

Taxation and Compliances in Restructuring

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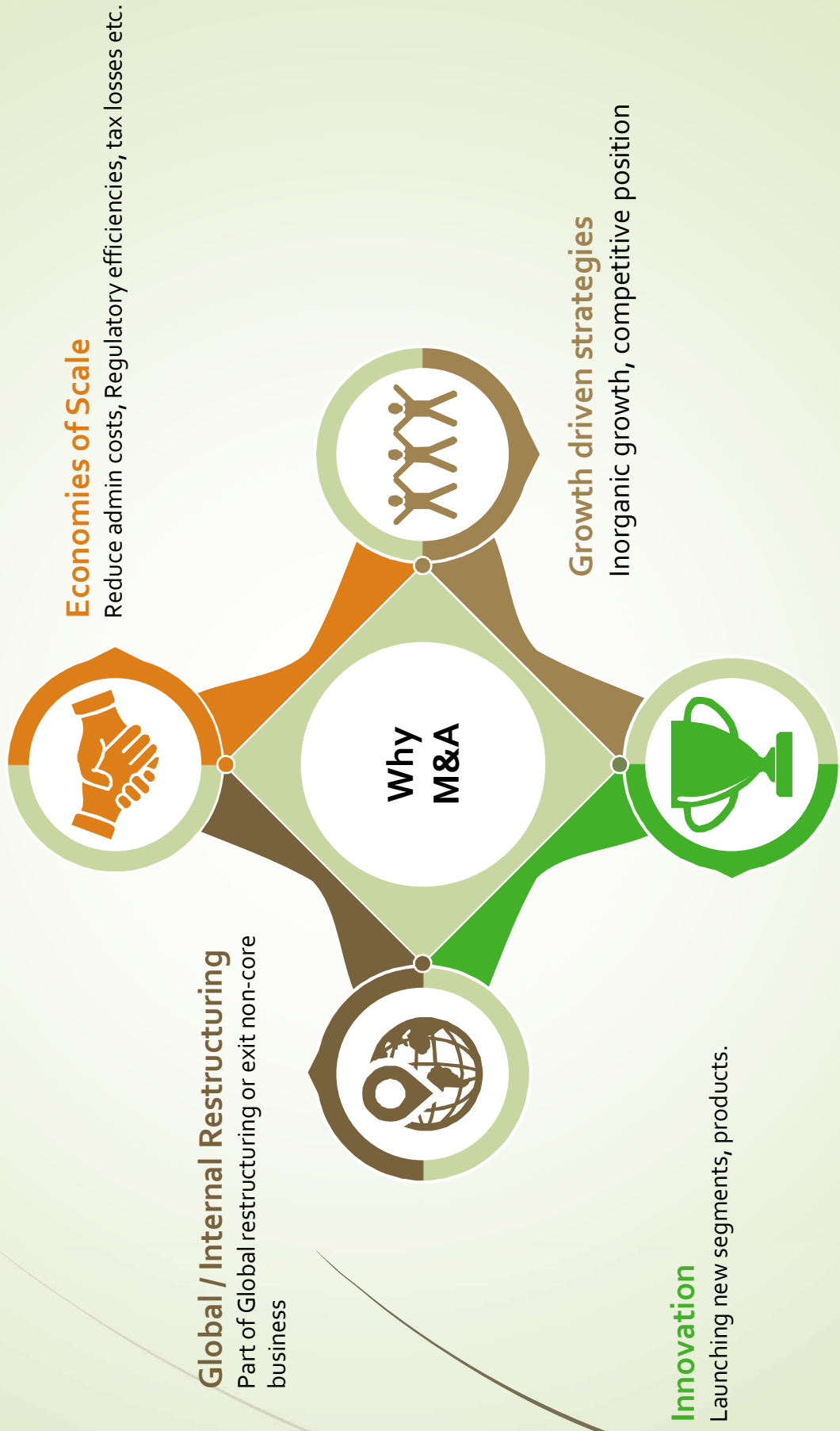
4 May, 2019

Some Recent Transactions

Notable merger transactions		
Radiant Life Care Pvt. Ltd with Max Healthcare Ltd.	Merger of Indus Towers Limited with Bharti Infratel Limited	Merger of GlaxoSmithKline Consumer Healthcare Limited with Hindustan Unilever Limited
	Merger of Vodafone Service Limited, Vodafone India Limited and Idea Cellular Limited	

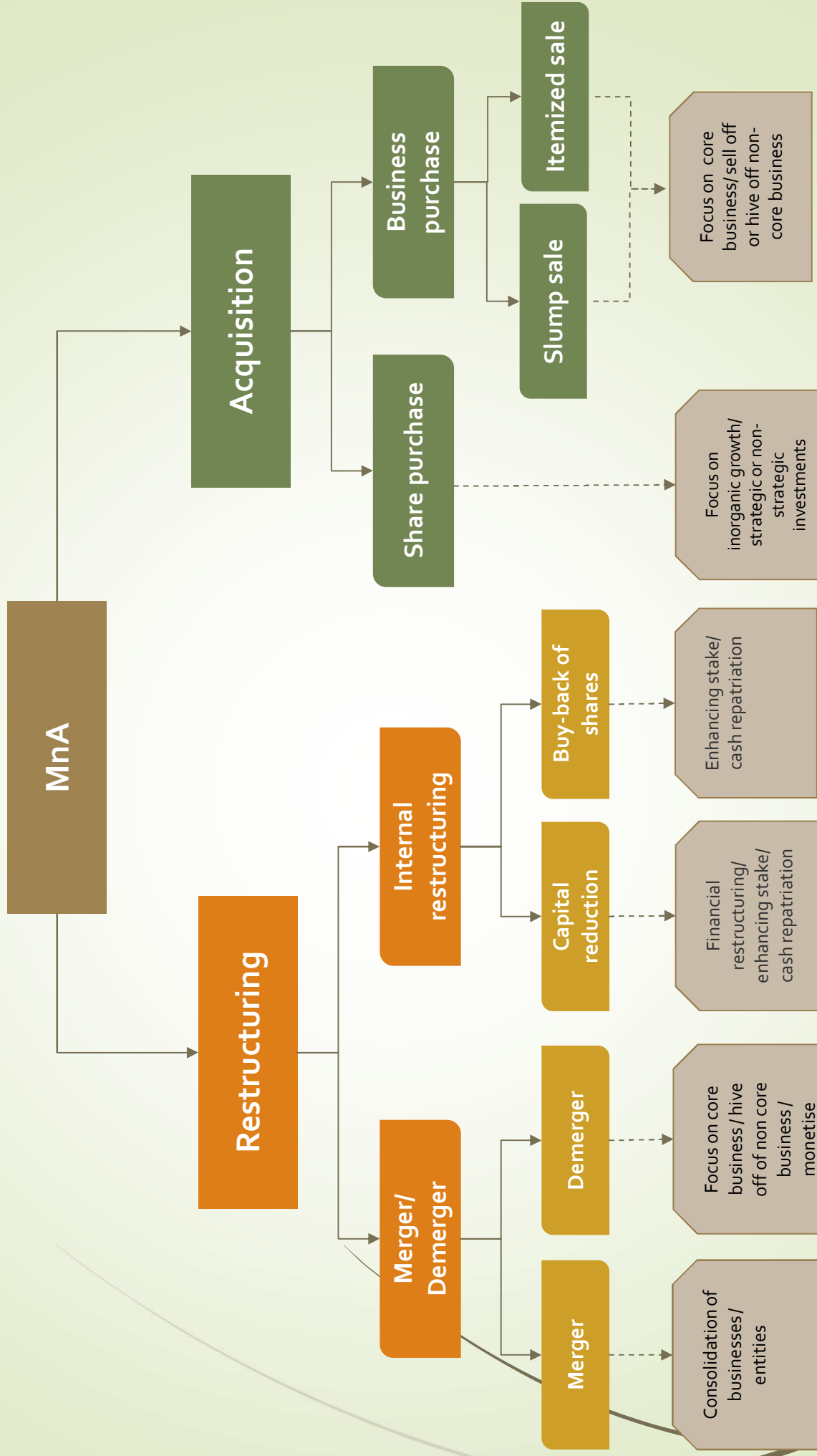
Notable acquisitions / divestures		
Walmart Inc. acquires majority stake in Flipkart Online Services Pvt. Ltd	Demerger of branded apparel business of Arvind Limited into Arvind Fashions and engineering division into Arvind Anveshan	Composite scheme of arrangement involving, inter alia, demerger of Travel Corporation (India) Limited into SOTC Travel Management Private Limited
		Tata Steel acquires controlling stake in Bhushan Steel

