

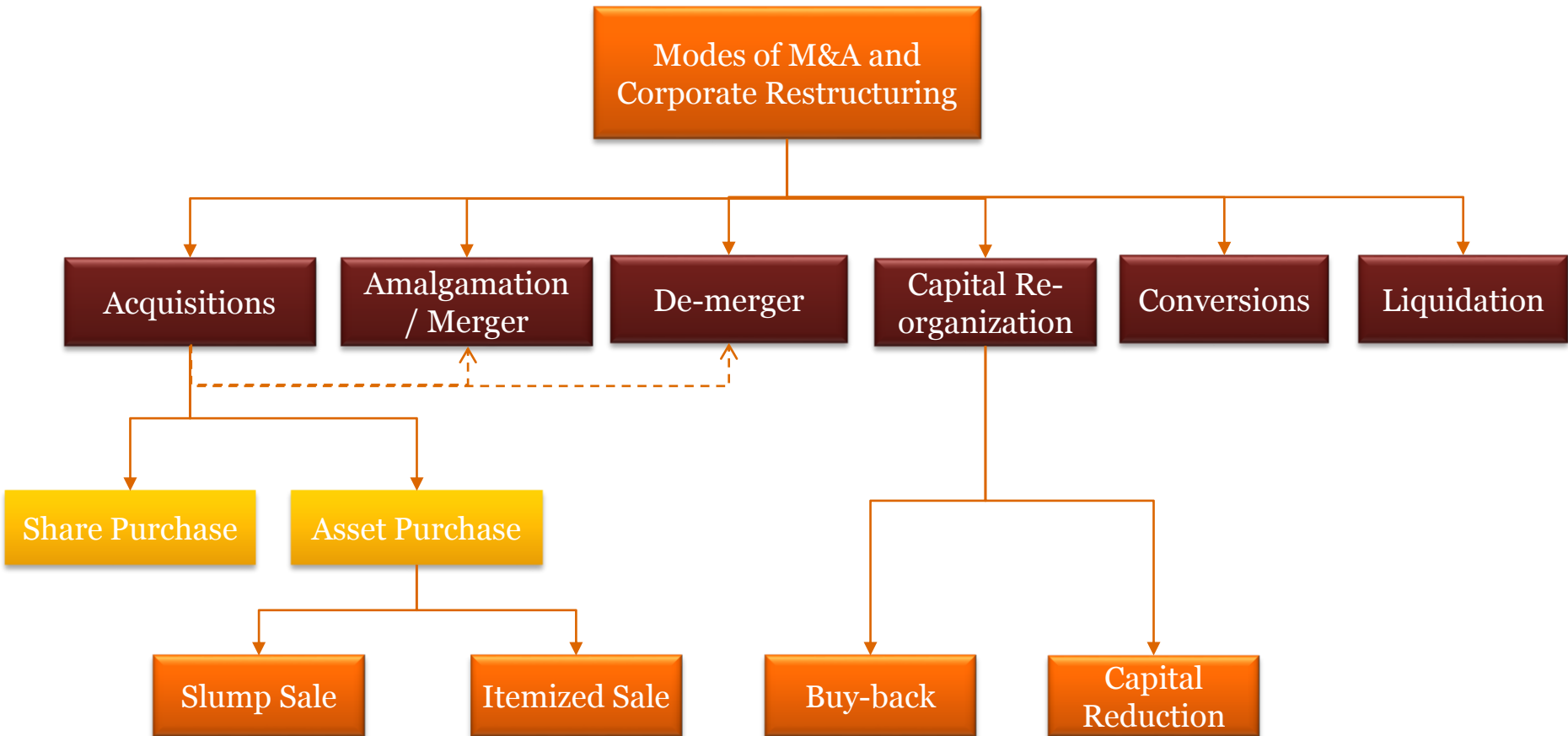
Tax implications of Amalgamations & Demergers

