Certificate Course by AICAS

CORPORATE RESTRUCTURING- TAXATION ISSUES

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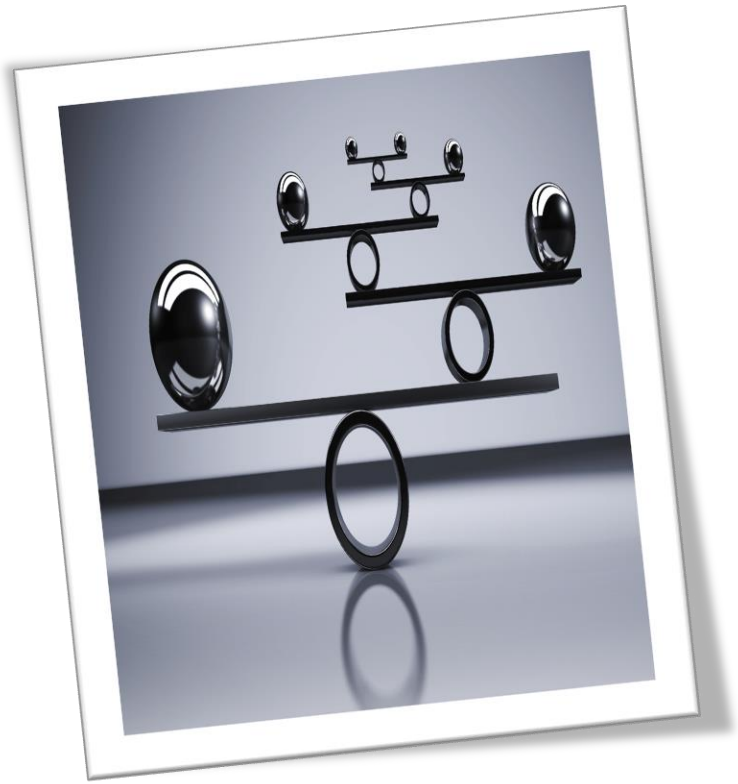
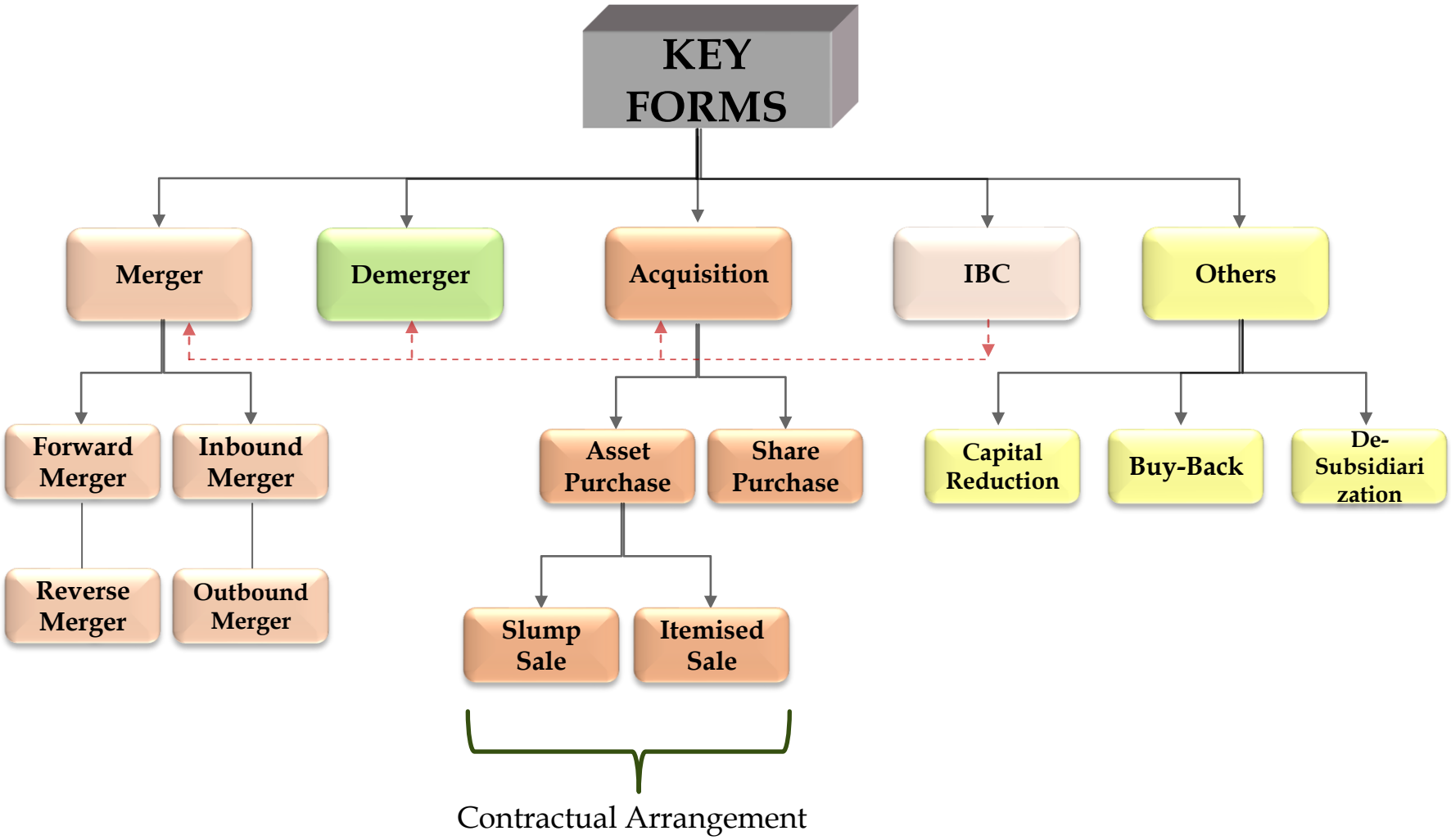
WHAT IS CORPORATE RESTRUCTURING ?



- Restructure means to organize differently.
- Restructuring is a corporate management term for the act of reorganizing the legal, ownership, operational, or other structures of a company for the purpose of making it more profitable, or better organized for its present needs.
- Corporate Restructuring is generally undertaken for –
  - ✓ Consolidation/separation of businesses
  - ✓ Investor entry
  - ✓ Simplification of legal structure
  - ✓ Unlocking of value
  - ✓ Separation/ family arrangement
  - ✓ Listing of shares
  - ✓ Fiscal benefits

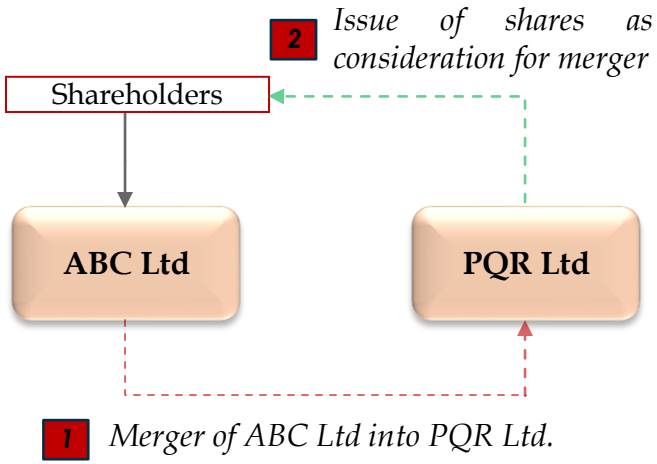
KEY FORMS OF CORPORATE RESTRUCTURING



CONCEPT OF AMALGAMATION

ABC Ltd: *Amalgamating Company*

PQR Ltd: *Amalgamated Company*



As per section 2(1B) of IT Act, amalgamation covers only amalgamation in relation to '**Companies**' and not any other form of entity *viz.*, LLP, partnership firm, sole proprietorship etc