Why M&A



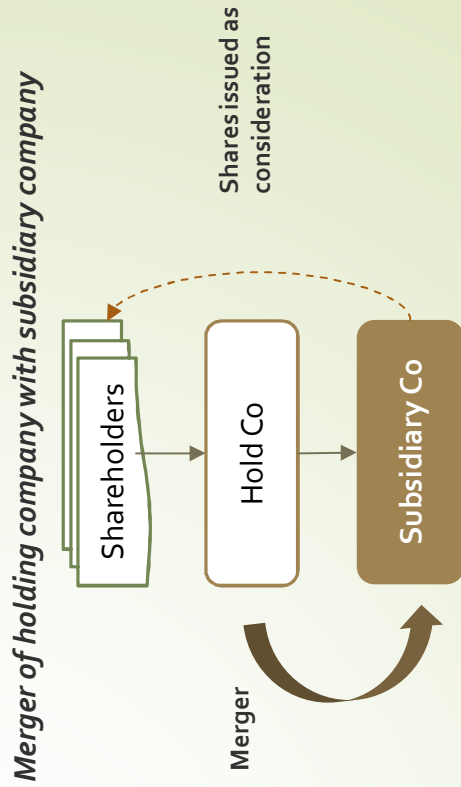
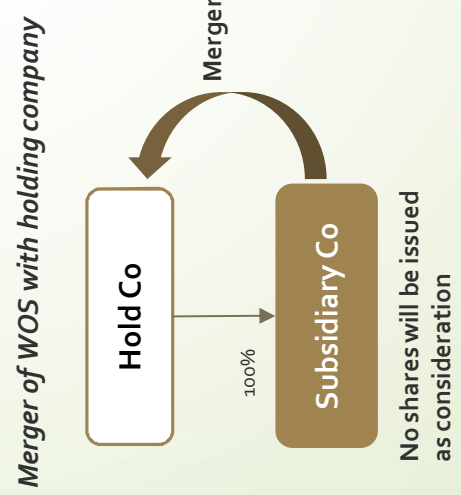
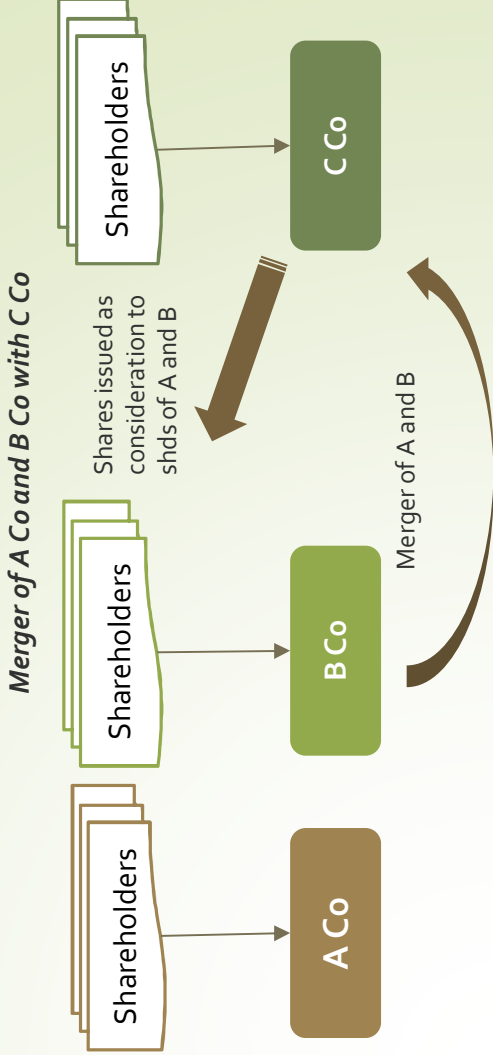
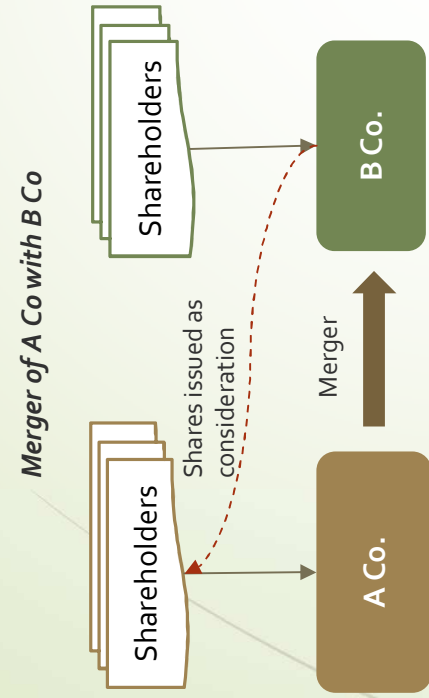
Modes of M&A in India

Typical modes of Business Reorganization in India



➤ Mergers

Merger – Typical Ways



Illustrative scenarios only

Merger – Key Tax Implications

Transferor Company

- Capital Gains Tax - Exempt
- GST - Exempt

Transferee Company

- Actual cost of the assets acquired – same as transferor company
- WDV of the assets acquired – WDV of assets in the books of transferor
- Tax holiday – available except 80IA
- Depreciation – available proportionately basis period of holding during the year
- No tax implications under 56(2)(x)
- Carry forward of losses – available subject to conditions
- MAT credit – Transferable*
- GST credit – Transferable

Shareholders of Transferor Company

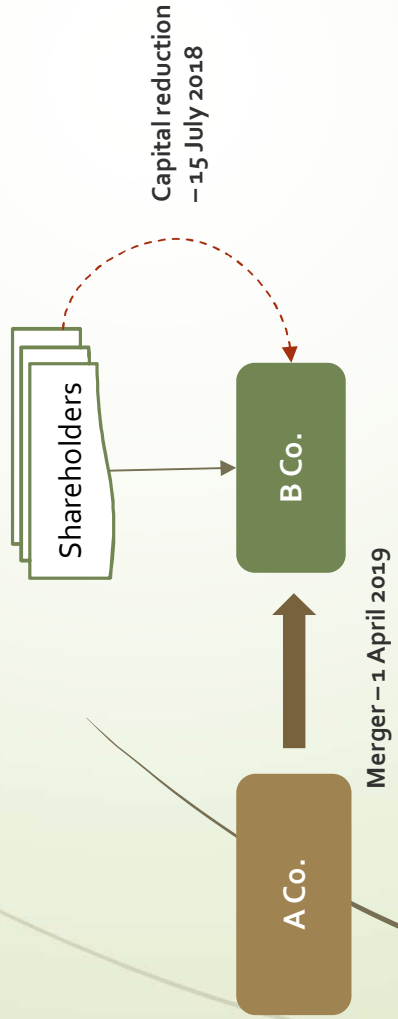
- Capital gains – exempt
- COA of new shares – same as COA of previously held shares, except 112A situation period of holding of new shares – available from date of acquisition of previous shares
- Cost of inflation index on subsequent sale – to be the year of acquisition of previous shares
- No tax implications under 56(2)(x)