- Jayesh Sanghvi

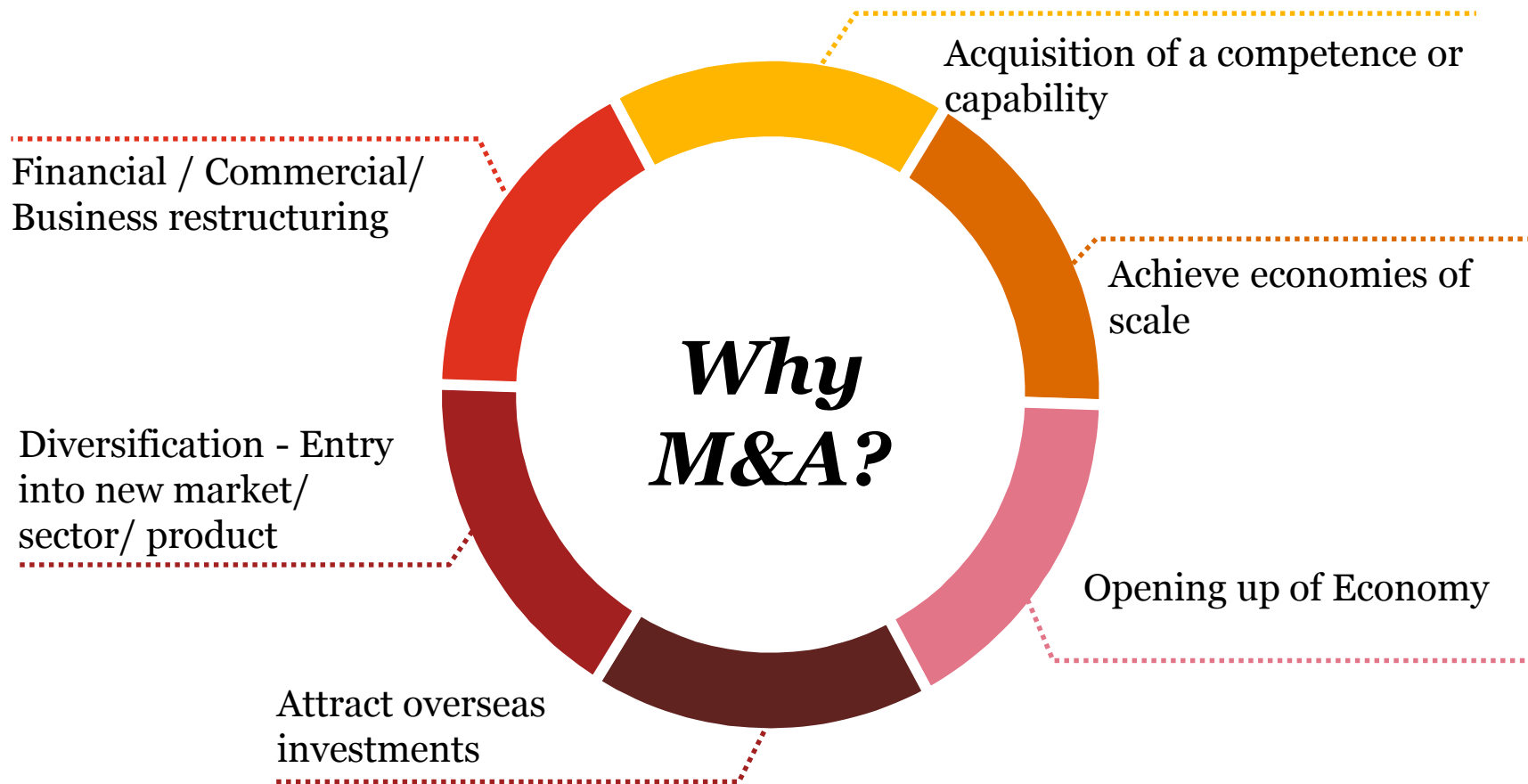


July 2017

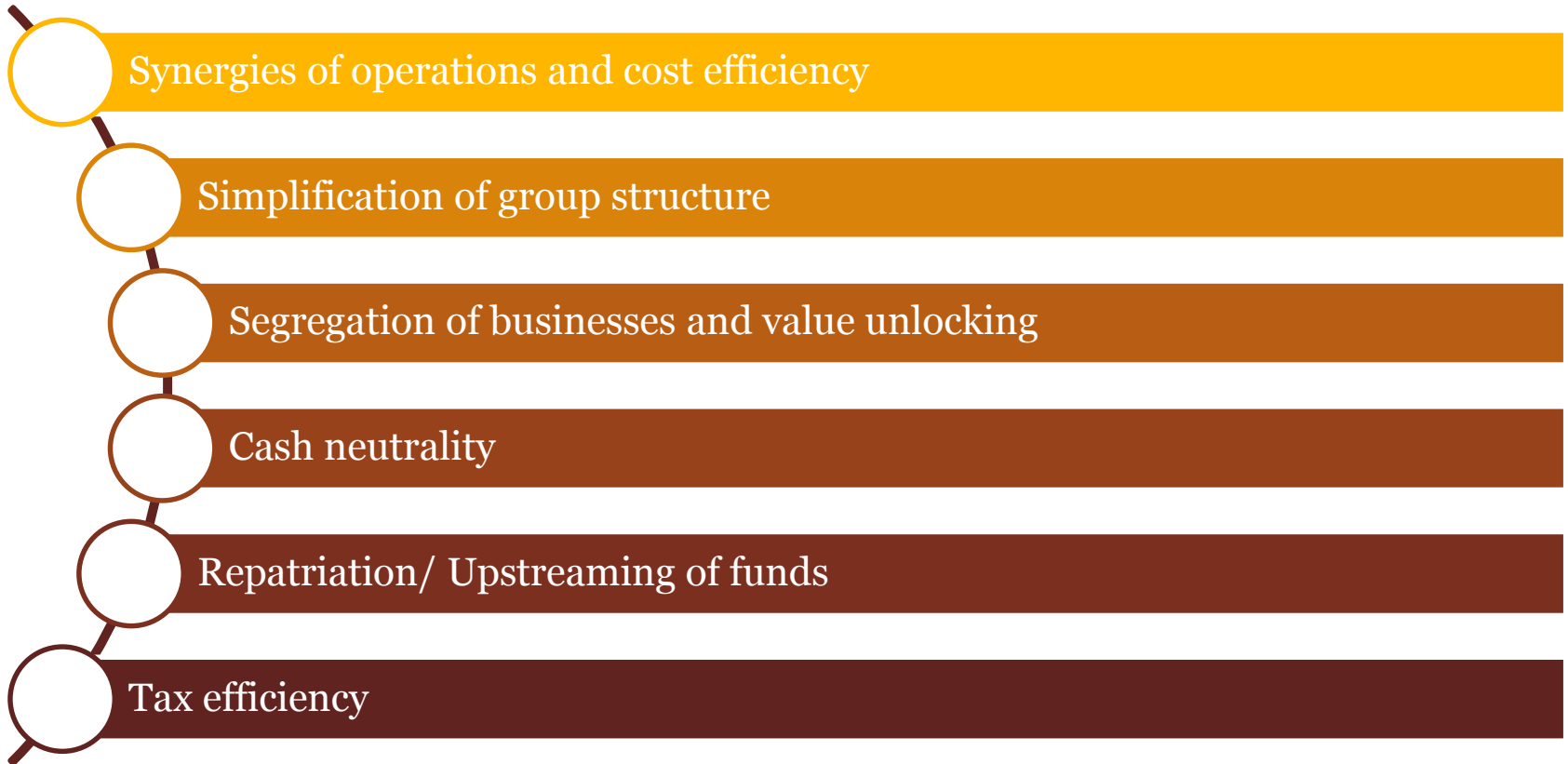
Modes of M&A and Corporate Restructuring



Key Drivers of M&A



Key drivers for Corporate Restructuring

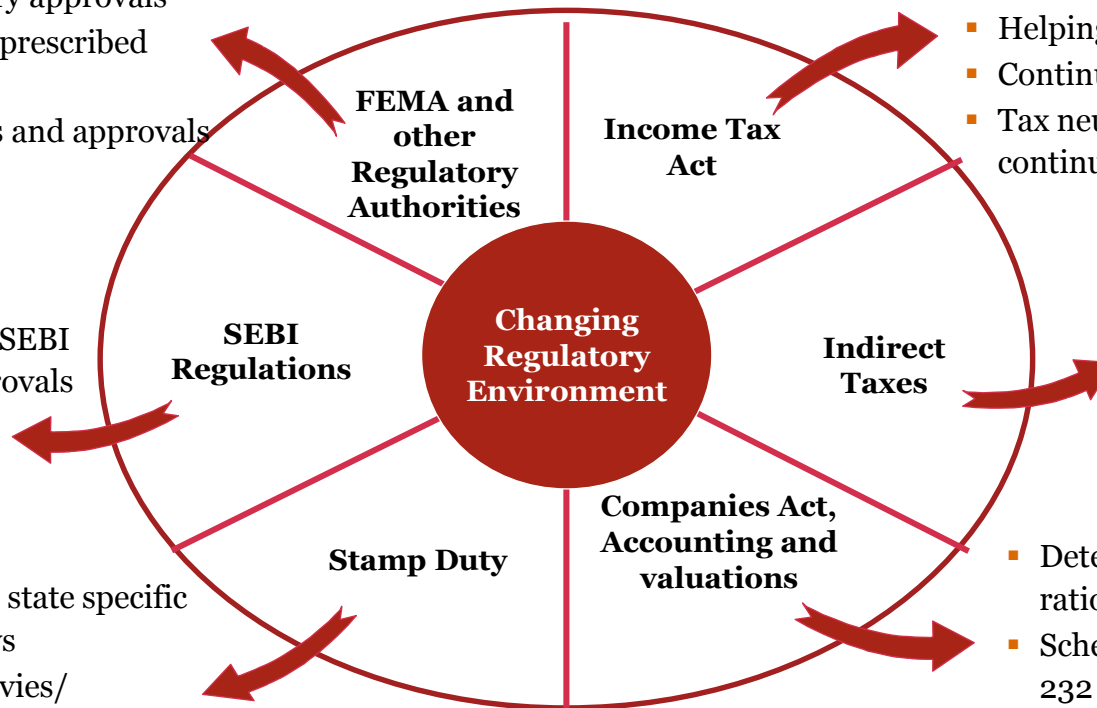


Key Tax and Regulatory considerations under M&A and Corporate Restructuring

- Understanding the FDI Regulations
- Seeking necessary approvals
- Complying with prescribed guidelines
- CCI implications and approvals

- Compliance with SEBI Regulations/approvals
- Stock exchange compliances

- Understanding state specific stamp duty laws
- Determining levies/ registration charges
- Adjudication proceedings etc.



- Tax implications in the hands of the Seller, purchaser / Transferor , Transferee Company, shareholders
- Helping maximize depreciation benefit
- Continuity of Carry forward of losses
- Tax neutrality of restructuring and continuity of fiscal benefits

- GST applicability on business transfer, mergers / demergers
- Credit of taxes paid, continuity of fiscal benefits

- Determination of share exchange ratio / Funding Structures
- Scheme of arrangements u/s 230-232 of the Companies Act, 2013
- Approvals from RD/ ROC/ OL
- Complying with prescribed procedures, resolution, filings etc
- Accounting implications and disclosures.

Impact on stakeholders such as shareholders, creditors and employees also important

Amalgamation – Income Tax Implications

Definition: Section 2(1B)

“**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 (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that—

- a. all the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation;
- b. all the liabilities of the amalgamating company or companies immediately before the amalgamation become the liabilities of the amalgamated company by virtue of the amalgamation;
- c. shareholders holding not less than three fourths in value of the shares in the amalgamating company or companies (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;

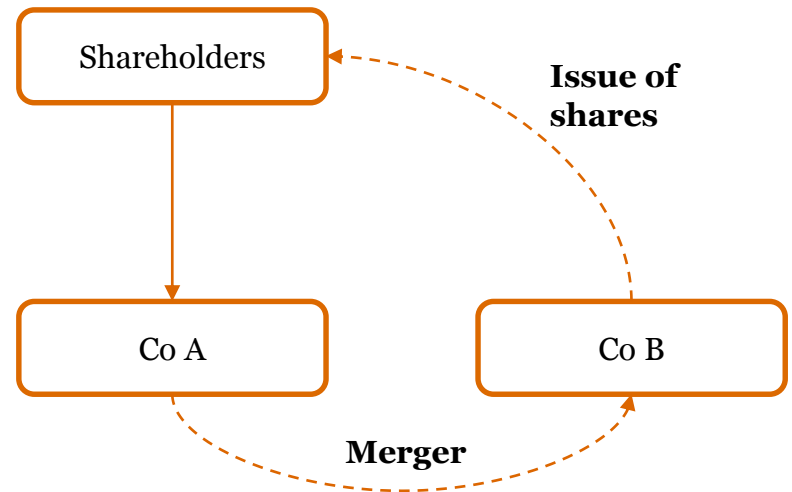
otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the winding up of the first-mentioned company

Key ingredients

Sr. Conditions

- 1 Transfer of all properties
- 2 Transfer of all liabilities
- 3 Shareholders holding at least 3/4th in value become shareholders

- Scheme of amalgamation between the companies and their shareholders
- NCLT approval
- Approval from shareholders, creditors and statutory authorities – RD, ROC, OL, Stock Exchange, SEBI, Income Tax, etc.
- Automatic liquidation of the amalgamating company without dissolution



If 9 out of 10 shareholders don't become shareholders of amalgamated company??

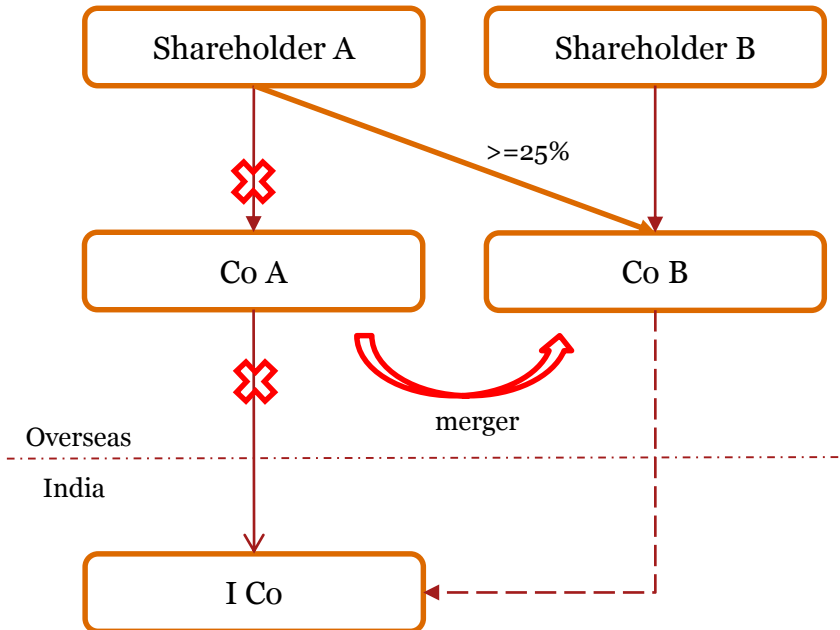


Taxability

In the hands of	Taxability	Section	Conditions
Amalgamating company	No capital gains tax on transfer of assets	47(iv)	<ul style="list-style-type: none"> Amalgamated company is a Indian company
Shareholders of Amalgamating Company	No capital gains tax on transfer of shares	47(vii)	<ul style="list-style-type: none"> Consideration in form of shares in amalgamated company Amalgamated company is a Indian company
Cost of acquisition of shares received on merger by the shareholders	= Cost of shares held in the amalgamating company	49(2)	Transfer as referred u/s 47(vii)
Period of holding of shares received on merger by the shareholders	= period of holding of shares held in the amalgamating company	2(42A)(c)	Transfer as referred u/s 47(vii)
Amalgamated Company: <u>Cost of Assets</u> - Stock - Capital Asset - Depreciable Assets	= Same as the cost of shares / Capital assets held by amalgamating company = WDV of depreciable asset held by amalgamating company	- 43C - Explan 7 to 43(1) - Section 49(1)	Amalgamated company is a Indian company
Period of holding of capital assets for STCG/ LTCG	= period of holding of capital assets held in the amalgamating company	2(42A) r.w.s. 49(1) and 47(vi)	

