style="list-style-type: none">A copy of the order under sub-section (6) confirming the schemeshall be communicated to ROC having jurisdiction over the transferee company and the persons concerned, andROC shall register the scheme and issue a confirmation thereof to the companies andsuch confirmation shall be communicated to the ROC where transferor company or companies were situated	Rule 25(7) <ul style="list-style-type: none">The confirmation order of the scheme issued by the CG or NCLTshall be filed with ROC in Form INC-28,within 30 days of the receipt of the order of confirmation.

FTM : Key provisions and procedures

Section	Provision	Rules
233(8)	<ul style="list-style-type: none">▪ The registration of the scheme under sub-section (3) or sub-section (7)	NA
Dissolution of Transferor Company	<ul style="list-style-type: none">▪ shall be deemed to have the effect of <u>dissolution of the transferor company without process of winding-up</u>	
233(9)	<ul style="list-style-type: none">▪ The registration of the scheme shall have the following effects:<ul style="list-style-type: none">a) transfer of property or liabilities of the transferor company to the transferee companyb) the charges, if any, on the property of the transferor company shall be applicable and enforceable as if the charges were on the property of the transferee company;c) legal proceedings by or against the transferor company pending before any court of law shall be continued by or against the transferee company; andd) where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of debt due to dissenting creditors, such amount, to the extent it is unpaid, shall become the liability of the transferee company	NA
Effect of Scheme approval		

FTM : Key provisions and procedures

Section	Provision	Rules
233(10) Treasury Shares not allowed	<ul style="list-style-type: none">▪ A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company▪ all such shares shall be cancelled or extinguished on the merger	NA
233(11) Application to ROC	<ul style="list-style-type: none">▪ Transferee company shall file an application with ROC along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital▪ Set-off fess already paid by the Transferor Company on its authorised share capital available against fees due on revised capital	NA

FTM : Key provisions and procedures

Section	Provision	Rules
233(12) Provisions applicable to demerger etc.	<ul style="list-style-type: none"> ▪ The provisions of this section shall mutatis mutandis apply to a company or companies specified in sub-section (1) ▪ in respect of a scheme of compromise or arrangement referred to in section 230 or ▪ division or transfer of a company referred to in Section 232(1)(b) 	NA
233(13) Rules	<ul style="list-style-type: none"> ▪ The CG may provide for the merger or amalgamation of companies in such manner <u>as may be prescribed</u> 	Rule 25 of CAA Rules
233(14) Section 233 process not mandatory	<ul style="list-style-type: none"> ▪ A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation 	Rule 25(8) <ul style="list-style-type: none"> ▪ schemes of arrangement or compromise falling within the purview of section 233 ▪ the concerned companies may, at their discretion, opt to undertake such schemes under sections 230 to 232 of the Act,

FTM : Broad Timelines

Sl.	Activity	Parties	Timelines	Forms	Section	Rules
1	Appointment of various agencies - advisors, registered valuer, Scrutinizer etc.	Advisors etc.	X - 15	-	-	-
2	Pre board meeting evaluation, conceptualization, preparations	Company team	X - 15	-	-	-
3	Approval of the Scheme in Board meeting	Board of Companies	X	-	-	-
4	Notice of the proposed scheme inviting objections or suggestions	ROC, OL, RD, Other Regulators	X+1	CAA.9 GNL.1	233(1)(a)	25(1)
5	Filing of declaration of Solvency	ROC, OL, RD	X+1	CAA.10, GNL.2	233(1)(c)	25(2)
6	Issuance of Notice of meeting of members	Members	X+1	-	233(1)(b)	25(3)
7	Issuance of Notice of meeting of creditors	Creditors	X+1	-	233(1)(d)	25(3)
8	Receipt of objections or suggestions, if any	ROC, OL, RD	X+31	-	-	-
9	Conduct of meeting of Members / Creditors and approval of the Scheme by requisite majority	Members, Creditors	X+32	-	233(1)(d)	25(3)
10	Filing of application for approval of Scheme	RD, ROC, OL	X+39	CAA.11, RD.1, GNL.1	233(2)	25(4)(a), (b)

FTM : Broad Timelines

Sl.	Activity	Parties	Timelines	Forms	Section	Rules
11	ROC, OL to communicate its objections or suggestions, if any, on the Scheme to RD	ROC, OL to RD	X+69	-	233(3)	25(5)
12	Approval of the Scheme by RD	RD to Company	X+99	CAA.12	233(3), (4)	25(6)(a)
13	Filing of order confirming the Scheme with ROC, aggregation of authorized share capital etc.	ROC	X+129	INC-28	233(3), (7)	25(7)
14	Filing of stamp duty adjudication application	Stamp Duty Authority	X+129	Form ADJ 1	-	-
15	Other implementation actions as per the Scheme to be taken by the Companies	Company team	X+130	-	-	-
OR						
12	Filing of application by RD with Hon'ble NCLT	RD to NCLT	X+99	CAA.13	233(5)	25(6)(b)
13	NCLT to consider the Scheme - either may approve it by passing necessary orders OR consider the Scheme as per procedure u/s. 232	NCLT	X+159	-	233(6)	-
#	Depending on the decision of NCLT, steps as stated from Sr. No. 13 to 15 above to be taken	-	X+180	-	-	-