**Basis judicial precedents*

Impact of Explan 2A of sec. 2(22)

Explan 2A of sec. 2(22)

- In case of an amalgamated company, the accumulated profits, whether capitalized or not, or loss, as the case may be, shall be increased by the accumulated profits, whether capitalised or not, of the amalgamating company on **the date of amalgamation**

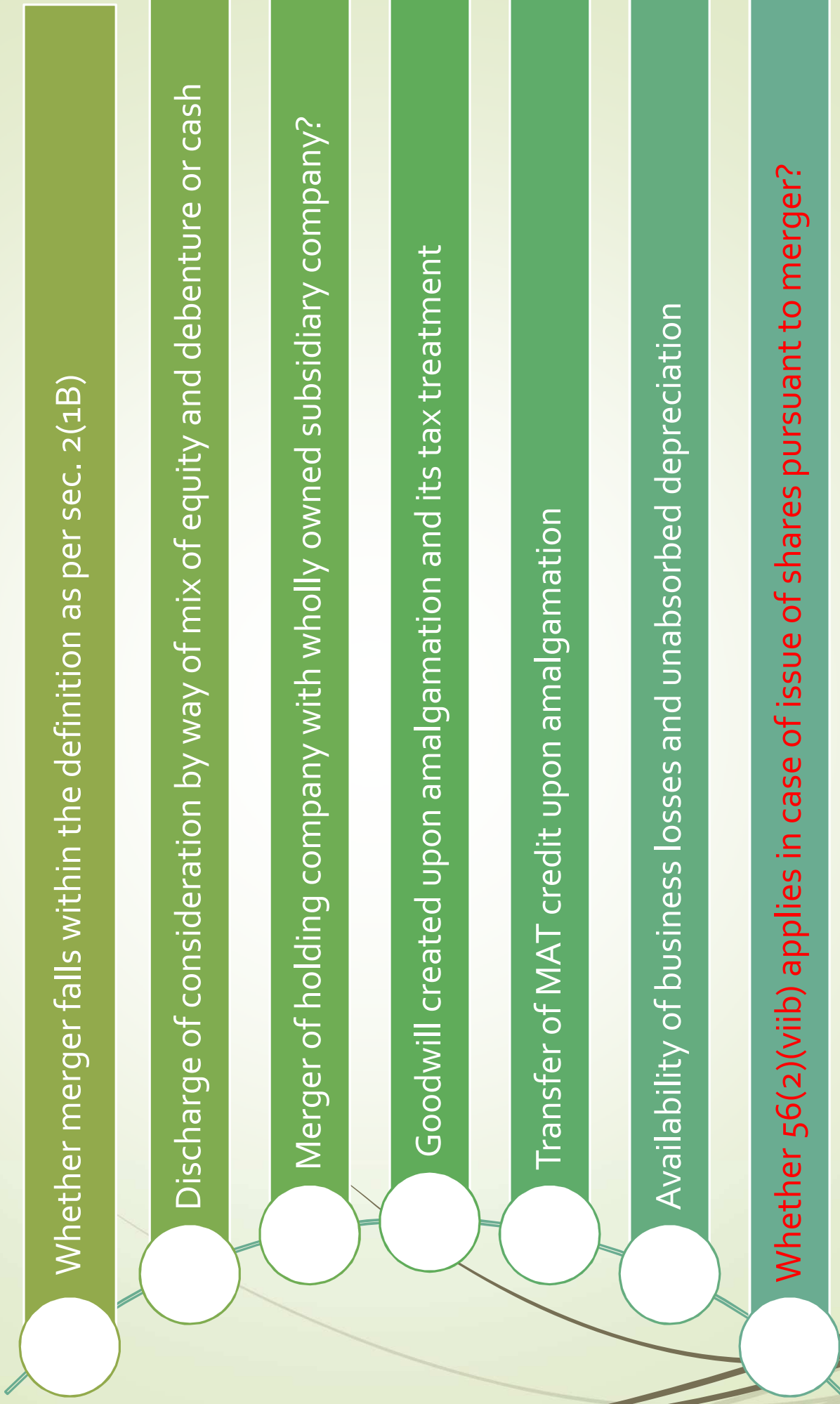


Particulars	INR
Accumulated Profit of A Co	450
Accumulated Profit of B Co	50
Total	500

Accumulated profit for capital reduction

What if the merger had happened in 2016? Can accumulated profits of A Co. be considered at the time of capital reduction ?

Critical tax aspects - Merger



Merger – S.72A - Carry forward of Business Losses and Unabsorbed depreciation

Sec. 72A

Accumulated business loss and unabsorbed depreciation of the amalgamating company **shall be deemed** to be business losses or unabsorbed depreciation of the amalgamated company **for the previous year** in which the amalgamation is **effected**

'Business' of

Should be in the 'business' in which such carry forward of losses and UAD are incurred

- a company owning an "**industrial undertaking**" or a ship or a hotel with another company;
- a banking company with a specified bank;
- one or more public sector company or companies engaged in the business of operation of aircraft with one or more public sector company or companies engaged in similar business

What is "Industrial Undertaking"

any undertaking engaged in:

- the manufacture or processing of goods; or
- the manufacture of computer software; or
- the business of generation or distribution of electricity or any other form of power; or
- the business of providing telecommunication services, including radio paging, domestic satellite service, network of trunking, broadband network and internet services; or
- mining; or
- the construction of ships, aircrafts or rail systems

Fresh lease of life for c/f Business Losses on amalgamation?

S.72A - Compliance Conditions:

has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for **3 or more years**;

has held continuously as on the date of amalgamation at least **3/4th of the book value of fixed assets** held by it two years prior to the date of amalgamation

Amalgamating company

- holds continuously for a **min. 5 years** from the date of amalgamation at least **3/4th** of the BV of fixed assets of the amalgamating company acquired;
- continues the business of the amalgamating company for a **minimum period of 5 years** from the date of amalgamation;
- which owns an industrial undertaking of the amalgamating company by way of amalgamation, shall achieve the level of production of **atleast 50%** of the installed capacity of the undertaking **before the end of 4 years** from the date of amalgamation and continue to maintain the said minimum level of production **till the end of 5 years** from the date of amalgamation;
- to furnish to AO - **Form No. 62** duly verified by an CA from the year of achieving fifty percent level of production upto completion of 5 years from the date of amalgamation

Amalgamated Company

In case of violation of any conditions, the set off of BL/UAD availed by amalgamated company shall be deemed to be income of amalgamated company for the year in which such conditions are not complied with.

