CORPORATE RESTRUCTURING, VALUATION & INSOLVENCY
INDEX – ADDITIONAL QUESTIONS

LESSON 1 - TYPES OF CORPORATE RESTRUCTURING

1. Explain the legal framework of Corporate restructuring.

Answer:

Corporate Restructuring in India is governed by the following Acts, Rules, etc.:

- Chapter XV of The Companies Act, 2013 (the Act) i.e. The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016
- Chapter IV of the Act i.e. the Companies (Share Capital and Debentures) Rules, 2014 - Buy Back of shares/ purchase of own securities
- The National Company Law Tribunal (Procedure for reduction of share capital of Company) Rules, 2016 -Reduction of share capital
- The Companies (Compromises, Arrangements, and Amalgamations) Rules, 2016
- Income Tax Act, 1961
- Accounting Standards
- Foreign Exchange Management Act, 1999
- Competition Act, 2002
- Indian Stamp Act, 1899
- State Stamp Acts
- Insolvency and Bankruptcy Code, 2016 and Rules & Regulations thereon
- Intellectual Property Rights

2. What are the reasons for Amalgamation?

Answer:

Following are the reasons for Amalgamation:

a) To acquire cash resources
b) To eliminate competition
c) Tax savings/advantages
d) Economies of large scale operations
e) To Increase shareholders value
f) To reduce the degree of risk by diversification
g) Managerial effectiveness
h) To achieve growth and financial gain
i) Revival of weak or sick or insolvent/bankrupt company
j) Survival
k) Sustaining growth

3. What are the Key Takeaways from Spin offs and Split offs?

Answer:

Key Takeaways of Spin offs:

- A spinoff is the creation of an independent company through the sale or distribution of new shares of an existing business or division of a parent company.
- The spun-off companies are expected to be worth more as independent entities than as parts of a larger business.
- When a corporation spins off a business unit that has its own management structure, it sets it up as an independent company under a renamed business entity.

Key Takeaways Split offs:

- Split-offs are a method that can be used for a corporate divestiture.
- Split-offs do not mandate a proportioned pro rata share distribution but rather offer shareholders the option to exchange shares.

- Split-offs are motivated by the desire to create greater value for shareholders through the shedding of assets and offering of a new, separate company.

4. What is the difference between Spin-off and Split-off?

Answer:

Following is the difference Between Spin-off and Split-off

Basis for comparison	Spin-Off	Split-Off
Meaning	Spin-off implies a business action, wherein a company disjoins a division and creates new business entity, which is separately listed in the stock exchange and has independent board of directors.	Split-off refers to a corporate divestiture process in which a company's subsidiary turnout as a separate entity, with independent listing of its capital stocks.
Shares	Shares of the subsidiary company are distributed to all the shareholders.	Holding company's shareholders are required to exchange their shares, to get shares in the subsidiary.
Reason	To create a separate identity of the new firm.	To create a distinction between the core business and the new one.

5. Write a Short note on Alteration of Share Capital

Answer:

ALTERATION OF SHARE CAPITAL:

Alteration of share capital means, increase or decrease in or rearrangement of share capital as permitted in Articles of Association. An increase or decrease in the share capital of a company may be carried out as and when the company requires thus leading to an alteration in the company's share capital.

According to section 61 of the Companies Act, 2013 a limited company having a share capital derives its power to alter its share capital through its articles of association. As per the section the company may, if so authorised by its articles, alter its memorandum in its general meeting to –

1. increase its authorised share capital by such amount as it thinks expedient;
2. consolidate and divide all or any of its share capital into shares of a larger amount than its existing shares. The proviso to Section 61(1)(b) clarifies that No consolidation and division which results in changes in the voting percentage of shareholders shall take effect unless it is approved by the Tribunal on an application made in the prescribed manner.
3. convert all or any of its fully paid-up shares into stock, and reconvert that stock into fully paid-up shares of any denomination;
4. sub-divide its shares, or any of them, into shares of smaller amount than is fixed by the memorandum, so, however, that in the sub-division the proportion between the amount paid and the amount, if any, unpaid on each reduced share shall be the same as it was in the case of the share from which the reduced share is derived;
5. cancel shares which, at the date of the passing of the resolution in that behalf, have not been taken or agreed to be taken by any person, and diminish the amount of its share capital by the amount of the shares so cancelled;
6. The cancellation of shares shall not be deemed to be a reduction of share capital.

If a company increases its capital beyond the amount of authorised capital, it shall increase its authorised capital by the amount of new shares. If consolidation and division, results in changes in the voting percentage of shareholders, it shall be approved by the Tribunal.

Legal Provisions of Alteration of Share Capital:

- Section 61 to 64 read with Section 13 and 14 of the Companies Act, 2013
- The Companies (Share Capital and Debentures) Rules, 2014
- National Company Law Tribunal Rules, 2016.

6. Explain the Conclusiveness of certificate for reduction of capital with the help of case laws.

Answer:

- Where the Registrar had issued his certificate confirming the reduction, the same was held to be conclusive although it was discovered later that the company had no authority under its articles to reduce capital [**Re Walkar & Smith Ltd., (1903)**].
- Similarly, in a case where the special resolution for reduction was an invalid one, but the company had gone through with the reduction, the reduction was not allowed to be upset [**Ladies's Dress Assn. v. Pulbrook, (1900)**].

7. Explain the Liability of members in respect of reduced share capital with the help of related case laws.

Answer:

- On the reduction of share capital, a member of the company, past or present, shall not be liable to any call or contribution in respect of any share held by him exceeding the amount of difference, if any, between the amount paid on the share, or reduced amount, if any, which is to be deemed to have been paid thereon, as the case may be, and the amount of the share as fixed by the order of reduction.
- In the case of Reckitt Benckiser (India) Ltd. (2005) the reduction was objected to by a group of shareholders on the grounds that there was no necessity to reduce capital and the reduction was discriminatory as it would extinguish the class of public shareholders. Ultimately, Reckitt Benckiser (India) Ltd. offered to let the objectors remain as shareholders and consequently, the Delhi High Court approved the capital reduction.
- If, however the name of any creditor entitled to object to the reduction of share capital under this section is, by reason of his ignorance of the proceedings for reduction or of their nature and effect with respect to his debt or claim, not entered on the list of creditors, and after such reduction, the company commits a default, within the meaning of section 6 of the Insolvency and Bankruptcy Code, 2016, in respect of the amount of his debt or claim–
  a) every person, who was a member of the company on the date of the registration of the order for reduction by the Registrar, shall be liable to contribute to the payment of that debt or claim, an amount not exceeding the amount which he would have been liable to contribute if the company had commenced winding-up on the day immediately before the said date; and
  b) if the company is wound up, the Tribunal may, on the application of any such creditor and proof of his ignorance as aforesaid, if it thinks fit, settle a list of persons so liable to contribute, and make and enforce calls and orders on the contributories settled on the list, as if they were ordinary contributories in a winding up.

8. What are the Penalties under reduction of Capital

Answer:

If any officer of the company

a) Knowingly conceals the name of any creditor entitled to object to the reduction;
b) knowingly misrepresents the nature or amount of the debt or claim of any creditor; or
c) abets or is privy to any such concealment or misrepresentation as aforesaid, he shall be liable under section 447.

9. Explain Reduction of capital and Scheme of Compromise and Arrangement with the help of case laws.

Answer:

- Arrangement includes 'a reorganisation of share capital of the company' and reorganisation can involve reduction of share capital. However, as part of the scheme of compromise or arrangement, distinct formalities as prescribed under section 100 do not have to be observed [Maneckchowk and Ahmedabad Mfg. Co.Ltd., Re (1970) 2 Comp LJ 300 (Guj);.
- It may however be noted that, in all such cases involving reduction of share capital in the scheme of compromise or arrangement, the petition seeking confirmation of the Tribunal with respect to the scheme must also expressly mention that the company is also seeking, at the same time, the confirmation of the Tribunal with respect to the reduction of share capital, and that, while seeking the consent of the members to the scheme, the consent of the members with respect to the reduction of share capital had also been obtained. The power of Tribunal to give to creditors an opportunity of raising objections to the reduction of capital is discretionary.

- In an appropriate case, for example, where the interests of creditors are duly and fully protected, the Tribunal may exercise its discretion against calling upon the creditors to raise objections.

10. What are the Advantages of buy-back?

Answer:

Following are the Advantages of buy-back:

- It is an alternative mode of reduction in capital without requiring approval of the National Company Law Tribunal
- To improve the earnings per share
- To improve return on capital, return on net worth and to enhance the long-term shareholders value
- To provide an additional exit route to shareholders when shares are undervalued or thinly traded
- To enhance consolidation of stake in the company
- To prevent unwelcome takeover bids
- To return surplus cash to shareholders
- To achieve optimum capital structure
- To support share price during periods of sluggish market condition
- To serve the equity more efficiently.

11. Explain the Income tax aspects of Buy Back.

Answer:

- Section 46A of the Income-tax Act, 1961 provides that any consideration received by a security holder from any company on buy back shall be chargeable to tax on the difference between the cost of acquisition and the value of consideration received by the security holder as capital gains. The computation of capital gains shall be in accordance with the provisions of Section 48 of the Income-tax Act, 1961.
- In respect of Foreign Institutional Investors (FIIs), as per the provisions of Section196D (2) of the Income Tax Act,1961 no deduction of tax at source shall be made before remitting the consideration for equity shares tendered under the offer by FIIs as defined under Section 115AD of the Income Tax Act,1961.
- NRIs, OCBs and other non-resident shareholders (excluding FIIs) will be required to submit a No Objection Certificate (NOC) or tax clearance certificate obtained from the Income Tax authorities under the Income Tax Act.
- In case the aforesaid NOC or tax clearance certificate is not submitted, the company should deduct tax at the maximum marginal rate as may be applicable to the category of shareholders on the entire consideration amount payable to such share holders.

12. Explain the Special Resolution and its additional disclosure requirements SEBI (Buy Back of Securities) Regulations, 2018

Answer:

For the purposes of passing a special resolution the explanatory statement to be annexed to the notice for the general meeting shall contain disclosures as specified in Schedule I to the Regulations. A copy of the above resolution passed at the general meeting shall be filed with SEBI and the stock exchanges where the shares or other specified securities of the company are listed, within seven days from the date of passing of the resolution.

In case of Board approval

A company, authorized by a resolution passed by the Board of Directors at its meeting to buy back its shares or other specified securities, shall file a copy of the resolution, with the SEBI and the stock exchanges, where the shares or other specified securities of the company are listed, within **two working days** of the date of the passing of the resolution.

13. What are the Contents of Explanatory Statement annexed to the notice where the buy-back is pursuant to shareholders' approval?

Answer:

following disclosures prescribed in Schedule I of the Regulations should be annexed to the notice where the buy-back is pursuant to shareholders' approval:

I. Date of the Board meeting at which the proposal for buy back was approved by the Board of Directors of the company;

II. Necessity for the buy back;

III. Maximum amount required under the buy back and its percentage of the total paid up capital and free reserves;

IV. Maximum price at which the shares or other specified securities are proposed be bought back and the basis of arriving at the buy back price;

V. Maximum number of securities that the company proposes to buy back; Method to be adopted for buy back as referred in sub-regulation (iv) of regulation 4;

VI. (a) the aggregate shareholding of the promoter and of the directors of the promoters, where the promoter is a company and of persons who are in control of the company as on the date of the notice convening the General Meeting or the Meeting of the Board of Directors;

(b) aggregate number of shares or other specified securities purchased or sold by persons including persons mentioned in (a) above from a period of six months preceding the date of the Board Meeting at which the buy back was approved till the date of notice convening the general meeting;

(c) the maximum and minimum price at which purchases and sales referred to in (b) above were made along with the relevant dates;

VII. Intention of the promoters and persons in control of the company to tender shares or other specified securities for buy-back indicating the number of shares or other specified securities, details of acquisition with dates and price;

VIII. A confirmation that there are no defaults subsisting in repayment of deposits, redemption of debentures or preference shares or repayment of term loans to any financial institutions or banks;

IX. A confirmation that the Board of Directors has made a full enquiry into the affairs and prospects of the company and that they have formed the opinion-

a) that immediately following the date on which the General Meeting or the meeting of the Board of Directors is convened there will be no grounds on which the company could be found unable to pay its debts;

b) as regards its prospects for the year immediately following that date that, having regard to their intentions with respect to the management of the company's business during that year and to the amount and character of the financial resources which will in their view be available to the company during that year, the company will be able to meet its liabilities as and when they fall due and will not be rendered insolvent within a period of one year from that date; and

c) in forming their opinion for the above purposes, the directors shall take into account the liabilities as if the company were being wound up under the provisions of the Companies Act, 1956 or Companies Act or the Insolvency and Bankruptcy Code, 2016 (including prospective and contingent liabilities).

X. A report addressed to the Board of Directors by the company's auditors stating that–

a) they have inquired into the company's state of affairs;

b) the amount of the permissible capital payment for the securities in question is in their view properly determined; and

c) the Board of Directors have formed the opinion as specified in clause(x) on reasonable grounds and that the company will not, having regard to its state of affairs, will not be rendered insolvent within a period of one year from that date.