Amalgamation

Overseas Amalgamations

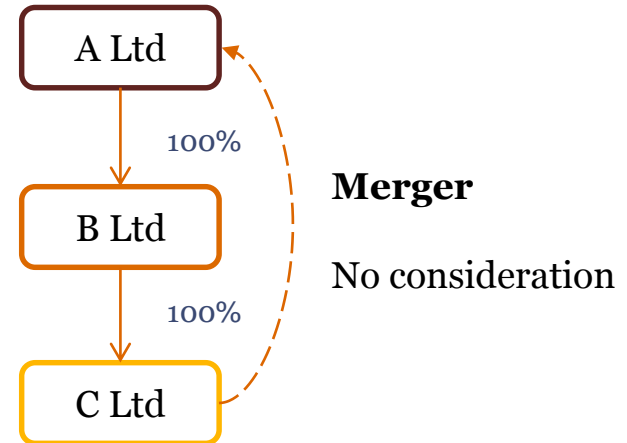
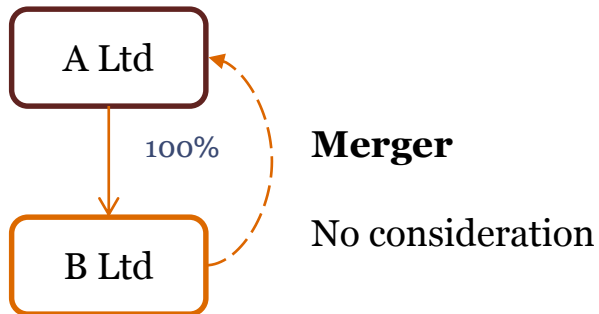


Tax implications in India on transfer of shares of ICo to Co B?

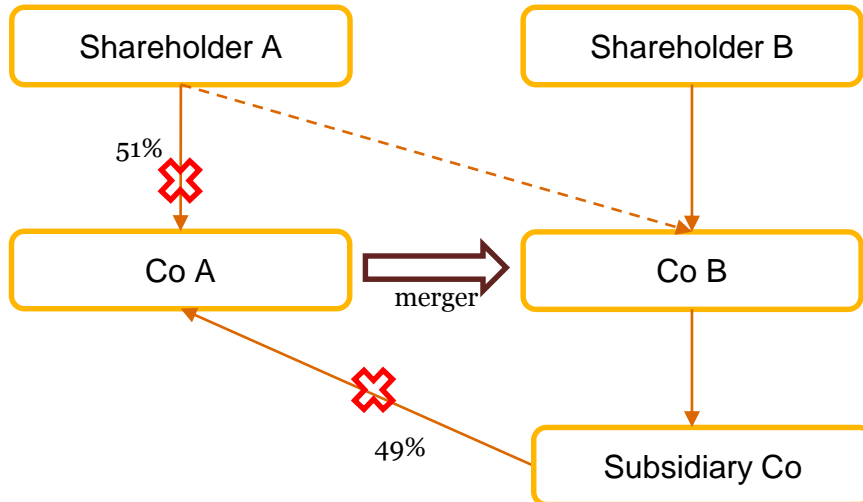
Conditions u/s 47(via):

1. At-least 25% shareholders of Co A continue to be shareholders of Co B
2. Exempt in foreign country

Case Study 1 - Whether 2(1B) compliant?



Case Study 2 - Whether 2(1B) compliant?

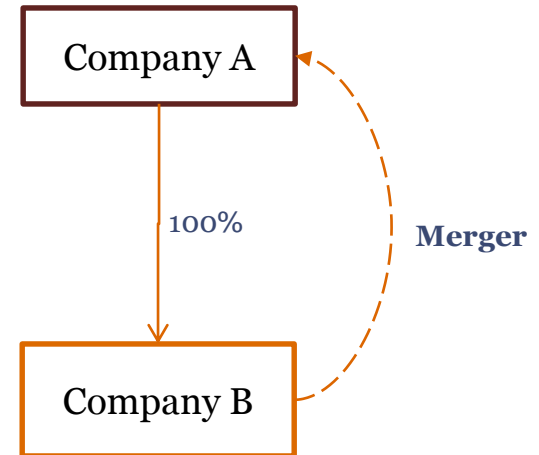


- Condition of at least 75% shareholder becoming shareholder in Co B is not fulfilled
- Is merger compliant of Section 2(1B)?

Case Study 3 - Deemed dividend implication?

Whether transfer of capital asset on merger of Company B into Company A results in distribution of dividend by the subsidiary company to its shareholder under section 2(22)(a) or section 2(22)(c)?

- Section 2(22)(a) is attracted in case of distribution entails release of an asset
- Section 2(22)(c) is attracted in case of *liquidation*

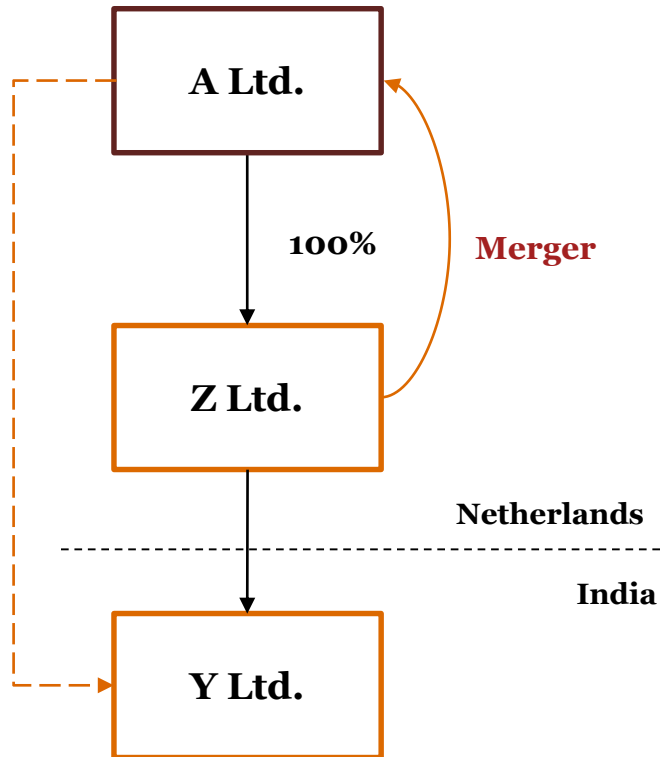


CBDT Circular No. 5P of 1967 dated 9th October 1967

Case Study 4 – discharge of consideration

Sr. No	Transferor company	Issue of consideration by Transferee Company	Section 2(1B) Compliant?	Tax neutral in hands of Transferor and Shareholder?
1	Equity Shares holder	Preference shares		
2	Equity Share holder	Equity + Preference Shares		
3	Equity Share holder Preference Share holder	Equity Shares to Equity share holders Cash consideration to Preference Share holders		
4	Equity Share holder	Equity shares and Debentures		

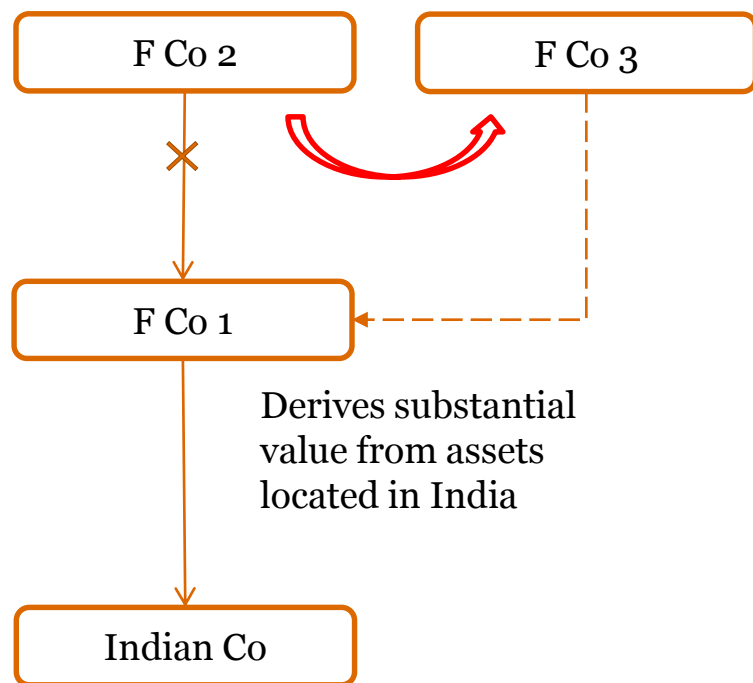
Case study 5 - Overseas merger



- In the case of merger of a wholly owned subsidiary into its holding company, condition of section 47(via) cannot be satisfied since the amalgamated co holds all the shares of the amalgamating co.
- Will exemption under Section 47(via) be available in such a case?