S. 79 - Change in substantial shareholding

Trigger
for S.79

- Carry forward and set off of losses (*incurred in any year prior to the year of change in shareholding*) against future income (post change in shareholding) shall not be available, if,
- there is change in shareholding of a company (not being a company in which public are substantially interested);
 - Shareholders beneficially holding not less than fifty-one percent of the voting power on the last day of the year(s) in which loss was incurred are not the same shareholders beneficially holding shares carrying not less than fifty-one percent of the voting power on the last day of the year of set off

If, within the same year, shareholding changes by more than 49% and subsequently, original shareholding is restored. Can provisions of sec. 79 trigger?

S. 79 - Dichotomy in thoughts

Legal Ownership

- A company is a distinct legal entity, and has an existence **separate from that of its shareholders** – assets of the company are not assets of the shareholders
- A person can be a beneficial owner when shares are held by someone else on his behalf
- Change in registered shareholder triggers sec. 79
- **Case Laws:**
 - i. Yum Restaurants (Delhi HC)
 - ii. Acer Computer International Limited (AAR)
 - iii. Tainwala Trading and Investments (ITAT Mumbai)
 - iv. Just Lifestyle (ITAT Mumbai)

Beneficial ownership

- S.79 states that shares carrying not less than 51% of the voting power were beneficially held by persons who **beneficially held** shares of the company carrying not less than 51% of voting power on the last day of the year in which loss incurred
- A subsidiary is effectively controlled by its parent company; the parent company controls the voting power of the company
- sec. 79 is not triggered if the **beneficial shareholders remain the same**, even if there is change in the immediate shareholders
- **Case Laws:**
 - i. Amco Power Systems (ITAT Bangalore; upheld by Karnataka HC)
 - ii. Select Holidays Resorts (ITAT Delhi)
 - iii. Wadhwa & Asso. Realtors Pvt Ltd. (ITAT Mumbai)

S. 79 - Exclusions

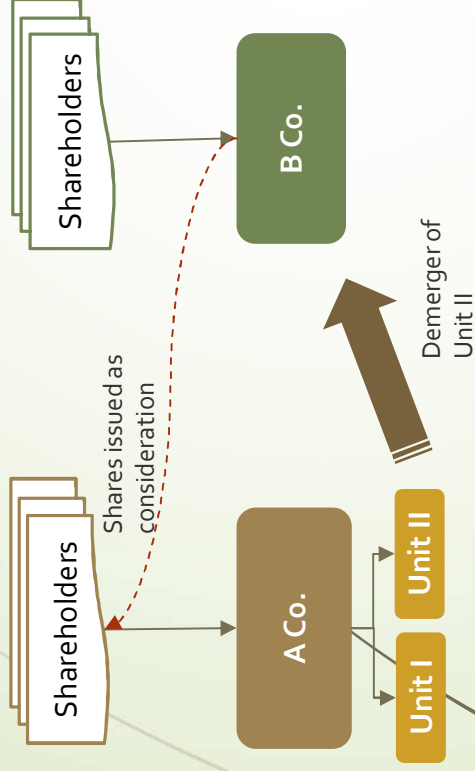
Change in shareholding of Indian Sub Co. as a result of merger/demerger of its 'foreign holding company'	<ul style="list-style-type: none">• Condition - 51% shareholders of the amalgamating/demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company
Change in shareholding in case of eligible " start-up " companies	<ul style="list-style-type: none">• All the shareholders (<i>in the year of incurring the loss</i>) ought to continue to hold shares as of the last day of the previous year in which the setoff is to be claimed• Above exception applicable only for losses incurred in first 7 years from incorporation
Change pursuant to resolution under 'IBC 2016'	<ul style="list-style-type: none">• resolution plan approved under the Insolvency and Bankruptcy Code, 2016
Others	<ul style="list-style-type: none">• Transfer of shares by way of gift to any relative from the shareholder• Death of shareholder

Whether sec. 79 applies to all losses including unabsorbed depreciation ?
Whether sec. 72A overrides sec. 79 ?

Demergers

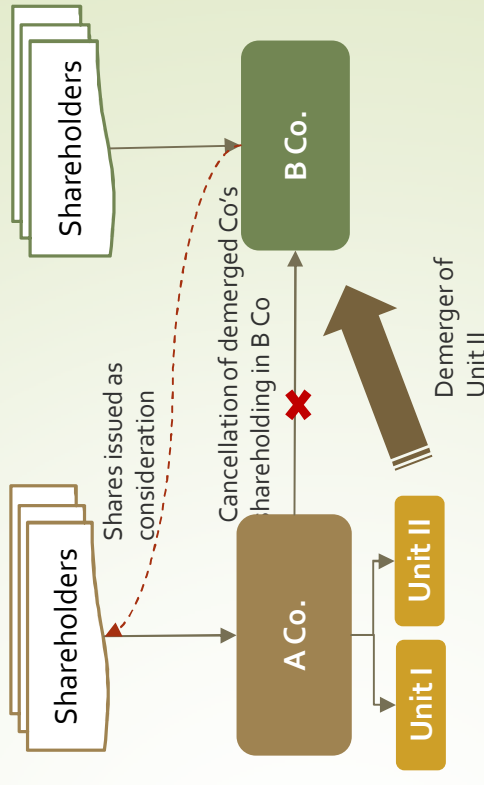
Demerger – Typical Ways

Demerger of a unit from A Co to B Co and shares issued by B Co



Non –mirror shareholding demerger

Demerger of a unit from A Co to B Co and shares issued by Hold Co of B Co



Mirror shareholding demerger – this is typically carried out by the listed company and pursuant to demerger the resulting company will also get listed

The above are broad illustrative scenarios

Demerger – Key conditions

“Demerger” means the transfer of one or more undertakings by the demerged company to any resulting company

Tax neutrality conditions

- Transfer of all properties & liabilities **relatable** to the ***undertaking*** being transferred by the demerged company to the resulting company ***at book value***;
- Discharge of consideration by the resulting company by way of issue of shares on proportionate basis (except where resulting company itself is a shareholder of the demerged company);
- Issue of shares to the shareholders holding not less than 3/4th shares (in value) in the demerged company (other than the shares already held by the resulting company of its nominees of its subsidiary);
- Transfer of undertaking to be on a ‘going concern basis’

Demerger – Key conditions

“Undertaking” means

Undertaking” shall include **any part of an undertaking**, or a unit or division of an undertaking or a business activity taken as a whole

“Liabilities” means

the liabilities directly relatable to the undertaking;
specific loans or borrowings (including debentures) of the undertaking
amounts of general or multipurpose borrowings on proportionate basis

Value of Property

Revaluation amount to be ignored
Strictly means ‘**Book Value**’

Demerger – Key conditions

Demerged Company
[sec. 2(19AAA)]

“Demerged Company” means the company whose undertaking is transferred to a resulting company pursuant to demerger

Resulting Company
[sec. 2(41A)]

“Resulting Company” means one or more companies (including a wholly owned subsidiary thereof) to which the undertaking of the demerged company is transferred in a demerger and, the resulting company in consideration of such transfer of undertaking, issue shares to the shareholders of the demerged company and includes any authority or body or local authority or public sector company or a company established, constituted or formed as a result of demerger [sec. 2(41A)]

Whether wholly owned subsidiary includes step down wholly owned subsidiary also?