Additional Disclosures (Regulation 5(iv)(c))

In addition to disclosure required under Schedule I, where the buy-back is through tender offer from existing securities holders, following additional disclosures are required to be made to the explanatory statement:

a) the maximum price at which the buy-back of shares or other specified securities shall be made and whether the Board of Directors of the company is being authorized at the general meeting to determine subsequently the specific price at which the buy-back may be made at the appropriate time;

b) if the promoter intends to offer their shares or others pacified securities, the quantum of shares or other specified securities proposed to be tendered, and the details of their transactions and their holdings for the last six months prior to the passing of the special resolution for buy-back including information of number of shares or other specified securities acquired, the price and the date of acquisition.

LESSON 2 - ACQUISITION OF COMPANY/BUSINESS

1. Prepare a checklist for Transferor company in the process of takeover.

Answer:

Check-list

Transferor Company (Documents etc. involved in the process of takeover):

1. MOA and AOA
2. Offer of a scheme or contract from the transferee company
3. Minutes of Board meeting containing consideration of the offer and its acceptance or rejection
4. Notice calling general meeting with explanatory statement
5. Form CAA 14 circulated to the members (dissenting)
6. Minutes of general meeting of the company containing approval of the offer by statutory majority in value and in numbers also, if required
7. Court order, if any
8. Register of Members
9. Notice sent by the transferee company to dissenting shareholders for acquiring their shares
10. Duly filled in and executed instrument(s) of transfer of shares held by the dissenting shareholders
11. Bank Passbook or Statement of Account in respect of the amount deposited in the special bank account to be kept in trust for the dissenting shareholders
12. Annual Report.

2. Prepare a checklist for Transferee company in the process of takeover.

Answer:

Transferee Company (Documents etc. involved in the process of takeover):

1. MOA and AOA
2. Minutes of Board meeting containing consideration and approval of the offer sent to the transferor company
3. Offer of a scheme or contract sent to the transferor company
4. Notice to dissenting shareholders if any, of the transferor company
5. Notice to the remaining shareholders of the transferor company, who have not assented to the proposed acquisition, if any
6. Form No: CAA14 received from the transferor company, which has been circulated to its members by that company
7. Minutes of general meeting of the company containing approval of the shareholders to the offer of scheme or contract sent to the transferor company
8. Court order, if any
9. Register of Investments
10. Duly filled in and executed instrument(s) of transfer for shares held by the dissenting shareholders
11. Balance Sheets showing investments in the shares of the transferor company

3. What are the major amendments and changes were introduced through SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011.

Answer:

In 2009, SEBI constituted a Takeover Regulation Advisory Committee ("TRAC Committee") under the Chairmanship of Late Mr. C Achutan to review the Takeover Regulations of 1997. The committee submitted its report in 2010 and the Regulations, SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 were notified on September 23, 2011 and became effective from October 22, 2011. The major amendments/changes were:

1. **Increase in trigger limit** for open offer from 15% to 25%
2. Increase in statutory **open offer size** from 20% of share capital to 26% of total share capital of the company
3. Overhaul of exemptions from open offer: Exemptions have been further categorized into the following broad heads:

   (a) Transactions, which trigger a statutory open offer due to substantial acquisition of shares/ voting rights, or due to change in control

(b) Transactions, which trigger a statutory open offer due to acquisition of shares/ voting rights exceeding prescribed thresholds, provided that there is no change in control.

4. **Offer pricing:** The new regulations brought in the concept of Volume Weighted Average Market Price.
5. **Creeping acquisition:** The New Regulations provided that an acquirer could make a creeping acquisition of 5% annually (between April 1 to March 31 of next year) to reach 75% stake such that the minimum public shareholding of 25% is maintained. The manner of computation of the 5% creeping acquisition limit has also been clarified.
6. **Non-Compete Fee** : The provision of payment of non compete was done away with.
7. Recommendation of independent directors on the open offer to be published in the newspapers in which the detailed public statement was given.

The Regulations, further sought to include the various Securities Appellate Tribunal ("SAT") judgements, informal guidance given and the experience gained from implementing the Takeover Regulations from the year 1994. They further sought to align itself with the Takeover Regulations as they exist in the rest of the world.

4. How is the maximum permissible non-public shareholding in a listed company defined?

Answer:

Maximum permissible non-public shareholding is derived based on the minimum public shareholding requirement under the Securities Contracts (Regulations) Rules 1957 ("SCRR"). Rule 19A of SCRR requires all listed companies (other than public sector companies) to maintain public shareholding of at least 25% of share capital of the company. Thus by deduction, the maximum number of shares which can be held by promoters i.e. Maximum permissible non-public shareholding) in a listed companies (other than public sector companies) is 75% of the share capital.

5. What is the basis of computation of the creeping acquisitions limit under Regulation 3(2) of Takeover Regulations 2011?

Answer:

For computing acquisitions limits for creeping acquisition specified under regulation 3(2), gross acquisitions/ purchases shall be taken in to account thereby ignoring any intermittent fall in shareholding or voting rights whether owing to disposal of shares or dilution of voting rights on account of fresh issue of shares by the target company.

6. Whether for the purpose of the creeping acquisition in terms of the Takeover Regulations, 2011, the Creeping Acquisition made during the period 01.04.201 to 22.10.2011 will be considered?

Answer:

The Takeover Regulations, 2011 have clearly defined the financial year as the period of 12 months commencing on the first day of the month of April. Thus, for the purpose of the creeping acquisitions under Regulation 3(2) of Takeovers Regulations 2011, shares acquired during 1/4/2011 to 22/10/2011 will be taken in to account.

7. What are the typical steps and corresponding timelines, in an open offer process?

Answer:

- Under most scenarios (except in certain types of indirect acquisitions) on the day of the triggering event, the acquirer is required to make a Public Announcement to the stock exchanges where shares of Target Company are listed and to SEBI. Within 5 working days thereafter, the acquirer is required to publish a Detailed Public Statement (DPS) in newspapers and also submit a copy to SEBI, after creation of an escrow account.
- Within 5 working days of publication DPS, the acquirer through the manager to the offer is required to file a draft letter of offer with SEBI for its observations. The letter of offer is dispatched to the shareholders of the target company, as on the identified date, after duly incorporating the changes indicated by SEBI, if there are any.
- The offer shall open not later than 12 working days from the date of receipt of SEBI's observations. The acquirer is required to issue an advertisement announcing the final schedule of the open offer, one working day before opening of the offer. The offer shall remain open for 10 working days from the date of opening of the offer. Within 10 working days after the closure of the offer, the acquirer shall make payments to the shareholders whose shares have been accepted. A post offer advertisement, giving details of the acquisitions, is required to be published by the acquirer within 5 workings days of the completion of payments under the open offer.

8. How are the thresholds for the requirement of making an open offer in case of an indirect acquisition computed?

Answer:

The thresholds for the requirement of making an open offer in case of an indirect acquisition are computed on the basis of the voting rights and/or control acquired in the target company. Further, the quantum of acquisition of the target company in case of an indirect acquisition cannot be computed on a pro rata basis. This is illustrated as below:

- If X acquires 40% shares of Y along with majority control of Y which, in turn, holds 70% shares of Z, a listed company along with majority control of Z, then X, in effect, acquires control on 70% shares of Z held by Y. Therefore, X will be required to make an open offer for the shareholders of Z.
- Now; If X, which already holds 40% shares of Y and majority control of Y, further acquires additional 10% shares of Y, then X, in effect, does not acquire control on any shares additional to 70% shares of Z held by Y. Therefore, X will not be required to make an open offer for the shareholders of Z. It may be noted that the computation of quantum of additional shares acquired by X in Z as 10% of 70%, i.e., 7% on pro rata basis is not correct. Here, X does not acquire any additional shares of Z either directly or indirectly by acquiring additional 10% shares of Y.
- Now; if A and B are in joint control of X which holds majority control of Y which, in turn, holds 70% shares of Z along with its majority control and A acquires sole control of X pursuant to cessation of control of X by B, then A, in effect, acquires sole control of Z indirectly through X and Y. Therefore, X will be required to make an open offer for the shareholders of Z.

9. Are there special provisions for determining the offer price in case of open offer arising out of indirect acquisition of a target company?

Answer:

Yes. Since indirect acquisitions involve acquiring the target company as a part of a larger business, SAST Regulations, 2011 have prescribed additional parameters to be taken into account for determination of the offer price. If the size of the target company exceeds certain thresholds as compared to the size of the entity or business being acquired then the acquirer is required to compute and disclose in the letter of offer, the per share value of the target company taken into account for the acquisition, along with the methodology. (Kindly refer to Regulation 5). Further, in indirect acquisitions which are not in the nature of deemed direct acquisition, the offer price shall stand enhanced by an amount equal to a sum determined at the rate of 10% per annum for the period between the date on which primary acquisition was contracted and the date of Detailed Public Statement.

10. Can a person holding less than 25% of the voting rights/ shares in a target company, make an offer?

Answer:

Yes, any person holding less than 25% of shares/ voting rights in a target company can make an open offer provided the open offer is for a minimum of 26% of the share capital of the company.

11. What are the restrictions on acquirers making a voluntary open offer?

Answer:

A voluntary offer cannot be made if the acquirer or PACs with him has acquired any shares of the target company in the 52 weeks prior to the voluntary offer. The acquirer is prohibited from acquiring any shares during the offer period other than those acquired in the open offer. The acquirer is also not entitled to acquire any shares for a period of 6 months, after completion of open offer except pursuant to another voluntary open offer.

12. How is the voluntary offer made by a person holding less than 25% of shares/ voting rights in a target company different from the voluntary offer made by a person holding more than 25% of shares/ voting rights of the target company?

Answer:

Voluntary offer by a person holding less than 25%	Voluntary offer by a person holding more than 25%
Minimum offer size of 26%.	Minimum offer size of 10%.
Maximum can be for entire share capital of the target company.	The maximum offer size is linked to maximum permissible non-public shareholding permitted under Securities Contracts (Regulations) Rules 1957.

No such conditions	• Acquirer should not have acquired any shares during 52 weeks period prior to Public Announcement. • Acquirer is not entitled to acquire any shares of the target company for a period of 6months after the completion of the open offer except for a voluntary open offer.

13. What is the stipulated size of an open offer?

Answer:

An open offer, other than a voluntary open offer under Regulation 6, must be made for a minimum of 26% of the target company's share capital. The size of voluntary open offer under Regulation 6 must be for at least 10% of the target company's share capital. Further the offer size percentage is calculated on the fully diluted share capital of the target company taking in to account potential increase in the number of outstanding shares as on 10th working day from the closure of the open offer.

14. How is the offer price calculated in case shares are infrequently traded on the stock exchange?

Answer:

If the target company's shares are infrequently traded, then the open offer price for acquisition of shares under the minimum open offer shall be highest of the following:

- Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;
- Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");
- Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;
- The price determined by the acquirer and the manager to the open offer after taking into account
- valuation parameters including book value, comparable trading multiples, and such other parameters that are customary for valuation of shares of such companies.

15. What are the threshold limits for acquisition of shares / voting rights, beyond which an obligation to make an open offer is triggered?

Answer:

Acquisition of 25% or more shares or voting rights: An acquirer, who (along with PACs, if any) holds less than 25% shares or voting rights in a target company and agrees to acquire shares or acquires shares which along with his/ PAC's existing shareholding would entitle him to exercise 25% or more shares or voting rights in a target company, will need to make an open offer before acquiring such additional shares.

Acquisition of more than 5% shares or voting rights in a financial year: An acquirer who (along with PACs, if any) holds 25% or more but less than the maximum permissible non-public shareholding in a target company, can acquire additional shares in the target company as would entitle him to exercise more than 5% of the voting rights in any financial year ending March 31, only after making an open offer.

16. What should be the contents of public announcement?

Answer:

According to Regulation 15(1), the public announcement shall contain such information as may be specified, including the following,—

a) name and identity of the acquirer and persons acting in concert with him;
b) name and identity of the sellers, if any;
c) nature of the proposed acquisition such as purchase of shares or allotment of shares, or any other means of acquisition of shares or voting rights in, or control over the target company;
d) the consideration for the proposed acquisition that attracted the obligation to make an open offer for acquiring shares, and the price per share, if any;
e) the offer price, and mode of payment of consideration;
f) offer size, and conditions as to minimum level of acceptances, if any; and
g) intention of the acquirer to either delist the target company or retain the listing of the target company. In case of proposed delisting under regulation 5A, the proposed open offer price and indicative price as required under

regulation 5A shall be disclosed along with an explanation setting out the rationale and basis for justifying the indicative price.

The detailed public statement pursuant to the public announcement shall contain such information as may be specified in order to enable shareholders to make an informed decision with reference to the open offer.

The public announcement of the open offer, the detailed public statement, and any other statement, advertisement, circular, brochure, publicity material or letter of offer issued in relation to the acquisition of shares under these regulations shall not omit any relevant information, or contain any misleading information.

