MERGER AND AMALGAMATION UNDER COMPANY LAW

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ABSTRACT

In corporate capital scheme, there are two ways for a company to raise its capital, through loan and equity. A company can raise its capital by issuing shares on the stock market as the quickest and easiest ways to finance its operation. And second is take loan from banks or any other sources to raise capital of his company. With this initial reason and based on economic perspectives further, the concept of merger and acquisitions is developed.

Merger or acquisition, in the context of corporate strategy, is an integration of two companies with a certain mechanism in particular business area that ultimately result in a large capitalization in the market economy. It is very easiest way to raise capital of company or reconstruction of his company, simply combining two entities to increase opportunities in the given market. Theoretically, there are three primary methods of M&As; those were merger, sale of assets, and tender offer. Merger and Acquisitions are usually simply referred to as merger, the condition or process in which a company buys “another company”

Keywords: *Corporate, Strategy, Capitalization, Combining, Amalgamation.*

INTRODUCTION

Every merger or acquisition involves one or more methods of obtaining control of a public or private company, and the legal aspects of these transactions include issues relating to due-diligence, defining the party's contractual obligations, structuring exit options, and the like. Due to the positive as well as negative impact cross border merger or acquisition may have on the economy; every legal system seeks to regulate it. Interestingly, while regulating cross border merger or acquisition, the government has to be cautious to avoid any kind of over regulation, as the same may be fatal for the economic development and may result in discouraging foreign investors as well as domestic investors, seeking to acquire foreign companies.

Merger is defined as combination of two or more companies into a single company where one survives and the other lose their corporate existence. The survivor acquires the assets as well as liabilities of the merged company or companies. Generally, the company, which survives, is the buyer, which retains its identity and the seller company is extinguished.

Merger is the fusion of two or more existing companies or absorption of one company into another. All assets, liabilities and stock of one company stand transferred to transferee Company in consideration of payment in the form of equity shares of transferee Company or debentures or cash or a mix of the two or three modes[i].

A merger sought to effect for a variety of reasons: - it is an inexpensive way to entering into a new activity or a new market,

1. it gives the opportunity way of entering into a new activity or a new market, and
2. it gives opportunity to use the spare capacity in the acquiring company with the assets of the other company, where the companies are under the control of same group.

MERGERS AND AMALGAMATIONS IN COMPANY LAW

The Merger Provisions govern schemes of arrangements between a company, its shareholders and creditors. The Merger Provisions are in fact worded so widely that they provide for and regulate all kinds of corporate restructuring that a company can possibly undertake, such as mergers, amalgamations, demergers, spin-off/ hive off, and every other compromise, settlement, agreement or arrangement between a company and its members and/or its creditors.

A. Procedure under the Merger Provisions

Since a merger essentially involves an arrangement between companies, those companies which intend to merge must make an application to the National Company Law Tribunal ("NCLT") having jurisdiction over such company for

- convening meetings of its respective shareholders and/or creditors;
- seeking dispensation of such meetings basis the consents received in writing from the shareholders and creditors. Basis the NCLT order, either a meeting is convened or dispensed with. If the majority in number, representing 3/4th in value of the creditors or shareholders present and voting at such meeting (if the meeting is held) agree to the merger, then the merger, if sanctioned by the NCLT, is binding on all creditors and shareholders of the company. The Merger Provisions constitute a comprehensive code in them, and under these provisions, the NCLT has full power to sanction any alterations in the corporate structure of a company.

For example, in ordinary circumstances a company must seek the approval of the NCLT for effecting a reduction of its share capital. However, if a reduction of share capital forms part of the corporate restructuring proposed by the company under the Merger Provisions, then the NCLT has the power to approve and sanction such reduction in share capital and companies will not be required to follow a separate process for reduction of share capital as stipulated under the CA 2013.