Demerger – Tax Implications

In the hands of	Taxability / Treatment	Sec.	Conditions / Remarks
Demerged Company	No capital gains tax on transfer of assets	47(vib)	Resulting company should be an Indian company
Shareholders of Demerged Company	No capital gains tax on receipt of shares from the resulting company	47(vid)	
Cost of Assets for Resulting Company:	= WDV of depreciable asset to be the same as WDV in the hands of the Demerged Company	- Expln 7A to 43(1) - Expln 2B to 43(6)(c) - 49(1)	Resulting company should be an Indian Company
- Depreciable Assets			
- Capital Asset			
	= No specific provision for cost of Capital Asset acquired		
Cost of acquisition of shares received on demerger by the shareholders	= Cost of acquisition of shares in demerged company be split on the basis of net book value of the assets transferred bearing to the Net Worth of the Demerged Company immediately before such demerger	49(2C)	

Demerger – Tax Implications

In the hands of	Taxability / Treatment	Sec.	Conditions / Remarks
Period of holding of shares received on demerger by the shareholders	Includes period of holding of shares held in the demerged company	Expln 1(i)(g) to sec. 2(42A)	
Period of holding of capital assets	Includes period of holding of capital assets held by the demerged company	Expln 1(i)(b) to 2(42A) r.w.s. 49(1) and 47(vib)	

Demerger – Tax Consideration

Cost Split up in the hands of shareholders

'Cost of acquisition of shares of resulting company' [sec. 49(2C)]

$$= \frac{\text{Cost of acquisition of shares in demerged company} \times \text{Net book value of the assets transferred in the demerger}}{\text{Net worth of the demerged company before the demerger}}$$

'Cost of acquisition of the original shares by the shareholders in the demerged company' - [sec. 49(2D)]

= Cost of acquisition of shares in demerged company – cost of acquisition of shares of resulting company arrived at under sec. 49(2C)

'Net worth' is defined as the aggregate of the paid up share capital and general reserves as appearing in the books of account of the demerged company immediately before the demerger .

Whether definition of Networth is to be interpreted strictly to include only 'General reserve' ?

How to compute the cost split in case of demerger of negative networth undertaking ?

S.72A - Compliance Conditions:

Losses 'Directly related'

Entire amount of 'directly relatable' business losses and unabsorbed depreciation is allowed to be carried forward and set-off in the hands of the resulting company

Losses 'Not-directly related'

The accumulated business loss and unabsorbed depreciation should be '*apportioned*' between the resulting company and the demerged company in the *ratio of the assets transferred to the resulting company and assets retained by the demerged company* and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be

Demerger – Other key aspects

Tax Holidays

- Tax incentives are either based on business (u/s. 80-IA / 80-IB / 10B) or area / region based (u/s. 80-IC / 10A / 10C)
- Continuity of unexpired period of tax holiday to the transferee company in amalgamation / demerger except u/s. 80-IA (12A)

MAT Credit

- All the shareholders (*in the year of incurring the loss*) ought to continue to hold shares as of the last day of the previous year in which the setoff is to be claimed
- Above exception applicable only for losses incurred in first 7 years from incorporation

S.56(2)(x)

- No implications on receipt of properties in the hands of the Transferee company pursuant to amalgamation or demerger – Clause (IX) to the proviso of sec. 56(2)(x)

➡ Slump Sale

Slump Sale - Meaning

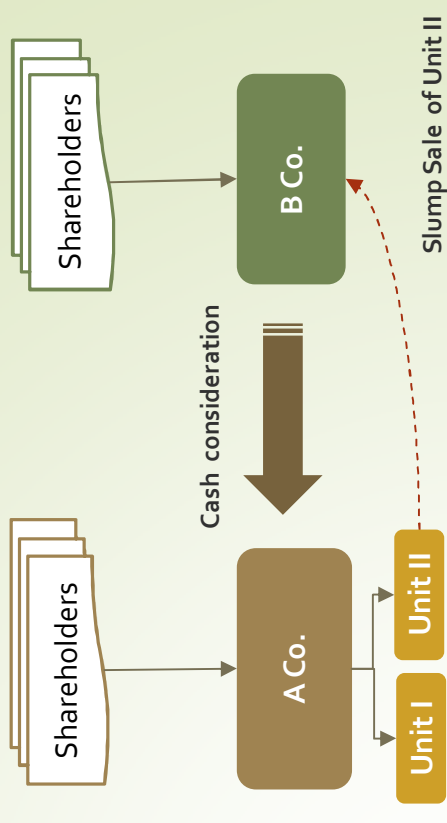
- the transfer of one or more undertakings
- as a result of sale for a lump sum consideration
- without values being assigned to individual assets and liabilities in such sales
- Explanation – Determination of value of an asset/liability for purpose of payment of stamp duty, registration fees **shall not** be regarded as assignment of values to individual assets or liabilities

Meaning of Slump Sale [sec. 2(42c)]

Undertaking

“Undertaking” shall include 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 or not constituting a business activity

[Explanation 1 to sec. 2(19AA)]



Concept of 'Going Concern' – most critical

Slump Sale – Key tax aspects

Computational Mechanism

Computation of Capital Gains	INR
Full Value of Consideration	XX
Less: Tax Net-worth of the Undertaking [Refer Table below]	(YY)
Taxable Capital Gain	ZZ
Tax @20%* (excluding surcharge @12% and Cess @4%)	ZZZ

*Assuming the Business is held for 36 months or more. Accordingly, the resultant gain is long term. Else @30% plus surcharge & cess

What is Tax Net-worth

Computation of Capital Gains	INR
Tax WDV of Depreciable assets	X
Add: Book Value of Non-depreciable assets (excluding Revaluation)	Y
Less: Book Value of liabilities (excluding Revaluation)	(Z)
Tax Net-worth	YY

Notes:

- Capital gain will be regarded as short-term if the ownership of business is 36 months or less
- Benefit of Indexation is not available in case of slump sale
- If value of liabilities transferred is more than the value of assets, i.e. networth of undertaking is negative, the difference may be added to the value of the consideration for tax purposes
- The current year tax business losses, UAD, b/f capital loss may be set off against the capital gains arising on slump sale
 - Long term Capital Loss may be set off against Long term capital Gains
- Tax losses including UAD of the identified business will not be transferred in the hands of buyer. Similarly income tax balances i.e. Advance tax & TDS also typically remain with the Seller

Slump Sale – Key tax aspects

Sellers Perspective

Buyers perspective

Tax Liability

- Capital Gains tax, OR
- MAT payable
- MAT payable, if tax on book profits* > capital gains tax + corporate tax
 - Difference between MAT paid and capital gains available as MAT Credit for carry forward and set off up to subsequent 15 years
 - Net position (profit on sale of business and other routine income) for FY of closing needs to be assessed to see if liability under MAT or normal tax is payable
 - MAT credit, if any, in the books of Seller as on the date of transfer of business will not be transferred via slump sale
- Advisable to confirm the accounting treatment with the Auditors on account of impact under IndAS

Secondary risk – past tax dues

- If the Seller fails to pay its tax dues - acquisition of Business may be considered as void
- Buyer may insist Seller obtaining a **Tax Clearance Certificate** from TA

Succession Risk

- If slump sale is considered to be succession of business:
 - Buyer could be held liable for any income tax liabilities of Seller pertaining to FY year in which the succession took place upto the date of succession and FY preceding that year. Eg: Transaction completed - 1 Feb 2018, Buyer's risk - Tax liability of F.Y. 16-17 and 1 April 17 till 31 Jan 18.
 - Accordingly, Buyer may insist for **indemnity** as a safeguard.