- The term 'Merger' and 'Amalgamation' are synonymous. The term 'Amalgamation' is not defined under the Companies Act, 2013 ("**2013 Act**").
- The expression 'Amalgamation' is defined u/s-2(1B) of the Income Tax Act, 1961 ("**IT Act**") as follows:

  *"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……. ..subject to the following **conditions**:*

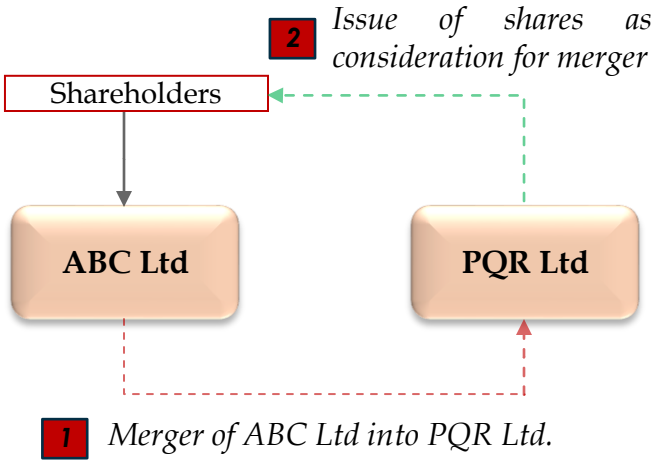
  - **All properties** of the amalgamating company to be transferred to the amalgamated company;
  - **All liabilities** of the amalgamating company to be **transferred to the amalgamated company**;
  - Shareholders holding **at least 3/4th in value of shares** of the amalgamating company

    (other than shares already held therein by, or by a nominee of the amalgamated company or its subsidiary) agree to become shareholders of the amalgamated company.

CONCEPT OF AMALGAMATION

ABC Ltd: *Amalgamating Company*

PQR Ltd: *Amalgamated Company*



- The provisions relating to merger/ amalgamation are laid down in sections 230 to 240 of 2013 Act read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 ("**M&A Rules**").
- Section 234 of 2013 Act read with rule 25A of M&A Rules permits 'Inbound Merger' and 'Outbound Merger' subject to approval of Reserve Bank of India in accordance with Foreign Exchange Management (Cross Border Merger) Regulations, 2018.

- Pursuant to the scheme of amalgamation becoming effective:
  - ✓ All the assets and liabilities of ABC Ltd (Transferor Company) shall stand transferred to PQR Ltd (Transferee Company);
  - ✓ Shareholders of ABC Ltd will become the shareholders of PQR Ltd; and
  - ✓ ABC Ltd shall stand dissolved with effect from the effective date.

CONCEPT OF APPOINTED DATE AND EFFECTIVE DATE

Appointed Date and Effective Date :

Appointed Date [Marshall Sons and Co. (India) Ltd. vs. ITO : 89 Taxman 619(SC)]

- Appointed Date is the date on which assets and liabilities of the transferor company vest in the transferee company.
- Accounts on the appointed date form the basis for valuation of shares and determination of share exchange ratio.
- Appointed date is relevant for the purpose of assessment of income of the transferor and transferee company.
- All income or loss of the amalgamating company relating to the period after the appointed date becomes the income or loss of the amalgamated company with attendant consequences.
- Upon amalgamation becoming effective, amalgamating company ceases to exist and assessment made in the name of amalgamating company is nullity [**PCIT vs. Maruti Suzuki Ltd. 265 Taxman 515 (SC)**].

Effective Date:

- Effective date is the date on which scheme is complete & effective, i.e., certified copy of the NCLT order is filed with Registrar of Company or the last of the approvals obtained.
- From the effective date, the transferor company stands dissolved.

KEY TAX IMPLICATIONS IN CASE OF AMALGAMATION

Section 47(vi)	Transfer of capital assets from amalgamating company to amalgamated company, in a scheme of amalgamation, shall not be considered as 'Transfer', provided that the amalgamated company is an Indian company.
Section 47(vii)	Transfer of shares by the shareholders of amalgamating company, under scheme of amalgamation, is not 'Transfer', provided the amalgamated company is an Indian company and the consideration is discharged by allotment of shares of amalgamated company.
Sixth proviso to Section 32(1)	Depreciation on (depreciable) assets to the amalgamating company and amalgamated company in proportion to the number of days for which the assets were used by them.
Exp. 7 to Section 43(1)/ Exp. 2 to Section 43(6)	Depreciation on assets transferred by the amalgamating company to the amalgamated company will be calculated on the basis of tax written down value in the hands of amalgamating company.
Section 35DD	Expenses incurred exclusively for the purpose of amalgamation shall be allowed as deduction in the hands of amalgamated company in five equal installments beginning from the previous year in which the amalgamation takes place.

KEY TAX IMPLICATIONS IN CASE OF AMALGAMATION

Explanation 1(i)(b) to Section 2(42A) r/w sec 49(1)(e)	Period of holding of assets in the hands of amalgamated company shall be reckoned from the date of acquisition of said asset by the amalgamating company.
Section 49(1)(iii)(e) r/w section 55	Cost of acquisition of capital asset in the hands of amalgamated company shall be the cost of acquisition at which the capital asset was acquired by the amalgamating company.
Explanation 1(i)(c) to Section 2(42A)	Period of holding of shares which becomes property of shareholder of amalgamating company in consideration of transfer referred u/s-section 47(vii) of IT Act, the period for which such shares were held in the amalgamating company shall be taken into account.
Section 49(2)	Where the capital asset being share(s) in an amalgamated company becomes the property of the shareholder in consideration of transfer referred to in section 47(vii) of the IT Act, the cost of acquisition of the shares shall be deemed to be the cost of acquisition of such shares in the amalgamating company.

KEY TAX IMPLICATIONS IN CASE OF AMALGAMATION

Section 10A/10B/10AA/ 80-IB/80-IC/80-IAB	Tax holiday as given under sections 10A/ 10B/ 10AA/ 80-IB/ 80-IC/ 80-IAB of the IT Act shall not be available to the amalgamating company, in the year of transfer, and be available to the amalgamated company.
Section 41(1)	Any amount received qua cessation of liability in the hands of amalgamating company shall be taxed in the hands of the amalgamated company.