17. What is a letter of offer? What are the disclosures required under the Letter of offer?

Answer:

The letter of offer is a document which is dispatched to all shareholders of the target company as on identified date. This is also made available on the website of SEBI. Letter of offer contains details about the offer, background of Acquirers/PACS, financial statements of Acquirer/ PACs, escrow arrangement, background of the target company, financial statements of the target company, justification for offer price, financial arrangements, terms and conditions of the offer, procedure for acceptance and settlement of the offer. SEBI has prescribed the format for Letter of offer, which enumerates minimum disclosure requirements. The Manager to the offer/ acquirer is free to add any other disclosures which in his opinion are material for the shareholders. The format is available in the SEBI website.

18. If the minimum level of acceptance is not reached, can the acquirer acquire shares under the Share Purchase Agreement, which triggered the offer?

Answer:

In a conditional offer, if the minimum level of acceptance is not reached, the acquirer shall not acquire any shares in the target company under the open offer or the Share Purchase Agreement which has triggered the open offer.

19. What is a competitive offer? What happens if there is a competing offer?

Answer:

Competitive offer is an offer made by a person, other than the acquirer who has made the first public announcement. A competitive offer shall be made within 15 working days of the date of the Detailed Public Statement (DPS) made by the acquirer who has made the first public announcement. If there is a competitive offer, the acquirer who has made the original public announcement can revise the terms of his open offer provided the revised terms are favorable to the shareholders of the target company.

Further, the bidders are entitled to make revision in the offer price up to 3 working days prior to the opening of the offer. The schedule of activities and the offer opening and closing of all competing offers shall be carried out with identical timelines.

20. What is the role of the target company in the open offer process?

Answer:

- Once a PA is made, the board of directors of the Target Company is expected to ensure that the business of the target company is conducted in the ordinary course. Alienation of material assets, material borrowings, issue of any authorized securities, announcement of a buy- back offer etc. is not permitted, unless authorized by shareholders by way of a special resolution by postal ballot.
- The target company shall furnish to the acquirer within two working days from the identified date, a list of shareholders and a list of persons whose applications, if any, for registration of transfer of shares, in case of physical shares, are pending with the target company.
- After closure of the open offer, the target company is required to provide assistance to the acquirer in verification of the shares tendered for acceptance under the open offer, in case of physical shares.
- Upon receipt of the detailed public statement, the board of directors of the target company shall constitute a committee of independent directors to provide reasoned recommendations on such open offer, and the target company shall publish such recommendations and such committee shall be entitled to seek external professional advice at the expense of the target company. The recommendations of the Independent Directors are published in the same newspaper where the Detailed Public Statement is published by the acquirer and are published at least 2 working days before opening of the offer. The recommendation will also be sent to SEBI, Stock Exchanges and the Manager to the offer.

21. What are the obligations of the manager to the open offer?

Answer:

Regulation 27 provides for obligations of the manager to the open offer. They are

1. Prior to public announcement being made, the manager to the open offer shall ensure that,—
   a) the acquirer is able to implement the open offer; and
   b) firm arrangements for funds through verifiable means have been made by the acquirer to meet the payment obligations under the open offer.
2. The manager to the open offer shall ensure that the contents of the public announcement, the detailed public statement and the letter of offer and the post- offer advertisement are true, fair and adequate in all material aspects, not misleading in any material particular, are based on reliable sources, state the source wherever necessary, and are in compliance with the requirements under these regulations.
3. The manager to the open offer shall furnish to the Board a due diligence certificate along with the draft letter of offer filed under regulation 16.
4. The manager to the open offer shall ensure that market intermediaries engaged for the purposes of the open offer are registered with the Board.
5. The manager to the open offer shall exercise diligence, care and professional judgment to ensure compliance with these regulations.
6. The manager to the open offer shall not deal on his own account in the shares of the target company during the offer period.
7. The manager to the open offer shall file a report with the Board within fifteen working days from the expiry of the tendering period, in such form as may be specified, confirming status of completion of various open offer requirements

22. What is Takeover Bid? What are the different types of Takeover Bid?

Answer:

"Takeover bid" is an offer to the shareholders of a company, who are not the promoters of the company or the sellers of the shares under an agreement, to buy their shares in the company at the offered price within the stipulated period of time. It is addressed to the shareholders with a view to acquiring sufficient number of shares to give the Offer or Company, voting control of the target company. A takeover bid is a technique, which is adopted by a company for taking over control of the management and affairs of another company by acquiring its controlling shares.

Type of takeover bids

A takeover bid may be a "friendly takeover bid" or a "hostile takeover bid". Bids may be mandatory/competitive bids.

Mandatory Bid: The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011, require acquirers to make bids for acquisition of certain level of holdings subject to certain conditions. A takeover bid is required to be made by way of a public announcement issued to the stock exchanges, followed by a Detailed Public Statement in the newspapers. Such requirements arise in the following cases:

a) for acquisition of 25% or more of the shares or voting rights;
b) for acquiring additional shares or voting rights to the extent of 5% of the voting rights in any financial year beginning April 01, if such person already holds not less than 25% but not more than 75% or 90% of the shares or voting rights in a company as the case may be;
c) for acquiring control over a company.

23. How is the offer price calculated in case shares are frequently traded on the stock exchange?

Answer:

If the target company's shares are frequently traded then the open offer price for acquisition of shares under the minimum open offer shall be highest of the following:

- Highest negotiated price per share under the share purchase agreement ("SPA") triggering the offer;
- Volume weighted average price of shares acquired by the acquirer during 52 weeks preceding the public announcement ("PA");
- Highest price paid for any acquisition by the acquirer during 26 weeks immediately preceding the PA;
- Volume weighted average market price for sixty trading days preceding the PA.

24. Write a short note on Cross border Takeovers.

Answer:

Cross Border Takeover is a much sort after term in recent years. Competitiveness among the domestic firms forces many businesses to go global. There are various factors which motivate firms to go for global takeovers. Apart from personal glory, global takeovers are often driven by market consolidation, expansion or corporate diversification motives. Also, financial, accounting and tax related matters inspire such takeovers.

Expansion and diversification are one of the primary reasons to cross the border as the domestic markets usually do not provide the desired growth opportunities. Another main reason for cross border takeovers is to attain monopoly. Acquirer company is always on the lookout for companies which are financially vulnerable but have untapped resources or intellectual capital that can be exploited by the purchaser. Global takeovers are complex processes. Despite some harmonized rules, taxation issues are mainly dealt within national rules, and are not always fully clear or exhaustive to ascertain the tax impact of a cross-border merger or acquisition. This uncertainty on tax arrangements sometimes require seeking of special agreements or arrangements from the tax authorities on an ad hoc basis, whereas in the case of a domestic deal the process is much more deterministic.

Going global is rapidly becoming Indian company's mantra of choice. Indian companies are now looking forward to drive costs lower, innovate speedily, and increase their international presence. Companies are discovering that a global presence can help insulate them from the vagaries of domestic market and is one of the best ways to spread the risks. Indian corporate sector has witnessed several strategic acquisitions. Tata Motors acquisition of Daewoo Commercial Vehicle Company, Tata Steel's acquisition of Singapore's NatSteel, Reliance's acquisition of Flag is the culmination of Indian Company's efforts to establish a presence outside India.

It is expected that the cross borders takeovers will increase in the near future. The companies will have to keep in mind that global takeovers are not only business proposals but also a corporate bonding for which both the entities have to sit and arrive at a meaningful and deep understanding of all the issues as mentioned above.

LESSON 3 - PLANNING & STRATEGY

1. What are the limitations to All Cash, All Stock Offers?

Answer:

1. Although cash transactions can appear to be an easy, straightforward way of acquiring another company, it is not always the case.
2. All stock offer for shareholders is a taxable event. Even if they sell their shares to the acquirer at a premium, taxes may take a significant chunk of their earnings if the sale price is higher than the acquisition price investors paid when they initially purchased their shares.
3. However, all shares of stock that are made at a price higher than the stock's cost basis constitutes a taxable event, so this particular sale is not that different from a tax standpoint from a normal sale on the secondary market.
4. Another possible acquisition method would be for the acquiring company to offer shareholders an exchange of all the shares they hold in the target company for shares in the acquiring company. These stock-for-stock transactions are not taxable.
5. The acquiring firm could also offer a combination of cash and shares.
6. The main distinction between cash and stock transactions is that, in cash transactions, acquiring shareholders take on the entire risk that the expected synergy value embedded in the acquisition premium will not materialize.
7. In stock transactions, that risk is shared and diversified with selling shareholders. More precisely, in stock transactions, the synergy risk is shared in proportion to the percentage of the combined company the acquiring and selling shareholders each will own.

2. Explain about funding made through Equity Shares?

Answer:

- **Equity share capital:**

It can be considered as permanent capital of the company. Equity needs no servicing as the company is not required to pay to its equity shareholders the fixed amount return in form of interest which would be the case if a company were to borrow by issue of bonds or other debt instruments.

Raising money from the public by issue of shares or bonds or debentures is a time-consuming process and involves huge costs. It would require numerous things to be in place and several rounds of discussion would be required to take place between the directors and key promoters having the controlling stake, between the Board of Directors (BOD) and consultants, analysts, experts, Company Secretaries, Chartered Accountants & lawyers. Furthermore, it requires several legal compliances.

Thus, planning for an acquisition by raising funds through public issue may be complicated and long drawn process.

- **Issue of securities for listed companies**

The Securities and Exchange Board of India (the "SEBI") is the nodal authority regulating entities that are listed and to be listed on stock exchanges in India. SEBI through SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("SEBI ICDR") regulates the issue of securities of such companies. These regulations apply to:

a) a public issue;
b) a rights issue, where the aggregate value of specified securities offered is fifty lakh rupees or more;
c) a preferential issue;
d) an issue of bonus shares by a listed issuer;
e) a qualified institutional placement by a listed issuer;
f) an issue of Indian Depository Receipts

3. Explain the provisions of funding through Preference Shares.

Answer:

One more source of funding a merger or the takeover may be through the issue of preference shares, but unlike equity capital, issue of the preference share capital as purchase consideration to the shareholder of merging company mostly includes the payment of fixed preference dividend at a fixed rate.

Thus, before deciding to raise funds for this purpose, by an issue of preference shares, the Board of the company has to ensure that the merged company or Target Company would be able to yield sufficient profits for covering additional

liability in respect of the payment of preference dividend. A company that is funding its merger or takeover proposal through an issue of preference shares is required to pay a dividend to such shareholders as per agreed terms.

Issue and redemption of preference shares:

Section 55 of the Act read with Rule 9 and Rule 10 of the Companies (Share Capital and Debentures) Rules, 2014 deals with the procedure involved in issue and redemption of preference shares. SEBI regulations shall be followed, in case a company intends to list its preference shares on a recognized stock exchange. Some of the features pertaining to issue and redemption of preference shares have been listed in the following table:

Sl. No.	Particulars	Description
1	Issue of irredeemable preference share	Not permitted, after the commencement of Companies Act, 2013.
2	Maximum period of redemption	Preference shares shall be redeemed within a period not exceeding twenty years from the date of their issue. However, a company may issue preference shares for a period exceeding twenty years but not exceeding thirty years, for infrastructure projects, subject to the redemption of a minimum ten percent of such preference shares per year from the twenty first year onwards or earlier, on proportionate basis, at the option of the preference shareholders. The term "infrastructure projects" means the infrastructure projects specified in Schedule VI. [For Schedule VI, refer to Annexure-I, at the end of this chapter]
3	Authority to issue	Yes, authorization to issue preference shares is required in Articles of Association of Company. Further it also requires the approval of shareholders in general meeting through special resolution.
4	Particulars of resolution	a) the priority with respect to payment of dividend or repayment of capital vis-avis equity shares; b) the participation in surplus fund; c) the participation in surplus assets and profits, on winding-up which may remain after the entire capital has been repaid; d) the payment of dividend on cumulative or non-cumulative basis. e) the conversion of preference shares into equity shares. f) the voting rights; g) the redemption of preference shares.
5	Explanatory statement	The explanatory statement shall provide complete material facts concerned with the issue of such shares, including- a) the size of the issue and number of preference shares to be issued and nominal value of each share; b) the nature of such shares i.e. cumulative or non - cumulative, participating or non-participating, convertible or non - convertible; c) the objectives of the issue; d) the manner of issue of shares; e) the price at which such shares are proposed to be issued; f) the basis on which the price has been arrived at; g) the terms of issue, including terms and rate of dividend on each share, etc.; h) the terms of redemption, including the tenure of redemption, redemption of shares at premium and if the preference shares are convertible, the terms of conversion; i) the manner and modes of redemption; j) the current shareholding pattern of the company; k) the expected dilution in equity share capital upon conversion of preference shares.
6	Preconditions for issue	Shall not have any subsisting default in the redemption of preference shares issued either before or after the commencement of the Act or in payment of dividend due on any preference shares.
7	Preconditions for redemption	Such shares shall be fully paid, before redemption
8	Manner of redemption	Redemption shall be done out of profits of the company which would otherwise be available for dividend or out of the proceeds of a fresh issue of shares made for the

		purposes of such redemption. A company may redeem its preference shares only on the terms on which they were issued or as varied after due approval of preference shareholders under section 48 of the Act. Preference shares may be redeemed: a) at a fixed time or on the happening of a particular event; b) any time at the company's option; or c) any time at the shareholder's option.
9	Inability to redeem or pay dividend	A company if is not in a position to redeem any preference shares or to pay dividend, if any, it may, with the consent of the holders of three-fourths in value of such preference shares and with the approval of the Tribunal on a petition made by it in this behalf, issue further redeemable preference shares equal to the amount due, including the dividend thereon.
10.	Transfer to Capital Redemption Reserve Account	A sum equal to the nominal amount of the shares to be redeemed shall be transferred to CRR account from profits, if such shares are proposed to be redeemed out of the profits of the company.
11	Impact on share capital	Issue of further redeemable preference shares or the redemption of preference shares shall not be deemed to be an increase or a reduction, in the share capital of the company
12	Register of Members	Register of Members maintained under section 88 shall contain the particulars in respect of such preference shareholder(s).