Slump Sale – Key tax aspects

Sellers Perspective

Tax Depreciation

- In the year of transfer -
 - Seller can claim depreciation on assets in ratio of number of days the assets were used

Buyers perspective

Withholding obligations on transfer of immovable property

- May not be required – Arguably, in case of a slump sale, 'business' is being transferred and there is no standalone transfer of immovable property
- This needs to be tested with relevant local property registration office

Tax Depreciation

- In the year of transfer -
 - Buyer can claim depreciation on assets in ratio of number of days the assets were used
 - In subsequent years, tax depreciation may be available on stepped up value (as per PPA)
 - Buyer could claim depreciation on certain intangibles recorded basis PPA such as goodwill, know-how, patents, copyrights, trade marks, licenses, franchises or any other business or commercial rights of similar nature

Slump Sale – Key tax aspects

Slump Sale via Scheme vs Slump Sale via BTA

Particulars	Slump Sale via Scheme	Slump Sale via BTA
Involving government contracts or license transfers or other regulatory approvals	<ul style="list-style-type: none">• Preferable	<ul style="list-style-type: none">• Less preferable
Pre-qualifications transfer envisaged	<ul style="list-style-type: none">• Preferable	<ul style="list-style-type: none">• Less preferable
Time involvement	<ul style="list-style-type: none">• Longer timeline	<ul style="list-style-type: none">• Shorter timeline
Regulatory approvals	<ul style="list-style-type: none">• Mandatory approvals of various authorities under NCLT route including an intimation to income tax authorities	<ul style="list-style-type: none">• Lesser approvals required
Stamp duty*	Could be restricted to Maximum stamp duty of that particular state; Eg: Maharashtra – INR 25 crs	No such restriction
Income Tax / GST		Same treatment in both scenarios

Itemised Sale

Itemized Sale – Meaning and Tax Implications

Meaning

- Not defined under IT Act
- Involves individual sale of assets
- Consideration is identifiable against each asset
- Buyer discharges consideration to the seller for the asset acquired

Tax Implications

Nature of Asset

Nature of Income

Depreciable Assets

- Provisions of S.50 are applicable
- Short term capital gains
(if the consideration > WDV of the relevant block of asset)

Non – Depreciable Assets

- Short term capital gains / Long term capital gains
(Depending on the period of holding)

Current Assets

Business profits

Itemized Sale vs Slump Sale

Particulars	Itemized Sale	Slump Sale
Definition under IT Act	Not specified	Defined specifically
Criteria of 'Undertaking'	Not required to be complied with	Required to be complied with
Transfer of 'Liabilities'	Flexibility of not acquiring the liabilities	No Flexibility
Consideration	No specific conditions	Lumpsum Consideration
Capital Gains computation mechanism	Capital gains to be computed for each item of capital asset	Capital gains to be computed for 'undertaking' as per specified formula in the IT Act
Nature of gains / loss	<ul style="list-style-type: none"> - For depreciable assets – short term - For non depreciable assets – depends on the period of holding of assets 	<ul style="list-style-type: none"> - Depends on the period of holding of the undertaking - Holding period of individual assets not relevant
Indexation benefit	Available (in case of non depreciable long-term assets)	Not Available
Provisions of sec. 50C	Applicable	Not Applicable

Share Acquisitions

Share Acquisition – Major Transactions

Acquirer: Walmart
Seller: Flipkart

- Walmart acquired a 77% stake in Flipkart through a SPA for ~ USD 16 bn

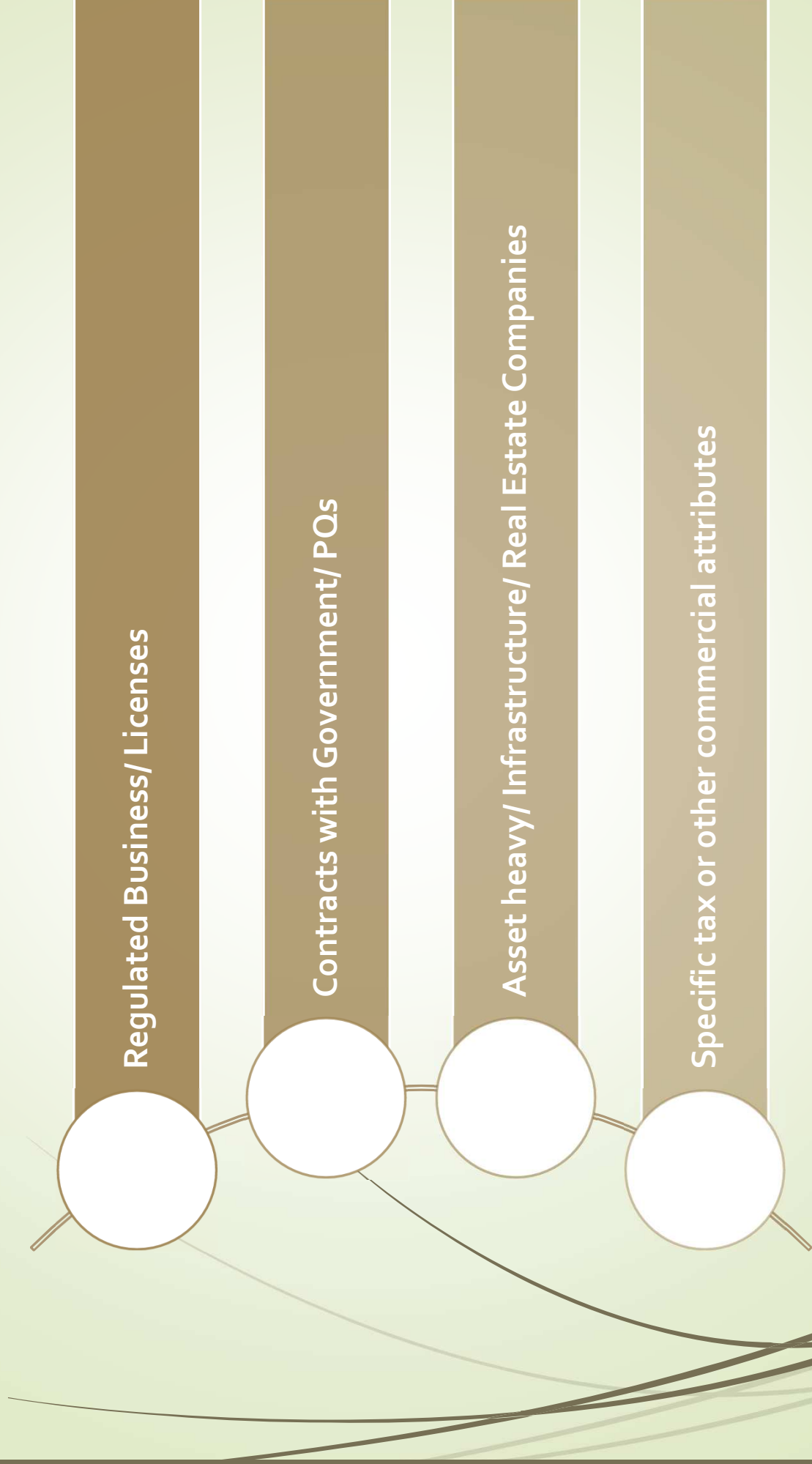
Acquirer: Cube Highways and Infrastructure Pte. Ltd. (CHIPL)
Seller: IVRCL Limited

- IVRCL Limited entered into a SPA to sell its two subsidiary companies viz. Salem Tollways Limited and Kumarapalayam Tollways Limited to CHIPL for ~ INR 726 Crs