KEY TAX IMPLICATIONS IN CASE OF AMALGAMATION

Section 72A: Carry forward and set off of accumulated losses and unabsorbed depreciation

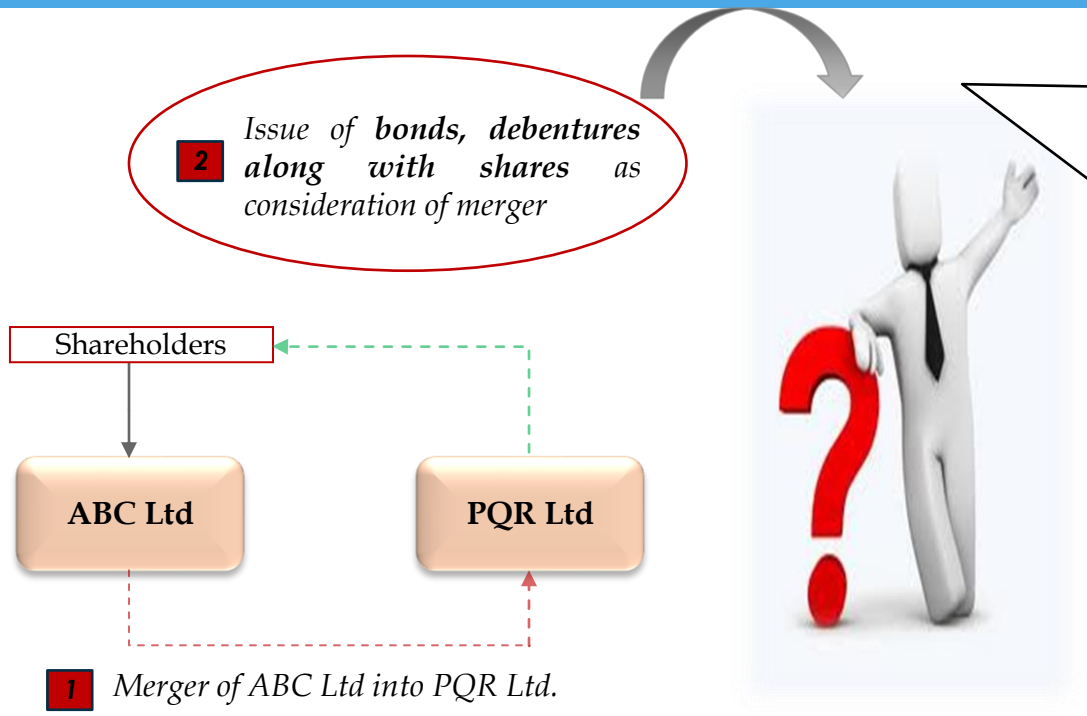
Eligibility	Accumulated business loss and depreciation of the amalgamating company owning an **industrial undertaking**, hotel or of a banking company shall be deemed to be the accumulated loss and depreciation of the amalgamated company.
Conditions for Amalgamating Company	▪ company engaged in business, in which accumulated loss occurred or depreciation remain unabsorbed, for 3 or more years; and ▪ held continuously, as on date of amalgamation, at least 75% of book value of fixed assets held by it 2 years prior to the date of amalgamation.
Conditions for Amalgamated Company	▪ holds continuously for a minimum period of 5 years from date of amalgamation at least 75% of book value of fixed assets of amalgamating company acquired in scheme; ▪ continues the business of amalgamating company for a minimum period of 5 years from date of amalgamation; and ▪ fulfills such other conditions as specified under rule 9C of IT Rules.

KEY TAX IMPLICATIONS IN CASE OF AMALGAMATION

Section 72A: Carry forward and set off of accumulated losses and unabsorbed depreciation

Meaning of Industrial Undertaking	Industrial Undertaking, means any undertaking which is engaged in- ▪ manufacture or processing of goods; ▪ manufacture of computer software; ▪ the business of generation or distribution of electricity or any other form of power; or ▪ the business of providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services; or ▪ mining; or ▪ the construction of ships, aircrafts or rail systems.

CASE STUDY ON AMALGAMATION



Whether issuance of bonds/ debentures alongwith shares of the amalgamated company as consideration would be in consonance with the provisions of section 47(vii)(b) of the IT Act?

- ✓ Conditions of section 2(1B) of IT Act are met, considering at least 75% in value of the shareholders of the amalgamating company would become shareholders in amalgamated company.

- ✓ Section 47(vii) is violated since the amalgamated company is mandatorily required to issue "shares" as consideration [refer: CIT vs. Gautam Sarabhai Trust : 173 ITR 216 (Guj) wherein the court has held that, in such circumstances, the benefit of section 47(vii) of the IT Act cannot be granted].
- ✓ Tax levy in the hands of shareholders of the amalgamating company under section 45 of IT Act [Refer: Grace Collis : 248 ITR 323 (SC) – amalgamation constitutes "transfer"]

CASE STUDY ON AMALGAMATION

Particulars	Amount (in Rs.)
Amount of Consideration **[A]**	100
Value of Net Assets transferred **[B]**	80
Excess Consideration Paid **[A-B]**	**20**

Allowability of depreciation u/s 32 of the IT Act on intangibles (other than goodwill) in the books of amalgamated company (on the basis of the valuation report) on the excess consideration paid by the amalgamated company over and above the net assets taken over?

- ✓ The Finance Act, 2021 has amended section 2(11) and section 32 of the IT Act to specifically exclude "goodwill of a business or profession" from the definition of "block of assets", thereby denying depreciation on goodwill.
- ✓ No bar from claiming depreciation on other eligible intangible assets acquired for consideration.
- ✓ Where the business is acquired at a premium, i.e., being the difference between the purchase consideration and the net value of the assets, which is attributable to various intangible business and commercial rights (customer relationship, trademark/licences, business information/ processes, etc.) and the same is supported by the valuation report, such difference would qualify to be "business and commercial rights of similar nature" entitled to depreciation under section 32 of the IT Act.

CASE STUDY ON AMALGAMATION

Particulars	Amount (in Rs.)
Amount of Consideration **[A]**	100
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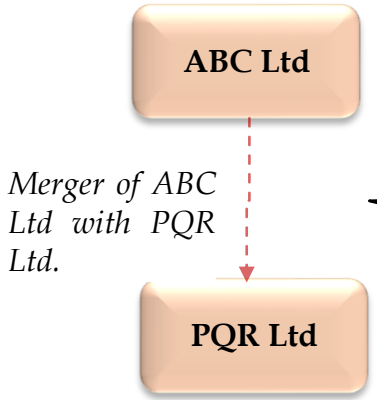
Allowability of depreciation u/s 32 of the IT Act on intangibles (other than goodwill) in the books of amalgamated company (on the basis of the valuation report) on the excess consideration paid by the amalgamated company over and above the net assets taken over?

- ✓ The business rights are not same as "goodwill" of the business so as to disentitle the claim of depreciation thereon.
- ✓ Intangible assets, which are not covered within the meaning of the six assets specified in section 32(1)(ii) of the IT Act, but otherwise form essential tool of business would fall within the meaning of the expression "any other business or commercial right of similar nature" and accordingly, qualify for depreciation under that section. **(CIT vs. Hindustan Coca Cola Beverages Private Limited: 331 ITR 192 (Del HC)** [SLP filed by revenue has been dismissed by the Supreme Court in SLP No. 26151/2011], **Areva T&D India Ltd vs. DCIT**: 345 ITR 421 (Del) [SLP No. 21227/2012 filed by the Revenue against decision was dismissed by the Supreme Court vide order dated 23rd September, 2013).

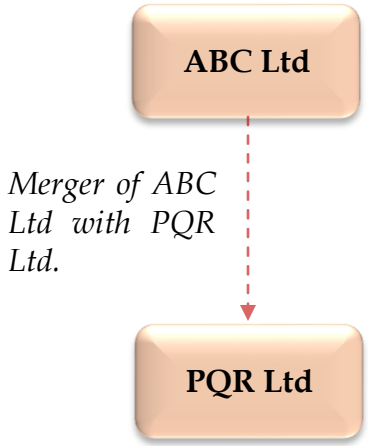
CASE STUDY ON AMALGAMATION



Upon the scheme becoming effective, how would the amalgamated company file the return of income for years whose due date of filing return of income has lapsed?