4. What are the provisions for funding through swaps or stock to stock mergers?

Answer:

- Funding through stock swaps is a very common method. Under this method of funding, the holders of the target company's stock receive shares of the acquiring company's stock in lieu of the merger.
- The share exchange ratio is mutually determined by the Board of Directors of both the companies on the basis of the valuation report prepared by the professionals.
- Stock swap mergers might involve risk. Along with the normal risks, stock swap mergers consist of the risks associated with the fluctuations in the stock prices of two companies.
- The terms of deal involve an exchange of shares and are predicted on prices of the two companies' stock at the time of the announcement, drastic changes in shares prices of one or both of companies can cause an entire deal to be re-evaluated.

5. Write a short note on Tata Motors Acquisition of Jaguar Land Rover

Answer:

- Tata Motors acquired the UK based Jaguar and Land Rover for USD 2.3 billion from the US based Ford Motors.
- The deal was a part of the long term strategy of Tata Motors to increase its international presence and consolidating its position in terms of product diversification and Research and Development capabilities.
- The economic slowdown in Europe and American markets posed a risk to the future of the company amidst tough market conditions along with the funding risks and the currency risks associated with the deal.
- Tata Motors raised USD 3 billion from banks that included JP Morgan, Citibank and State Bank of India. This deal used Leveraged Buy-Out (LBO). The purpose of a LBO is to allow an acquirer to make large acquisitions without having to commit a significant amount of capital.
- A typically transaction involves the setup of an acquisition vehicle that is jointly funded by a financial investor and management of the target company. Often the assets of the target company are used as collateral for the debt.
- Debt capital comprises of a combination of highly structured debt instruments including prepayable bank facilities and/or publicly or private placed bonds commonly referred to as high-yield debt.
- This deal has provided the Leverage to Tata Group in many ways to repay the amount for the deal: Rs. 1.92 Billion underwriting agreement with J M financial Consultants. Rs.1.75 Billion was raised through a deposits scheme from the Public. Additional subscriptions by promoter companies such as TATA sons, TATA Capital and Investment. TATA was leveraged by British Government also.

6. What are the powers of Tribunal in case of oppression and mismanagement?

Answer:

If an application is made under Section 241 of the Act to the Tribunal and it is of the opinion that the company's affairs have been or are being conducted in a manner prejudicial or oppressive to any member or members or prejudicial to public interest or in a manner prejudicial to the interests of the company and that winding-up the company would unfairly prejudice such member or members, then the Tribunal may pass relevant order to resolve the complaint. Orders may provide for the following:

- regulation of conduct of affairs of the company in future
- purchase of shares or interests of any members of the company by other members thereof or by the company
- in the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital
- restrictions on the transfer or allotment of the shares of the company
- the termination, setting aside or modification, of any agreement, howsoever arrived at, between the company and the managing director, any other director or manager, upon such terms and conditions as may, in the opinion of the Tribunal, be just and equitable in the circumstances of the case
- the termination, setting aside or modification of any agreement between the company and any person other than those referred to in clause (e)

7. What are the rights of minority shareholders during Mergers/Amalgamations/ Takeovers?

Answer:

1. Approval of Tribunal is required in case of corporate restructuring by a company. Where a compromise or arrangement is proposed—
   a) between a company and its creditors or any class of them; or
   b) between a company and its members or any class of them,
   the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, appointed under this Act or under the Insolvency and Bankruptcy Code, 2016, as the case may be, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.
   The Scheme is also required to be approved by shareholders, before it is filed with the NCLT. The scheme is circulated to all shareholders along with statutory notice (Form No. CAA-2) of the Tribunal convened meetings and the explanatory statement under section 230(3) of the Act read with Rule 6 of Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 for approving the scheme by shareholders.
2. As per proviso to Section 230(4) of the Act, it is provided that any objection to the compromise or arrangement shall be made by persons holding 10% or more of the shareholding or having 5% or more of the total outstanding debt as per latest audited financial statement. Thus, shareholders holding less than 10% or more of the shareholding are not entitled to object to the scheme as matter of statutory right. There are other built in safeguards in the matter of approval of the scheme of compromise and arrangements. The notice convening the meetings and also the notice of hearing of the petition (in Form CAA- 2) is required to be published in the newspaper as per the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016. The notice is also required to be given to various statutory authorities, sectoral regulators, etc.
   Though there may not be any express protection to any dissenting minority shareholders to file their objections as a matter of right on this issue, the Tribunal, while approving the scheme, may follow judicious approach more particularly in view of the publication of the public notices about the proposed scheme in the newspapers. Any interested person (including a minority shareholder) may appear before the NCLT. There have been, however, occasions when shareholders holding miniscule shareholdings, have made frivolous objections against the scheme, just with the objective of stalling or deferring the implementation of the scheme. The courts have, on a number of occasions, overruled their objections. In view of this, proviso to Section 230(4) of the Act has put some limit for the objectors.
3. In case of Takeovers, as per SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, SEBI has powers to appoint investigating officer to undertake investigation, in case complaints are received from the investors, intermediaries or any other person on any matter having a bearing on the allegations of substantial acquisition of shares and takeovers. SEBI may also carry out such investigation suo moto upon its own knowledge

or information about any breach of these regulations. Under section 235 of the Act, a transferee company, which has acquired 90% shares of a transferor company through a scheme or contract, is entitled to acquire shares of remaining 10% shareholders. Dissenting shareholders have been provided with an opportunity to approach Tribunal. For this purpose, there is no threshold applicable i.e. even a single dissentient shareholding holding one share may also approach Tribunal. In such case, further acquisition of shares by the transferee company will be subject to the outcome of the decision of the NCLT

4. Section 230(12) provides that an aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

8. Explain the provisions of purchase of minority shareholding as per Section 236 of the Companies Act 2013?

Answer:

Section 236 of the Companies Act, 2013 states that:

1. In the event of an acquirer, or a person acting in concert with such acquirer, becoming registered holder of 90% or more of the issued equity share capital of a company, or in the event of any person or group of persons becoming 90%. majority or holding ninety per cent. of the issued equity share capital of a company, by virtue of an amalgamation, share exchange, conversion of securities or for any other reason, such acquirer, person or group of persons, as the case may be, shall notify the company of their intention to buy the remaining equity shares.
2. The acquirer, person or group of persons shall offer to the minority shareholders of the company for buying the equity shares held by such shareholders at a price determined on the basis of valuation by a registered valuer in accordance with such rules as may be prescribed.
3. The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them, as the case may be, in a separate bank account to be operated by company whose shares are being transferred for at least one year for payment to the minority shareholders and such amount shall be disbursed to the entitled shareholders within sixty days: However, such disbursement shall continue to be made to the entitled shareholders for a period of one year, who for any reason had not been made disbursement within the said period of sixty days or if the disbursement have been made within the aforesaid period of sixty days, fail to receive or claim payment arising out of such disbursement.
4. In the event of a purchase under this section, company whose shares are being transferred shall act as a transfer agent for receiving and paying the price to the minority shareholders and for taking delivery of the shares and delivering such shares to the majority, as the case may be.
5. In the absence of a physical delivery of shares by the shareholders within the time specified by the company, the share certificates shall be deemed to be cancelled, and company whose shares are being transferred shall be authorised to issue shares in lieu of the cancelled shares and complete the transfer in accordance with law and make payment of the price out of deposit made under subsection (4) by the majority in advance to the minority by despatch of such payment.
6. In the event of a majority shareholder or shareholders requiring a full purchase and making payment of price by deposit with the company for any shareholder or shareholders who have died or ceased to exist, or whose heirs, successors, administrators or assignees have not been brought on record by transmission, the right of such shareholders to make an offer for sale of minority equity shareholding shall continue and be available for a period of three years from the date of majority acquisition or majority shareholding.
7. Where the shares of minority shareholders have been acquired in pursuance of this section and as on or prior to the date of transfer following such acquisition, the shareholders holding seventy-five per cent. or more minority equity shareholding negotiate or reach an understanding on a higher price for any transfer, proposed or agreed upon, of the shares held by them without disclosing the fact or likelihood of transfer taking place on the basis of such negotiation, understanding or agreement, the majority shareholders shall share the additional compensation so received by them with such minority shareholders on a pro rata basis.
8. When a shareholder or the majority equity shareholder fails to acquire full purchase of the shares of the minority equity shareholders, then, the provisions of this section shall continue to apply to the residual minority equity shareholders, even though,—
   a) the shares of the company of the residual minority equity shareholder had been delisted; and

b) the period of one year or the period specified in the regulations made by the Securities and Exchange Board under the Securities and Exchange Board of India Act, 1992, had elapsed.

9. What are the various forms filed in the process of Merger/ Amalgamation?

Answer:

Following are the various forms filed in the process of merger/amalgamation:

Form No.	Relevant Section	Rule	Particulars
CAA 1	Section 230(2) (c)(i)	Rule 4	Creditor's Responsibility Statement
CAA 2	Section 230 (3)	Rule 6 and 7	Notice and Advertisement of notice of the meeting of creditors or members
CAA 3	Section 230(5)	Rule 8	Notice to Central Government and other Regulatory Authorities
CAA 4		Rule 13(2) and Rule 14	Report of result of meeting by Chairperson
CAA 5	Section 230	Rule 15(1)	Petition to sanction compromise or arrangement
CAA 6	Section 230(7)	Rule 17(3)	Order on petition
CAA 7	Section 232	Rule 20	Order under section 232
CAA 8	Section 232(7)	Rule 21	Statement to be filed with Registrar of Companies
CAA 9	Section 233(1)	Rule 25(1)	Notice of the scheme inviting objections or suggestions
CAA 10	Section 233(1) (c)	Rule 25(2)	Declaration of solvency
CAA 11	Section 233(2)	Rule 25(4)	Notice of approval of the scheme of merger
CAA 12	Section 233(5)	Rule 25(5)	Confirmation order of scheme of merger or amalgamation
CAA 13	Section 233(5)(6)	Rule 25(6)	Application by the Central Government to the Tribunal
CAA 14	Section 235(1)	Rule 26	Notice to dissenting shareholders
CAA 15	Section 238(1)	Rule 28	Information to be furnished along with circular in relation to any scheme or contract involving the transfer of shares or any class of shares in the transferor company to the transferee company
CAA 16	Section 230	Rule 25A(4)	Declaration on compromise or arrangement or merger or demerger between an Indian company and a company or body corporated which has been incorporated in a country which shares Land border with India.

LESSON 4 - PROCESS OF M&A TRANSACTIONS

1. What are the key highlights of Companies Act, 2013 impacting merger and amalgamation?

Answer:

Following are the key highlights of Companies Act, 2013 impacting merger and amalgamation:

- Creation of treasury shares i.e. holding the share in its own name or in the name of the trust, whether on its own behalf or on behalf of any of its subsidiary or associated company is no longer permissible.
- Objections to the scheme can be raised only by shareholders holding at least 10% stake or creditors holding at least 5% of total outstanding debts as per the latest audited financial statements thereby avoiding unnecessary delays.
- Regulators to make representation within 30 days regarding scheme, else deemed 'no objections' or no representation on the proposal of such merger/amalgamation.
- No approval of Tribunal is required in case of merger between holding company and its 100% subsidiary or merger between small companies (based on prescribed capital/turnover).
- Merger of Indian company with foreign company located in certain jurisdictions is allowed subject to RBI Regulations/FDI Guidelines.
- Shareholders would have an option to vote for the scheme through postal ballot, e-voting in addition to voting physically at a meeting.

2. Briefly explain the areas covered under due diligence.

Answer:

Normally the due diligence process should incorporate the following areas, in order to assess the nitty-gritty of the transactions of the takeover and to opt for or opt out of the takeover deal:

A. Management Analysis

- Company's HR Policies
- Assessment of Senior Level Management, resumes of key employees their qualifications and work exposures, previous background, etc.
- Summary Plan descriptions of qualified and non-qualified retirement plans
- Business Experience
- Union Contract, copies of collective bargaining agreements, description of all employees problems within last five years including the alleged wrongful termination, harassment discrimination, etc.
- Strike History
- Labour Relations/ Agreements, grievance procedures, labour disputes currently pending or settled within last five years.
- Workman's' compensation claim history / unemployment claim history
- Personnel Schemes, description of benefits of all employees' health and welfare insurance policies
- Profile of permanent employees
- Labour dues and settlement history Status of labour law compliances.

