



PRESENTATION ON REGULATORY FRAMEWORK OF MERGERS AND AMALGAMATIONS

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REGULATORY FRAMEWORK FOR THE MERGER



- Income Tax Act;
- NBFC Regulations, if an NBFC;
- Listing Regulations, if Listed;
- Stamp Duty in Telangana;
- Procedure under Companies Act under NCLT Route and Fast Track Route.

INCOME TAX ACT



Meaning of Merger:

- Under the Income Tax Act, amalgamation and merger are similar concepts.
- A qualified merger is defined under Section 2 (1B) of the Act to mean merger of one or more companies with another company or the merger of two or more companies to form one company in such a manner that:
 - ✓ All properties to be transferred to the merged company
 - ✓ All liabilities to be transferred to the merged company
 - ✓ At least 3/4th in value of shareholders of the merging company should be shareholders in the merged company.
- The above conditions are cumulative and would need to be satisfied to ensure that the amalgamation qualifies as a tax qualified merger.

INCOME TAX (CONTD.....)



Capital gains

- The Income Tax Act (“IT Act”) provides for capital gains tax exemptions, if the merger qualifies as a merger under the IT Act (section 2(1B) of the IT Act).

Benefits to amalgamating companies

- Transfer of capital assets by amalgamating companies to amalgamated company would not be subject to capital gains tax in the hands of amalgamating companies (section 47(vi) of the IT Act).

Benefits to the shareholders of amalgamated company

- No capital gains tax in the hands of the shareholders of amalgamating companies, on allotment of shares by amalgamated company to the shareholders of amalgamating company, as consideration for the merger (section 47(vii) of the IT Act).

INCOME TAX (CONTD....)

Carry forward of losses

- Section 72A(1) of the Act provides that in case of amalgamation of a company with another company, the business loss and unabsorbed depreciation of the amalgamating company is permitted to be carried forward and set-off in the hands of amalgamated company subject to fulfillment of certain conditions.
- Conditions to be fulfilled by amalgamating company:
 - ☐ It qualifies as an industrial undertaking.
 - ☐ Has been engaged in the business for at least three years during which the accumulated loss has occurred or the unabsorbed depreciation has accumulated.
 - ☐ 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



INCOME TAX (CONTD....)



Carry forward of losses

- Conditions to be fulfilled by amalgamated company:
 - ☐ Holds at least 3/4th of the book value of the fixed assets of the amalgamating company for a minimum period of five years from the date of amalgamation
 - ☐ The amalgamated company continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation.
 - ☐ It achieves fifty percent of installed capacity of the undertaking of the amalgamating company before the end of four years from the date of amalgamation and continue to maintain the said minimum till the end of five years.
- In case the any of the above conditions are not fulfilled in subsequent years the amount of loss or unabsorbed depreciation set off would be taxable in the hands of amalgamated company in the year in which the applicable condition is breached.

INCOME TAX (CONTD....)



- Further it should be noted that benefit of carry forward of losses is available only to a company owning an industrial undertaking or a ship or a hotel.
- Industrial undertaking is defined in section 72A(7) of the Act to mean an undertaking engaged in one of the following:-
 - The manufacture or processing of goods.
 - The manufacture of computer software.
 - The business of generation or distribution of electricity or any other form of power.
 - The business of providing telecommunication services.
 - The construction of ships, aircraft or rail systems.
 - Mining
- The above definition of the term industrial undertaking is exhaustive and any other industry not falling within the above definition would not qualify as industrial undertaking and therefore would not be entitled to the benefit of carry forward of business loss and unabsorbed depreciation in the event of merger.

NBFC REGULATIONS

NBFC

Non Banking Financial Company

In terms of the RBI regulations, no NBFC shall make investment/open subsidiary abroad without obtaining prior approval of RBI.

Further, where a non-NBFC merges with an NBFC, prior written approval of the Reserve Bank would be required if such a merger satisfies any one or both the conditions:

- ☐ any change in the shareholding of the NBFC consequent on the merger which would result in acquisition/transfer of shareholding of 26 per cent or more of the paid up equity capital of the NBFC;
- ☐ any change in the management of the NBFC which would result in change in more than 30 per cent of the directors, excluding independent directors.

STOCK EXCHANGE

COMPLIANCE



➤ SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 lays down certain obligations of the listed companies in the event of any merger/amalgamation/arrangement/re-construction involving listed companies which are laid down as follows:.