- ✓ Section 139(5) of the IT Act contemplates filing of revised return when the assessee "discovers" any "omission" or any "wrong statement". The word "discovers" connotes discovery of some omission or wrong statement in the return of which the assessee was not aware of at the time of filing of original return.
- ✓ Furnishing of revised computation of income by the assessee during assessment proceedings on account of amalgamation becoming effective does not, strictly and theoretically speaking, fall within the purview of section 139(5) of the IT Act, as held by Supreme Court in the case of **Dalmia Power Ltd. vs. ACIT : 420 ITR 339**. In that case, the apex Court directed the Revenue department to receive the revised return filed by the assessee after expiry of the due date for filing revised tax return under section 139(5) of the IT Act and compete the assessment after taking into account of scheme of amalgamation sanctioned by NCLT.

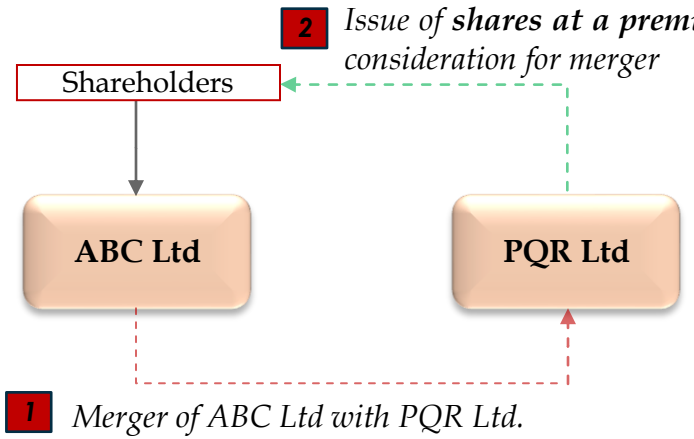
CASE STUDY ON AMALGAMATION



Upon the scheme becoming effective, how would the amalgamated company file the return of income for years whose due date of filing return of income has lapsed?

- ✓ The Gujarat High Court in the case of **Deep Industries Limited in R/SCA No. 11916 of 2021 dated 29.09.2021** allowed the assessee to file physically the revised return in pursuance of the NCLT order.
- ✓ The ratio laid down in the aforesaid decisions has been subsequently enacted in the statute via newly inserted provisions of section 170A of the IT Act, introduced vide Finance Act, 2022 w.e.f. 01.04.2022, which provides that in case of business reorganization, the successor company can modify its return of income within a period of six months from the end of the month in which order by High Court or Tribunal or Adjudicating Authority, as the case may be, is passed.

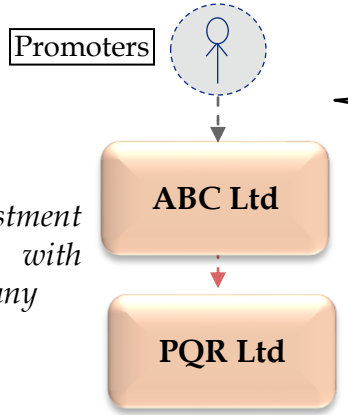
CASE STUDY ON AMALGAMATION



Whether the provisions of section 56(2)(viib) of the IT Act would get attracted in the hands of amalgamated company on issuance of shares at a premium as consideration for amalgamation?

- ✓ Clause (viib) of sub-section (2) of section 56 of the IT Act provides that if a company in which public is not substantially interested, issue shares at a premium, to any person, the excess of the aggregate consideration received for such shares over the fair market value of such shares would be taxable as "income from other sources".
- ✓ In lieu of vesting of assets and liabilities of business of amalgamating company, the amalgamated company would allot shares to shareholders of amalgamating company; there is, in such circumstances, no receipt of consideration by amalgamated company for issuance of shares, attracting the mischief of section 56(2)(viib) of IT Act **[DCIT vs. M/s Ozone India Ltd in ITA No. 2081/Ahd/2018 (Ahm)]**.
- ✓ Section 56(2)(viib) of the IT Act was introduced as an anti-abuse provision aimed at arresting circulation of unaccounted money in the economy, and therefore, the same should not apply in case of bona-fide scheme of arrangement.

CASE STUDY ON AMALGAMATION

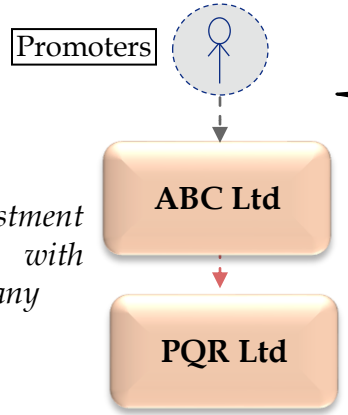


Merger of investment holding company with operating listed company

Whether the scheme of amalgamation can be regarded as resulting in tax avoidance and therefore, is liable to be rejected?

- ✓ The Delhi Bench of the NCLT in the scheme of amalgamation between **PIPL Business Advisors and Investments Private Limited and GSPL Advisory Services and Investment Private Limited and NIIT Technologies Limited** in Company Petition CAA – 385/ND/2017 connected with CA (CAA) – 83(ND) of 2017, considered scheme of amalgamation of the promoter investment company holding shares of the listed operating company with the latter, in order to eliminate cross holding and to enable individual promoter shareholder to directly hold shares of the listed company.
- ✓ Overruling the objections raised by the Revenue on the ground that series of transactions were undertaken within a short period of time, i.e., gift of shares, family trust becoming shareholder of amalgamating company followed by the merger thereof, with the sole intention of providing benefit to the promoter family trusts only and evading tax, the NCLT sanctioned the scheme of amalgamation.

CASE STUDY ON AMALGAMATION

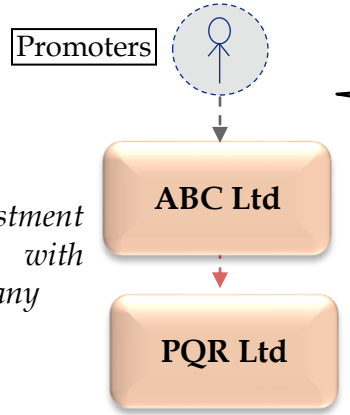


Merger of investment holding company with operating listed company

Whether the scheme of amalgamation can be regarded as resulting in tax avoidance and therefore, is liable to be rejected?

- ✓ In the scheme of amalgamation between **Gabs Investments Private Limited ("Gabs Investments") and Ajanta Pharma Limited ("Ajanta Pharma")** in CSP No. 995 of 2017 and CSP No. 996 of 2017 in CSA No, 791 & 792 of 2017 where Gabs Investment, a private limited investment company, held by Agrawal Family Members (Promoters) was proposed to be merged with Ajanta Pharma, a listed pharmaceutical company; both Gabs Investments and Agrawal Family Members were shareholders and promoters of Ajanta Pharma. Effectively, pursuant to the proposed Scheme, individual Promoters would have received proportionate shares in Ajanta Pharma.
- ✓ The Income Tax Department objected to the scheme on the ground that if the transaction were to be structured as transfer of the shares in Ajanta Pharma from Gabs Investments to the shareholders of Gabs Investments, there would have been a significant incidence of tax; by structuring the transaction as amalgamation instead, the companies and their promoters effectively sought to avoid such a tax liability. Considering the said allegations, the NCLT rejected the scheme of merger holding that the proposed scheme of amalgamation was devised only to benefit the common promoters of both the amalgamating and amalgamated companies and did not serve any public interest.

