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

- **Acquisitions**
  - Share Purchase
  - De-merger

- **Amalgamation / Merger**
  - Asset Purchase
  - Slump Sale

- **IBC**
  - Buy-back
  - Capital Reduction

- **Capital Re-organization**
  - Split / Consolidation
  - Bonus
  - DVR

- **De-merger**

- **Slump Sale**

- **Asset Sale**
**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**

- Accounting
- Appointed date
- Licenses & registration
- Intangibles
- Employees benefits & sensitivities
- Conduct of business
- Contractual approvals
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

- Shareholders (100%)
- A (Land & Building)
- B
- Demerger

Can land & building be considered as undertaking?

2 Discharge of demerger Consideration by Holding Co.

- Shareholders (100%)
- Hold Co.
- A
- Unit A
- Unit B
- Demerger of Unit B

Payment of consideration by holding company - Tax neutral?
MERGER/ DEMERGER OF LISTED WITH UNLISTED

Pre-Merger

A Promoter  B shareholder

Public

A  B
Listed

Merger of A into B

Post Merger

A Promoter  B Promoter

Public

B (A+B)
Listed

• 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
MERGER/ DEMERGER OF UNLISTED WITH LISTED

Pre-Merger

Public

A Promoter

B Promoter

QIB’s

Merger of B into A

Post Merger

Public + QIB’s

A Promoter

B Promoter

A

Listed

B

Listed

- 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
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

<table>
<thead>
<tr>
<th>Particulars</th>
<th>A</th>
<th>B</th>
<th>B (Post merger)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assets (on date of amalgamation)</td>
<td>40</td>
<td>60</td>
<td>100</td>
</tr>
<tr>
<td>Assets disposed off (Post amalgamation)</td>
<td>(10)</td>
<td>-</td>
<td>(10)</td>
</tr>
<tr>
<td>Assets (Post disposal)</td>
<td>30</td>
<td>60</td>
<td>90</td>
</tr>
<tr>
<td>%</td>
<td>75%</td>
<td>100%</td>
<td>90%</td>
</tr>
</tbody>
</table>

## Case study-2

<table>
<thead>
<tr>
<th>Particulars</th>
<th>A</th>
<th>B</th>
<th>B (Post merger)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Assets (on date of amalgamation)</td>
<td>40</td>
<td>60</td>
<td>100</td>
</tr>
<tr>
<td>Assets disposed off (Post amalgamation)</td>
<td>(20)</td>
<td>-</td>
<td>(20)</td>
</tr>
<tr>
<td>Assets (Post disposal)</td>
<td>20</td>
<td>60</td>
<td>80</td>
</tr>
<tr>
<td>%</td>
<td>50%</td>
<td>100%</td>
<td>80%</td>
</tr>
</tbody>
</table>
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

<table>
<thead>
<tr>
<th>Shareholder</th>
<th>Initial Shareholding</th>
<th>Case 1</th>
<th>Case 2</th>
<th>Case 3</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No of shares</td>
<td>%</td>
<td>No of shares</td>
<td>%</td>
</tr>
<tr>
<td><strong>A</strong></td>
<td>100</td>
<td>50%</td>
<td>100</td>
<td>50%</td>
</tr>
<tr>
<td><strong>B</strong></td>
<td>100</td>
<td>50%</td>
<td>50</td>
<td>25%</td>
</tr>
<tr>
<td><strong>C</strong></td>
<td>-</td>
<td>-</td>
<td>50</td>
<td>25%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>200</td>
<td></td>
<td>200</td>
<td></td>
</tr>
</tbody>
</table>
## CASE STUDY - CARRY FORWARD OF LOSSES UNDER SECTION 79

### Pre Amalgamation

<table>
<thead>
<tr>
<th>Shareholders</th>
<th>Loss</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>100%</td>
<td>Loss- 10 cr</td>
</tr>
<tr>
<td>B</td>
<td>100%</td>
<td>Loss- 15 cr</td>
</tr>
</tbody>
</table>

