



CORPORATE AND CAPITAL RESTRUCTURING

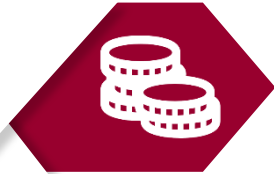
**Chamber of Tax Consultants
Presented by Suraj Malik**

September 14, 2019

DRIVERS FOR CORPORATE STRUCTURING

INTERNAL DRIVERS

Cash trap/
balancing



Value
Unlocking



Simplification of
Group Structure



Tax Optimization



EXTERNAL DRIVERS

Growth



Eliminate
competition



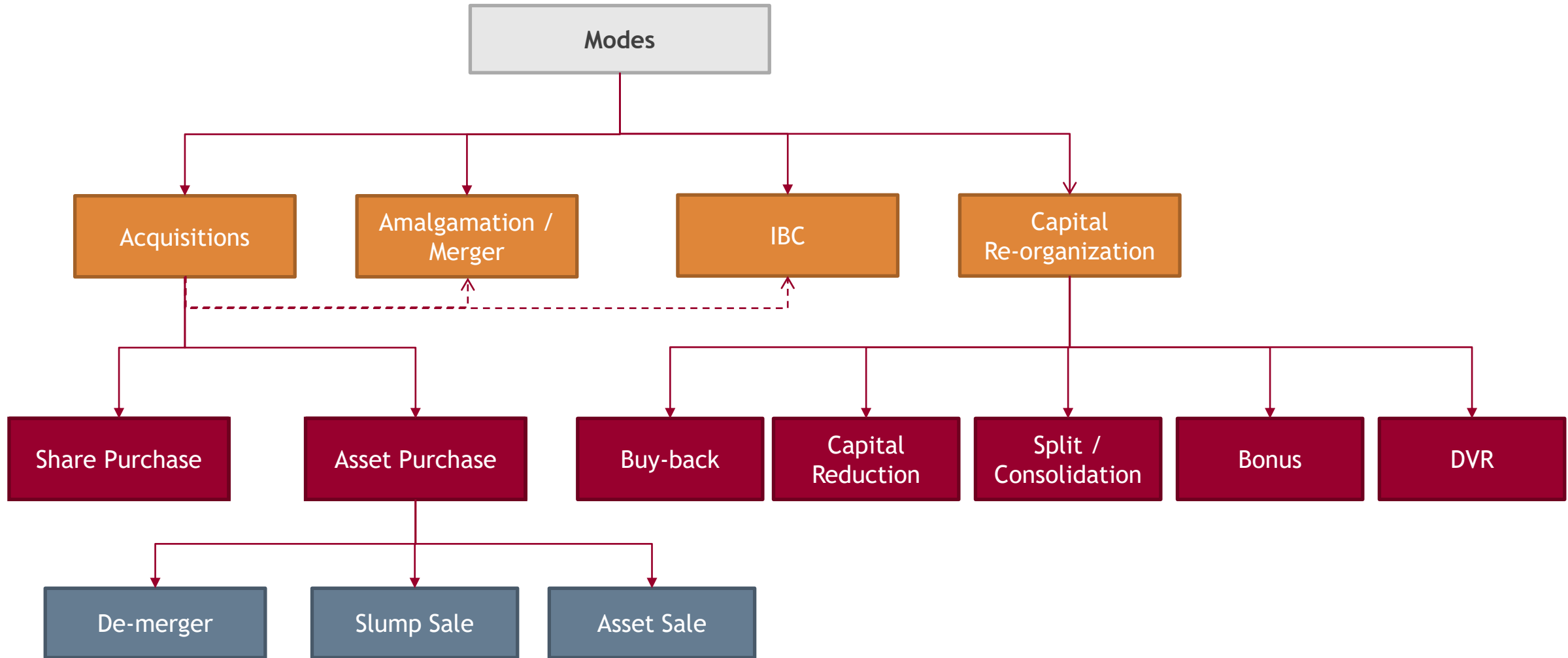
Deploy
capital



Enter new
markets



MODES OF RESTRUCTURING



TAX & REGULATORY CONSIDERATIONS

SEBI

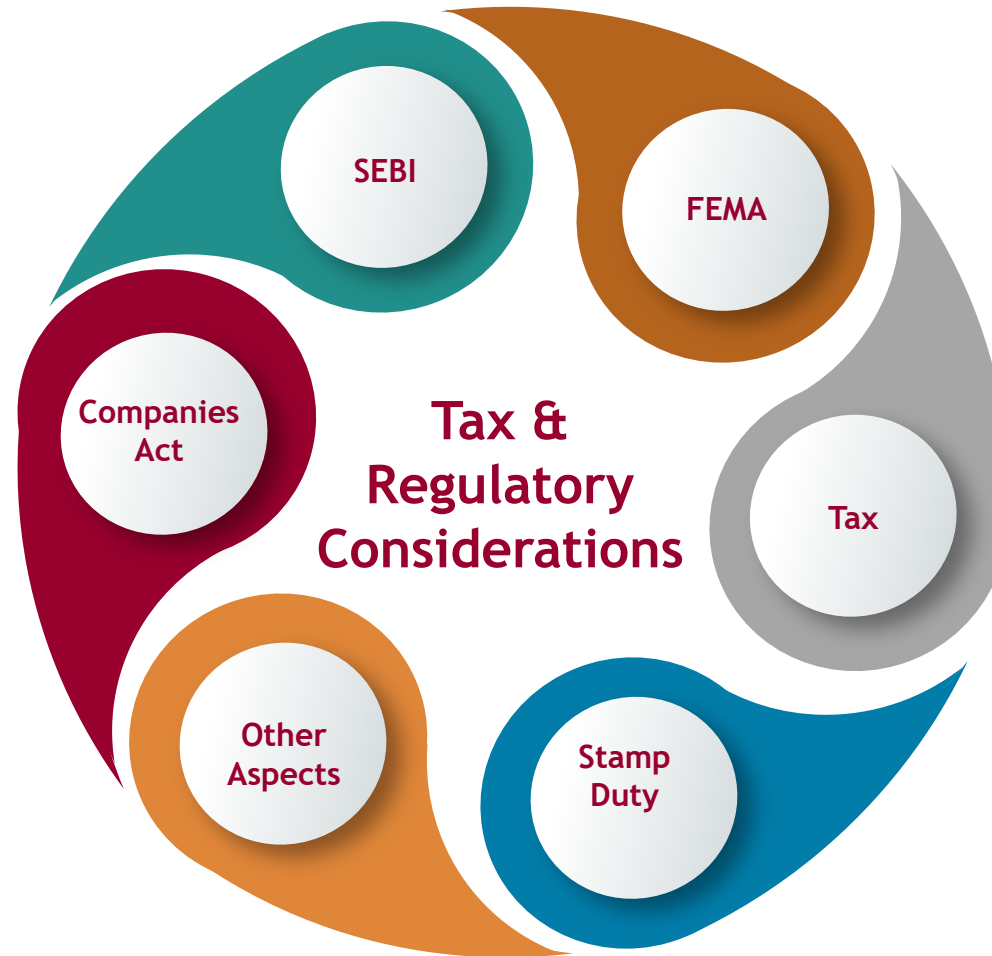
- Schemes involving listed entities
- Other regulations such as takeover
- Prescribed disclosures