CASE STUDY ON AMALGAMATION

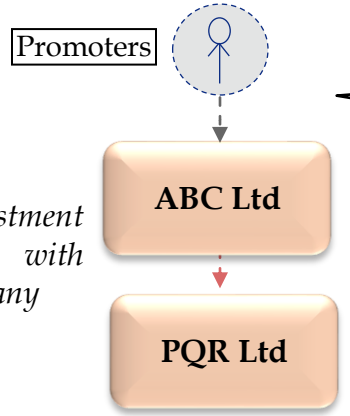


Merger of investment holding company with operating listed company

Whether the scheme of amalgamation can be regarded as resulting in tax avoidance and therefore, is liable to be rejected?

- ✓ The Chandigarh Bench of NCLT approving the amalgamation of a loss-making company, **Panasonic India Private Limited** (Transferor Company) with the profit-making company, **Panasonic Life Solutions India Private Limited** (Transferee Company), overruled the objections raised by the Income tax Department qua the proposed merger on the ground that the proposed merger was designed for tax avoidance since – (a) the amalgamated company sought to claim benefit of carry forward losses and unabsorbed depreciation of the amalgamating company under section 72A of the IT Act and, (b) the shareholders of the amalgamating company stood to benefit from exemption from levy of tax on capital gains. Negating the objections raised by the Income-tax Department and approving the merger, the NCLT observed that in case the assessing officer during the course of assessment/reassessment proceedings believes that GAAR should be invoked, the Income tax Department is at liberty to do so, in accordance with the provisions of the IT Act.

CASE STUDY ON AMALGAMATION



Merger of investment holding company with operating listed company

Whether the scheme of amalgamation can be regarded as resulting in tax avoidance and therefore, is liable to be rejected?

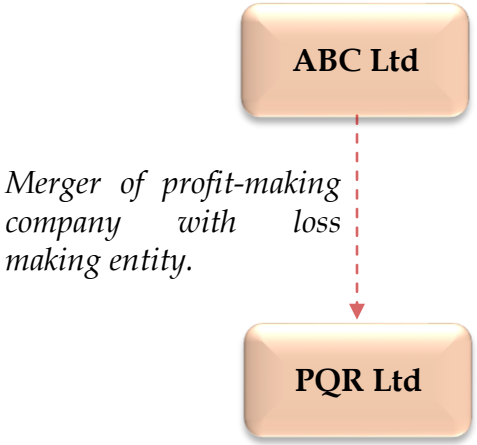
- ✓ In the case of **Panasonic India**, although the NCLT has sanctioned the scheme of amalgamation on the ground that the same was in compliance with the requirements of the relevant sections of 2013 Act and was not detrimental to public interest, the NCLT has left open the applicability of GAAR.

THE SCHEME MUST BE UNDERTAKEN FOR A BUSINESS RATIONALE

TAX BENEFIT, IF ANY, SHOULD BE INCIDENTAL THERETO

CONCEPT OF REVERSE MERGER

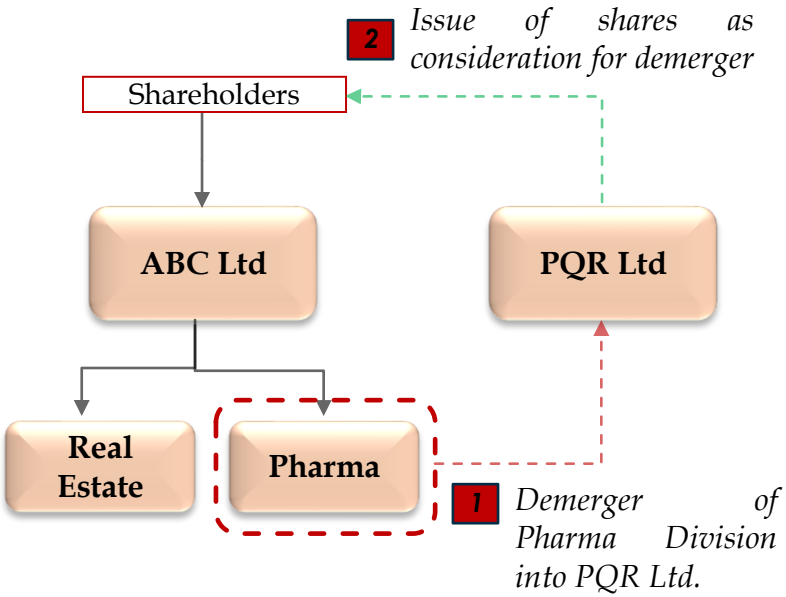
- There is no universal definition of the term '**Reverse Merger**'.
- Circumstances in which a 'Merger' can be regarded as 'Reverse Merger':
  - ✓ A reverse merger occurs when a private company that has strong prospects and is eager to raise financing buys a publicly listed shell company, usually one with no business and limited assets.
  - ✓ The term reverse merger is also used in those cases of mergers where a company having higher net worth is merged into a company having lower net worth.
  - ✓ Amalgamation of a profit-making company with a loss-making company.



CONCEPT OF DEMERGER

ABC Ltd: *Demerged Company*

PQR Ltd: *Resulting Company*



- The term 'Demerger' is defined under section 2(19AA) of the IT Act, as follows:

  "Demerger", in relation to companies, means the transfer, pursuant to a scheme of arrangement under sections 391 to 394 of the Companies Act, 1956, by a demerged company of its one or more undertakings to any resulting company in such a manner that –

  - **All the properties & liabilities** belonging to demerged undertaking of the demerged company becomes the properties/ liabilities of the resulting company;
  - The properties & liabilities relatable to demerged undertaking are **transferred at their respective book values**
  - Consideration is discharged by issuance of shares of the resulting company to the shareholders of the demerged company;
  - Shareholders holding not less than $3/4^{th}$ in value of shares of the demerged company (other than shares already held therein immediately before demerger) becomes shareholders of resulting company;
  - Undertaking must be transferred on a going concern basis.

KEY TAX IMPLICATIONS IN CASE OF DEMERGER

Section 47(vib)	Transfer of capital assets by the demerged company to the resulting company, in a scheme of demerger, shall not be considered as 'Transfer', provided that the resulting company is an Indian company.
Section 47(vid)	Any transfer or issue of shares by the resulting company, in a scheme of demerger, to the shareholders of the demerged company if the transfer or issue is made in consideration of demerger of the undertaking, is exempt from levy of tax
Section 49(2C)	Cost of shares in the resulting company = (Cost of shares in demerged company) x (Net Book Value of assets transferred/ Net Worth of demerged company pre-demerger)
Section 2(22)(v)	Any distribution of shares, pursuant to a demerger, by the resulting company to the shareholders of the demerged company *(whether or not there is a reduction of capital in the demerged company)* shall not be considered as deemed dividend.
Section 41(1)	Resulting company shall be chargeable to tax as successor of business.
Sixth proviso to Section 32	Depreciation in respect of assets transferred to be apportioned in the ratio of number of days used by the demerged company/ resulting company.

