CHAPTER - 7 TAXATION & STAMP DUTY ASPECTS OF C.R.

Synopsis.

Amalgamation and related provisions

- Section 2(1B) - Amalgⁿ & taxation.
- Section 72A - Carry Forward & set off (Gen.).
- Section - 72AA - Carry Forward & set off (certain co.)
- Section - 47 - Capital Gain exemptions.
- Section - 35 D
- Section - 35
- Section - 35 DD
- Section - ABB
- Section - ABA
- Section - 35 E

- Sec. 2(42C) - Slump sale & taxation.
- Sec. 2 (19 AA) - Demerger and taxation.
- Sec. 2(22) - Deemed div. & taxation.

Stamp Duty.

- Const. background on Levy of SD.
- SD payable on tribunal's ordr
- Inc. on Levy of SD.
- 3 things from Li taka vs St. of Maharashtra.
- SD on other Documents
- Exempⁿ from payment of SD.

Purpose.

- The primary purpose of taxation provisions in corporate Restructuring is to ensure Tax Neutrality

1) Facilitate Growth - To allow companies to merge or split for business synergy without the immediate burden of Tax.

2) Revival of businesses - To encourage healthy companies to take over loss making units by allowing them to set off (u/s 72A)

3) Prevent tax Evasion - To ensure that restructuring is done for genuine business reasons and not just to avoid tax (hence the 3-year, 5-years conditions).

4) Continuity (in case of demerger) - To ensure that tax benefits like depⁿ and losses follow the undertaking or the business, even if the legal owner changes.

⇒ Definition of Amalgamation - [section 2(1B)]

⇓

- Amalgamation is the merger of one or more companies (Amalgamating) in to another company (Amalgamated) or to form a new company.

conditions -

- All assets of amalgamating co. must transfer to amalgamated co.
- All Liabilities must be transfer.
- sh·hol· holding atleast 3/4th in value of sh. must become sh·hol of new company.

- Acquisition of Asset ≠ Amalgn

⇒ carry forward and set off loss and unabsorbed depn - [section 72A]

- This section allows the amalgamated co· to use the brought forward losses and unabsorbed depn of the amalgamating company.

conditions· For

Amalgamating co·
[The OLD co]

⇓

→ Must be engaged in business* For at least 3 years.

→ Must have held at least 3/4th of the book value of fixed assets continuously for 2 yrs prior to amalgamation.

Amalgamated co·
[The New co]

⇓

→ Must hold at least 3/4th of the F.A. acquired for at least 5 yrs from → amalgamation.

→ Must continue the business of amalgamating co → 5 years

→ Must fulfill other pres· condin

⇓

- If these conditions are violated within 5 years, the set off already allowed will be treated as taxable income in the year of violation.

→ Applicability of section 72AA

- The Benefit of sec. 72A is available if the amalgamation falls under one of the following 4 categories.

⇓

1) Industrial undertakings, ships or Hotels ⟶ with another company

2) A Banking co. ref. in the banking Regulation Act, 1949 with a specified bank.

3) one or more public sector co. merging with each other or another PSC.

4) ear erstwhile public sector company merging with another company.

- The amalgamation must be carried out w.5 years from the end of P.yr. in which the restriction on amalgⁿ ends.

↓

- In this specific case, the allowance of unabsorbed depⁿ shall not be more than acc. loss and unab. depⁿ of the PSU as of the date it ceased to be a public sector company.

⇒ Demerger.

↓

In the case of demerger, the accumulated loss and unabsorbed depⁿ shall be handled as follows -

If loss / unab. depⁿ is.

Directly Relatable

↓

If it is directly relatable to the undertaking trf. it is allowed to be set off in the hands of resulting co.

Not Directly Relatable.

↓

If it is not directly relatable it shall be apportioned betⁿ the demerged co. and the resulting co. in the ratio of assets retained and transferred.

⇒ Reorganisation of Business.

↓

- In case of business re-organisation where a firm or proprietory concern is succeeded by a company, the accumulated losses and unabsorbed depⁿ of the predecessor are deemed to be the losses of the successor co.

↓

- However, if conditions laid down in section 47 are violated, the tax benefit pre-claimed will be treated as the income of the successor company in the year of non compliance.