Companies Act

- Scheme of arrangements u/s 230 - 234
- Shareholder/ creditor approval
- Related party transactions
- Approvals from regulatory authorities such as RD, RoC
- Prescribed compliances

Other Aspects

- Valuation
- Competition Act
- NBFC/ CIC guidelines
- Sectoral regulators



FEMA

- Inbound Investment
- Outbound Investment
- Cross Border M&A
- LRS
- Share Swap

Tax

- Income tax
- Tax attributes
- Tax neutrality
- GST

Stamp Duty

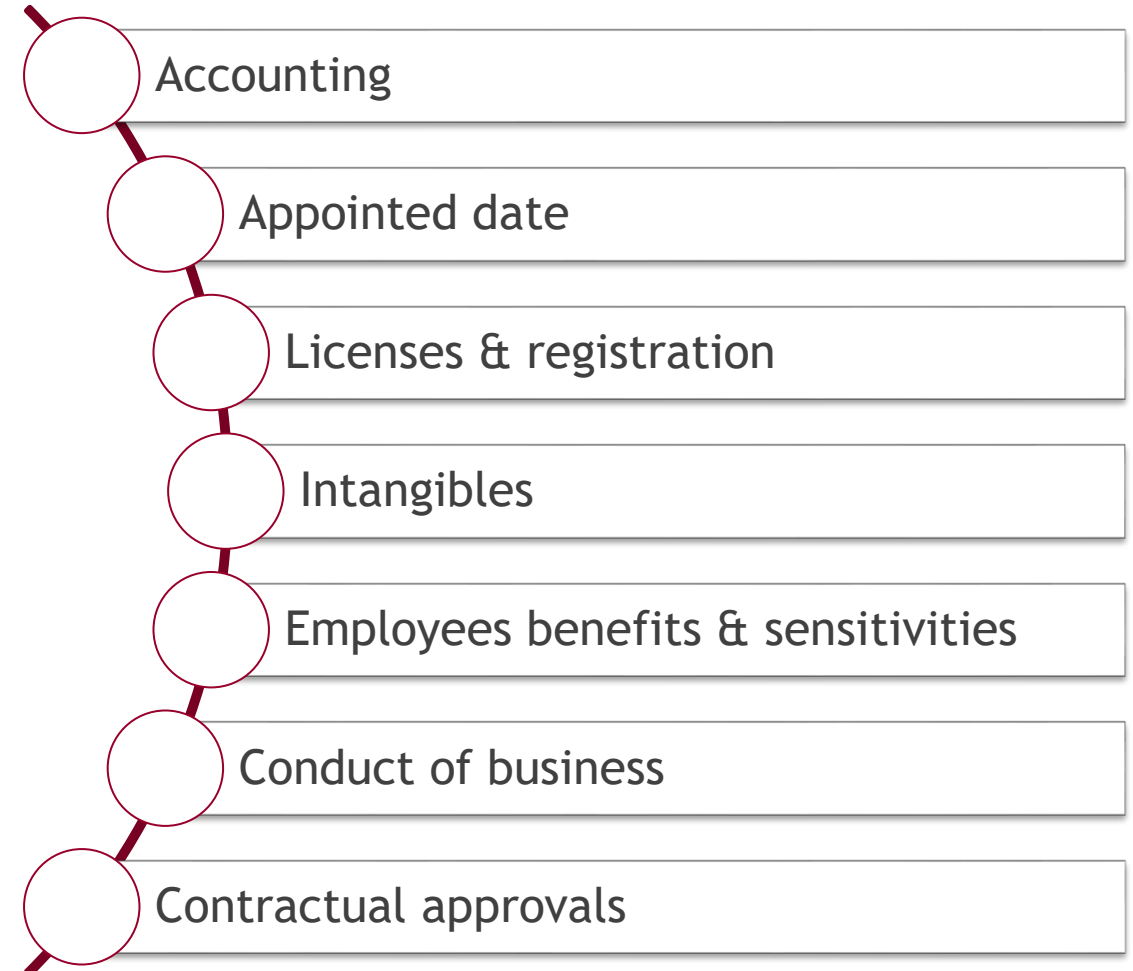
- State specific entry
- Planning avenues
- Adjudication process

SCHEME OF ARRANGEMENT: KEY CONSIDERATIONS

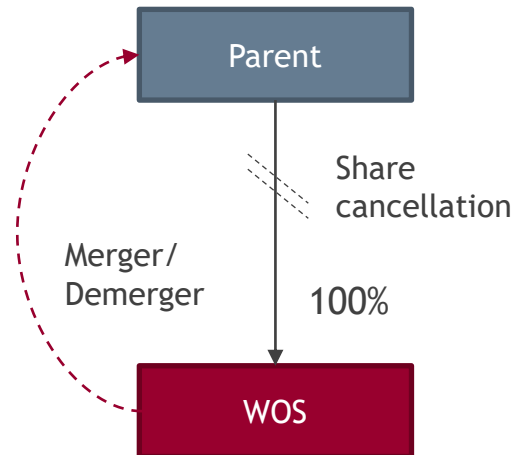
Companies Act

- Prescribed NCLT process
 - Requires approval from shareholders & creditors
 - Treatment of different classes
 - Requisite majority of 75%
 - Value or number
 - Present including proxy & voting
 - Dispensation from conducting meetings
 - Dispensation from sending notices
- Notice to tax & other regulatory authorities
 - Deemed approval after 30 days
- Representation from RD/RoC/OL
- NCLT order to be filed with RoC in 30 days