KEY TAX IMPLICATIONS IN CASE OF DEMERGER

Exp. 7A to Section 43(1)	Actual cost of transferred assets to the resulting company shall be cost of such asset in the hands of demerged company.
Section 35DD	Expenses incurred exclusively for the purpose of demerger shall be allowed as deduction in five equal installments beginning from the previous year in which the demerger takes place.
Explanation 1(i)(g) to Section 2(42A)	Period of holding of shares which becomes property of shareholder of demerged company in consideration of a demerger, shall be reckoned from the date of acquisition of share(s) by such shareholder in the demerged company.
Explanation 1(i)(b) to Section 2(42A) r/w sec 49(1)(e)	Period of holding of assets in the hands of resulting company shall relate back to the date of acquisition of such asset by the demerged company.
Section 49(1)(iii)(e) r/w section 55	Cost of acquisition of capital assets in the hands of resulting company shall be the cost of acquisition at which the capital asset was acquired by the demerged company.
Exp. 2A to Section 43(6)	Depreciation on assets transferred to the resulting company will be calculated on the basis of tax written down value in the hands of the demerged company.

KEY TAX IMPLICATIONS IN CASE OF DEMERGER

Section 72A: Carry forward and set off of accumulated losses and unabsorbed depreciation

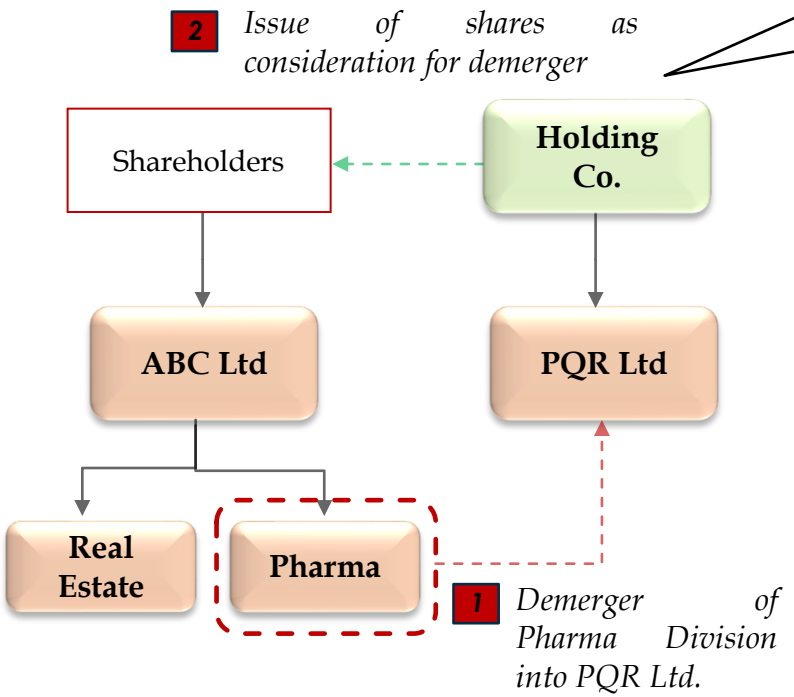
[Section 72A(4)]	In the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall— ▪ where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company; ▪ where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.
[Section 72A(5)]	The Central Government may, for the purposes of the IT Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes. ***[Not yet prescribed]***

CASE STUDY ON DEMERGER

ABC Ltd: *Demerged Company*

PQR Ltd: *Resulting Company*

Whether demerger involving issuance of consideration by holding company of the resulting company would be tax neutral under the scheme of the IT Act?



- ✓ "Resulting company" defined in section 2(41A) of the IT Act means "*one or companies (including a wholly owned subsidiary thereof) to which the undertaking of the demerged company is transferred in a demerger and, the resulting company in consideration of such transfer of undertaking, issues shares to the shareholders of the demerged company*".
- ✓ The law visualizes that there can be more than one resulting company (ies) in a situation of demerger of a single undertaking (the undertaking) of the demerged company.

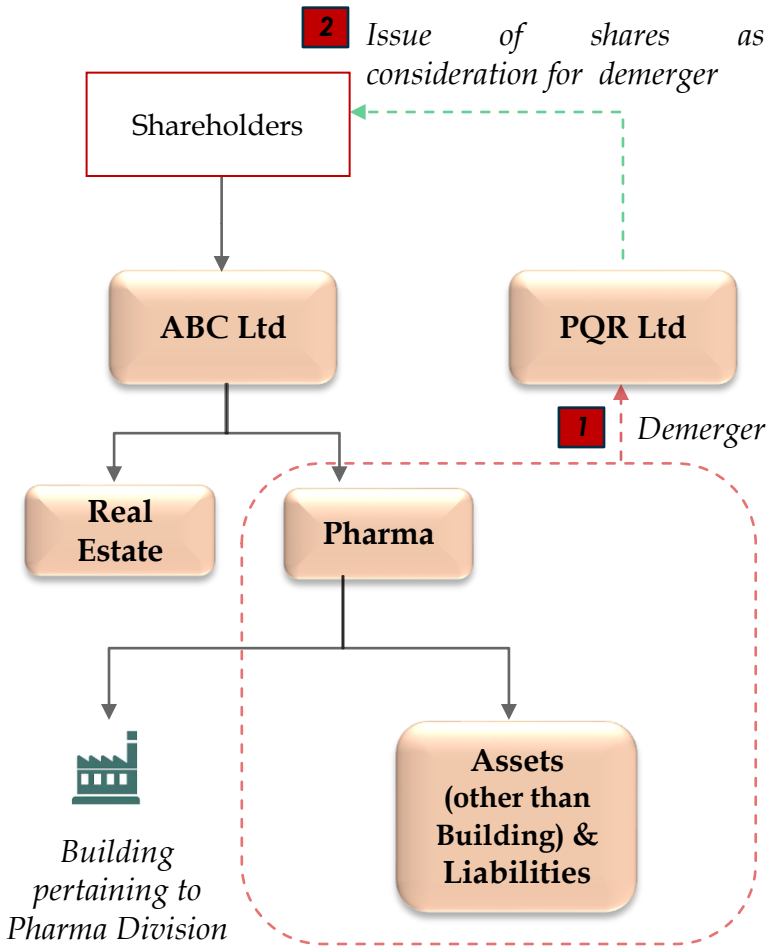
- ✓ It is possible to contend that the demerger should qualify as tax neutral demerger, subject to fulfilment of other conditions stated therein.

On the contrary, it can also be contended that the definition of "resulting company" in section 2(41A) has to be read in the context of definition of demerger in section 2(19AA) of the IT Act and therefore, for tax neutral demerger, it is mandatory that the resulting company issues its own shares to the shareholders of the demerged company in consideration of the demerger.

CASE STUDY ON DEMERGER

ABC Ltd: *Demerged Company*

PQR Ltd: *Resulting Company*



Whether some of the non crucial assets relatable to the 'Undertaking' can be retained by the demerged company?