⇒ Carry Forward and set off of accumulated losses and unabsorbed depⁿ in certain cases - [Section 72AA]

I. one or more Banking co. ⟶ Banking instiᵗⁿ (as per CG)
one or more Banking co. ⟶ Banking institution
[sub. to a strategic disinvestme. within 5 years]

II. one or more correspoing New Bank ⟶ another corresponding New Bank (as per CG)

III one or more Govt. company ⟶ another Govt. co. (as per CG)

⇓

Amalgamating co. ↓ Losses / unab. dep ⟶ Amalgamated co ↓ Allowed

---

⇒ Capital Gain Tax.

↓

Normal Rule - Capital Asset + Transfer = Capital Gain ✓

↓

Exceptions - As per sec. 47 of IT Act treat certain transaction from amalgamation as not transfer. and hence capital gain will not be applicable.

↓

1.	In the scheme of Amalgamation. ⟶	If the amalgamated co. is an Indian co.
2.	In the scheme of demerger. ⟶	If the resulting co. is an Indian co.

3. Amalgamating company ↓ Foreign co. —Transfer.⟶ Amalgamated company ↓ Foreign co.

Transfer ↓ Sh. held in an Indian co. ↓ No CG Tax. ⟶ If both conditions are satisfied. *

4. Amalgamating co.
↓
Foreign co.

Transfer → Amalgamated co.
↓ Foreign co.

Foreign co. sh.
↓
Value derived from Indian co.
↓
No capital Gain. — If both conditions are satisfied.

Conditions -

1. at least 25% of sh. hol. of amalgamating co. remain sh. hol. of amalgamated company.
2. Such transfer does not attract capital Gains in the country in which amalgamating co. is incorporated.

5. In a scheme of demerger.

Demerged co.
↓
Foreign co.

Capital Asset → Resulting co
↓ Foreign co.

Indian co. sh.
↓
Exempt - (2 conditions ↑)

6. In a scheme of demerger

Demerged co
↓
Foreign co

Capital Asset → Resulting co.
↓ Foreign co

Foreign co → sh.
↓
derived its value from indian co. shares
↓
Exempt - (2 conditions)

Conditions -

1. sh. hol. holding not less than 3/4th in the value of shares of the demerged Foreign co. continue to remain sh. hol. of resulting ~~de-mer~~ Foreign co.
2. Such transfer does not attract tax on capital gain in the country in which demerged Foreign co. is incorporated. sec. 230 - ~~240~~ 232 shall not apply in case of demergers.

7. Merger / demerger of co-op. banks. ⟶ No CG Tax on transfer of assets or shares.

8. Co-op Bank → Banking co. ⟶ Asset transfer during conversion is tax free.

→ Amalgamating co. ⟶ Amalgamated co.

- Preliminary exp.
- Exp. on scientific research
- Licence
- Prospecting → minerals.
- exp. on spectrum

↓

Not yet written off

Amalgamated co. ↓

- Exp. on Amalg^n (5 years).

⇒ Tax Aspects on slump sale.

- As per section 2(42C) of the Income Tax Act, 1961. it is the transfer of one or more undertakings for a lump sum consideration without values being assigned to the individual assets and liabilities in such transfer.

- what is undertaking ?
  - It refers to a business unit where the investment exceeds 20% of the company's net worth or it generates 20% of the company's total income.

→ sale of undertaking can be in following ways -

Sale of Running concern.

[slump sale]

↓

Full consideration	xxx
(-) Exp. (transfer)	(xx)
Net consideration →	xxx
(-) cost of Acq^n	(xx)
capital G/L. →	xxx.

↓

(36 m) ← LT / ST → (<36 m)

No index^n benefit.

Sale of concern which is being wound up

[Not a slump sale - it is a piecemeal distrib^n]

↓

Taxed as per various provision of Income Tax Act. 1961.

⇒ Tax Aspects of Demerger.

- Demerger in relation to companies means transfer of one or more undertaking by demerged company to any resulting company. in such a manner that -

→ All Property and Liabilities of the undertaking becomes the property and liabilities of resulting company.

→ The Property and Liabilities of the undertaking must be transferred at the values appearing in the books of demerged company.