B. Fast Track Merger

The Fast Track merger covered under section 233 of CA 2013 requires approval from shareholders, creditors, the Registrar of Companies, the Official Liquidator and the Regional

Director. Under the fast track merger, scheme of merger shall be entered into between the following companies:

- two or more small companies (private companies having paid-up capital of less than INR 100 million and turnover of less than INR 1 billion per last audited financial statements); or
- a holding company with its wholly owned subsidiary; or
- such other class of companies as may be prescribed.

The scheme, after incorporating any suggestions made by the Registrar of Companies and the Official Liquidator, must be approved by shareholders holding at least 90% of the total number of shares, and creditors representing 9/10th in value, before it is presented to the Regional Director and the Official Liquidator for approval[ii]. Thereafter, if the Regional Director/ Official Liquidator has any objections, they should convey the same to the central government. The central government upon receipt of comments can either direct NCLT to take up the scheme under Section 232 (general process) or pass the final order confirming the scheme under the Fast Track process.

C. *Cross Border Mergers*

Section 234 of the CA 2013 permits mergers between Indian and foreign companies with prior approval of the Reserve Bank of India ("RBI"). A foreign company means any company or body corporate incorporated outside India, whether having a place of business in India or not. The following conditions must be fulfilled for a cross border merger:

- The foreign company should be incorporated in a permitted jurisdiction which meets certain conditions.
- The transferee company is to ensure that the valuation is done by a recognized professional body in its jurisdiction and is in accordance with internationally accepted principles of accounting and valuation.
- The procedure prescribed under Company Act 2013 for undertaking mergers must be followed.

The RBI also issued the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 ("Merger Regulations") on March 20, 2018 which provide that any transaction undertaken in relation to a cross-border merger in accordance with the FEMA Regulations shall be deemed to have been approved by the RBI.

SECTION 232, MERGER AND AMALGAMATION OF COMPANIES

1) Where an application is made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement proposed between a company and any such persons as are mentioned in that section, and it is shown to the Tribunal—

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (hereinafter referred to as the transferor company) is required to be transferred to another company (hereinafter referred to as the transferee company), or is proposed to be divided among and transferred to two or more companies, the Tribunal may on such application, order a meeting of the creditors or class of creditors or the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal may direct and the provisions of sub-sections (3) to (6) of section 230 shall apply mutatis mutandis.

(2) Where an order has been made by the Tribunal under sub-section (1), merging companies or the companies in respect of which a division is proposed, shall also be required to circulate the following for the meeting so ordered by the Tribunal, namely:—

a) the draft of the proposed terms of the scheme drawn up and adopted by the directors of the merging company;

b) confirmation that a copy of the draft scheme has been filed with the Registrar ;

c) a report adopted by the directors of the merging companies explaining effect of compromise on each class of shareholders, key managerial personnel , promoters and nonpromoter shareholders laying out in particular the share exchange ratio, specifying any special valuation difficulties;

d) the report of the expert with regard to valuation, if any;

e) 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.

(3) The Tribunal, after satisfying itself that the procedure specified in sub-sections (1) and (2) has been complied with, may, by order, sanction the compromise or arrangement or by a subsequent order, make provision for the following matters, namely:—

a) the transfer to the transferee company of the whole or any part of the undertaking, property or liabilities of the transferor company from a date to be determined by the parties unless the Tribunal, for reasons to be recorded by it in writing, decides otherwise;

b) the allotment or appropriation by the transferee company of any shares, debenture , policies or other like instruments in the company which, under the compromise or arrangement, are to be allotted or appropriated by that company to or for any person:

c) Provided that a transferee company shall not, as a result of the compromise or arrangement, hold any shares in its own name or in the name of any trust whether on its behalf or on behalf of any of its subsidiary company or associate companies and any such shares shall be cancelled or extinguished;

d) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company on the date of transfer;

e) dissolution, without winding-up, of any transferor company;

f) the provision to be made for any persons who, within such time and in such manner as the Tribunal directs, dissent from the compromise or arrangement;

g) where share capital is held by any non-resident shareholder under the foreign direct investment norms or guidelines specified by the Central Government or in accordance with any law for the time being in force, the allotment of shares of the transferee company to such shareholder shall be in the manner specified in the order;

h) the transfer of the employees of the transferor company to the transferee company;

i) where the transferor company is a listed company and the transferee company is an unlisted company,