* Hoechst GmbH, In re [2007] 289 ITR 312 (AAR)

Case Study 6 - Overseas Merger



Consider the following scenario:

- F Co 1 holds 100% in Indian Co
- F Co 2 holds 100% in F Co 1
- F Co 2 to merge into F Co 3
- Transfer of shares of F Co 1 to F Co 3 upon merger

? Tax implications in India?

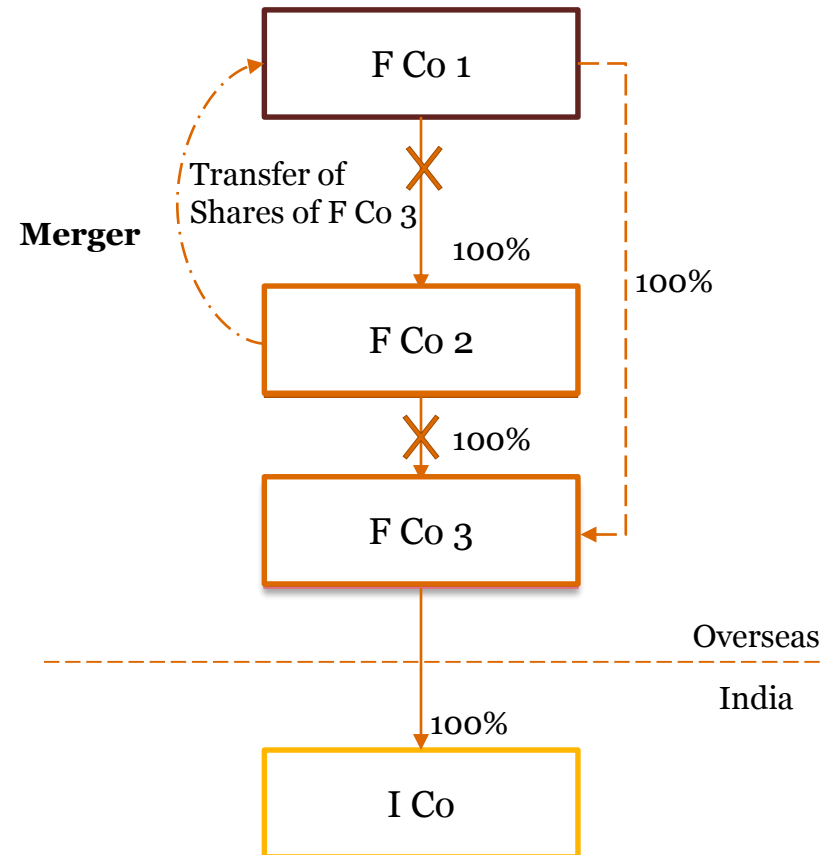
Case Study 7 - Overseas merger

Consider the following scenario:

- F Co 1 holds 100% in F Co 2
- F Co 2 holds 100% in F Co 3
- F Co 3 holds 100% in I Co
- Merger of F Co 2 into F Co 1
- Transfer of shares of F Co 3 to F Co 1 upon merger



Tax implications in India?



Demerger – Income Tax Implications

Definition: Section 2(19AA)

“**Demerger**”, in relation to companies, means the transfer pursuant to a Scheme by a demerged company of its one or more undertakings to any resulting company in such a manner that—

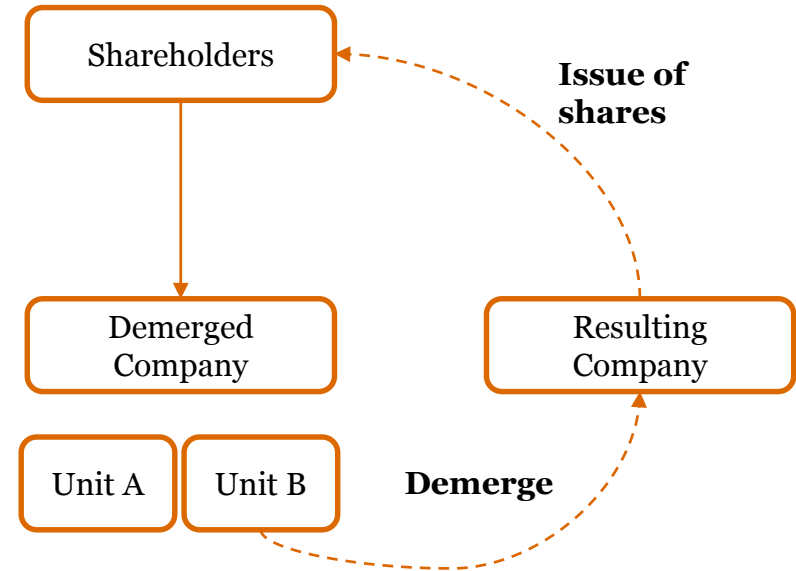
- a. all the property of the undertaking, being transferred by the demerged company, immediately before the demerger, becomes the property of the resulting company by virtue of the demerger;
- b. all the liabilities relatable to the undertaking, being transferred by the demerged company, immediately before the demerger, become the liabilities of the resulting company by virtue of the demerger;
- c. the property and the liabilities of the undertaking or undertakings being transferred by the demerged company are transferred at values appearing in its books of account immediately before the demerger;
- d. the resulting company issues, in consideration of the demerger, its shares to the shareholders of the demerged company on a proportionate basis [except where the resulting company itself is a shareholder of the demerged company];
- e. the shareholders holding not less than three-fourths in value of the shares in the demerged company (other than shares already held therein immediately before the demerger, or by a nominee for, the resulting company or, its subsidiary) become share-holders of the resulting company or companies by virtue of the demerger; otherwise than as a result of the acquisition of the property or assets of the demerged company or any undertaking thereof by the resulting company
- f. the transfer of the undertaking is on a going concern basis;
- g. the demerger is in accordance with the conditions, if any, notified under sub-section (5) of section 72A by the Central Government in this behalf

Key ingredients

Sr. Conditions

- 1 Transfer of undertaking
- 2 Transfer of all properties of the undertaking at BV
- 3 Transfer of all liabilities of the undertaking at BV
- 4 Resulting Co to issue shares to the shareholders of Demerged Co
- 5 Shareholders holding at-least 3/4th in value become shareholders
- 6 Transfer on going concern basis

- Scheme of arrangement between the companies and their shareholders
- NCLT approval
- Approval from shareholders, creditors and statutory authorities - RD, ROC, Stock Exchange, SEBI, Income Tax, etc.



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 **not constituting a business activity**

What is an Undertaking?

An undertaking refers to a business activity engaged with a view to earn profits

In General parlance:

- Undertaking refers to a division or a part of a business enterprise carrying on operations independently
- Means an “enterprise”, “venture” or “engagement”

As per Courts:

- The expression “undertaking” is an amalgam of all ingredients of property and is not capable of being dismembered. In reality, the undertaking is a complete and complex weft and the various types of business and assets are threads which cannot be taken apart from the weft - ***R.C. Cooper vs. Union of India (SC) 40 Com Cases 325***
- A business undertaking as a going concern includes all rights, assets, contingent or definite, corporeal and incorporeal and all interest in advantage, present or future. It also includes the management, executive employees and anything which goes as part of organization - ***Avaya Global Connect Ltd. Vs. ACIT (Mumbai Tribunal) 122 TTJ 300***
- An undertaking should be interpreted to mean any venture or enterprise which a person undertakes to do - ***CIT v. Textile Machinery Corporation (Cal HC) 80 ITR 428***

Demerged Co has only 1 undertaking – can that be demerged?



Liabilities & Assets

Liabilities include –

- a. the liabilities which arise out of the activities or operations of the undertaking;
- b. the specific loans or borrowings (including debentures) raised, incurred and utilized solely for the activities or operations of the undertaking; and
- c. so much of the amounts of general or multipurpose borrowings, if any, of the demerged company as stand in the same proportion which the value of the assets transferred in a demerger bears to the total value of the assets of such demerged company immediately before the demerger

Common borrowings –
whether proportion of
aggregate liabilities to be
considered for transfer or
individually?



Common
borrowings!! - What
about common
liabilities??



Value of the property: Any change in the value of assets consequent to their revaluation shall be ignored

Common Assets

If certain common assets / back-office operations are not transferred, will it jeopardize the nature of undertaking?