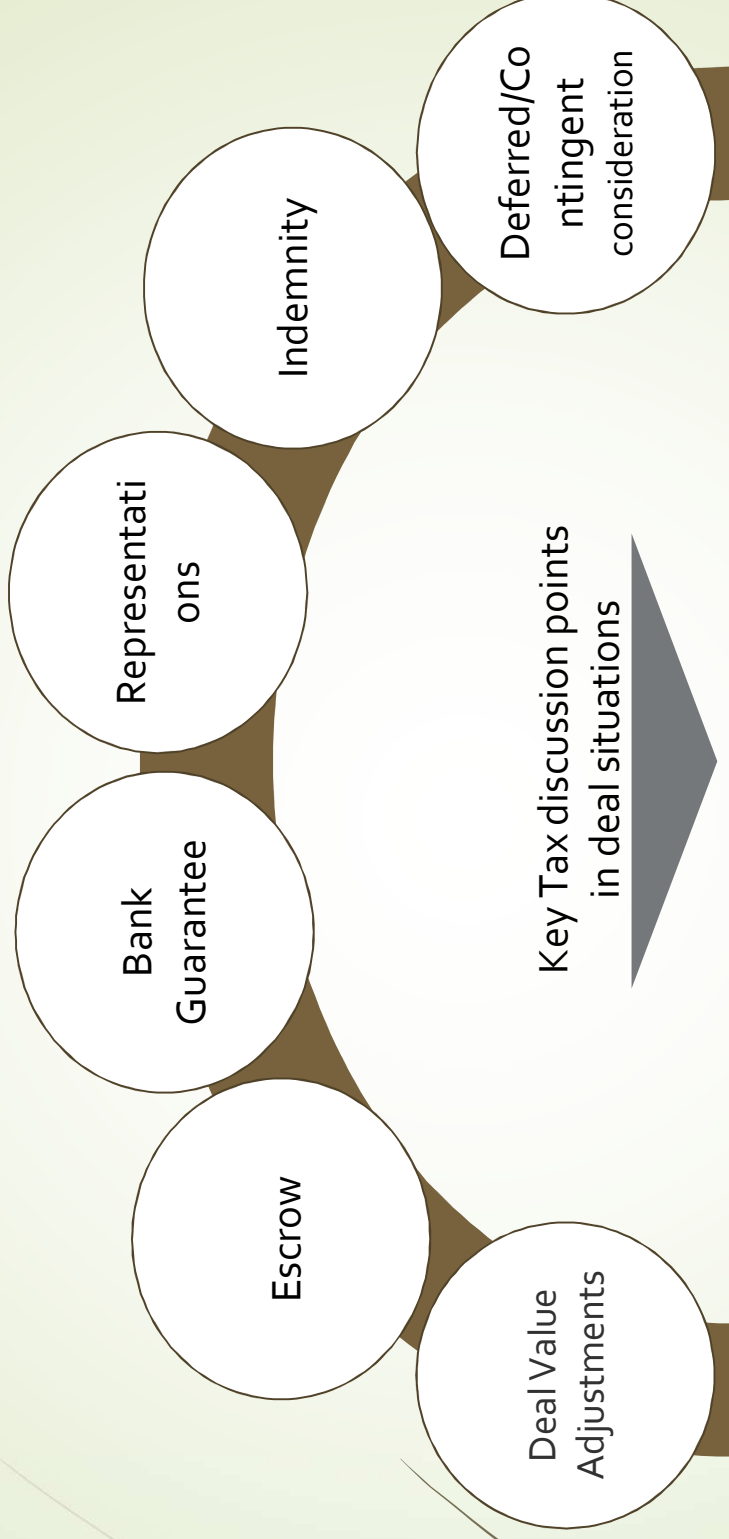
Acquirer: Reliance Industries Limited
Seller: Saavn Media

- Reliance Industries bought ~80% equity stake in Saavn Media (Saavn India) for ~ INR 800 Crs

Share Acquisition – When suitable vis-à-vis other modes



Share Acquisition – Key tax matters in deal negotiations



Share Acquisition – Key tax matters in deal negotiations

Tax Representations - General

- Compliance with tax laws and accurate payments of taxes
- Accurately and timely filed all tax returns
- All withholding tax property deducted and duly deposited
- No investigation / scrutiny pending with respect to undertaking concerned
- Ownership is clear from income tax purposes
- Tax exemptions/ benefits / holidays/ incentives are in compliance with and admissible under applicable law

Specific Warranties

- Warranties relating to specific due diligence issues

Tax Indemnities

- Time Frame
- Cap on amount
- Gross-ups and escrow/hold backs for indemnity payments
- Specific indemnity

➡ Buy Back

Buy-back of shares

Taxability provisions [Sec. 115QA]

- From 1 June 2013, buy-back tax provisions were introduced on unlisted companies and exemption was provided to its shareholders, as buy-back tax was to be paid by the Company
- Currently, buy-back of shares is taxable @ 23.296% on the **difference** between buy-back **consideration** and the '**amount which was received by the Company**' for issue of such shares
- Buy-back provisions are not applicable to listed companies so gains on buy-back, if any are taxable in hands of shareholder of the listed company

Other provisions

- In case of corporate shareholders, MAT may be applicable
- No deemed dividend implications on buy-back [Clause (iv) to section 2(22)]

Buyback of shares by Amalgamated Co; what shall be the '*amount received by the Company*' ?

Buy-back of shares

Taxability in the hands of	Listed Shares						Unlisted Shares	
	Buy back through stock exchange mechanism (subject to STT)		Buy back directly from shareholders (not subject to STT)					
	Equity shares	Preference shares	Equity shares	Preference shares	Equity shares	Preference shares	Equity shares	Preference shares
Company								
Liability of buy-back tax	No	No	No	No	No	No	Yes	Yes
Shareholders								
Held more than 12 months (listed shares) / 12 months (unlisted shares)	10%* (gains exceeding INR 1 lakhs)		20%* (with indexation) 10%* (without indexation)					Exempt
Held upto 12 months (listed shares) / 24 months (unlisted shares)	15%*		As per slab rates					

* Plus applicable surcharge and cess

Capital Reduction

Capital Reduction of shares – Tax implications

In hands of the Company

- Distribution to shareholders by Company on the reduction of its capital is deemed as dividend to the extent to which the Company possesses accumulated profits, whether capitalized or not
- Deemed dividend u/s. 2(22)(d) is subject to dividend distribution tax u/s. 115-O of the IT Act

In the hands of shareholders

- Reduction of share capital by a Company and pro-rata distribution of cash / assets to the shareholders amount to transfer and therefore, taxable as capital gains
- For determining the amount liable to capital gain tax, full value of consideration is reduced by the amount, which has been reckoned as dividend

Other provisions

- Capital loss on account of capital reduction in the hands of the shareholders involving payment of any consideration cannot be allowed under the provisions of the IT Act. [Bennett Coleman & Co. Ltd. vs. Addl CIT (ITA. No. 3013/MUM/2007)]
- Applicability of sec. 56(2)(x) provisions

Capital reduction of shares

Impact of sec. 50CA

- Sec. 50CA, as introduced by the Finance Act, 2017, provides for adoption of FMV (as prescribed in Rule 11JAA) as the consideration for transfer of unquoted shares of a company, where actual consideration is lower than FMV
- The difference between FMV and consideration shall be subject to tax in the hands of the transferor under the head “Capital Gains”
- Applicable to transferor who holds shares as capital asset and not as stock-in-trade
- Extends to any form of shares whether equity or preference. But does not cover convertible debt instrument such as CCD or warrants or right entitlement
- Transactions which are not likely to be covered by sec. 50CA include:
 - Capital reduction with no consideration
 - Transfer by way of gift which is exempted u/s. 47(iii)
 - Any transfer which can qualify for exemption u/s. 47 or under the treaty
- Sec. 50CA is different from sec. 50D as taxation u/s. 50D is triggered only when consideration is unascertainable while sec. 50CA is in respect of unascertained consideration which is less than prescribed FMV