Few critical points for consideration

- **Declaration of Solvency**
 - Positive net worth of all companies mandatory?
- **Approval of Scheme by requisite majority of Members and Creditors**
 - 90% of total share capital / creditors
- **Timelines** to be strictly followed – e.g. within 7 days application must be filed
- **Whether CG / RD can reject the Scheme?**
 - Statutory provisions do not give powers to RD to reject the Scheme
 - It can either approve the scheme by passing an order of confirmation OR
 - Submit an application with NCLT to consider the Scheme along with its opinion
- **Bombay High Court ruling in Asset Auto v. UoI**
 - **[2024] 167 taxmann.com 461 (Bombay) [01-08-2024]**
 - Where scheme between holding company and its WOS was approved by majority representing 90% in value of creditors of respective companies, CG, i.e. **RD could not reject said scheme on ground that transferor companies were not solvent**, RD was required to file an application before Tribunal stating its objections and requesting Tribunal to consider scheme under section 232



Other Key Areas for Evaluation

Other Key Areas for Evaluation

- **Monetary / Cost factors**

- Income Tax
- GST
- Stamp Duty
- Transfer Premium / other Charges
- Change of control clauses

- **Non-monetary factors / Compliance of Law**

- SEBI laws
- FEMA laws
- Competition Commission
- Permission from Sectoral Regulators – RBI, SEBI, IRDAI, RERA, MIB etc.

- **Accounting Treatment**

- Non-monetary and/or Monetary



Amalgamation under IT Act

- Section 2(1B) - definition
- Tax neutrality - Exemption
 - to Amalgamating company
 - to Amalgamated company
 - to Shareholders
- Carry forward of Losses
- Few key provisions

Amalgamation - Definition

Section 2(1B) – definition of ‘Amalgamation’

- i. **Merger** of two or more **companies** - **amalgamating company** and **amalgamated company**
 - ❖ Sec 2(17) - Company includes **Indian company** & **body corporate incorporated outside of India**
- ii. All the **property** and **liabilities** of the amalgamating companies becomes the property and liabilities of the amalgamated company
 - ❖ Past liabilities - Indemnification by controlling shareholders
 - ❖ No restrictions on value at which these assets / liabilities are transferred / recorded
- iii. **Shareholders holding not less than 3/4th** in value of **shares** in amalgamating company
 - other than shares already **held therein immediately before the amalgamation** by, or by a nominee for, the amalgamated company or its subsidiary
 - **become shareholders of the amalgamated company by virtue of the amalgamation**
 - ❖ **Shares and shareholders - Preference shares**
 - ❖ **Shareholders** as on Appointed Date vs. Effective Date
 - ❖ Merger of **fellow subsidiary companies** – having same immediate holding company

A ‘merger’ of two companies under CA 2013 not necessarily an ‘amalgamation’ under the IT Act – Scheme document generally mentions merger is in compliance of conditions of Sec 2(1B)

Amalgamation - Exemption

For Amalgamating Company

- Section 47 (vi) : any transfer of a **capital asset** by the amalgamating company to the amalgamated company
 - ✓ if the amalgamated company is an Indian company;

For Amalgamated Company

- Section 56(x) : any person receives specific asset without or for inadequate consideration
 - ✓ Exception – received pursuant to transaction referred to in Sec 47(vi), (via), (viab)

Amalgamation - Exemption

For Shareholders

- Sec 47 (vii) : any transfer by a shareholder of a capital asset being shares held by him in the amalgamating company, if
 - ✓ transfer is made in consideration of **the allotment to him of any shares** in the amalgamated company **except** where the **shareholder itself is the amalgamated company**, and
 - ✓ amalgamated company is an **Indian Company**
 - ❖ Monetary consideration taxable
 - ❖ Subsidiary of amalgamated company shareholder in the amalgamating company – issue of shares?

- Sec 49(2) – Cost of acquisition of shares of the amalgamated company shall be deemed to be the **cost of acquisition** of the shares in the amalgamating company
 - Sec 2(42A) – period of holding in amalgamating company shall be considered
 - ❖ Listed amalgamating company - Grand fathering benefit available?
 - ❖ Top-down merger - Holding company into operating company – grand fathering lost
 - ❖ Mauritius / Singapore DTAA – Pre-2017 acquisition grand fathered – benefit to continue?