- Filing the draft scheme with the stock exchanges for obtaining observation letter or no-objection letter, before filing such scheme with NCLT and such no-objection letter shall be placed before NCLT at the time of seeking approval from the NCLT.
- The stock exchanges shall forward the scheme to SEBI along with its observation letter/ no-objection letter on the scheme. SEBI shall provide its comments on the draft scheme to the stock exchanges.
- The listed entity shall intimate the record date to all the stock exchange(s) where it is listed for corporate actions like merger.

STAMP DUTY IMPLICATIONS



As per the Indian Stamp Act, 1899 as applicable for the state of Telangana & Andhra Pradesh, the stamp duty payable on the scheme of arrangement is 2% of the total value of shares issued or allotted to the shareholders as consideration for merger. For other states, please refer to respective stamp act.

PROCESS OF MERGER UNDER NCLT ROUTE



- Obtainment of fairness opinion from a SEBI Registered merchant banker and valuation report on the valuation of assets/shares from a registered valuer.
- The board of directors of the amalgamated company and the amalgamating companies shall approve the scheme of merger.
- Upon sanction of the Scheme by the Board, the companies shall submit the scheme to the SEBI/stock exchange for obtaining no-objection letter/observation letter, if involves listed company. Upon obtainment of no objection from SEBI an application along with the scheme shall be submitted to the respective National Company Law Tribunal (“NCLT”).
- Upon hearing the application, NCLT shall issue appropriate directions for convening the meeting of the creditors or the members or any class of creditors of both the companies or dispense the meetings depending on the consent affidavits obtained from the members and creditors.

MERGER PROCESS UNDER NCLT ROUTE (CONTD...)



- Pursuant to the order of the Tribunal, the notice of the meeting shall be sent individually to each of the creditors or members as the case may be. The notice shall include the no objection/observation letter from SEBI, if involves listed company. The notice shall also provide e-voting facility to the public shareholders.
- The notice of the meeting shall be advertised in atleast one English newspaper and in atleast one vernacular language in the state in which the registered office of the company is situated, atleast one month before the date of the meeting.
- The scheme should be approved by the requisite majority of the shareholders and/or the creditors representing three-fourths in value of the creditors, or class of creditors or members or class of members, as the case may be, voting in person or by proxy or by postal ballot, of both the companies. Also, atleast more than 50% of public shareholders should approve the scheme, if listed. The chairperson of the meeting shall submit a report on the result of the meeting within 3 days after conclusion of the meeting.

MERGER PROCESS UNDER NCLT ROUTE (CONTD...)



- Within a period of 7 days of the filing of the report by the chairperson, a petition shall be filed with the NCLT for sanction of the scheme.
- NCLT shall fix a date for the hearing of petition and notice of the hearing shall be advertised in the same newspaper in which the notice of the meeting was advertised not less than 10 days before the date fixed for hearing.
- Once the scheme is sanctioned then the order sanctioning the scheme is required to be filed with the Registrar of Companies within a period of 30 days of the date of receipt of the order.
- Steps for listing of specified securities should be completed and trading in securities to commence within 60 days of receipt of the order of the NCLT.
- Also, the order along with other requisite documents may be submitted with the Stock Exchange, if it involves listed company.

PROCESS OF MERGER UNDER FAST TRACK ROUTE



- A notice of the proposed scheme is issued to invite suggestions or objections to the jurisdictional ROC, OL, income tax department and to the persons who are affected by the proposed scheme of the merger (for example any sectoral regulators for any companies), in Form CAA-9;
- Each of the companies is required to file a declaration of solvency in Form CAA-10 with the jurisdictional ROC;
- The companies shall issue a notice for convening a general meeting of all its members and creditors and shall obtain consent of the members and creditors of the requisite value as laid down under Section 233 of the Companies Act, 2013;
- Upon approval of the scheme of merger in the meetings, the transferee company shall file a copy of the approved scheme with the Regional Director, ROC and the OL, within 7 days of the conclusion of the meeting of the members or class of members and creditors or class of creditors. The scheme shall be accompanied with the result of the meetings in Form CAA-11.
- Upon receipt of the scheme, and in the event of any objections or suggestions, the ROC or the OL shall intimate the same to the RD, within 30 days.
- The transferee company shall file the confirmation order within 30 days from the date of receipt of the order from the RD in Form INC-128, along with the applicable fees, with the jurisdictional ROC.
- It may be noted that in case of merger of a wholly owned subsidiary with its holding company by listed companies, filing of the scheme with the stock exchanges for the purpose of obtainment of no-objection letter is not applicable. However, the schemes must be filed with the exchanges for disclosure purposes.

THANK YOU

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DISCLAIMER: *The content of this presentation is intended to provide a general guide to the subject matter. For any queries, the authors can be reached at (i) prashant@samistilegal.in (ii) anitadugar@samistilegal.in.*