B. Financial Analysis

- Audited Financial Statements along with auditor's reports for at least past five years or since inception.
- Auditor s letters and replies for the past five years or since inception
- The most recent unaudited statements, with comparable statements to the prior year.
- The company's credit report, if available
- Analyst reports, if available
- Budgets and forecasts and strategic plans
- Significant ratio analysis
- Revenue versus cost comparison.
- **Financial ratios**
  - ✓ Return on Assets
  - ✓ Return on Net worth

- ✓ Gross Profit to Net Profit Ratio
- ✓ Debt Equity Ratio
- ✓ Expense Ratio
- ✓ Debt-Service Coverage Ratio.

- **Analysis of**
  - ✓ Fixed and variable expenses
  - ✓ Gross margins
- The company's general ledger
- Replacement cost data
- Valuation of Assets / Liabilities
- A description of the company's internal control procedures
- Internal audit/control reports for last five years
- Insurance coverage of all assets.

C. Intellectual Property Rights

- A list of domestic and foreign patents and patent applications
- A list of trademark and trade names
- A list of copyrights
- A description of important technical know-how
- A description of methods used to protect trade secrets and know-how
- Any work for hire agreements
- A list of and copies of all consulting agreements, agreements regarding inventions, licences, or assignments of intellectual property to or from the company Any patent clearance documents
- A list of and summary of any claims or threatened claims by or against the company regarding intellectual property.

D. Taxes

- Income-tax returns for the last five year or since inception
- States sales/VAT returns /GST returns
- Assessment orders
- Tax audit, where applicable
- Any tax settlement documents
- Other tax filing statements (State and Central Excise).
- Number of current tax litigations, if any.

E. Marketing Analysis

- Data on Past Sales and future trend
- Customer base and profile
- Major sales agreements, warranty agreements, distributorship/franchisee agreements, product development agreements.
- Trends
- Distribution channels
- Product Profile
- Development / Disclosure.

F. Manufacturing

- Location
- Technology
- Manufacturing process
- Quality Research & Development
- Sourcing of Raw Material.

G. Compliance Status of various laws as applicable

- Companies Act 2013
- Stock Exchange Compliances,
- SEBI/RBI Regulations

- Labour Laws
- Competition laws
- Environmental Protection laws.

H. Litigation

- A schedule of all pending litigations
- A description of any threatened litigations
- Copies of insurance policies providing coverage as to pending or threatened litigation
- Documents relating to any injunctions, consent decrees, or settlements to which the company is a party
- A list of unsatisfied judgments.

3. Prepare a due diligence checklist considering various aspects for acquisition.

Answer:

The acquiring company is always interested in the financial aspects, human aspects, assets and liabilities of the target company. The following due diligence checks may help in carrying out the process:

- **Financial Aspects:**
  - Read the auditor's report and qualifying remarks, if any and director's responsibility statement.
  - Whether the company is profit making, dividend paying company
  - Calculate financial ratios and compare it with the previous year(s) figures of the company and also compare with the industry trend.
  - Whether the Balance sheet have any fictitious assets?
  - Whether any assets have been re-valued (particularly of real estates) in current year or in past.
  - Calculate Net worth and its components and compare it with the previous year(s) figures.
  - Compare the cash flow statements of current year with that of the previous year(s).
  - Whether the borrowing from banks/FI is classified as Standard Assets in the books of the bank.
  - Whether clear demarcation is made between the capital and revenue income and expenditure.
  - Whether any penalty from Revenue Authorities, Stock Exchanges/ SEBI/ CCI/ FEMA levied in the current / past years?
  - Whether any litigation against the company, is pending before any court of law?
  - Amount of contingent liabilities.

- **Debtor's Aspects:**
  - Study the demographic profile of the customer.
  - Study the type of customer base.
  - Whether sales are made in concentration / very few buyers are available in the market.
  - What is the debt realisation cycle?
  - What are the terms and conditions for sales on credit?
  - How the sales campaign is made in order to lead the others in the market.

- **Creditor's Aspects:**
  - Who are the suppliers?
  - What are the terms and conditions for purchase on credit?
  - Whether the supplier is unique or discattered or no single supplier can mis-match the supply?

- **Material Control Aspect:**
  - Make a review of all material contracts and commitments of the target company.
  - Study various issues pertaining to guaranties, loans, and credit agreements.
  - Study the Customer and supplier contracts, Equipment leases, Indemnification agreements, License agreements, Franchise agreements, Equity finance agreements, Distribution, dealer, sales agency, or advertising agreements, Non-competition agreements, Union contracts and collective bargaining agreements, Contracts the termination of which would result in a material adverse effect on the company.

- **Human Aspect:**
  - Study the organization chart and biographical information,
  - Type of workforce and expertise involved.
  - Summary of any labour disputes, information concerning any previous, pending, or threatened labour stoppage,
  - Employment and consulting agreements, loan agreements, and documents relating to other transactions with officers, directors, key employees, and related parties,
  - Schedule of compensation paid to officers, directors, and key employees for the three most recent fiscal years showing separately salary, bonuses, and non-cash compensation (e.g., use of cars, property, etc.)
  - Employee benefits and copies of any pension, profit sharing, deferred compensation, and retirement plans, management incentive or bonus plans not included in above as well as other forms of non- cash compensation, Employment manuals and policies, involvement of key employees and officers in criminal proceedings or significant civil litigation, Actuarial reports for past three years for gratuity valuations.

- **Regulatory Aspects:**
  - Study the revenue returns filed by the company and its assessment orders.
  - Whether any penalty has been imposed for contraventions of the provisions of the law and such penalty is still due.
  - Whether the company is abiding with the company law compliances. Check the various returns filed with the RoC.
  - Is there any specific laws applicable and compliance of such laws are regular.

4. What are the details needs to be disclosed along with notice of meeting?

Answer:

1. the following details of the compromise or arrangement, if such details are not already included in the said scheme:—

I. details of the order of the Tribunal directing the calling, convening and conducting of the meeting:
   a) date of the Order;
   b) date, time and venue of the meeting.

II. details of the company including:
   a) Corporate Identification Number (CIN) or Global Location Number (GLN) of the company;
   b) Permanent Account Number (PAN);
   c) name of the company;
   d) date of incorporation;
   e) type of the company (whether public or private or one-person company);
   f) registered office address and e-mail address;
   g) summary of main object as per the memorandum of association; and main business carried on by the company;
   h) details of change of name, registered office and objects of the company during the last five years;
   i) name of the stock exchange (s) where securities of the company are listed, if applicable;
   j) details of the capital structure of the company including authorised, issued, subscribed and paid up share capital; and
   k) names of the promoters and directors along with their addresses.

III. if the scheme of compromise or arrangement relates to more than one company, the fact and details of any relationship subsisting between such companies who are parties to such scheme of compromise or arrangement, including holding, subsidiary or of associate companies;

IV. the date of the board meeting at which the scheme was approved by the board of directors including the name of the directors who voted in favour of the resolution, who voted against the resolution and who did not vote or participate on such resolution;

V. explanatory statement disclosing details of the scheme of compromise or arrangement including: —
   a) parties involved in such compromise or arrangement;

b) in case of amalgamation or merger, appointed date, effective date, share exchange ratio (if applicable) and other considerations, if any;
c) summary of valuation report (if applicable) including basis of valuation and fairness opinion of the registered valuer, if any, and the declaration that the valuation report is available for inspection at the registered office of the company;
d) details of capital or debt restructuring, if any;
e) rationale for the compromise or arrangement;
f) benefits of the compromise or arrangement as perceived by the Board of directors to the company, members, creditors and others (as applicable);
g) amount due to unsecured creditors.

VI. disclosure about the effect of the compromise or arrangement on:
a) key managerial personnel;
b) directors;
c) promoters;
d) non-promoter members;
e) depositors;
f) creditors;
g) debenture holders;
h) deposit trustee and debenture trustee;
i) employees of the company;

VII. Disclosure about effect of compromise or arrangement on material interests of directors, Key Managerial Personnel (KMP) and debenture trustee. Explanation- For the purposes of these rules it is clarified that-
a) the term 'interest' extends beyond an interest in the shares of the company, and is with reference to the proposed scheme of compromise or arrangement.
b) the valuation report shall be made by a registered valuer, and till the registration of persons as valuers is prescribed under section 247 of the Act, the valuation report shall be made by an independent merchant banker who is registered with the Securities and Exchange Board or an independent chartered accountant in practice having a minimum experience of ten years.

VIII. investigation or proceedings, if any, pending against the company under the Act.

IX. details of the availability of the following documents for obtaining extract from or for making or obtaining copies of or for inspection by the members and creditors, namely:
a) latest audited financial statements of the company including consolidated financial statements;
b) copy of the order of Tribunal in pursuance of which the meeting is to be convened or has been dispensed with;
c) copy of scheme of compromise or arrangement;
d) contracts or agreements material to the compromise or arrangement;
e) the certificate issued by Auditor of the company to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the Accounting Standards prescribed under section 133 of the Companies Act, 2013; and
f) such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme;

X. details of approvals, sanctions or no-objection(s), if any, from regulatory or any other governmental authorities required, received or pending for the proposed scheme of compromise or arrangement.

XI. a statement to the effect that the persons to whom the notice is sent may vote in the meeting either in person or by proxies, or where applicable, by voting through electronic means.

5. What are the filing requirements in the process of Merger/Amalgamation?

Answer:

The following forms, reports, returns, etc. are required to be filed with the Registrar of Companies, SEBI and Stock Exchanges at various stages of the process of merger/amalgamation:

1.

a) when the objects clause of the memorandum of association of the transferee company is altered to provide for amalgamation/merger, for which special resolution is passed;

b) the company's authorised share capital is increased to enable the company to issue shares to the shareholders of the transferor company in exchange for the shares held by them in that company for which a special resolution for alteration of its articles is passed;

c) a special resolution is passed to authorise the Company's Board of Directors to issue shares to the shareholders of the transferor company in exchange for the shares held by them in that company; and

d) a special resolution authorizing the transferee company to commence the business of the transferor company or companies as soon as the amalgamation/merger becomes effective; the company should file with ROC within thirty days of passing of the aforementioned special resolutions in the prescribed e-form. The following documents should be annexed to the said e-form:

   I. certified true copies of all the special resolutions;

   II. certified true copy of the explanatory statement annexed to the notice for the general meeting at which the resolutions are passed, for registration of the resolution. This e-form should be digitally signed by Managing Director/Director/Manager or Secretary of the Company duly authorized by Board of Directors. This e-form should also be certified by Company Secretary or Chartered Accountant or Cost Accountant (in whole time practice) by digitally signing the e-form.

2. In compliance with the listing regulations, the transferee company is required to give notice to the stock exchanges where the securities of the company are listed, of the Board meeting called for the purpose of discussing and approving amalgamation.

3. In compliance with the listing regulations, the transferee company is required to give intimation to the stock exchanges where the securities of the company are listed, of the decision of the Board approving amalgamation and also the swap ratio, before such information is given to the shareholders and the media.

4. The transferee company is required to file with the Registrar of Companies, INC-28 along with a certified copy of the Tribunal's order on summons directing the convening and holding of meetings of equity shareholders/ creditors including debentures holders etc. as required under Section 230 of the Companies Act. This e-form should be digitally signed by the Managing Director or Director or Manager or Secretary of the Company duly authorized by the Board of Directors. However, in case of foreign company, the e-form should be digitally signed by an authorized representative of the company duly authorized by the Board of Directors. The original certified copy of the Tribunal order is also required to be submitted at the concerned ROC office simultaneously while filing INC-28, failing which the filing will not be considered and legal action will be taken.

5. In compliance with the listing regulations, the transferee company is required to simultaneously furnish to the stock exchanges where the securities of the company are listed, copy of every notice, explanatory statement, minutes of the meeting etc. sent to members of the company in respect of a general meeting in which the scheme of arrangement of merger/amalgamation is to be approved.

6. The transferee company is required to file with the Central Government notice of every application made to the Tribunal under Section 230 to 240 of the Companies Act, 2013. No notice need be given to the Central Government once again when the Tribunal proceeds to pass final order to dissolve the transferor company.

7. To file with the Registrar of Companies within thirty days of allotment of shares to the shareholders of the transferor company in lieu of the shares held by them in that company in accordance with the shares exchange ratio incorporated in the scheme of arrangement for merger/amalgamation, the return of allotment along with the prescribed filing fee as per requirements of the Act. This e-form should be digitally signed by Managing Director or Director or Manager or Secretary of the Company duly authorised by the Board of Directors. The e-form should also be certified by Company Secretary or Chartered Accountant or Company Secretary (in whole time practice) by digitally signing the e-form.

6. Explain the provision for Preservation of books and papers of amalgamated companies.

Answer:

- Section 239 provides that the books and papers of a company which has been amalgamated with, or whose shares have been acquired by, another company shall not be disposed of without the prior permission of the Central Government and
- before granting such permission, that Government may appoint a person to examine the books and papers or any of them for the purpose of ascertaining whether they contain any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation or the acquisition of its shares.

- Maintenance of records of merging entity and making suitable entries in the records (e.g. registers under Companies Act reflecting changes in shareholding, directors etc. as applicable) of merged entity is a must.
- One will need to dive deep to ensure maintenance of all past records including statutory and non-statutory registers, original copies of various forms, returns, certificates, approvals, litigation and property records. Company may need to relocate the records to centralized storage maintained by the merged/new entity.