Scheming Areas



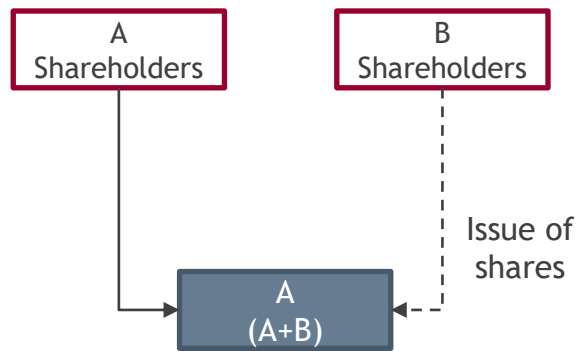
SCHEME BETWEEN PARENT & WOS



- Fast track merger
 - Available for merger of WoS with Parent
 - Fast Track Demerger
- No requirement of NCLT approval:
 - Filing of the scheme with RoC/OL for observation
 - Approval from shareholders (90% in number)
 - Approval from creditors (90% in value)
 - Filing of declaration of solvency
 - Filing of the Scheme with RD for its approval
- Stamp Duty
 - Stamp duty on RD confirmation
 - Basis of levy in absence of any issue of shares
- Fast track process available in case of small companies

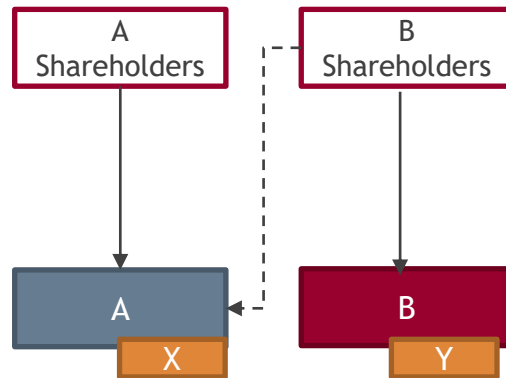
SCHEME OF ARRANGEMENT: TAX NEUTRALITY

Merger, tax neutral, subject to prescribed conditions:



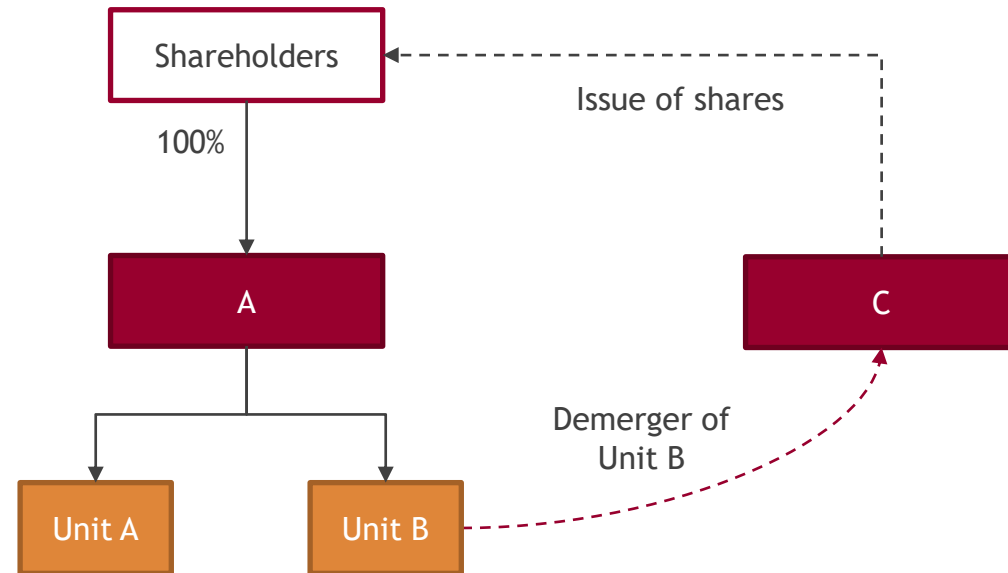
- All the properties & liabilities of B become the properties & liabilities of A
- At least 75% (in value) of B's shareholders become shareholders in A
- A is an Indian Company
- Consideration other than shares issued by A
 - Impact on tax neutrality

Demerger of an “undertaking”, tax neutral, subject to prescribed conditions:



- All properties & liabilities of undertaking X become the properties & liabilities of A
 - Allocation of general or multi-purpose borrowings
- All the properties & liabilities of undertaking X transferred at Book value
- B's shareholders allotted shares in A on proportionate basis pursuant to demerger
- At least 75% (in value) of B's shareholders become the shareholders in A
- Transfer of undertaking on a going concern basis
- A is an Indian Company

CASE STUDY- DEMERGER

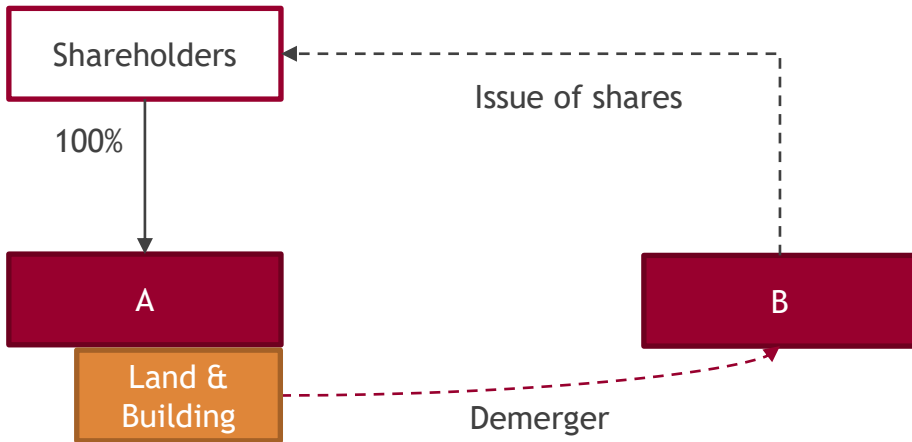


Consideration in the form other than shares?

Violation of other conditions of section 2(19AA)?

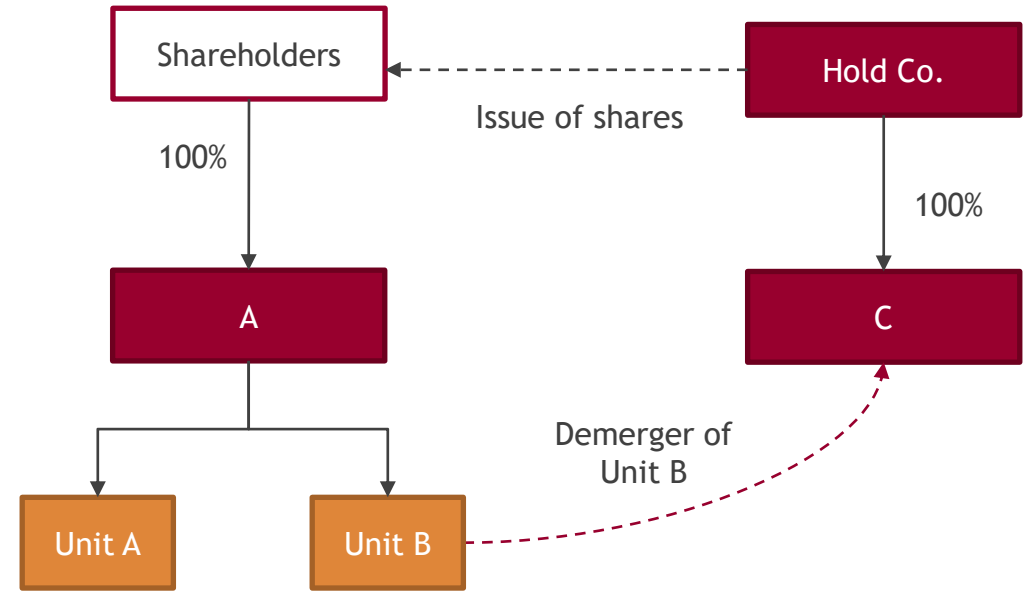
CASE STUDY- DEMERGER

1 Demerger of land & building



Can land & building be considered as undertaking?