↓

The requirement to record at a book value does not apply if resulting company records the property and Liabilities of undertaking at a different value to comply with the Indian accounting standard

→ The resulting company issues shares in consid^n of demerger to the shareholders of the demerged co. on a proportionate basis.

→ Shareholders holding at least 3/4th in the value of shares in the demerged company must become shareholders of the resulting co.

→ The transfer of undertaking must be on going concern basis.

⇒ Tax Aspects of Demerged company -

Tax concession to demerged co.

↓

- No cap. Gain if result. co is an Indian co.

- $\boxed{\text{D. co}}$ → Foreign co. ; I. co's sh. → $\boxed{\text{Res. co.}}$ → F. co.

I. co's sh. ↓ No CG (2 cond^n)

- $\boxed{\text{D. co}}$ → F. co. ; F. co's sh. which derive it's value F. I. co. → $\boxed{\text{Res. co}}$ → F. co.

↓ No. CG (2 cond^n)

Tax concession to sh. hol. of D. co.

↓

- For cal. of CG on sale of sh. of D. co or R. co

A] COA of sh. of the R. co

↓

COA will be divided in prop. of net book value trf. in the R.c in prop. to net worth (Net asset)

B] COA of sh. of the D.c

↓

Remaining COA

C] Period of holding of Dc. = Deemed Period of holding of Dc.

Tax concession to resulting company

↓

- The resulting co. can take the deduction of the following if trf. by the D.c.

1. preliminary exp.
2. Licence exp.
3. Spectrum exp.
4. exp. on prospecting
5. Bad debts
6. exp. on amalgamation
7. B. Losses / unab. dep^n
   - Directly relatable
   - or
   - in prop to N. A
8. ded^n of industrial un. in infra.
9. — 1 — other thn infra

⇒ Dividend and Deemed Dividend. [2(22) of IT Act 1961]

company → sh.holders

1. → Assets
2. → Deb. deb. stock, dep. cert. bonus sh. to pref. sh.
3. → distribution on Liquidation.
4. → distribution on red. of cap.
5. → Adv. / Loan to
   - sh. h. holding 10% VR in co.
   - entity in which such sh. h. is partner / member.
6. → any payment by the co. on purchase of its own sh. under sec - 68.

Does not include :-

→ For 3 and 4 (the amt of shares) - amt. paid to sh. h. who does not have right to surplus.

→ A/L given in the ordinary course of business.

→ shares of resulting co. rec. persu. to a demerger.

→ If the advance / Loan under (cl. 5) has been set off with the div payable, such amt will not be consider as dividend.

⇒ Taxability of Dividend -

→ earlier

Dividend distribution tax was paid by the co. and dividend was exempt in the hands of company's sh. holders.

→ From 2021

Co's are not required to pay DDT. dividend is taxable in the hands of sh. holders.

⇒ Consti. background of levy of stamp duty.

Article 265 → levy or collection of tax. → only by autho. of law. → Parliament / State Le. A.

↓

Article 246. → seventh sch.

- List-1 Union List
  - entry NO-91
  - → Rate of SD
    - → B/E
    - → cheque
    - → PN
    - → policies of insu.
    - → trf. of sh./deb./proxies
    - → Bill of L.
- List-2 State List
  - Entry no-63
  - → Rate of SD
    - • on document not covered under List-1
    - Eg - Tribunal's order sanctioning a scheme of M/A.
- List-3 concurr. List
  - entry no-44
  - → Rate of SD
    - • power to levy SD

↓

Hence, it can not be said that state has no Jurisdn to levy SD on order of H.C sanctioning C/A u/s 394 of Co. Act, 1956.
[Now u/s 230 from tribunal, under Co. Act 2013] → [Li Taka v. State of Maharashtra]

→ SD payable on tribunal's order sanctioning M/A u/s 230.

since the amalgamation involves transfer of assets, Liabilities, properties etc. of the transferor co. to the transferee co. ⟹

Necessary Reg. will be done in the land record of the state.

⇓

So SG can levy SD on the instrument of transfer as per bombay stamp Act 1958.