Based on numerous judicial precedents*, the following principles emerge –

- a. If the assets and liabilities being transferred constitute a business activity capable of being run independently, such assets and liabilities could constitute a 'business undertaking'
- b. Even if some assets are retained by the transferor, the transfer would not lose the character of undertaking, if the transfer is of a going concern and the transferee is in a position to carry on the business without any interruption
- c. To ensure that the undertaking is a going concern, the tax authorities can certainly examine whether essential and integral assets like plant, machinery and manpower have been transferred

'going concern' character of the undertaking should not be hampered

* CIT v. Max India Limited (319 ITR 68) (P&H HC); Rohan Software Private Limited (115 ITD 302) (Mum ITAT); Indo Rama Textile Limited, in re (23 Taxmann 390) (Delhi HC); Premier Automobile Ltd v. ITO 2003 264 ITR 193; ECE Industries v. DCIT 2007 15 SOT 671 (Delhi HC); Mahindra Mainers Engineering & Chemical Products Limited Vs. Income tax Officer 2(2)(2) (Mumbai Tribunal) (ITA No.2544/Mum/2010)

Taxability

In the hands of	Taxability/ Treatment	Section	Conditions/ Remarks
Demerged Company	No capital gains tax on transfer of assets	47(vib)	<ul style="list-style-type: none"> Resulting company is an Indian company
Resulting Company: <u>Cost of Assets</u> - Depreciable Assets - Capital Asset	= Cost of depreciable asset to be the same as cost in the hands of the Demerged Company =No specific provision for cost of Capital Asset acquired	Explanation (viiia) of Section 43(1)	The past tax liabilities remain with the Demerged Company
Cost of acquisition of shares received on demerger by the shareholders	= Cost of acquisition of shares in demerged co 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)	<ul style="list-style-type: none"> Resulting company is an Indian company
Period of holding of shares received on demerger by the shareholders	= period of holding of shares held in the demerged company	Expln 1(g) to Section 2(42A)	Conditions of 2(19AA) needs to be complied with
Period of holding of capital assets for STCG/ LTCG	= period of holding of capital assets held in the demerged company	2(42A) r.w.s. 49(1) and 47(vib)	

Other tax considerations

WDV of block of assets

- In the hands of demerged company: Reduced by WDV of assets transferred
- In the hands of resulting company: WDV of assets acquired to be added to block of asset
- Depreciation to be apportioned based on the number of days

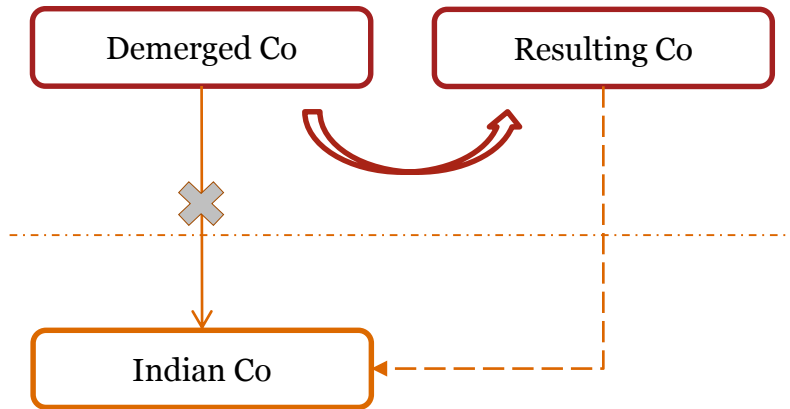
Cost of shares in the hands of shareholders of demerged company

- Cost of shares of resulting company: (Cost of shares of demerged company x BV of net assets transferred) / Net-worth of demerged company
- Cost of shares of demerged company: Original cost – cost of shares of resulting company
- Period of holding of shares of resulting company to include period for which shares held in demerged company

Example:

Particulars	Reference	Details	Amount
Actual cost of shares held in D Co by shareholders	A		100
Net assets of business transferred	B		50
Net worth of D Co on the date of demerger	C		200
Cost of new shares allotted in R Co	$D = A \times (B / C)$	$100 \times (50 / 200)$	25
Cost of original shares in D Co	$E = A - D$	$100 - 25$	75

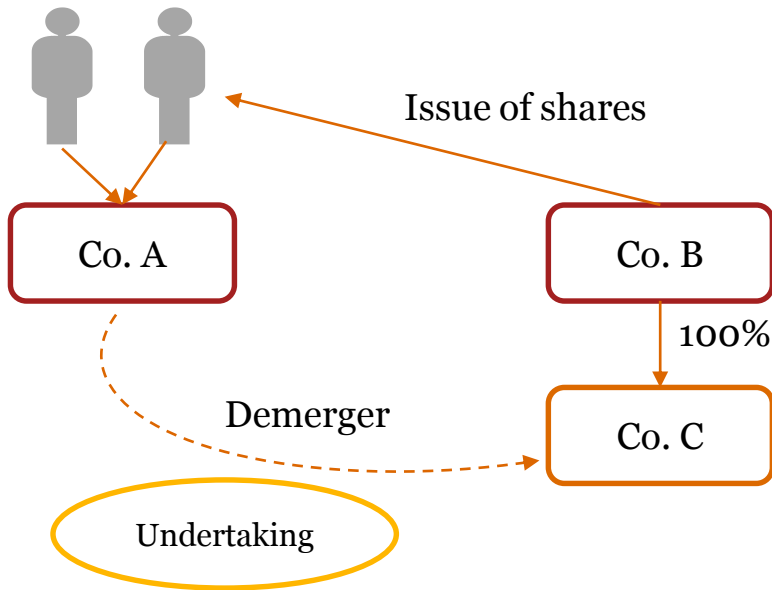
Overseas Demerger



Conditions u/s 47(vic)

1. Shareholders holding at-least **3/4th in value** of Demerged Co become shareholders of Resulting Co
2. Exempt in foreign country

Case Study 1



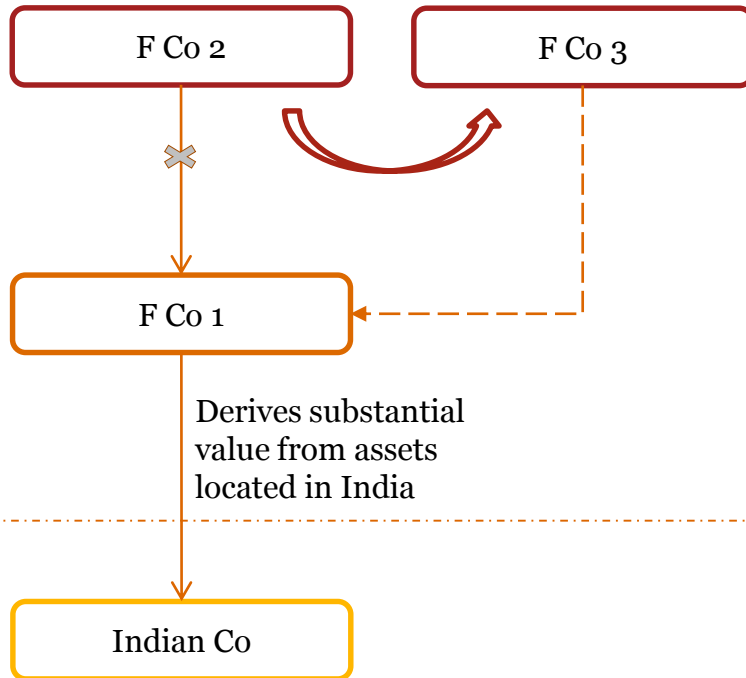
Question:

Whether demerger as per section 2(19AA)?

“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

Case Study 2

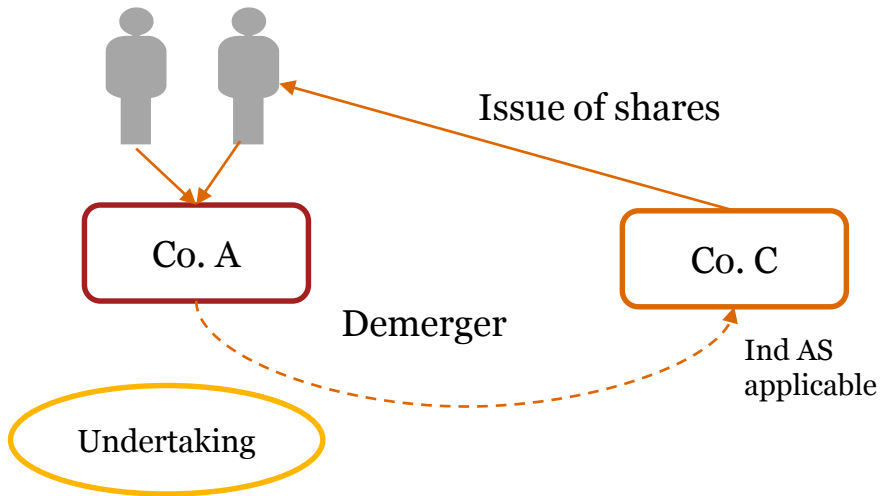


Consider the following scenario:

- F Co 1 holds 100% in Indian Co
- F Co 2 holds 100% in F Co 1
- F Co 2 to demerge business (including investment in F Co 1) into F Co 3

? Tax implications in India?

Case Study 3



Consider the following scenario:

- Demerger of the Undertaking from Co. A to Co. C
- Co. C to record the assets and liabilities at fair value in light of the applicable Ind AS 103
- Section 2(19AA) of the Act requires that property and the liabilities of the undertaking transferred by the demerged company are transferred at book value

? Whether Demerger would be tax neutral?

Other Tax Implications

Definition: Section 72A

(1) Where there has been an amalgamation of—

(a) a company owning an **industrial undertaking** or a ship or a hotel with another company; or

(b) a banking company referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949)⁵⁷ with a specified bank; or

(c) 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, then,

notwithstanding anything contained in any other provision of this Act, the **accumulated loss** and the **unabsorbed depreciation** of the amalgamating company **shall be deemed** to be the loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company **for the previous year** in which the amalgamation was effected, and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly.

(2) Notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless:

(a) the amalgamating company—

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

(ii) 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;

Definition: Section 72A

(b) the amalgamated company—

(i) holds continuously for a minimum period of **five years** from the date of amalgamation at least **three-fourths of the book value of fixed assets** of the amalgamating company acquired in a scheme of amalgamation;

(ii) **continues the business** of the amalgamating company for a minimum period of **five years** from the date of amalgamation;

(iii) fulfils 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.