Amalgamation – Carry forward of Losses – Sec 72A

Fresh lease of life to Losses

Accumulated business loss & unabsorbed depreciation - shall be **deemed to be loss of the year** in which amalgamation is effected

Conditions for Amalgamating Company

- ✓ Amalgamation of company owning **industrial undertaking, ship or hotel**
- ✓ Public sector cos. – special provisions
- ✓ Company **engaged in business** for 3 or more years
- ✓ At least **75% of BV of fixed assets** held continuously for 2 years prior to the date of amalgamation

Conditions for Amalgamated Company

- ✓ For a minimum of **5 years**
 - Continue the **business** of the amalgamating company; and
 - Hold continuously at **least 75% of BV** of fixed assets of amalgamating company
- ✓ Achieve at least **50% of installed capacity** before end of 4 years & continue to maintain the same till year 5

Industrial undertaking means :

- ✓ the manufacture or processing of **goods**; or
- ✓ the manufacture of **computer software**; or
- ✓ business of generation or distribution of **electricity** or any other form of power; or
- ✓ business of providing **telecommunication services**,
- ✓ **mining**; or
- ✓ construction of **ships, aircrafts or rail systems**;

In case **conditions are not complied with by the amalgamated company**, loss / unabsorbed depreciation claimed in previous years shall become **income of the year in which default is made**

Amalgamation - Few key provisions

➤ **Sec 2(22) – Dividend - Accumulated Profits**

- **For amalgamated company** - accumulated profits, whether capitalised or not, of the amalgamating company on the date of amalgamation to be added
- ❖ CBDT Circular No. 5-P of October 9, 1967 – merger of subsidiary into holding company

➤ **Section 41(1) – cessation of trading liability**

- Benefit to the Amalgamated company in respect of which loss or expenditure was incurred by the amalgamating company
- ❖ Issue of redeemable preference shares to creditors prior to amalgamation

➤ **Section 79(2) – change in shareholding of closely held Indian company**

- Which is a subsidiary of a foreign company
- as a result of **amalgamation** or **demerger** of a foreign company subject to the condition
 - ✓ 51% shareholders of amalgamating or demerged foreign company
 - ✓ Continue to be the shareholders of the amalgamated or the resulting foreign company;

❖ **Accounting treatment – fair value – MAT – conversion of stock in trade into capital asset**

While amalgam of two persons, whether natural or artificial, is often good, but its beneficial only if certain prerequisites or conditions are strictly observed



Demerger under IT Act

- Section 2(19AA) - definition
- Tax neutrality - Exemption
 - to Amalgamating company
 - to Amalgamated company
 - to Shareholders
- Few key provisions

Demerger - Definition

Section 2(19AA) – definition of ‘Demerger’

“**Demerger**”, 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** in such a manner that:

- ❖ **Fast track demerger covered ?**
- ❖ May not be a Scheme of arrangement u/s. 391 to 394 of CA, 1956 viz. 230-232 of CA, 2013

All the **property** and **liabilities** of the undertaking becomes the property and liabilities of the resulting company

- ✓ ‘Undertaking’ includes **any part of an undertaking, or a unit or division of an undertaking** or a **business activity** taken as a whole
- ✓ **Specific loans or borrowings** (including debentures) relating to the Undertaking
- ✓ **General or multi purpose borrowings** – ratio of assets transferred to total assets of the demerged company

Property and **liabilities** to be transferred at the values appearing in **the books of the demerged company**

- ✓ **Revaluation** in books of demerged company to be ignored
- ✓ **Exception:** recording at different value by resulting company to comply with provisions of Ind-AS
 - MAT – change in value to be ignored for calculation of book profits

Demerger - Definition

Issue of shares by the resulting company to the shareholders of the demerged company on a **proportionate basis**

- ✓ **Exception:** where the resulting company itself is a shareholder in the demerged company
 - **Definition of Resulting Company** – Sec 2(41A) – resulting company means one or more companies (includes WOS) to which undertaking is transferred
 - ❖ **Transfer of undertaking to WOS and issue of shares by the Holding Company possible** – vice versa not possible

Shareholders holding at least **3/4th in value of the shares** to become shareholders of the resulting company

- ✓ Same on the lines of condition in amalgamation
- ✓ **Other than shares held in the demerged company by the resulting company or its subsidiary**

Transfer of undertaking on a **going concern basis**

- ❖ Composite scheme – receipt of undertaking through amalgamation and onward transfer of the undertaking as part of demerger
 - ❖ *To fulfill Undertaking test | To achieve intended shareholding structure*
- ❖ Undertaking should be going concern qua demerged company?