7. What are the possible reasons for business growth and expansion that can by the merged company?

Answer:

There are broadly four possible reasons for business growth and expansion which is to be achieved by the merged company. These are

1. Operating economies,
2. Financial economies,
3. Growth and diversification, and
4. Managerial effectiveness.

LESSON 5 - DOCUMENTATION – MERGER & AMALGAMATION

1. What are the documents/details that needs to be sent along with notice of meeting?

Answer:

The notice of meeting shall be accompanied with a copy of the scheme. Additionally, if the scheme does not include the following details, then the same shall also be sent along with the notice.

a) Details of the order of the Tribunal directing the calling, convening and conducting of the Meeting
   - Date of the Order;
   - Date, time and venue of the meeting

b) Details of the company including –
   - Corporate Identification Number (CIN) or Global Location Number (GLN) of the company;
   - Permanent Account Number (PAN);
   - Name of the company;
   - Date of incorporation;
   - Type of the company (whether public or private or one-person company);
   - Registered office address and e-mail address;
   - Summary of main object as per the memorandum of association; and main business carried on by the company;
   - Details of change of name, registered office and objects of the company during the last five years;
   - Name of the stock exchange (s) where securities of the company are listed, if applicable;
   - Details of the capital structure of the company including authorized, issued, subscribed and paidup share capital;
   - Names of the promoters and directors along with their addresses.

c) Relationship between companies:, including holding, subsidiary or of associate companies.

d) Disclosure about the effect of the compromise or arrangement on:
   - Key managerial personnel;
   - directors;
   - promoters;
   - non-promoter members;
   - depositors;
   - creditors;
   - debenture holders;
   - deposit trustees and debenture trustees;
   - employees of the company.

e) Disclosure about effect of M&A on material interests of directors, Key Managerial Personnel (KMP) and debenture trustee. The term 'interest' extends beyond an interest in the shares of the company, and is with reference to the proposed scheme of compromise or arrangement.

f) Details of Board Meeting: The date of the board meeting at which the scheme was approved by the board of directors, the name of the directors who voted in favor of the resolution, the names of the directors who voted against the resolution and the names of the directors who did not vote or participate on such resolution.

g) Investigation or proceedings, if any, pending against the company under the Act.

h) Details of the availability of the following documents for obtaining extract from or for making/obtaining copies of or for inspection by the members and creditors, namely:
   - latest audited financial statements of the company including consolidated financial statements;
   - copy of the order of Tribunal in pursuance of which the meeting is to be convened or has been dispensed with;
   - copy of scheme of compromise or arrangement; contracts or agreements material to the compromise or arrangement;
   - the certificate issued by auditor of the company to the effect that the accounting treatment if any proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013; and

- such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme.

i) Details of approvals, sanctions or no-objection(s), if any, from regulatory or any other government authorities required, received or pending for the purpose of scheme of compromise or arrangement.

j) A statement to the effect that the persons to whom the notice is sent may vote in the meeting either in person or by proxies, or where applicable, by voting through electronic means.

- **Further details to be provided in the Notice:**

1. A copy of the valuation report, if any;
2. Copy of the order of Tribunal in pursuance of which the meeting is to be convened or has been dispensed with copy of scheme of Merger & Amalgamation;
3. Contracts or agreements material to the Merger & Amalgamation;
4. Such other information or documents as the Board or Management believes necessary and relevant for making decision for or against the scheme;
5. The draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;
6. a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel, promoters and non-promoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;
7. Confirmation that a copy of the draft scheme has been filed with the Registrar;
8. The report of the expert with regard to valuation, if any;
9. A supplementary accounting statement if the last annual accounts of any of the merging company relate to a financial year ending more than six months before the first meeting of the company summoned for the purposes of approving the scheme.

2. What should be included in the Explanatory Statement?

Answer:

Explanatory Statement disclosing details of the scheme of compromise or arrangement shall include the following:

a) Parties involved in compromise or arrangement;

b) Appointed date, effective date, share exchange ratio (if applicable) and other considerations, if any;

c) Summary of valuation report (if applicable) including basis of valuation and fairness opinion of the registered valuer, if any, and the declaration that the valuation report is available for inspection at the registered office of the company;

d) Details of capital or debt restructuring, if any;

e) Rationale for the compromise or arrangement;

f) Benefits of the compromise or arrangement as perceived by the Board of directors to the company, members, creditors and others (as applicable);

g) Amount due to unsecured creditors.

3. What are the general Points to be kept in mind while filing Application / Petition with NCLT?

Answer:

Following are the general Points to be kept in mind while filing Application / Petition with NCLT:

1. Where a particular situation is not provided in the NCLT Rules, the NCLT may for reasons to be recorded in writing, determine the procedure in a particular case in accordance with the principles of natural justice.
2. The general heading in all proceedings before the Tribunal, in all advertisement and notices shall be in Form No. NCLT-4.
3. Every petition or application or reference shall be filled in form as provided in Form No. NCLT-1 with attachments thereto accompanied by Form No. NCLT-2 and in case of an interlocutory application, the same shall be filed in Form No. NCLT-1 accompanied by such attachments thereto along with the Form No. NCLT-3.
4. Every petition or application including interlocutory application shall be verified by an affidavit in Form.
5. Notice to be issued by the NCLT to the opposite party shall be in Form No. NCLT-5.

LESSON 6 - ACCOUNTING IN CORPORATE RESTRUCTURING: CONCEPT AND ACCOUNTING TREATMENT

1. What are the Standards one need to know and understand in corporate restructuring in addition to AS 14 and IND AS 103 for proper and accurate accounting ?

Answer:

In corporate restructuring, for proper and accurate accounting one also need to know and understand following standards in addition to AS 14 and IND AS 103:

Under Indian Accounting Standards (IND AS)

- Ind AS 110 Consolidated Financial Statements
- Ind AS 111 Joint Arrangements
- Ind AS 112 Disclosure of Interest in other Entity
- Ind AS 28 Investments in Associates and Joint Ventures

Under Accounting Standards

- AS 13 Accounting for Investments
- AS 21 Consolidated Financial Statements
- AS 23 Accounting for Investments in Associates in Consolidated Financial Statements
- AS 27 Financial Reporting of Interests in Joint Ventures

2. X Ltd. acquire Y Ltd. under the scheme of merger sanctioned by the Tribunal. Y Ltd. ceases to exist. Consideration is discharged by way of issue of equity shares of X Ltd. to the shareholders of Y Ltd. in the ratio 1:1. X Ltd. already held 5% in Y Ltd. as an investment prior to the effective date of merger i.e. 1st October 2022. 86% of the shareholders (by face value) of Y Ltd. excluding X Ltd. agreed to become shareholders of X Ltd. Whether the above case will qualify to be classified as merger as per AS-14.

Answer:

Even if we exclude the shares of Y Ltd. already held by X Ltd., consequent to the allotment of shares pursuant to merger, 90% criteria for amalgamation to be classified as merger is being met. Since 90% of the remaining shares i.e. 95% comes out to 85.5% shareholders. Thus the threshold is being met. Hence the above case will qualify as merger.

3. Distinguish between Pooling of Interest Method and Purchase Method.

Answer:

Following are differences between Pooling of Interest Method and Purchase Method:

Particulars	Pooling of Interest Method	Purchase Method
Purchase consideration	Consideration will be in the form of shares only.	Consideration may be in the form of equity shares/ other securities / cash/ other assets.
Recording of assets and Liabilities	Under this method assets and liabilities of transferor companies are recorded at Book Value only.	Under this method assets and liabilities of transferor companies are recorded at Fair Value.
Difference in consideration and Net assets taken over	Difference in consideration and Net assets taken over is adjusted in Reserve and surplus.	Difference in consideration and Net assets taken over is recorded in Goodwill or capital reserve.
Reserve	All reserve are incorporated in the books of Transferee company at the same value at which they appeared in the books of transferor.	No reserve are incorporated in the books of Transferee company except statutory reserve.

4. A Ltd. acquire B Ltd., on 1stApril, 2022 and discharges consideration for the business as follows:

a) Issued 42,000 fully paid equity shares of Rs.10 each at par to the equity shareholders of B Ltd.

b) Issued fully paid up 15% preference shares of Rs.100 each to discharge the preference shareholders (Rs.1,70,000) of B Ltd. at a premium of 10%

c) It is agreed that the debentures of B Ltd. (Rs.50,000) will be converted into equal number and amount of 13% debentures of A Ltd. Calculate the amount of purchase consideration.

Answer:

Calculation of purchase consideration:

a) 42,000 equity shares `Rs. 10 each issued at Rs. 10 = 4,20,000

b) 15% preference shares of Rs. 1,70,000*110% = 1,87,000 Total = 6,07,000

c) Not to be included in purchase considered as it is payment to debenture holders

5. X Ltd. having a share capital of Rs. 20 lakhs and Y Ltd. having a share capital of Rs. 30 lakhs. Z Ltd. was formed to take over the business of X Ltd and Y Ltd. at a purchase consideration of Rs. 25 lakhs and Rs. 28 lakhs, payable in shares of Z Ltd. The assets and liabilities were taken at their carrying amounts. Compute the Goodwill or Capital Reserve.

Answer:

Since the purchase consideration is payable in shares of the transferee company and all the assets and liabilities are taken over at their carrying amounts, the amalgamation is in the nature of merger, i.e. pooling of interests method.

For X Ltd. Purchase consideration = Rs. 25 lakhs

Less: Share capital of X Ltd = Rs. 20 lakhs

Excess of purchase consideration = Rs. 5 lakhs.

This shall have to be adjusted against the Reserves of Z Ltd.

For Y Ltd. Purchase Consideration = Rs. 28 lakhs

Less: Share Capital of Y Ltd = Rs. 30 lakhs

Since purchase consideration is less than share capital of the transferor company, Rs. 2 lakhs shall be treated as Capital Reserve.

6. What is goodwill and capital reserve as per AS-14?

Answer:

Goodwill is the excess of the price paid in a purchase over the fair value of the net identifiable assets acquired. Capital reserve is the excess of the fair value (agreed value) of the net identifiable assets acquired over the purchase price.

7. Sony Ltd. and Zee Ltd. are production of films and TV serials. Sony Ltd. makes a bid for Sony Ltd.'s business and the Competition Commission of India (CCI) announces that the proposed transaction is to be scrutinised to ensure that competition laws are not breached. Even though the contracts are made subject to the approval of the CCI, Sony Ltd. and Zee Ltd. mutually agree the terms of the acquisition and the purchase price before competition authority clearance is obtained. Can the acquisition date in this situation be the date on which Sony Ltd. and Zee Ltd. agree the terms even though the approval of CCI is awaited?

Answer:

Paragraph 8 of Ind AS 103 provides that acquisition date is the date on which the acquirer obtains control of the acquiree.

Further, paragraph 9 of Ind AS 103 clarifies that the date on which the acquirer obtains control of the acquiree is generally the date on which the acquirer legally transfers the consideration, acquires the assets and assumes the liabilities of the acquiree—the closing date. However, the acquirer might obtain control on a date that is either earlier or later than the closing date.

For example, the acquisition date precedes the closing date if a written agreement provides that the acquirer obtains control of the acquiree on a date before the closing date. An acquirer shall consider all pertinent facts and circumstances in identifying the acquisition date.

Since CCI approval is a substantive approval for Sony Ltd. to acquire control of Zee Ltd.'s operations, the date of acquisition cannot be earlier than the date on which approval is obtained from CCI. This is pertinent given that the approval from CCI is considered to be a substantive process and accordingly, the acquisition is considered to be completed only on receipt of such approval.

8. Amber Ltd. acquires 60% of the equity shares of Natural Ltd. a private entity, for Rs. 150 crore. The fair value of its identifiable net assets is Rs. 120 crore. How will the non-controlling interest be measured?

Answer:

a) Fair value method Fair value of 40% of the equity shares owned by non-controlling shareholders = 150/60% *40% = 100 crore.

b) Proportionate Net Asset value method Net asset value of 40% of the equity shares owned by non-controlling shareholders = 120*40%=48 crore.

9. What are the disclosures requirements as per IND AS 103 on Business Combination?

Answer:

Ind AS 103 requires detailed disclosures on Business Combination. The acquirer shall disclose the following information for each business combination that occurs during the reporting period:

a) the name and a description of the acquiree.

b) the acquisition date.

c) the percentage of voting equity interests acquired.

d) the primary reasons for the business combination and a description of how the acquirer obtained control of the acquiree.

e) a qualitative description of the factors that make up the goodwill recognised, such as expected synergies from combining operations of the acquiree and the acquirer, intangible assets that do not qualify for separate recognition or other factors.

f) the acquisition-date fair value of the total consideration transferred and the acquisition-date fair value of each major class of consideration

g) for contingent consideration arrangements and indemnification assets:

   I. the amount recognised as of the acquisition date;

   II. a description of the arrangement and the basis for determining the amount of the payment; and

   III. an estimate of the range of outcomes (undiscounted) or, if a range cannot be estimated, that fact and the reasons why a range cannot be estimated. If the maximum amount of the payment is unlimited, the acquirer shall disclose that fact.

h) for acquired receivables:

   I. the fair value of the receivables;

   II. the gross contractual amounts receivable; and

   III. the best estimate at the acquisition date of the contractual cash flows not expected to be collected.

i) the amounts recognised as of the acquisition date for each major class of assets acquired and liabilities assumed.

j) for each contingent liability recognised, the information required as per Ind AS 37, Provisions, Contingent Liabilities and Contingent Assets. If a contingent liability is not recognised because its fair value cannot be measured reliably, the acquirer shall disclose:

   i. the information required by paragraph 86 of Ind AS 37; and

   ii. the reasons why the liability cannot be measured reliably.

k) the total amount of goodwill that is expected to be deductible for tax purposes.