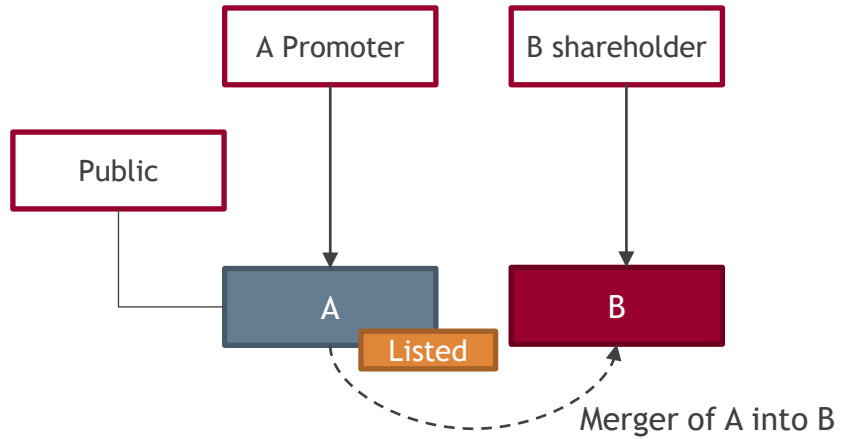
2 Discharge of demerger Consideration by Holding Co.



Payment of consideration by holding company - Tax neutral?

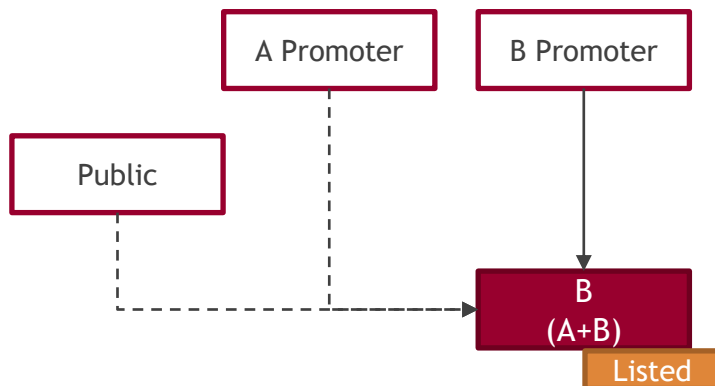
MERGER/ DEMERGER OF LISTED WITH UNLISTED

Pre-Merger



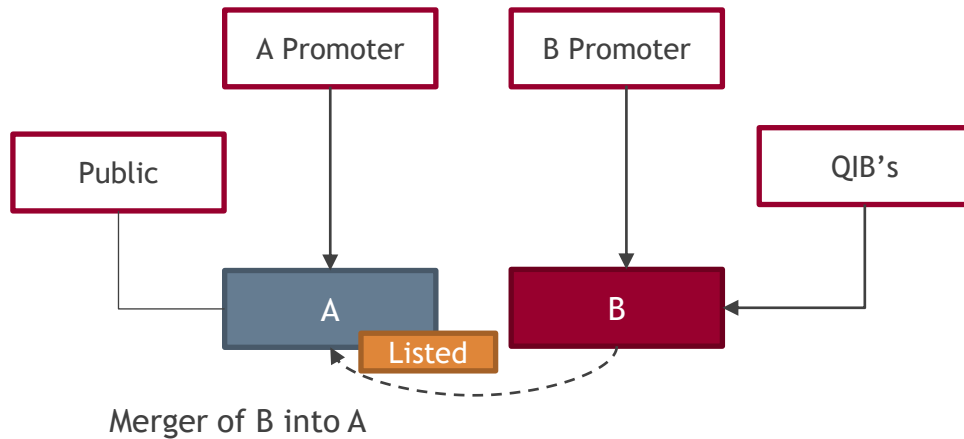
- Automatic listing of B without IPO process
- Post scheme shareholding
 - Post merger at least 25% of public shareholders of A to hold shares in B
- Post merger lock-in on transfer of shares by promoters of unlisted company (i.e. B Promoter)
 - Post merger shareholding up to 20% - 3 years
 - Post merger shareholding in excess of 20% - 1 year
- Can locked in shares be:
 - Pledged
 - Inter-se transfer

Post Merger



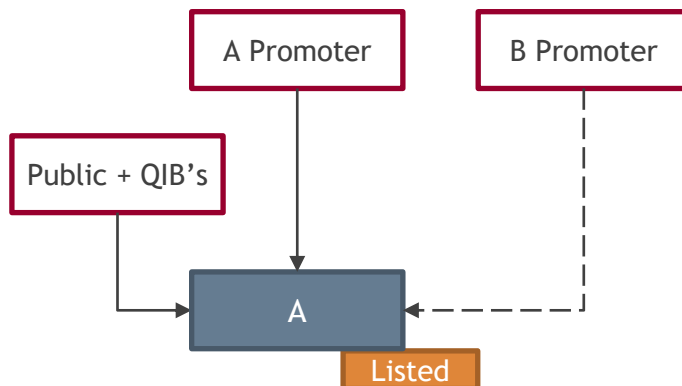
MERGER/ DEMERGER OF UNLISTED WITH LISTED

Pre-Merger



- Post scheme public shareholding
 - Post merger public of A + QIBs of B to hold at least 25% in the merged entity
- Does lock in apply on shares issued to B shareholders
- Preferential issue pricing guidelines to apply for valuation of A
- Rate of tax on transfer of shares by B promoters held for more than 12 months but less than 24 months

Post Merger



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OTHER ASPECTS

- Prior SEBI/ SE process, before filing application with NCLT
 - Intimation requirement in case of scheme between listed parent & WOS