Demerger to be in compliance with **conditions notified u/s. 72A(5)**

- ✓ **Sec 72A(5)** – CG to specify conditions as it considers necessary to ensure that the **demerger is for genuine business purposes**
 - Powers u/s. 72A(5) not yet exercised - No notification issued

Demerger - Exemption

For Demerged Company

- Section 47 (vib) : any transfer of a **capital asset** by the demerged company to the resulting company
 - ✓ if the resulting company is an Indian company;

For Resulting Company

- Section 56(x) : any person receives specific asset without or for inadequate consideration
 - ✓ Exception – received pursuant to transaction referred to in Sec 47(vib) & (vic)

Demerger - Exemption

For Shareholders

- Sec 47 (vid)
 - any **transfer** or **issue** of shares by the resulting company,
 - to the **shareholders** of the demerged company
 - if the **transfer or issue** is made in consideration of demerger of the undertaking

- ❖ **Transfer of share** by demerged company of **any other company** possible?
- ❖ **Sec 2(22) – Dividend** does not include
 - ✓ any **distribution of shares** pursuant to a demerger by the resulting company to the shareholders of the demerged company
- ❖ No exemption to Resulting Company for transfer of Capital Asset as part of Demerger

Demerger - Exemption

For Shareholders

- Sec 49(2C) – Cost of acquisition of shares in **resulting company**
 - **allocation** of cost of acquisition of shares in the demerged company
 - in the ratio of **net book value of assets** transferred to **net worth** of the demerged company
 - **net worth** means the aggregate of the **paid-up share capital** and **general reserves**

Net book value of assets transferred
under the demerger

Net worth of the demerged company
immediately before demerger

×

Original cost of acquisition of shares in
the demerged company

- ❖ Net assets to be considered?
 - ❖ Net worth calculation – net assets approach vs. capital + free reserves approach?
 - ❖ Listed companies provide indicative guidance – Recent case of Piramal Pharma demerger from Piramal Enterprise Limited
- Sec 2(42A) – period of holding in demerged company shall be considered

Demerger - Few key provisions

- **Sec 72A(4) – carry forward of losses**
 - **For the unexpired period** – no fresh lease of life
 - Directly **related losses** to Undertaking to be transferred
 - Not directly relatable losses to be apportioned between demerged company and resulting company in the ratio of **assets** transferred and retained

- **Section 41(1) – cessation of trading liability**

- **Section 79(2) – change in shareholding of closely held Indian company**

- **Non-compliance of conditions of demerger**
 - ❖ Could be very tax inefficient as Tax neutrality not available
 - ❖ Demerged company - Capital gains / business profits tax liability
 - ❖ Shareholders – receipt of dividend or receipt of shares without consideration – taxable?
 - ❖ **Grasim Industries** recent case
 - 'undertaking' test challenged – **transfer of investments**
 - sigh of relief from huge tax liability

Section 170A – specific provision for filing of Modified Return in ITR-A by successor companies

Stamp Duty provisions

- **Scheme of arrangement is an instrument**
 - Effecting the transfer of properties
 - Hence chargeable to Stamp Duty
- **Stamp Duty chargeability is governed by respective State's stamp duty laws**
 - In **Maharashtra**, applicable stamp duty is:
 - **10% of the value of Shares issued by the Transferee Company**, subject to maximum of
 - a) 5% of the value of immovable property transferred from the Transferor Company; or
 - b) 0.7% of the value of shares issued by the Transferee Company
- **FTM:** In case of merger of WOS into Holding Company, technically no shares are issued and no stamp duty is applicable – in Maharashtra
- **Orders confirming the Scheme needs to be adjudicated for stamp duty purposes**
 - Adjudication application in ADJ.1 needs to be submitted along with all supporting documents, affidavit, undertaking etc.
 - Stamp duty department generally takes extended time unless effectively coordinated / represented at the department

Few practical / operational challenges

- **Inter-company transactions during scheme implementation period**
 - IT compliances – TDS, deemed dividend
 - CA 2013 – approvals
- **Credit for TDS, Advance Tax paid by the Transferor Company**
 - Filing of ITR-A, Transfer of challan to the PAN of Transferee Company
- **Need for continuation of bank account of Transferor Company**
 - Old Income Tax refunds due
 - Customer receipts / cheques
- **Transfer of GST Credit – Form ITC-02 - Section 18(3), Rule 41(2)**
 - Non-availability of GST credit on expenditure incurred in relation to merger
- **Applicable statutory registrations, filings in Transferee Company**
 - Surrender of registrations, licenses of Transferor Company to be done after few months
- **Vendor registration with customers, suppliers etc.**



Thank You !

ankit.davda@bathiya.com | +91 99300 93181

The views expressed herein are strictly personal in nature and do not amount to views of the organization that the presenter is/was associated with. The contents of this document are for educational purposes only and do not amount to professional advice. No reliance should be placed on this document for any purpose.