### Post Amalgamation

<table>
<thead>
<tr>
<th>Shareholders of A</th>
<th>Shareholders of B</th>
</tr>
</thead>
<tbody>
<tr>
<td>51%</td>
<td>49%</td>
</tr>
</tbody>
</table>

### Carry forward & set off of losses

<table>
<thead>
<tr>
<th>Carry forward &amp; set off of losses</th>
<th>Case 1: Merger of A into B</th>
<th>Case 2: Merger of B into A</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Available</td>
<td>Available</td>
</tr>
<tr>
<td>B</td>
<td>Not available</td>
<td>Available</td>
</tr>
</tbody>
</table>
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

A

Shareholders

B

Merger

Outside India

India

Change in shareholding of I - Taxable in India?

2

A

Shareholders

B

Merger

Outside India

India

C derives substantial value from I

Subsidiaries

B does not derive substantial value from I

C

Outside India

India

Indirect transfer of shares of I - Taxable in India?
CASE STUDY - OVERSEAS MERGER

Shareholders

A

Issue of shares

B

100%

Merger

B derives substantial value from I

Outside India

India

I

Tax implications on shareholders of A
SLUMP SALE

Transfer of undertaking as a result of sale

Lumpsum consideration

No assignment of values to individual items

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**

<table>
<thead>
<tr>
<th>Consideration - other than cash</th>
<th>Transfer of Unit B to B</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>B</td>
</tr>
<tr>
<td>Unit A</td>
<td>Unit B</td>
</tr>
</tbody>
</table>

**Computation Mechanism - Negative net worth**

<table>
<thead>
<tr>
<th>Particulars</th>
<th>Case Study-1</th>
<th>Case Study-2</th>
<th>Case Study-3</th>
</tr>
</thead>
<tbody>
<tr>
<td>Net Worth</td>
<td>125</td>
<td>(125)</td>
<td>(125)</td>
</tr>
<tr>
<td>Sale Consideration (A)</td>
<td>150</td>
<td>150</td>
<td>150</td>
</tr>
<tr>
<td>Less: Deemed Cost of Acquisition (B)</td>
<td>(125)</td>
<td>-</td>
<td>(125)</td>
</tr>
<tr>
<td>Capital Gains (C= A-B)</td>
<td>25</td>
<td>150</td>
<td>275</td>
</tr>
</tbody>
</table>

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

- 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

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

- 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 Company

Transfer of all business assets & liabilities >50%

Issue of shares

Sole proprietorship

Company
SUCCESSION OF PARTNERSHIP FIRM BY COMPANY

- **Tax neutral subject to conditions:**
  - All assets and liabilities of the firm concern become the assets and liabilities of the company
  - All partners become 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

- **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
SURAJ MALIK

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.

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
THANK YOU

For more information & to discover how BDO India can help your organization achieve superior performance through innovative services, visit www.bdo.in or contact:

- **Suraj Malik**
  - Partner
  - M&A Tax
  - surajmalik@bdo.in

Confidential Information

This presentation has been prepared by BDO India LLP (BDO) and is considered to be proprietary strictly confidential. It contains information intended only for the person to whom it is transmitted. With receipt of this presentation, the recipient acknowledges and agrees that:

In the event the recipient does not wish to pursue this matter; this document will be destroyed, or returned to the address listed below, as soon as possible; The recipient will not copy, fax, reproduce, divulge, or distribute this confidential presentation, in whole or in part, without the expressed written consent of BDO; All of the information herein will be treated as confidential material with no less care than that afforded to your own company confidential material.

Disclaimer

The information contained in this document is for background purpose only, has not been verified and is subject to amendment, revision and updating. No representation or warranty, express or implied, is made as to the fairness accuracy or completeness of the information contained in this document and no reliance should be placed upon it. In particular, this document does not constitute or form part of an offer to sell or an invitation to purchase or subscribe for shares or other securities. It should be clearly understood that this document does not purport to contain all the information which may be required to appraise the project and that recipients are responsible for making their own decisions as to the completeness, fairness and accuracy of any information or opinion provided.