- Approval from majority of Public shareholders through e-voting :
 - Additional shares to promoter or promoter group
 - Scheme of arrangement involving listed entity & any other promoter entity
 - Acquisition of subsidiary shares from promoter group prior to merger of such subsidiary into the listed parent
 - Dilution in holding of pre-scheme public shareholders of listed entity in merged entity > 5%

- SEBI registered merchant banker to:
 - Certify information of unlisted entities in a specified format - “Abridged prospectus”
 - Provide fairness opinion on valuation/ share swap ratio

- Audited accounts of unlisted listed - not more than 6 months old

CARRY FORWARD OF LOSSES UNDER SECTION 72A

Nature of loss Accumulated business loss & unabsorbed depreciation

Conditions for Transferor

- Amalgamation of company owning *industrial undertaking*
- Company engaged in business for 3 or more years
- At least 75% of BV of fixed assets held continuously for 2 years prior to the date of amalgamation

Conditions for Transferee

- Continue to hold at least 75% of BV of fixed assets of transferor for a minimum 5 years
- Continue the business for a minimum period of 5 years
- Achieve at least 50% of installed capacity before end of 4 years and continue to maintain the same till year 5

Industrial undertaking means any undertaking which is engaged in—

- ❖ the manufacture or processing of goods; or
- ❖ the manufacture of computer software; or
- ❖ 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 - CARRY FORWARD OF LOSSES UNDER SECTION 72A

Case study-1

Particulars	A	B	B (Post merger)
Assets (on date of amalgamation)	40	60	100
Assets disposed off (Post amalgamation)	(10)	-	(10)
Assets (Post disposal)	30	60	90
%	75%	100%	90%

Case study-2

Particulars	A	B	B (Post merger)
Assets (on date of amalgamation)	40	60	100
Assets disposed off (Post amalgamation)	(20)	-	(20)
Assets (Post disposal)	20	60	80
%	50%	100%	80%

IMPACT OF CHANGE IN SHAREHOLDING - SECTION 79

Applicable to company not being a company in which the public are substantially interested

In case change in holding of shares carrying voting power > 49%

- As against the position on last day of the year in which was incurred

Lapse of carry forward of accumulated losses

- Impact on unabsorbed depreciation

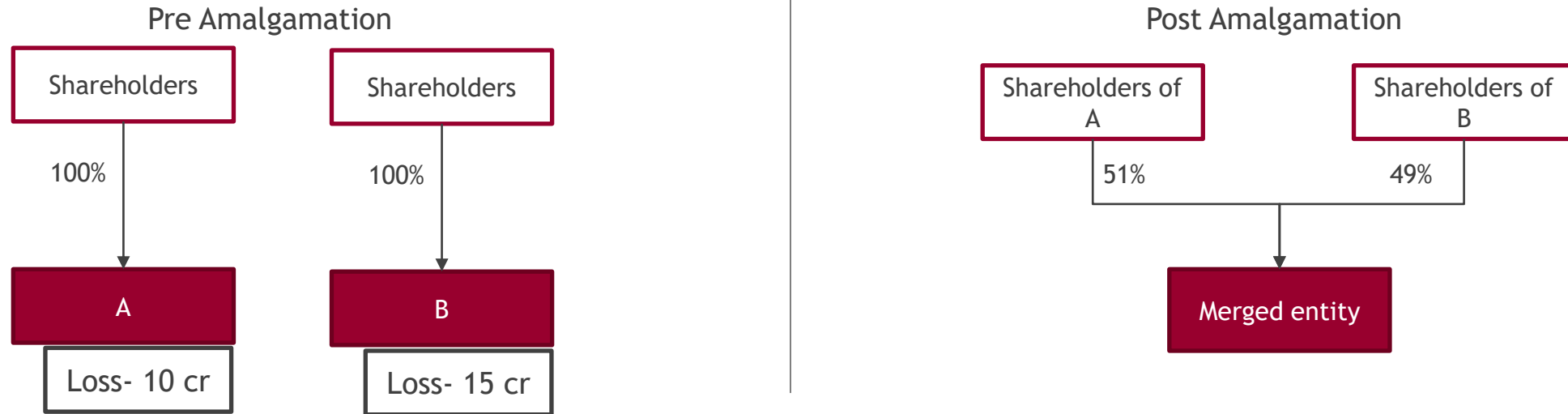
In case of eligible start ups, where all shareholders continue to hold shares, there is no impact of change in shareholding in respect of losses incurred in the seven years from incorporation

CASE STUDY - CARRY FORWARD OF LOSSES UNDER SECTION 79

Carry forward in case of start-up

Shareholder	Initial Shareholding		Case 1		Case 2		Case 3	
	No of shares	%	No of shares	%	No of shares	%	No of shares	%
A	100	50%	100	50%	50	25%	100	20%
B	100	50%	50	25%	50	25%	100	20%
C	-	-	50	25%	100	50%	300	60%
Total	200		200		200		500	

CASE STUDY - CARRY FORWARD OF LOSSES UNDER SECTION 79



Carry forward & set off of losses	Case 1: Merger of A into B	Case 2: Merger of B into A
A	Available	Available
B	Not available	Available

CARRY FORWARD OF LOSSES UNDER SECTION 79

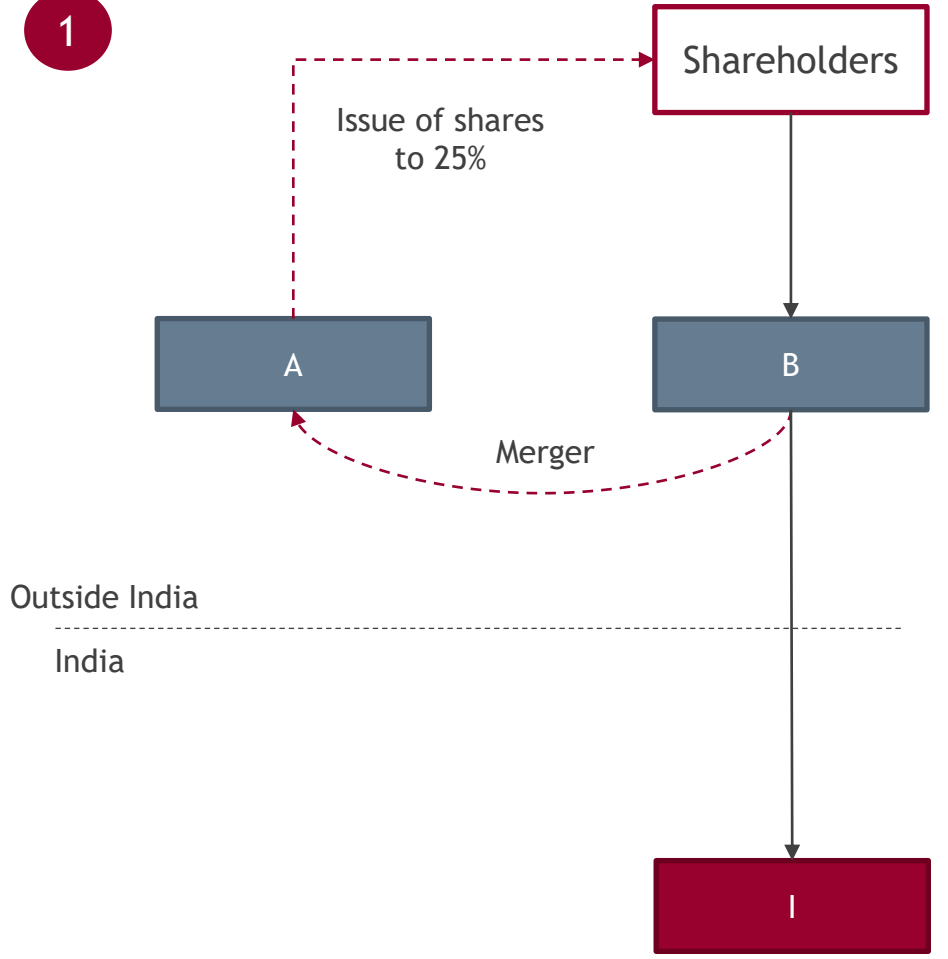
Section not to apply:

- Upon the death of a shareholder
- Transfer of shares by way of gift to any relative
- Change in shareholding of an Indian company which is a subsidiary of a foreign company as a result of amalgamation or demerger of a foreign company subject to:
 - 51% shareholders of amalgamating or demerged foreign company continue to be the shareholders of the amalgamated or the resulting foreign company
- Change in the shareholding takes place pursuant to a resolution plan approved under IBC*
- To a company, and its subsidiary and the subsidiary of such subsidiary*
 - NCLT suspended BOD of such company and has appointed new directors
 - Where a change in shareholding has taken place pursuant to a resolution plan approved under section 242 of Companies Act, 2013

**after affording a reasonable opportunity of being heard to the jurisdictional PCIT*

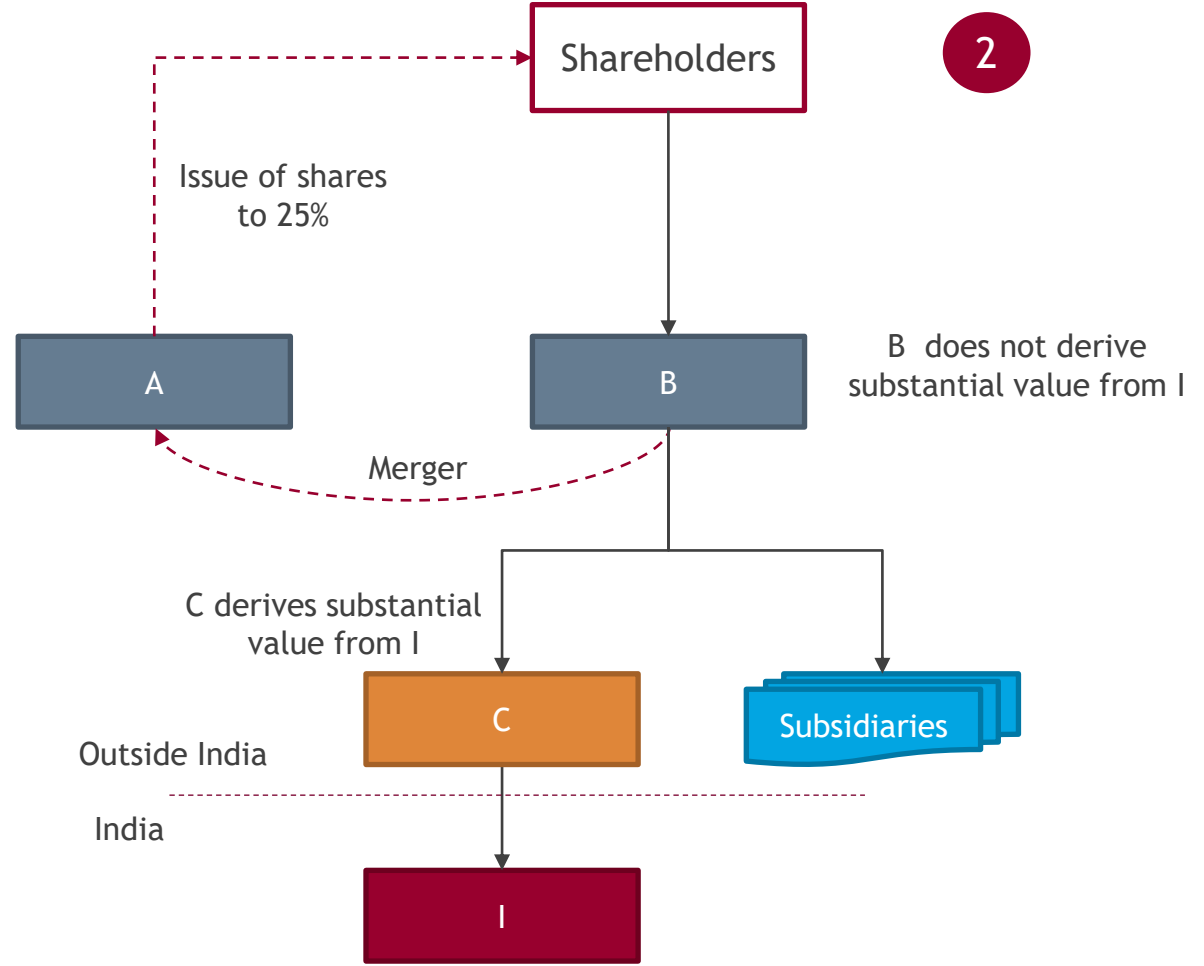
CASE STUDY - OVERSEAS MERGER

1



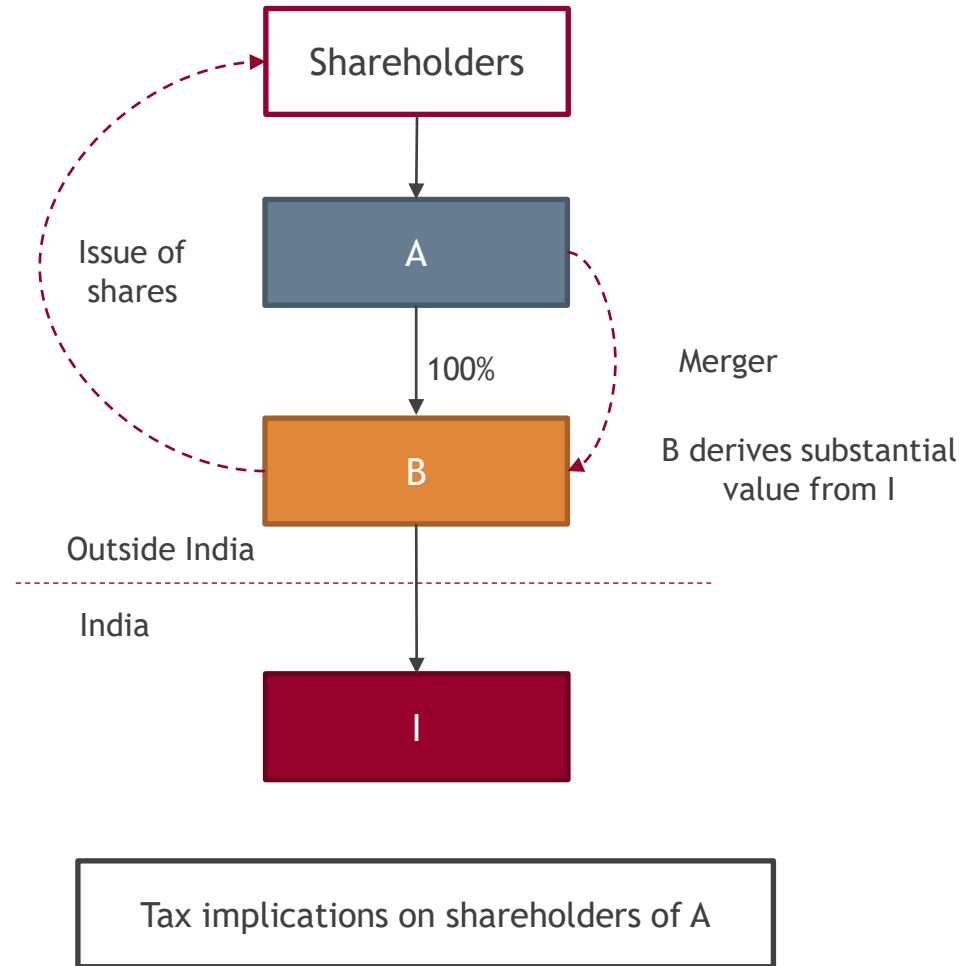
Change in shareholding of I - Taxable in India?

2

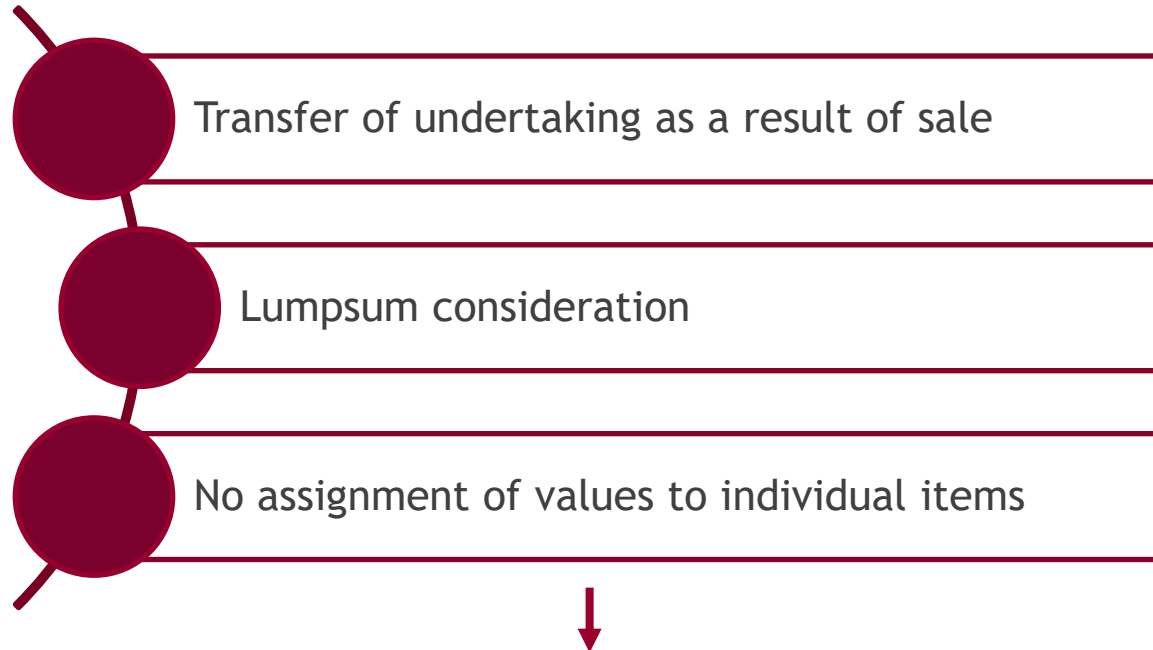


Indirect transfer of shares of I - Taxable in India?

CASE STUDY - OVERSEAS MERGER



SLUMP SALE



Undertaking 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.

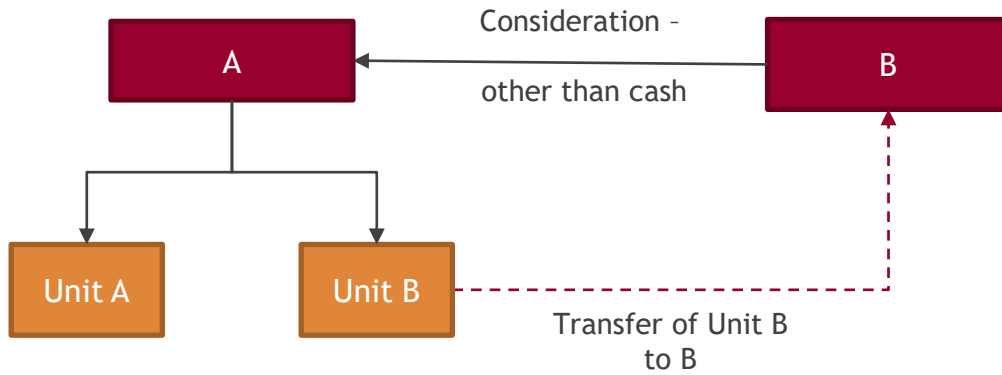


Determination of values for sole purpose of payment of :

- stamp duty,
- registration fee or
- other similar tax/fee

SLUMP SALE

Slump Exchange



Whether the transaction shall be taxable as “Slump Sale” u/s 50B of the Income Tax Act?