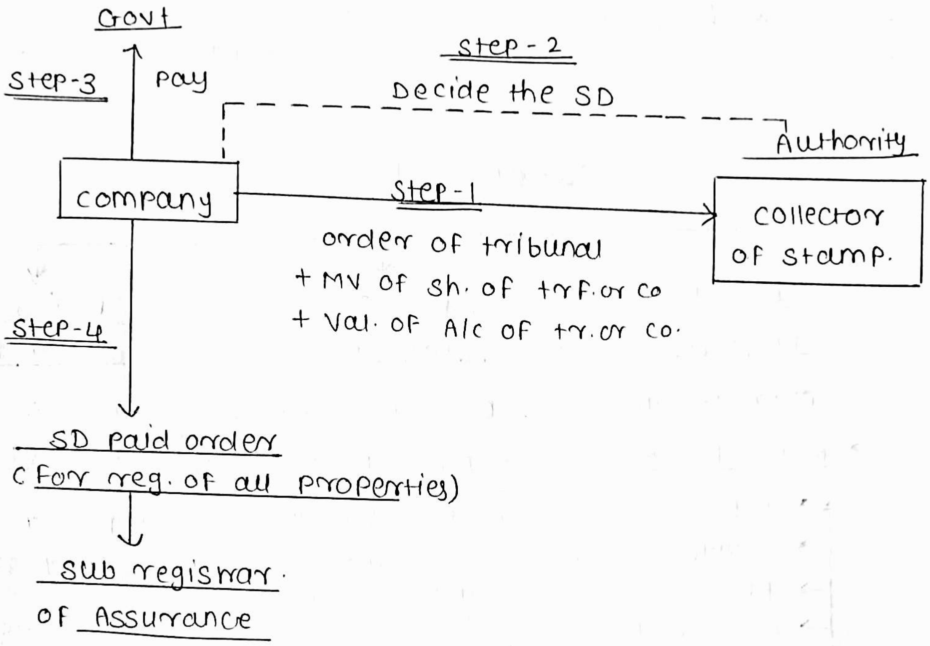
⇓

The order of H.C. (Tribunal order) is an instrument effecting the transfer.

⇓

SG can levy SD on the order of HC (TO) app. the amalgamation

→ Procedure for det. of stamp duty.



→ Incidence of levy.

- As per Bombay stamp Act 1958, SD is payable on any instrument
- Instrument include any document by which rights or Liabilities.

  created, transferred, Limited, extended, extinguished, recorded but does not include B/E, PN, B/L, property, LC, sh. trf, policy of insurance, deb.

- Essentials for levy of SD.
  - → instrument ✓
  - → inst. specified in sch. I - ✓
  - → inst. executed - ✓
  - → Not executed in the state
    or
    it executed in any state, if it rel. to property in the state

→ Stamp duty on other document.

- Apart from the merger order, several other documents are often execcued during a merger, such as.
  - Agreements
  - Indemnity bonds
  - Undertakings
- each of these documents is sub. to stamp duty based on its specific nature and legal requirement.

⇒ Exemption from stamp Duty.

- CG by notification has exempted the following amalgamation from SD

Transferor co $\xrightarrow{\text{at least } 90\% \text{ SC}}$ Transferee co.

Parent co $\xrightarrow{\text{at least } 90\% \text{ SC}}$ Subsidiary co.

Common parent co. $\xrightarrow{\text{at least } 90\%}$ S1 ; Common parent co. $\xrightarrow{\text{at least } 90\%}$ S2

- SG may follow the notification or choose to levy SD as per the state policy

---

Case law - Li Taka Pharmaceuticals v State of Maharashtra

Conclusions - An amalgamation under an order of court u/s 394 of the co. Act 1956, is an instrument under the Bombay stamp Act. 1958.

- States are well within their jurisdiction when the levy stamp duty on instrument of amalgamation.

- SD is not levied on the gross assets of the company. instead, it is calculated based on the value of undertaking (on going concern basis). The value ø for this purpose is usually the value of the shares alloted plus any other consideration paid. (Assets - Liabilities)

⇒ Definition - conveyance. - [sec. 2(g)] of Bombay stamp Act 1958

→ conveyance include

- a conveyance on sale
- every instrument
- every decree / final order of court
- every order made by HC u/s 394 of co. Act 1956 in respect of Amalgⁿ of companies.