10. Write a Short note on Internal Reconstruction?

Answer:

When a company incurs loss for number of years, the balance sheet does not reflect the true position of the business, as a higher net worth is depicted, than that of the real one. In such a company the assets are overvalued and it has many intangible assets and fictitious assets. Such a situation does not depict a true picture of financial statements. Such a situation requires reconstruction. Such a reconstruction may be carried out internally.

In an internal reconstruction, the assets are revalued, liabilities are negotiated, and losses suffered are written off by reducing the paid-up value of shares and/or varying the rights attached to different classes of shares. Existing company is not liquidated.

Internal reconstruction may be done in the following ways:

a) Cost reduction through closure of units.

b) Redundancy programmes.

c) Management or organisational restructuring involving decentralization.

11. Differentiate between Ind AS 103 and AS 14

Answer:

Difference between Ind AS 103 and AS 14:

a) Scope: Ind AS 103 has a wider scope than AS 14.

b) Method of accounting: Ind AS 103 prescribe only acquisition method for every business combination whereas AS 14 states two method of accounting: Pooling of interest method and Purchase method.

c) Recognition and measurement: Ind AS 103 recognises acquired identifiable assets liabilities and non-controlling interest at fair value. AS 14 allows choice of Book value or Fair Value.

d) Goodwill: Under Ind AS 103, Goodwill is not amortised but tested for annual impairment where as AS 14 require goodwill to be amortised over a period not exceeding 5 years.

e) Non Controlling Interest (NCI): Ind AS 103 provide for accounting of NCI, AS 14 do not.

f) Recording for consolidated financial statements: It is provided in Ind AS 103, not in AS 14.

g) Common control transactions: Appendix C deals with accounting for common control transactions, which prescribes Pooling of interest method of accounting. AS14 do not prescribe any different accounting for such transactions.

h) Contingent Consideration: Ind AS 103 recognise contingent consideration, AS 14 do not.

i) Reverse acquisitions: Ind AS 103 deal with reverse acquisitions, AS 14 do not.

LESSON 7 - TAXATION & STAMP DUTY ASPECTS OF CORPORATE RESTRUCTURING

1. What is the meaning of "accumulated loss"?

Answer:

"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;

2. What is unabsorbed depreciation?

Answer:

"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;

3. Define capital assets as per Income Tax Act, 1961?

Answer:

Section 2(14) of the Income Tax Act, 1961 defines capital assets as below:

For the purposes of this subject, Capital asset means,

a) Property of any kind held by an assessee, whether or not connected with his business or profession.
b) Any securities held by a Foreign Institutional Investor which has invested in such securities in accordance with the regulations made under Securities and Exchange Board of India Act, 1992.
c) any unit linked insurance policy (ULIP) issued on or after 1.2.2021, to which exemption under section 10(10D) does not apply on account of –
    i. premium payable exceeding Rs, 2,50,000 for any of the previous years during the term of such policy; or
    ii. the aggregate amount of premium exceeding Rs. 2,50,000 in any of the previous years during the term of any such ULIP(s), in a case where premium is payable by a person for more than one ULIP issued on or after 1.2.2021.

But does not include the following:

1. Any stock in trade (Other than the securities referred to in sub-clause (b)), consumables stores or raw materials held for the purpose of his business or profession.
2. Personal effects (movable property including wearing apparel and furniture for personal use). Exclusions: (a) jewellery; (b) archaeological collections; (c) drawings; (d) paintings; (e) sculptures; or (f) any work of art.

Rural Agricultural land in India, which is not an urban agricultural land. In other words, it must be rural agricultural land.

4. What are the points needs to be considered while calculating "net worth" for slump sale?

Answer:

In computing the net worth of the entity, the following points need to be considered:

1. The value of net worth should not take into account any change in the value of the asset or liability resulting from revaluation of such asset or liability.
2. In case of depreciable assets under the Income Tax Act, the Written Down Value of Block of assets as per the Act shall be considered.
3. In case of assets on which 100% deduction has been allowed u/s 35AD (specified business), the value of such assets will not be considered.

4. In case of any other asset, value as appearing in the books of accounts shall be considered.
5. After considering the above points, if the resulting net worth is negative, then the cost of acquisition shall be taken as nil for the purpose of computation of capital gains.
6. Value of goodwill while computing the 'net worth' of the undertaking while computing the 'net worth' of an undertaking which is then deemed 'cost of acquisition' under Section 50B, the insertion of Explanation 2(aa) of Section 50B clarifies that the value of any goodwill of business or profession (other than goodwill acquired by purchase from a previous owner) would need to be taken as NIL. Tax rates: The rates of tax applicable to the capital gain in a slump sale are as follows: Short Term Capital Gain: Normal Rates of taxation Long Term Capital Gain: 20%

5. What is the provision for carry forward and set off of accumulated loss and unabsorbed depreciation allowance in conversion of Conversion of Company into LLP?

Answer:

Conversion of Company into LLP [Section 72A(6A)]

whereby a private company or unlisted public company is succeeded by a limited liability partnership then, the accumulated loss and the unabsorbed depreciation of the predecessor company, shall be deemed to be the loss or allowance for depreciation of the successor limited liability partnership for the purpose of the previous year in which business reorganization was effected.

However, if any of the conditions laid down in the proviso to clause (xiiib) of section 47 are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the successor limited liability partnership, shall be deemed to be the income of the limited liability partnership chargeable to tax in the year in which such conditions are not complied with.

6. What is the meaning of Strategic disinvestment?

Answer:

"strategic disinvestment" means sale of shareholding by the Central Government or any State Government or a public sector company, in a public sector company or in a company, which results in—

a) reduction of its shareholding to below fifty-one per cent; and
b) transfer of control to the buyer:

However, sub-clause (a) shall apply only in a case where shareholding of the Central Government or the State Government or the public sector company was above fifty-one per cent before such sale of shareholding: requirement of transfer of control may be carried out by the Central Government or the State Government or the public sector company or any two of them or all of them.

LESSON 8 - REGULATION OF COMBINATIONS

1. What are the key provisions of Competition Act, 2002?

Answer:

Key provisions of the Competition Act, 2002 are contained in section 3, 4, 5 and 6. Through these sections, the Act declares anticompetitive agreements as void; prohibits abuse of dominant position, and regulates large combinations. Section 5 and 6 provides for regulation of the combinations beyond the prescribed threshold. A combination includes the acquisition of control, shares, voting rights, assets as well as the cases of merger or amalgamation.

Section 6 provides that no person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.

2. Briefly elaborate provisions of Combinations under The Competition Act, 2002.

Answer:

Section 5 defines the combination as

I. acquisition of control, shares, voting rights or assets; or

II. acquiring of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service; or

III. merger or amalgamation. A combination beyond the prescribed thresholds is regulated under the Act.

Section 6 declares a combination as void if it causes or is likely to cause an adverse effect on competition within the relevant market in India.

3. What are the Ordinarily exempt transactions under Combination Regulations

Answer:

The Combinations Regulations, 2011 provide for the procedural framework on regulation of the combinations. Schedule I to the Regulations provides a list of transactions which are ordinarily not likely to raise competition concerns and hence normally exempt from approval requirements. They are known as 'ordinarily exempt' transactions.

However, such ordinarily exempt transactions also need prior approval of the Commission if the same is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination. In other words, the parties will have to approach the Commission, before giving effect to the proposed combination.

The Commission has highlighted this fact in in the matter of SCM Soilfert Limited / Deepak Fertilizers (order under section 43A relating to Combination Registration No. C-2014/05/175), in the following words: "It is observed that the categories of combinations listed in Schedule I to the Combination Regulations must be interpreted in light of the Commission's objectives (listed in Section 18 of the Act) and the intent of Schedule I (expressed in Regulation 4 of the Combination Regulations). This means that the categories of combinations listed in Schedule I as normally not notifiable ought not to include combinations which envisage or are likely to cause a change in control or are of the nature of strategic combinations including those between competing enterprises or enterprises active in vertical markets."

4. What is the process of filing notice (Form)?

Answer:

Following is the process of filing notice (Form):

1. In case of an acquisition or acquiring of control of the enterprise, the acquirer shall file the notice in applicable form.
2. In case of a merger or amalgamation, parties to the combination shall jointly file the notice. The duly filled in notice is required to be delivered along with a copy and an electronic version thereof to the Commission's office.
3. In case the notifying party has requested confidentiality with respect to information or document(s) submitted during the inquiry, the non-confidential version thereof is required to be additionally filed along with an electronic copy.
4. A request for confidentiality may be made only if making the document or documents or part or parts thereof public will result in disclosure of trade secrets or destruction or appreciable diminution of the commercial value of the information or can be reasonably expected to cause serious injury.

5. The notifying party(ies) should clearly state the reasons and justification for requesting confidentiality and the implications for the business of the parties to the combination from the disclosure of such information/documents.
6. Further, in case request for confidentiality is made by the parties to the combination, it shall be substantiated with cogent reasons and detailed explanation for grant of such confidential treatment.
7. In this regard, it may be noted that mere statement(s) that the document(s) or information or part(s) thereof contain trade secret(s) or are of such commercial value that disclosure of same will cause serious injury, shall not be sufficient ground for accepting the request for confidentiality.
8. Further, in accordance with sub-regulation (3) of regulation 30 of the Combination Regulations, an affidavit regarding grant of confidentiality should also be filed along with the letter making request for grant of confidentiality.
9. If the notifying party is an Indian company, a certified copy of the board resolution authorizing the said person(s) to sign the notice should be provided.
10. For body corporates organised/incorporated under foreign laws, the following documents may be submitted:
    a) for body corporates which are required to pass board resolutions for such authorisation, a certified copy of the board resolution authorizing the said person(s) to sign the notice;
    b) for body corporates which under the laws applicable to such enterprises are not required to pass a board resolution for such authorisation, an authorization letter issued by any of any of the key managerial personnel (i.e., Chief Executive Officer or the Managing Director, Company Secretary, Director, Chief Financial Officer or their equivalent as per the applicable law) in favour of the person signing the notice. The said authorisation should be printed on the company letter head and should, wherever applicable, bear the company seal or its equivalent as per the applicable law; and
    c) In the event any document submitted by the notifying party(ies) are in a language other than English, translation in English of the said document is required to be provided.

5. What should be included in Summary of Combination given while delivering the notice?

Answer:

A summary of the combination, not containing any confidential information, in not less than 2000 words, comprising inter alia the details regarding:

a) the products, services and business(es) of the parties to the combination;
b) the values of assets/turnover for the purpose of section 5 of the Act;
c) the respective markets in which the parties to the combination operate;
d) the details of agreement(s)/other documents and the board resolution(s) executed/ passed in relation to the combination;
e) the nature and purpose of the combination; and
f) the likely impact of the combination on the state of the competition in the relevant market(s) in which the parties to the combination operate, along with nine copies and an electronic version thereof shall be separately given while delivering the notice.

6. What should be included in Summary for Website?

Answer:

A summary of the combination, not containing any confidential information, in not more than 500 words, comprising details regarding:

a) name of the parties to the combination;
b) the type of the combination;
c) the area of activity of the parties to the combination; and
d) the relevant market(s) to which the combination relates, along with an electronic version thereof shall be separately given while delivering the notice.

The summary so submitted shall be published on the website of the Commission.

LESSON 9 - REGULATORY APPROVALS OF SCHEME

1. Discuss the provisions of approval from CCI under Competition Act, 2002.

Answer:

Refer provisions given under Chapter 8 from notes.

2. Explain the provisions of approval under Income Tax Act, 1961.

Answer:

The Income Tax Act, 1961 contemplates and recognizes the following types of merger and acquisition activities:

a) Merger/Amalgamation;
b) Demerger or spin-off;
c) Slump sale/asset sale; and
d) Transfer of shares/Share Sale.

Merger has not been defined under the Income Tax Act, 1961 but has been covered under the term 'amalgamation' as defined in section 2(1B) of the Act. To encourage restructuring, merger and demerger, it has been given a special treatment in the Income-Tax Act, 1961 since the beginning. The Finance Act, 1999 clarified many issues relating to business reorganizations thereby facilitating and making business restructuring tax neutral.

Every scheme involving restructuring is required to be submitted to jurisdictional assessing officer and no objection is required from income-tax department before a scheme is approved by NCLT.

Certain provisions of Income Tax Act, 1961 applicable to mergers/demergers are as under:

Meaning of Amalgamation [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 —

I. 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;
II. 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;
III. 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.