Computation Mechanism- Negative net worth

Particulars	Case Study-1	Case Study-2	Case Study-3
Net Worth	125	(125)	(125)
Sale Consideration (A)	150	150	150
Less: Deemed Cost of Acquisition (B)	(125)	-	(125)
Capital Gains (C= A-B)	25	150	275

BUYBACK OF SHARES

Companies Act

- Buyback size
 - Limit on number of shares
 - Maximum pay out
 - Time interval
 - Buyback under Scheme
- Source of buyback
 - Free reserves & securities premium
 - Proceeds of issues of shares of another kind
- Procedural aspects
 - Board approval- up to 10% of paid up capital + free reserves (including share premium)
 - Special resolution for buyback in excess of above
- Post buyback debt equity ratio cannot exceed 2:1
 - Components of debt
 - SEBI position

Income Tax



Tax on company
(listed & unlisted)

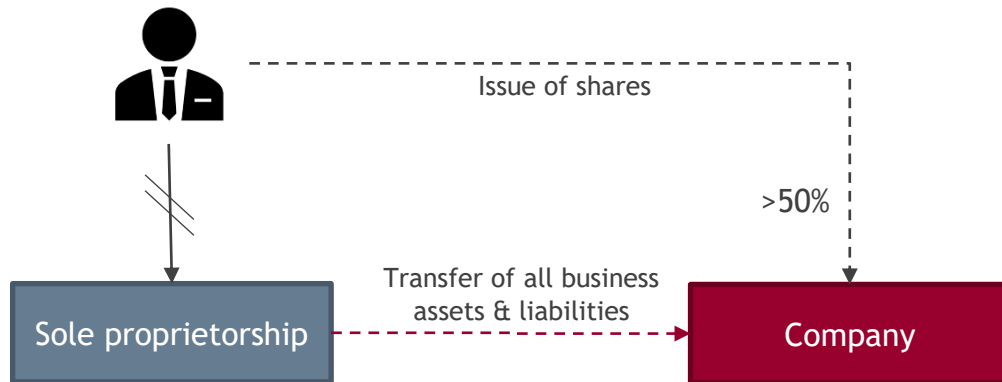


Rate of tax - 23.29%



Tax exempt in the
hands of shareholders

SUCCESSION OF SOLE PROPRIETORSHIP BY COMPANY



- No prescribed procedure under companies act for succession
 - Succession to existing company or new company?

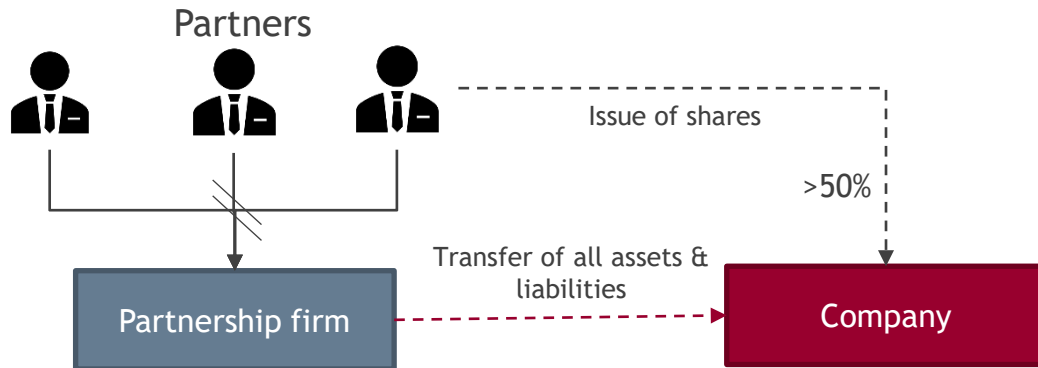
- **Tax neutral subject to conditions:**

- All assets and liabilities of the sole proprietary concern become the assets and liabilities of the company
- Sole proprietor to hold 50% or more of voting power in the company and such holding to continue for a period of 5 years
- Consideration in the form of shares only

- **Other Aspects:**

- Cost & period of holding of proprietorship concern available in the hands of Company
- Carry forward of accumulated loss & unabsorbed depreciation available in the hands of Co

SUCCESSION OF PARTNERSHIP FIRM BY COMPANY



- Prescribed process under Companies Act
 - Requires consent of all the creditors
 - Requires DIN of proposed directors & name approval
 - Draft AOA & MOA
 - File conversion form (URC-1)
 - Post approval, obtain certificate of incorporation

- **Tax neutral subject to conditions:**
 - All assets and liabilities of the firm concern become the assets and liabilities of the company
 - All partners becomes shareholders in proportion of capital accounts of firm on the date of the succession
 - Aggregate shareholding of partners: 50% or more of voting power in the company and such holding to continue for a period of 5 years
 - Consideration in the form of shares only
- **Other Aspects:**
 - Cost & period of holding of proprietorship concern available in the hands of Company
 - Carry forward of accumulated loss & unabsorbed depreciation available in the hands of Co- Fresh life

SURAJ MALIK



Partner
M&A

M: +91 9811443654
E: Surajmalik@bdo.in

AREAS OF EXPERTISE

- Corporate Restructuring
- Inbound & Outbound Investment
- AIF/REIT/InvIT
- Family office & Succession Planning
- Due Diligence
- Corporate Laws & Exchange Control Regulations

INDUSTRY EXPERTISE

- Infrastructure
- Consumer products
- Real Estate
- IT/SEZ & Financial Institution/NBFC

EDUCATION & PROFESSIONAL QUALIFICATIONS

- Chartered Accountant (ICAI)
- B Com

EXPERTISE SUMMARY

- Suraj Malik is a partner with BDO India LLP.
- He operates out of Gurgaon office and has over 15 years of diverse experience with large accounting firms and family office.
- He has diverse experience in deal structuring, inbound investments, M&A Transactions, corporate restructuring, family office and private equity.
- He has led and managed several transactions across multiple sectors such as Media, Hospitality, Real Estate, IT/SEZ and other general manufacturing industries
- He has also advised and implemented one of the largest family settlement in India and structured and executed succession strategy for HNIs and entrepreneurs;
- Suraj has spoken on various national and international events organized by the different institutions and also co-authored articles on various M&A related topics.

SELECT KEY PROJECTS

- Corporate restructuring of one of the largest Media and Newspaper Publication houses;
- Advised on the succession planning strategy for one of the known industrial group;
- Business restructuring and fund structuring for a larger healthcare business
- Strategy to remit surplus cash by a technology company in a tax optimum manner
- Inbound investment structure for a fortune 500 company
- Family office set up for a large Indian business house
- Innovative structuring of investments and exit for VC/ PE into start-ups

THANK YOU

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Suraj Malik



Partner

M&A Tax



surajmalik@bdo.in

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