(3) In a case where any of the conditions laid down in sub-section (2) are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with.

(4) Notwithstanding anything contained in any other provisions of this Act, in the case of a **demerger**, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(a) where such loss or unabsorbed depreciation is **directly relatable** to the undertakings transferred to the resulting company, be allowed to be **carried forward** and set off in the hands of the resulting company;

(b) where such loss or unabsorbed depreciation is **not directly relatable** to the undertakings transferred to the resulting company, be **apportioned** between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting 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.

Definition: Section 72A

For the purposes of this section,—

(a) "accumulated loss" means so much of the loss of the predecessor firm or the proprietary concern or the private company or unlisted public company before conversion into limited liability partnership or the amalgamating company or the demerged company, as the case may be, **under the head "Profits and gains of business or profession" (not being a loss sustained in a speculation business)** which such predecessor firm or the proprietary concern or the company or amalgamating company or demerged company, would have been entitled to carry forward and set off under the provisions of section 72 if the reorganisation of business or conversion or amalgamation or demerger had not taken place

(aa) "industrial undertaking" means any undertaking which is engaged in—

(i) the manufacture or processing of goods; or

(ii) the manufacture of computer software; or

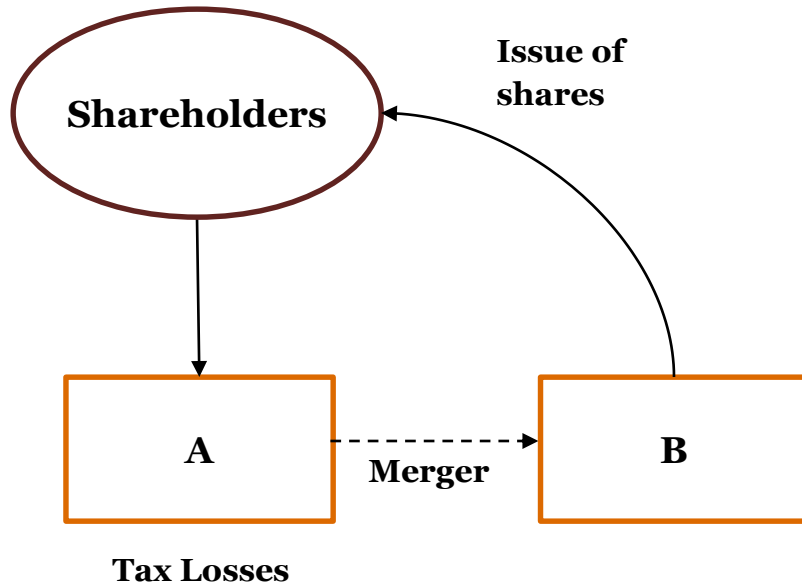
(iii) the business of generation or distribution of electricity or any other form of power; or

iiia) the business of providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services; or

(iv) mining; or (v) the construction of ships, aircrafts or rail systems

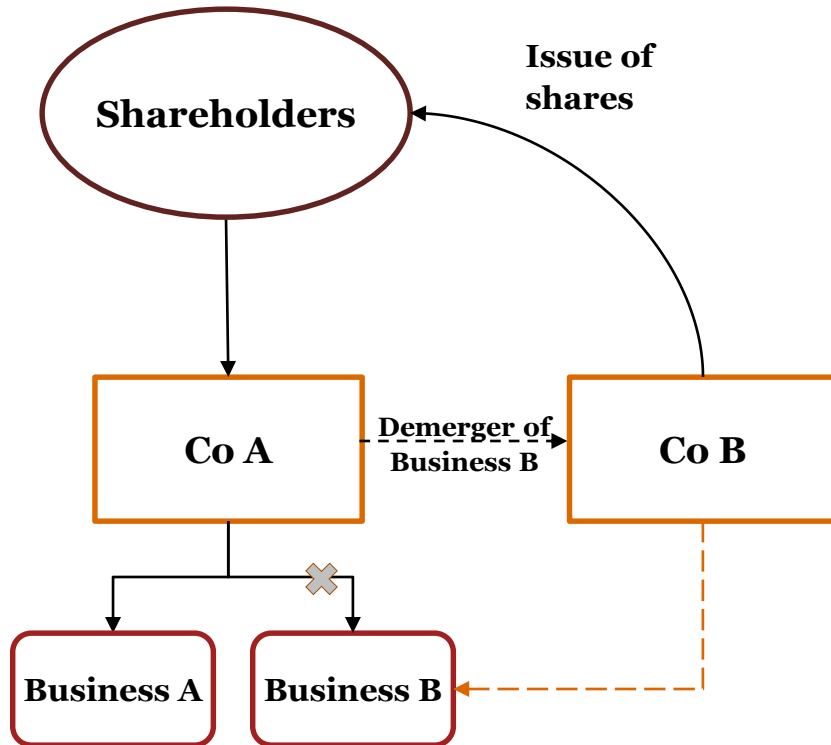
(b) "unabsorbed depreciation" means so much of the allowance for depreciation of the predecessor firm or the proprietary concern or the private company or unlisted public company before conversion into limited liability partnership or the amalgamating company or the demerged company, as the case may be, which remains to be allowed and which would have been allowed to the predecessor firm or the proprietary concern or the company or amalgamating company or demerged company, as the case may be, under the provisions of this Act, if the reorganisation of business or conversion or amalgamation or demerger had not taken place.

Amalgamation



- Merger to be as per the provisions of Section 2(1B)
- Possibility of fresh life of 8 years of business losses of amalgamating company
- Tax losses – Business loss & Unabsorbed depreciation
- Carry forward and set off of business losses and unabsorbed depreciation
- Amalgamating company owns an industrial undertaking or ship or hotel or amalgamation of banking company with a specified bank
- An industrial undertaking means any undertaking engaged in
 - Manufacture or processing of goods
 - Manufacture of computer software
 - Generation or distribution of electricity or some other form of power
 - Providing telecommunication services
 - Mining / construction of ships, aircrafts or rail systems

Demerger



- No conditions as to nature of business/ holding of assets/ continuity of business/ installed capacity applicable to the demerged company or the resulting company
- Demerger to be as per the provisions of Section 2 (19AA)
- Carry forward of losses
 - Business loss - unexpired period
 - Unabsorbed depreciation - indefinitely
- Not directly related to the demerged business - carried forward proportionately

Continuity of business losses/unabsorbed depreciation in Merger/Demerger – Case Study



Facts of the Case

- A Co is a closely held company & X Co is a Listed Company
- A Co has accumulated tax losses in services business
- Proposal to consolidate A Co and X Co

Options

1

Merger of A Co with X Co

2

Reverse merger of X Co with A Co.

3

De-merger of Services business of A Co into X Co.

Continuity of losses??

Definition: Section 79

Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year

- a. in the case of a company not being a company in which the public are substantially interested and other than a company referred to in clause (b), no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year, the shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred;
- b. in the case of a company, not being a company in which the public are substantially interested but being an eligible start-up as referred to in section 80-IAC, the loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, if, all the shareholders of such company who held shares carrying voting power on the last day of the year or years in which the loss was incurred;
 - continue to hold those shares on the last day of such previous year; and
 - such loss has been incurred during the period of seven years beginning from the year in which such company is incorporated;

Provided that nothing contained in this section shall apply to a case where a change in the said voting power and shareholding takes place in a previous year consequent upon the death of a shareholder or on account of transfer of shares by way of gift to any relative of the shareholder making such gift;

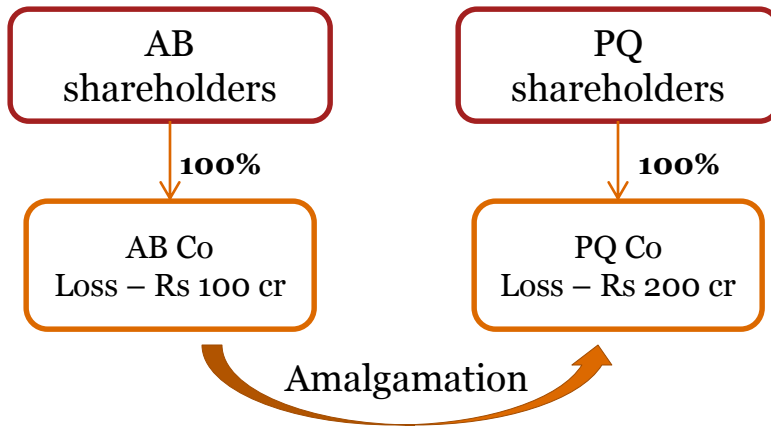
Provided further that nothing contained in this section shall apply to any change in the shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to the condition that fifty-one per cent shareholders of the amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company

Section 79 - Key Ingredients

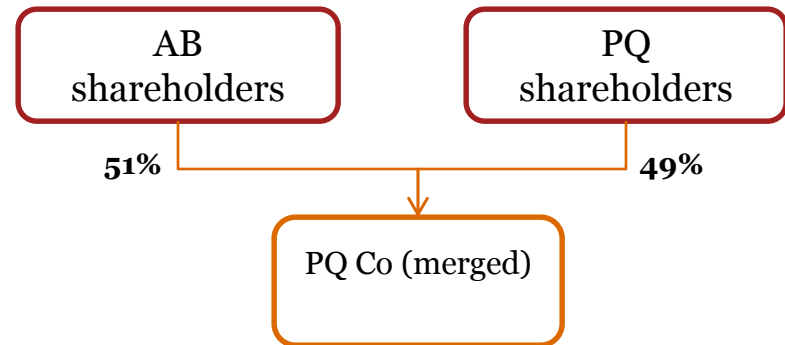
- ▶ Applicable only to *closely held companies*
 - companies other than companies in which public are substantially interested
- ▶ No carry forward / set off of accumulated losses
 - in case common shareholding of 51% is not maintained as *on last day* of the financial year
- ▶ Section not applicable where there is a change in shareholding of an Indian Company which is a subsidiary of a Foreign Company as a result of the Merger or Demerger of the Foreign Company subject to the condition that 51% of the merging or demerging Foreign Company continue to be the shareholders of the amalgamated or resulting Foreign Company
- ▶ The Finance Act, 2017 has amended section 79 to provide for relaxation from the rigors of section 79 to an eligible startup company subject to fulfillment of certain conditions