Section 45 of the Income Tax Act, 1961 levies tax on capital gains arising on the transfer of a capital asset. Section 2(47) of the Act defines the term 'transfer' in relation to a capital asset. If a merger or any other kind of restructuring results in a transfer of a capital asset by a resident or a capital asset that is situated in India to a non-resident, it would lead to a taxable event. Section 47 of the Act sets out certain transfers that are exempt from the provisions of Section 45 (the charging provision for tax on capital gains) and such transfers are exempt from tax on capital gains.

3. Discuss the relevant provisions of Companies Act, 2013 regarding regulatory approvals from RD / ROC/ OL?

Answer:

Section 233 deals with the merger or amalgamation of certain companies. It provides as under:

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 the following, namely:
   a) a notice of the proposed scheme inviting objections or suggestions, if any, from the Registrar and Official Liquidator where registered office of the respective companies are situated or persons affected by the scheme within thirty days is issued by the transferor company or companies and the transferee company;

b) the objections and suggestions received are considered by the companies in their respective general meetings and the scheme is approved by the respective members or class of members at a general meeting holding at least ninety per cent of the total number of shares;
c) each of the companies involved in the merger files a declaration of solvency, in the prescribed form, with the Registrar of the place where the registered office of the company is situated; and
d) the scheme is approved by majority representing nine-tenths in value of the creditors or class of creditors of respective companies indicated in a meeting convened by the company by giving a notice of twenty-one days along with the scheme to its creditors for the purpose or otherwise approved in writing.

2. The transferee company shall file a copy of the scheme so approved in the manner as may be prescribed, with the Central Government3 Registrar and the Official Liquidator where the registered office of the company is situated.
3. On the receipt of the scheme, if the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Central Government shall register the same and issue a confirmation thereof to the companies.
4. If the Registrar or Official Liquidator has any objections or suggestions, he may communicate the same in writing to the Central Government within a period of thirty days: Provided that if no such communication is made, it shall be presumed that he has no objection to the scheme.
5. If the Central Government after receiving the objections or suggestions or for any reason is of the opinion that such a scheme is not in public interest or in the interest of the creditors, it may file an application before the Tribunal within a period of sixty days of the receipt of the scheme under subsection (2) stating its objections and requesting that the Tribunal may consider the scheme under section 232.
6. On receipt of an application from the Central Government or from any person, if the Tribunal, for reasons to be recorded in writing, is of the opinion that the scheme should be considered as per the procedure laid down in section 232, the Tribunal may direct accordingly or it may confirm the scheme by passing such order as it deems fit. Provided that if the Central Government does not have any objection to the scheme or it does not file any application under this section before the Tribunal, it shall be deemed that it has no objection to the scheme.
7. A copy of the order under sub-section (6) confirming the scheme shall be communicated to the Registrar having jurisdiction over the transferee company and the persons concerned and the Registrar shall register the scheme and issue a confirmation thereof to the companies and such confirmation shall be communicated to the Registrars where transferor company or companies were situated.
8. The registration of the scheme under sub-section (3) or sub-section (7) shall be deemed to have the effect of dissolution of the transferor company without process of winding up.
9. The registration of the scheme shall have the following effects, namely:—
   a) transfer of property or liabilities of the transferor company to the transferee company so that the property becomes the property of the transferee company and the liabilities become the liabilities of the transferee company;
   b) 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; and
   d) 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.
10. 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 and all such shares shall be cancelled or extinguished on the merger or amalgamation.
11. The transferee company shall file an application with the Registrar along with the scheme registered, indicating the revised authorised capital and pay the prescribed fees due on revised capital: Provided that the fee, if any, paid by the transferor company on its authorised capital prior to its merger or amalgamation with the transferee company shall be set-off against the fees payable by the transferee company on its authorised capital enhanced by the merger or amalgamation.
12. 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 clause (b) of sub-section (1) of section 232.

13. The Central Government may provide for the merger or amalgamation of companies in such manner as may be prescribed.
14. A company covered under this section may use the provisions of section 232 for the approval of any scheme for merger or amalgamation.

4. Discuss the provisions of Foreign Exchange Management (Cross Border Merger) Regulations 2018 regarding regulatory approvals.

Answer:

Section 234 of the Companies Act, 2013 deals with the merger or amalgamation of company with foreign company. Sub-section (1) provides that the provisions of this Chapter unless otherwise provided under any other law for the time being in force, shall apply mutatis mutandis to schemes of mergers and amalgamations between companies registered under Companies Act, 2013 and companies incorporated in the jurisdictions of such countries as may be notified from time to time by the Central Government.

However, the Central Government may make rules, in consultation with the Reserve Bank of India, in connection with mergers and amalgamations provided under this section. Subject to the provisions of any other law for the time being in force, a foreign company, may with the prior approval of the Reserve Bank of India, merge into a company registered under Companies Act, 2013 or vice versa and the terms and conditions of the scheme of merger may provide, among other things, for the payment of consideration to the shareholders of the merging company in cash, or in Depository Receipts, or partly in cash and partly in Depository Receipts, as the case may be, as per the scheme to be drawn up for the purpose

For the purposes of sub-section (2), the expression **"foreign company"** means any company or body corporate incorporated outside India whether having a place of business in India or not. Further Rule 25A was added by the Companies (Compromise, Arrangements & Amalgamation) Amendment Rules 2017. The said rule deals with the merger or amalgamation of a foreign company with a Company and vice versa and provides as under:

1. A foreign company incorporated outside India may merge with an Indian company after obtaining prior approval of Reserve Bank of India and after complying with the provisions of sections 230 to 232 of the Companies Act, 2013 and these rules.
2.

a) A company may merge with a foreign company incorporated in any of the jurisdictions specified in Annexure B after obtaining prior approval of the Reserve Bank of India and after complying with provisions of sections 230 to 232 of the Companies Act, 2013 and these rules.
b) The transferee company shall ensure that valuation is conducted by valuers who are members of a recognised professional body in the jurisdiction of the transferee company and further that such valuation is in accordance with internationally accepted principles on accounting and valuation. A declaration to this effect shall be attached with the application made to Reserve Bank of India for obtaining its approval under clause (a) of this sub-rule.

3. The concerned company shall file an application before the Tribunal as per provisions of section 230 to section 232 of the Act and these rules after obtaining approvals specified in sub-rule (1) and subrule (2), as the case may be.
4. In case of a compromise or an arrangement or merger or demerger between an Indian company and a company or body corporate which has been incorporated in a country which shares land border with India, a declaration in Form No. CAA-16 shall be required at the stage of submission of application under section 230 of the Act.

LESSON 10 - FAST TRACK MERGERS

1. Briefly outline list of conditions for fast track mergers as per section 233 of Companies Act, 2013.

Answer

Following is the list of conditions for fast track mergers as per section 233 of Companies Act, 2013:

- A notice of the proposed scheme soliciting objections or suggestions from the Registrar and the official liquidators to be issued by the transferor or the transferee companies within thirty (30) days.
- If any objections or suggestions are received, then the same are considered in their respective general meetings and approved/disapproved by their respective members.
- A declaration of solvency is required to be filed by both the companies involved in the merger.
- The scheme has to be approved by majority of creditors representing nine-tenths in value of the creditors or class of creditors of the respective companies.
- The transferee company is required to file a copy of the approval in the prescribed manner, with the Central Government, Registrar and the Official Liquidator where the registered office of the company is situated.
- On receiving the said scheme, if the Registrar or the Official Liquidator does not have any objections or suggestions to the scheme, the Central Government shall register the said scheme and issue a confirmation thereof to the companies.
- If the Registrar or Official Liquidator has any objections or suggestions, the same may be communicated to the Central government within a period of thirty days. In the absence of any such communication, it would be presumed that no objections were raised.
- If the Central Government after receiving the objections or suggestions or for any other reason forms the opinion that the said scheme is not in public interest or in the interest of the creditors, it can file an application before the Tribunal within a period of sixty days.
- After filing of such application, the Tribunal has to render its judgment. If it is of the opinion (with reasons recorded in writing) that the scheme should be considered as per the procedure laid down in section 232, it may give directions accordingly.

2. What are the ingredients / contents one should include in a scheme of merger?

Answer:

From a practical standpoint, it is also imperative to know what are the ingredients / contents one should include in a scheme of merger. These ingredients are:

- Preamble
- Definitions of the terms used in the scheme
- A detailing of the pre-merger and the post-merger capital
- The way the assets and liabilities shall be transferred
- Appointed and effective date of the scheme
- Tax treatment of the scheme
- Benefits to be given to the staff
- Consolidation of the authorised share capital
- Dissolution without resorting to winding-up
- Notice of approval of the scheme
- Any amendments or modifications to the scheme

3. What are the practical difficulties involved in Fast track merger?

Answer:

Despite, fast track mergers being an innovative and convenient concept it poses certain practical difficulties. These **practical difficulties** are:

- Merging the authorised capital of all companies in the transferee company may not be practically viable.
- Form INC 28 which finally registers the scheme does not provide for the following:
  - ✓ A separate drop-down menu for Section 233
  - ✓ Change in the status of the transferor company

- There is doubt regarding whether the Regional Director can suggest changes to the scheme. It appears that if the ROC, Official Liquidator does not have objections to the scheme, the Regional Director has to confirm without any suggestions of his own.

LESSON 11 - CROSS BORDER MERGERS

1. What are the Benefits of Cross Border Mergers & Acquisitions?

Answer:

Following are the benefits of Cross Border Mergers & Acquisitions-

- Expansion of markets
- Geographic and industrial diversification
- Technology transfer
- Avoiding entry barriers
- Industry consolidation
- Tax planning and benefits
- Foreign exchange earnings
- Accelerating growth
- Utilisation of material and labour at lower costs
- Increased customers base
- Competitive advantage

2. What are the Challenges faced with Cross Border Mergers & Acquisitions?

Answer:

Following are the challenges involved in Cross border mergers and Acquisitions:

- Legal issues in different countries
- Accounting challenges
- Taxation aspects
- Technological differences
- Political landscape
- Strategic issues
- Overpayment in the deal
- Failure to integrate
- HR challenges.

3. Which laws govern Cross Border Mergers in India?

Answers:

The following laws, govern cross border mergers in India:

- Companies Act, 2013
- SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
- Foreign Exchange Management (Cross Border Merger) Regulations, 2018
- Competition Act, 2002
- Insolvency and Bankruptcy Code, 2016
- Income Tax Act, 1961
- The Department for Promotion of Industry & Internal Trade (DPIIT) Transfer of Property Act, 1882
- Indian Stamp Act, 1899
- Foreign Exchange Management Act, 1999 (FEMA)
- IFRS 3 Business Combinations

4. Explain the competition and Accounting aspects of Cross Border Mergers.

Answer:

Competition Law aspects of Cross Border Mergers are as follows:

- The Competition Commission of India (CCI) regulates the mergers in order to prevent the rise of monopolistic mergers.
- While mergers help in creating economies of scale and lead to increase in profits, they may also contribute to the creation of monopolistic structure. Hence mergers are made subject to the competition laws of the country.

- The CCI has to assess and inquire into any merger which may have an adverse impact on the healthy competition in the market.
- While making such assessment as to the adverse effects the commission takes account of a number of factors such as actual and potential level of competition through imports in the market, extent of barriers to entry into the market, level of combination in the market etc. Even a likelihood of causing of adverse impact is adequate for the competition commission to rule that the merger is creating an adverse impact.
- If the merged enterprise created post a cross-border merger possesses assets worth more than US $ 1 bn, or turnover more than US $ 3 bn; or the group to which the merged enterprise belongs possesses assets worth more than US $ 4 billion, or turnover more than US $ 12 billion then the competition commission is required to examine such combination. Conflict of Jurisdictions is another such problem wherein whether or not the merger would affect the competition in the market positively or negatively would depend on the market situation which is unique to every country.

Accounting aspects of Cross Border Mergers are as follows:

- In merger accounting, all the assets and liabilities of the transferor are consolidated at their existing book values. Under acquisition accounting, the consideration is allocated among the assets and liabilities acquired (on a fair value basis).
- Therefore, acquisition accounting may give rise to goodwill, which is normally amortized over 5 years. Further, goodwill arising on merger will not be amortized; instead it will be tested for impairment.
- The accounting treatment of merger within a group is separately dealt with under the new Ind AS, which requires all assets and liabilities of the transferor to be recognized at their existing book values only.
- The new IndAS are to be implemented in a phased manner. All listed companies and companies with net worth of INR 500 crore or more are required to adopt the Ind AS from 1 April, 2016. Companies with net worth of INR 250 crore or more are required to adopt Ind AS from 1 April, 2017. Other companies will continue to apply existing accounting standards.

5. What are the practicalities which need to be kept in mind while entering cross border mergers?

Answer:

Some practicalities which need to be kept in mind while entering cross border mergers are:

a) Conduct due diligence on the other firm.
b) Conduct a risk-benefit analysis before entering into the merger.
c) Valuation of both the firms is essential so as to predict the competition law treatment of the merger.
d) Make sure that when you enter into an outbound merger it is with a company from one of the prescribed jurisdictions.
e) Have an in-depth analysis of the host country's regulatory and political landscape ready before you take the decision of the merger.