(A) the transferee company shall remain an unlisted company until it becomes a listed company;

(B) if shareholders of the transferor company decide to opt out of the transferee company, provision shall be made for payment of the value of shares held by them and other benefits in accordance with a pre-determined price formula or after a valuation is made, and the arrangements under this provision may be made by the Tribunal:

Provided that the amount of payment or valuation under this clause for any share shall not be less than what has been specified by the Securities and Exchange Board under any regulations framed by it;

(i) where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation; and

(j) such incidental, consequential and supplemental matters as are deemed necessary to secure that the merger or amalgamation is fully and effectively carried out:

Provided that no compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal 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[iii].

(4) Where an order under this section provides for the transfer of any property or liabilities, then, by virtue of the order, that property shall be transferred to the transferee company and the liabilities shall be transferred to and become the liabilities of the transferee company and any property may, if the order so directs, be freed from any charge which shall by virtue of the compromise or arrangement, cease to have effect.

(5) Every company in relation to which the order is made shall cause a certified copy of the order to be filed with the Registrar for registration within thirty days of the receipt of certified copy of the order.

(6) The scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date.

(7) Every company in relation to which the order is made shall, until the completion of the scheme, file a statement in such form and within such time as may be prescribed with the Registrar every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

(8) If a company fails to comply with sub-section (5), the company and every officer of the company who is in default shall be liable to a penalty of twenty thousand rupees, and where the failure is a continuing one, with a further penalty of one thousand rupees for each day after the first during which such failure continues, subject to a maximum of three lakh rupees.

(9) If a transferor company or a transferee company contravenes the provisions of this section, the transferor company or the transferee company, as the case may be, shall be punishable with fine which shall not be less than one lakh rupees but which may extend to twenty-five lakh rupees and every officer of such transferor or transferee company who is in default, shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than one lakh rupees but which may extend to three lakh rupees, or with both.

Explanation: For the purposes of this section,—

(i) in a scheme involving a merger, where under the scheme the undertaking, property and liabilities of one or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to another existing company, it is a merger by absorption, or where the undertaking, property and liabilities of two or more companies, including the company in respect of which the compromise or arrangement is proposed, are to be transferred to a new company, whether or not a public company , it is a merger by formation of a new company;

(ii) references to merging companies are in relation to a merger by absorption, to the transferor and transferee companies, and, in relation to a merger by formation of a new company, to the transferor companies;

(iii) a scheme involves a division, where under the scheme the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and

(iv) property includes assets, rights and interests of every description and liabilities include debts and obligations of every description.

CONCLUSION

As Dale Carnegie said ***"Flaming enthusiasm, backed by horse sense and persistence, is the quality that most frequently makes for success"*** A quote that holds good for M&A in India, and a credo to which Indian companies seem to subscribe given their successes to date in completing acquisitions. There is little to stop Indian companies that desire to be global names for playing the merger and acquisition game globally. With a plethora of financing options, this aspiration has become a reality for many corporate houses, who can now boast of having the best in the industry under their wings. Indian companies have often surpassed their foreign counterparts in corporate restructuring both within and beyond the national frontiers.

Mergers and acquisitions are powerful indicators of a robust and growing economy. The legal framework for such corporate restructuring must be easy and facilitative and not restrictive and mired in bureaucratic and regulatory hurdles. The biggest obstacle in the way of completing a merger or an amalgamation remains the often long drawn out court procedure required for the sanction of a scheme of arrangement.

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ENDNOTES

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