► Compliances - Illustrative

Compliances - SEBI / Stock Exchanges

Compliance required only if Listed Company is involved

- SEBI Circular dated March 10, 2017 provides conditions and compliances by listed entities while undertaking 'Scheme of Arrangement'
- Listed Entities to comply with Regulation 11, 37 and 94 of LODR for every Scheme of Arrangement proposed u/s. 230 to 234 and sec. 66 of CA 2013
- Filing of Scheme of Arrangement by listed entities with NCLT only post receipt of observation letter or no objection letter ('Letter') from SEs
 - Such Letter to be placed before Tribunal
 - Validity of Letter is 6 months from the date of its issue
 - Submission of prescribed documents with SEs post sanction of Scheme

Merger of WoS into Listed Hold Co – Approval of SEBI required?

Compliances - Company Law

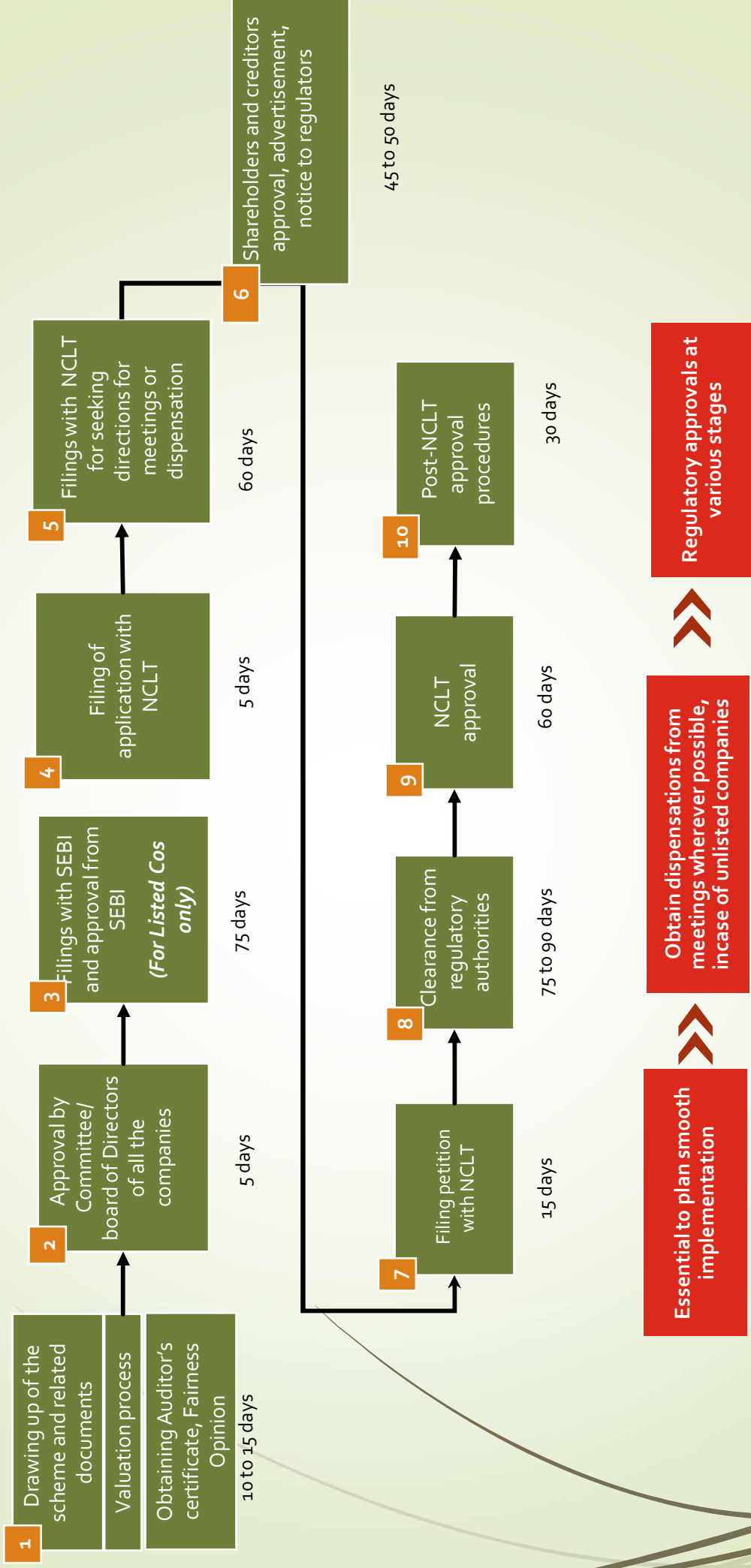
Governing Sections in Cos Act 2013

- Section 230-234 – governs all “Arrangements with members and creditors”; mergers, demergers, composite schemes etc. lays down the framework/process
- Section 66 – governs “ Reduction of Capital”

Approval from Key stakeholders

- Board of Directors
- Shareholders; all classes
- Lenders and Creditors (Secured and Unsecured)
- Jurisdictional NCLT
- RoC, Regional Director, Official Liquidator
- Income tax
- Specified Authorities in certain cases (DoT, RBI etc)
- Competition Commission of India (CCI)

Compliances - Broad steps for merger/ demerger



Typical time frame – 10 – 12 months; may vary on case to case basis

Compliances - Stamp Duty

Stamp Duty

- Stamp duty is levied on '**Instruments**'; thus, a NCLT order is an 'Instrument' and hence liable to stamp duty as the Indian Stamp Act
- Stamp Duty is payable in the States –
 - Where order approving the scheme is passed; and
 - Where the properties of transferor company are located
- Specific entry in the Schedule levying duty on NCLT order sanctioning amalgamation – Maharashtra, Gujarat, Rajasthan, Haryana, Karnataka, Andhra Pradesh, Tamil Nadu
- No specific entry in case of states other than above
- Depending on the state, it is imperative to evaluate the stamp duty exposure for each transaction.
- Eg: Maharashtra Stamp Act –

Article 25(da) – Conveyance; incase of merger, demerger

- 10% of the market value of shares issued as consideration; subject to higher of;
- 5% of the immovable property located in Maharashtra transferred pursuant to the Scheme; or
 - 0.7% of the value of the shares issued as consideration

The maximum stamp duty payable wrt to this Article is **INR 25 crs.**

Stamp Duty – One of most critical aspects of any restructuring exercise

Compliances - Other Laws

FEMA

- Issue of shares on merger/demerger permitted under the Automatic route
- Filings and related compliances to be adhered to. Eg; FC-GPR

RBI

- Restructurings involving NBFC, typically require RBI approval

Competition Commission of India

- Approval required where transaction breaches specified thresholds and are not expressly exempted

Sectoral Regulators

- DoT approval required for transfer of telecom licenses
- Ministry of Petroleum and Natural Gas required for transfer of petroleum mining rights

Illustrative only – Schemes approvals are typically conditional on approvals from sectoral regulators

Q & A

Disclaimer: The view/opinions, (if any) expressed herein are personal to the author of this presentation and strictly of purposes of academic discussions.

Thank You

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