Case Study - 1

Pre amalgamation Structure



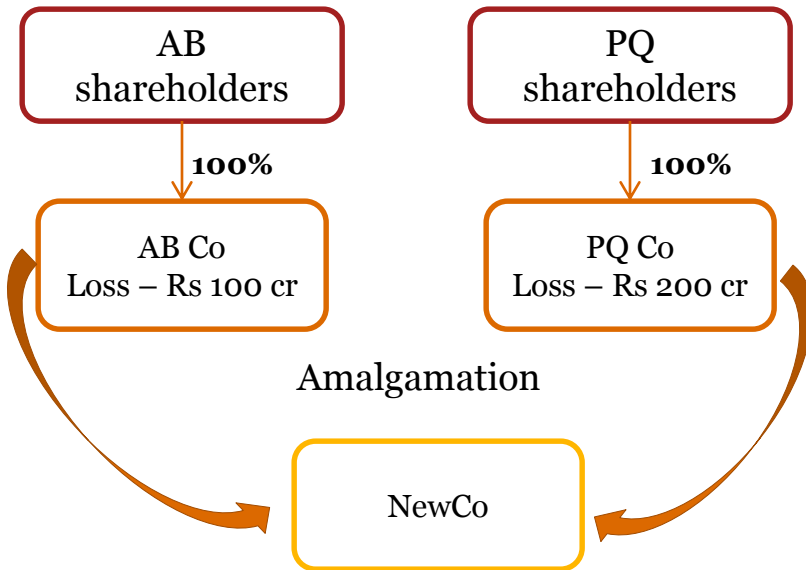
Post amalgamation Structure



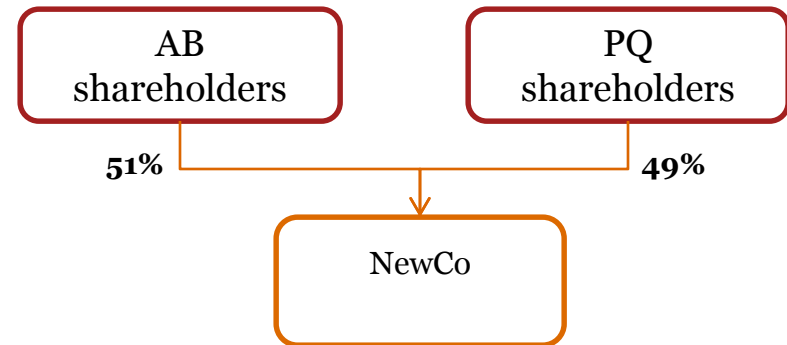
Quantum of Losses to be carried forward
by PQ Co?

Case Study - 2

Pre amalgamation Structure



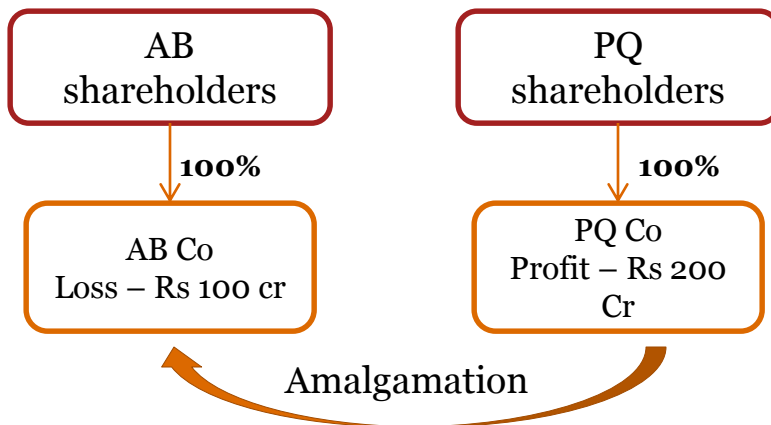
Post amalgamation Structure



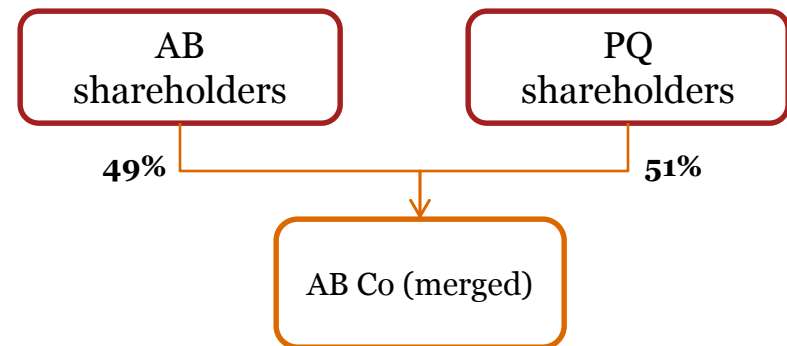
Quantum of Losses to be carried forward
by New Co?

Case Study - 3

Pre amalgamation Structure



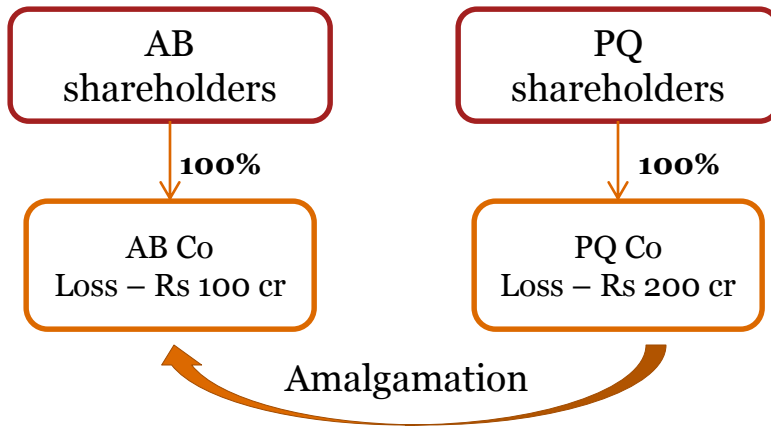
Post amalgamation Structure



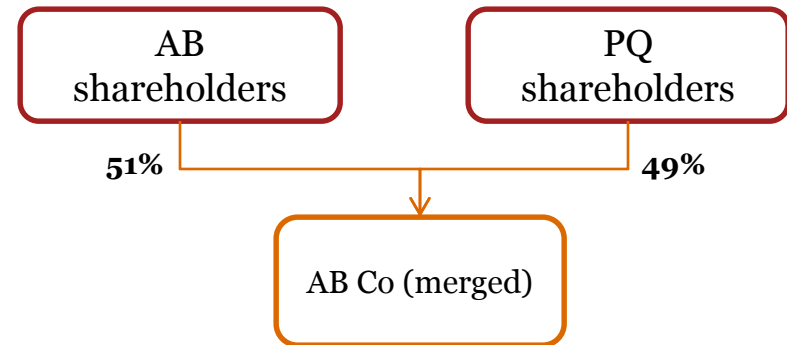
Quantum of Losses to be carried forward
by AB Co?

Case Study - 4

Pre amalgamation Structure



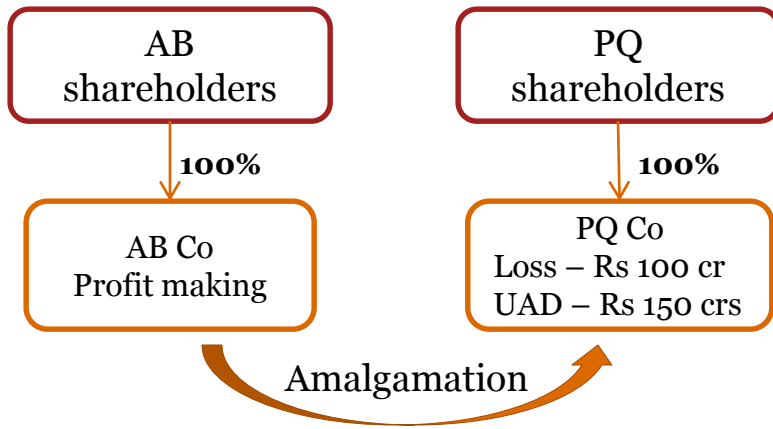
Post amalgamation Structure



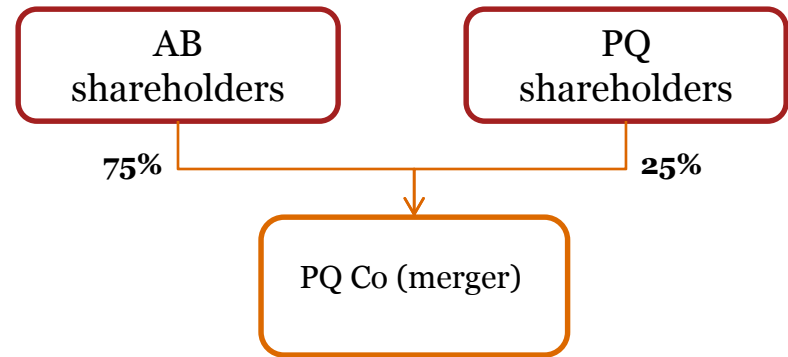
Quantum of Losses to be carried forward
by AB Co?