- ✓ The expression "undertaking" as defined in Explanation 1 to section 2(19AA) of the IT Act includes any part of an undertaking or a unit or division of an undertaking or a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity.
- ✓ To qualify the pre-requisites of demerger, what is essential is that the unit / division / undertaking / part of the undertaking or the business activity, being transferred as part of the undertaking should

(a) constitute a business activity, which can be carried on uninterruptedly with such assets and liabilities taken over by the transferee; and

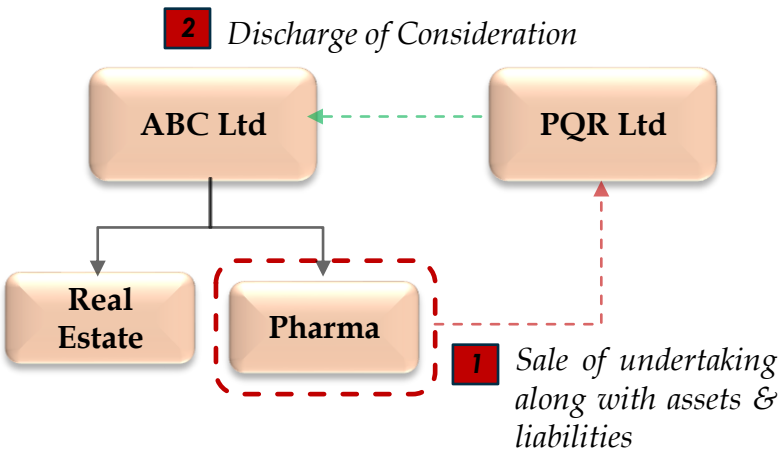
(b) such business activity is transferred as a whole.

[Indo Rama Textile Ltd., In re: 212 Taxman 462 (Del)]

CONCEPT OF SLUMP SALE

ABC Ltd: *Transferor Company*

PQR Ltd: *Transferee Company*



- Section 50B of IT Act read with Rule 11UAE of IT Rules deals with the provisions relating to computation of capital gains in case of 'Slump Sale'.
- The term 'Slump Sale' is defined under section 2(42C) of the IT Act as *'transfer of one or more **undertaking**, **by any means**, **for a lump sum consideration** without values being assigned to the individual assets and liabilities in such transfer.'*

Particulars	Manner of Computation
Full value of consideration	Actual sale consideration or fair market value computed as per rule 11UAE of IT Rules, whichever is higher.
Less: Net Worth of Undertaking## **[B]**	Computed as per Explanation (1) & Explanation (2) to section 50B of IT Act.
Capital Gain/ Loss	xxxxxx

##Note: *Benefit of indexation is not available in case of 'Slump Sale'.*

CONCEPT OF SLUMP SALE

- **Manner of Computation of "Net Worth" of Undertaking:**

Particulars	Amount (in Rs.)
Aggregate value of 'Total Assets' **[A]** ▪ Depreciable Assets – WDV u/s-43(6) of the IT Act ▪ Other Assets (except assets on which depreciation has been allowed in whole) – Book Value of such assets *[Revaluation to be ignored]*.	xxx
Less: Liabilities appearing in the books of account **[B]**	(xxx)
Net Worth [A-B]	**xxx**

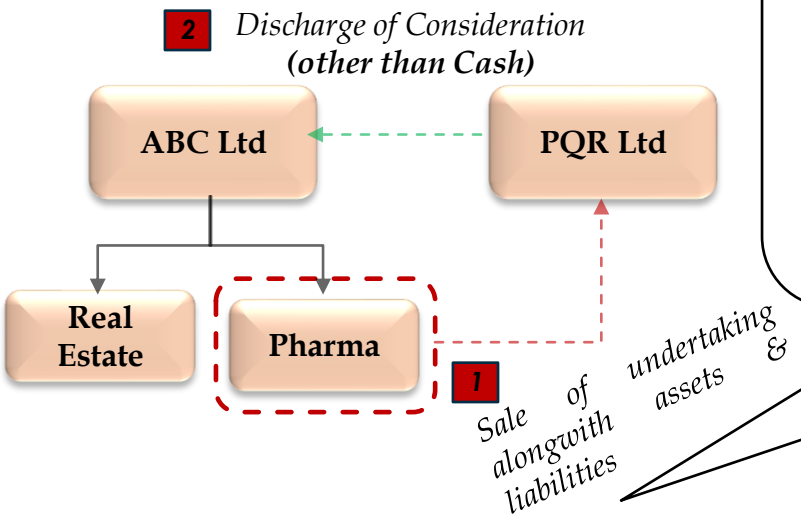
Key notes to Slump Sale:

- The consideration for transfer of undertaking may be discharged by any mode.
- In case of slump sale, the consideration is received by the transferor company and not its shareholders.
- Losses and unabsorbed depreciation shall remain with the transferor company.

CONCEPT OF SLUMP SALE

ABC Ltd: *Transferor Company*

PQR Ltd: *Transferee Company*



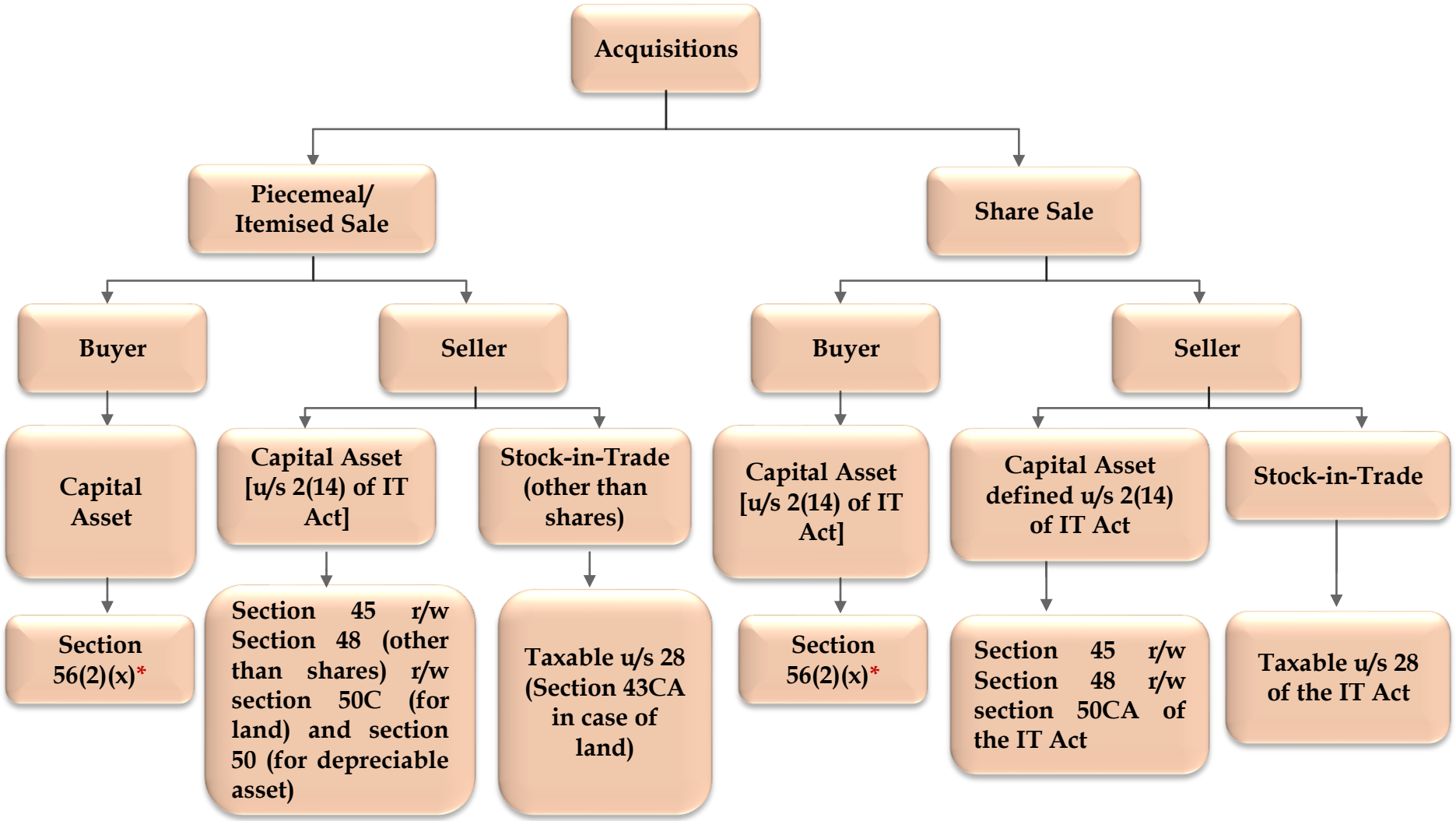
Whether the negative net-worth of the undertaking, i.e., where the liabilities exceed the assets taken over on transfer of undertaking is to be added back to the consideration received or is to be treated as nil for determining capital gains on sale of the undertaking, in terms of provisions of section 50B of the IT Act?