Case Study - 5

Pre amalgamation Structure



Post amalgamation Structure

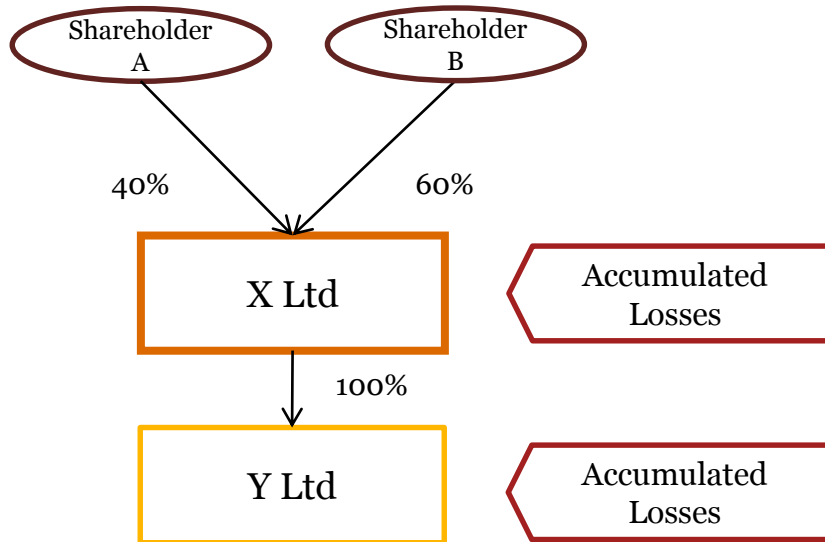


Quantum of Losses to be carried forward
by PQ Co?

*CIT vs Shri Subhulaxmi Mills Ltd [2001] 249 ITR 795 (SC)

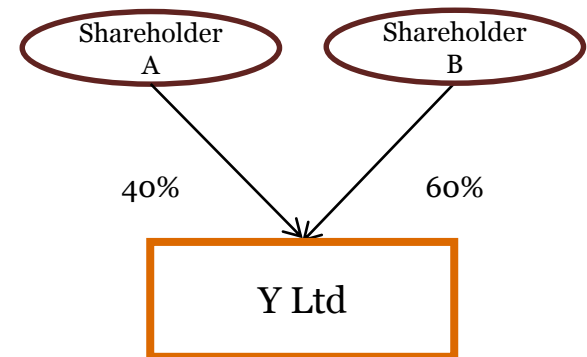
Case Study - 6

Pre - Merger



X Co proposes to merge into Y Co

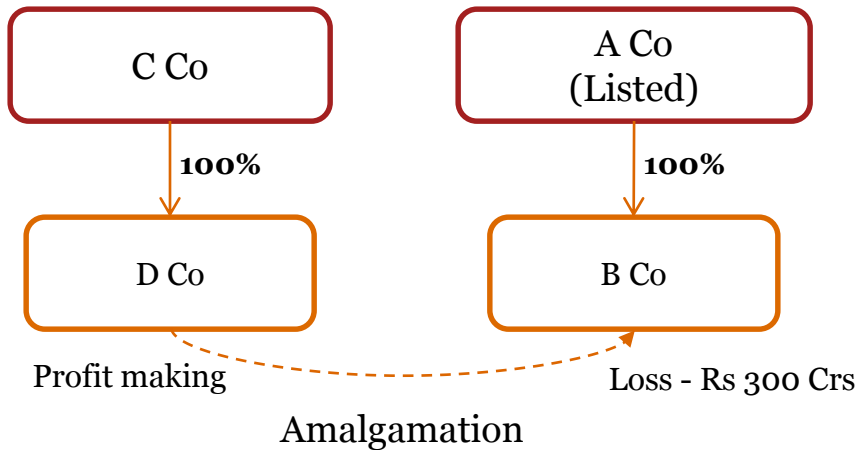
Post - Merger



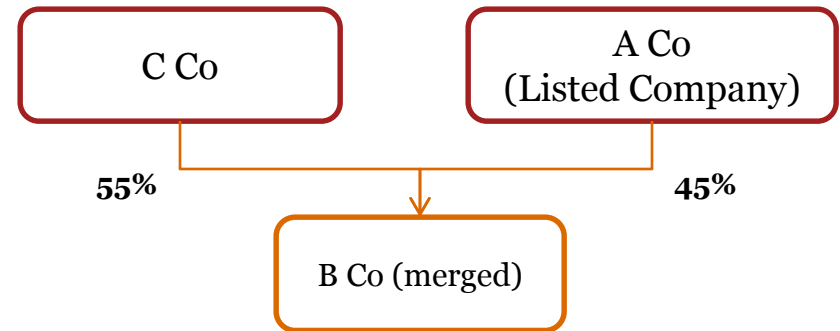
Whether accumulated tax Losses of X and Y co would lapse ?

Case Study 7

Pre amalgamation Structure



Post amalgamation Structure



Facts of the Case

- B Co is a manufacturing entity & A Co is a Listed Company
- Proposal to merger D Co into B Co

Quantum of Losses to be carried forward by B Co?

Tax incentives and MAT Credit

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 / de-merger except u/s Section 80-IA(12A)
- ▶ Explicit provisions not provided for Slump sale in the Act leading to ambiguity on availability or otherwise

MAT Credit

- ▶ MAT payable on book profits in the absence of Nil/lower tax profits
- ▶ Credit for MAT allowable to the assessee company who has paid such taxes
- ▶ Amalgamating Co ceases to exist after amalgamation.
- ▶ No specific provision for carry forward of MAT credit in case of amalgamation or de-merger. However, Mumbai ITAT* has endorsed a favorable view in this matter.

Goodwill

- ▶ Excess consideration paid over the value of the net assets taken over from the Transferor Company may be considered as Goodwill arising on amalgamation
- ▶ Further, goodwill is an intangible asset u/s 32(1)(b) of the Act and depreciation on goodwill allowable under this section - *CIT vs Smifs Securities Limited [TS-639-SC-2012]*
 - ▶ *Highly litigative*

Section 56

- ▶ No implications on transfer of properties in the hands of the Transferee Company pursuant to amalgamation or demerger - Clause (ix) to the proviso of Section 56(2)(x)

* SKOL Breweries Ltd vs ACIT [2008] 28 ITATINDIA 998 (Mum)

Appointed Date

Appointed Date

Concept: Date on which merger/ demerger is deemed to be effective.

- ▶ *Choice of Appointed date*
- ▶ *Not specifically defined in the Act*
- ▶ *Interpreted based on rulings of the Apex Court**
- ▶ *The date of amalgamation is the date mentioned in the scheme and approved by the court unless the Court specifies any other date*
- ▶ *Relevant for tax purposes as it is classified as the date of amalgamation / de-merger*



* Marshall Sons & Co. (India) Ltd. v. ITO [1997] 233 ITR 809 (SC)

Stamp Duty – Court/ NCLT Order

States wherein Court Order not included in instruments / definition under the Article “Conveyance”

1

Views

2

No stamp duty payable in absence of a specific entry in the State Schedule

High Court order can not be deemed to be a “conveyance”

Transfer is by operation of law

Supporting Case Laws: Madhu Intra Ltd v RoC

Order passed by the High Court u/s 391 to 394/ 230 to 232 of the Companies Act would fall in the definition of instrument within the meaning of “Conveyance”

Levy Stamp Duty on transfer of property through High Court/ NCLT Order in respective states at rates applicable to “Conveyance”

Hindustan Lever v State of Maharashtra, Delhi Towers, Emami Biotech ltd

Court Order in Maharashtra - Illustration

Stamp Duty as per Article 25(da) of the Maharashtra Stamp Act

- Maximum 10% of the fair value of shares issued, subject to the higher of the following:
 - 5% of the fair value of immovable property situated in Maharashtra of Transferor Company
 - 0.7% of the fair value of shares issued and consideration paid

Particulars	Case 1	Case 2	Case 3
Market value of shares issued on merger	100.00	200.00	180.00
True market value of immovable property located in Maharashtra	500.00	75.00	22.00
10% of market value of shares issued on merger (A)	10.00	20.00	18.00
Restricted to higher of:			
5% of market value of immovable property located in Maharashtra	25.00	3.75	1.10
0.7% of market value of shares issued on merger	0.70	1.40	1.26
(B)	25.00	3.75	1.26
Stamp duty is lower of A and B	10.00	3.75	1.26

Stamp Duty – Set off

Objective - To mitigate multiple incidence of stamp duty

- States have included provisions for set off of stamp duty like Maharashtra, Karnataka, Bihar, Madhya Pradesh, etc.

Section 19 of Maharashtra Stamp Act, 1958 ('MSA') (similar provisions in certain other state acts)

Instrument executed in one state (say Gujarat) is received in any other state (say Maharashtra)

- Such instrument is mentioned in the Schedule 1 to the MSA; and
- Relates to any property situated in or to any matter or thing done or to be done in Maharashtra

- Duty payable in Maharashtra will be reduced by the duty already paid in Gujarat at the time of execution of the instrument
- However, Bombay HC has rejected the claim of set off in case of Scheme of Amalgamation of RPL into RIL



Questions

Thank You

The views expressed in this presentation are personal views of the author. This presentation has been prepared for general guidance on matters of interest only and does not constitute professional advice. You should not act upon the information contained in this presentation without obtaining specific professional advice.