Particulars	Amount	Amount
Full value of consideration	100	100
Less: Net Worth of Undertaking **[B]**	(80)	(-80)
Capital Gain/ Loss	**20**	**180**

- ✓ Where the liabilities exceed the assets taken over on transfer of undertaking, the negative net worth is to be ignored and the full value of the consideration would be the amount of capital gains liable to tax.
- ✓ In common parlance, asset cannot have negative cost of acquisition - it may at worst have "nil" **[Zuari Industries Ltd. vs. ACIT : 105 ITD 569 (Mum.), Paperbase Co Ltd. vs. ACIT: 19 SOT 163 (Del)]**.

Contrary view taken by the Special Bench of Mumbai Tribunal in the case of **DCIT vs. Summit Securities Ltd.: 135 ITD 99 (Mum)(SB) -** negative net worth of the undertaking was to be added back, to arrive at capital gains chargeable to tax

KEY IMPLICATIONS QUA OTHER ACQUISITIONS



* *Section 56(2)(x) of the IT Act provides that any sum or property received by a person without consideration or for inadequate consideration from any person (other than relatives) in excess of Rs.50,000 would fall within the ambit of "income" and would be taxable under the head "Income from other sources".*

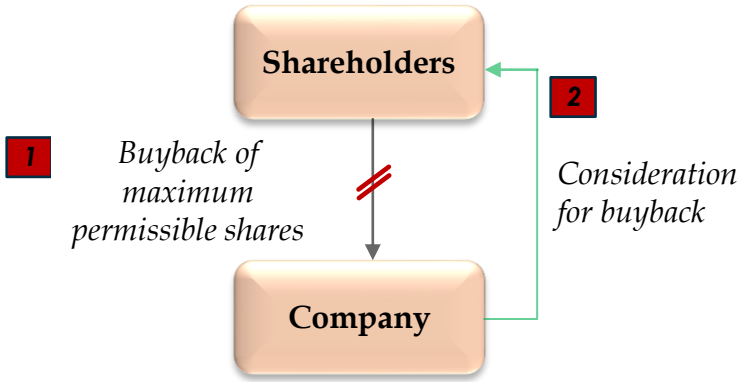
ACQUISITIONS UNDER IBC

- **Insolvency and Bankruptcy Code, 2016 ("IBC")** was introduced in 2016 with a view to streamline the corporate insolvency resolution/ liquidation process and improve India's ease of doing business competence.
- Section 238 of IBC overrides all other laws. The Supreme Court in the case of **PCIT vs. Monnet Ispat & Energy Ltd : [2019] 107 taxmann.com 481 (SC)** has categorically held that "*the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act.*"

Key Tax Implications:

- ✓ **Section 79 of the IT Act** was amended to not apply to cases where the shareholding of a corporate debtor changes pursuant to a resolution plan under the IBC, after allowing the Revenue department a reasonable opportunity of being heard in this regard.
- ✓ **Section 115JB of the IT Act** was amended to provide that for determining the 'book profit' (for levy of MAT) of a company against whom an application for corporate insolvency resolution was admitted by the NCLT, deduction of the **aggregate amount of brought forward losses and unabsorbed depreciation** would be allowed. In case of regular taxpayer, deduction of lower of (i) the brought forward losses or (ii) unabsorbed depreciation is allowed for the purpose of determining the 'book profits'.

BUY-BACK OF SHARES

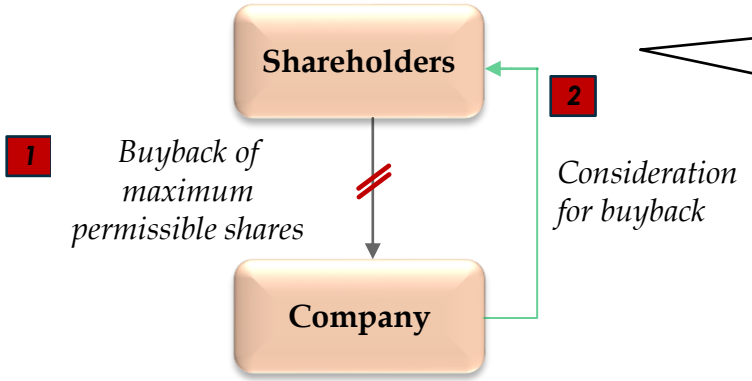


Manner of computation of distributed income :

Computation of 'Distributed Income'	
Consideration paid by company **[A]**	**
Less: Amount received by company for issue of such shares [Rule 40BB] **[B]**	(**)
Distributed Income **[A-B]**	***

- ✓ Section 68 of the 2013 Act provides for the provisions relating to buyback.
- ✓ **Section 115-QA** inserted in the statute vide Finance Act, 2013, w.e.f. 1.06.2013, provides for levy of tax in **the hands of the company o**n buyback of its own shares @ 20% of the "distributed income".
- ✓ For purposes of section 115QA of the IT Act, "distributed income" is to be computed by reducing the amount received by the company on issuance of shares from the consideration paid on buyback, so determined in the manner prescribed in Rule 40BB of the IT Rules.
- ✓ The aforesaid tax is considered to be the final payment of tax in respect of the buyback transaction.

CASE STUDY ON BUY-BACK OF SHARES



Whether provisions of section 56(2)(x) of the IT Act would apply in case of buyback of shares ?

Whether any taxability would arise in the hands of the shareholders opting for buyback ?

In the hands of Company buying back shares:

- ✓ Buyback of own shares by the company, in effect and substance, results in extinguishment of its liability towards the shareholders, which would have otherwise arisen at the time of liquidation. In view thereof, receipt of share certificates by the company on buyback cannot, in my opinion, tantamount to "receipt of property" *per se* for purposes of section 56(2)(x) of the IT Act; accordingly, the said section has no application in case of buyback of shares [Refer : **Vora Financial Services Pvt Ltd. vs. ACIT : 171 ITD 646 (Mum)].**

In the hands of Shareholders:

- ✓ Amount received on buy-back of shares is exempt from tax in the hands of the shareholders **[Section 10(34A) of IT Act]**.

Thank You