MERGER & AMALGAMATION
CONCEPT & ISSUES

Presented by:
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### Definition of Merger & Amalgamation

A legal process by which two or more companies are joined together to form a new entity or one or more companies are absorbed or blended with another company.

Under the Companies Act, 1956, the merger and amalgamation are synonymous.

The properties, assets and liabilities of amalgamating company(s) are absorbed or blended by/in an existing or a new amalgamated company.

Shareholders of amalgamating company are allotted shares in amalgamated company in exchange of the shares held in former.

Amalgamating company losses its existence and gets dissolved without process of winding up.

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**Example:****

- **Company “Y”** merges with **Company “X”**
- **Company “Y”** and **“Z”** merge with a new **Company “X”**
KINDS OF MERGER/AMALGAMATION
CONGENERIC MERGER

1. HORIZONTAL MERGER
2. VERTICAL MERGER

CONGLOMERATE MERGER

1. CASH MERGER
2. DEFACTO MERGER
3. DOWNSTREAM MERGER
4. UPSTREAM MERGER
5. SHORT FORM MERGER
6. TRIANGULAR MERGER
7. REVERSE MERGER
DIFFERENCE BETWEEN MERGER AND AMALGAMATION

• Often merger and amalgamation are considered as synonyms for each other and used interchangeably.
• However in strict sense merger is normally used as a strategic vehicle to achieve expansion, diversification, entry into the new market and acquisition of new technology and resources.
• Whereas amalgamation is commonly adopted to bringing assets of two companies under the control and superintendence of one company, which may be existing company or a new company.
ADVANTAGES OF MERGER / AMALGAMATION
**STRATEGIC SYNERGIES**

1. To achieve globalization;
2. For growth of market share;
3. For diversification of business;
4. To consolidate the businesses;
5. To widen the product range;
6. To achieve technology integration;
7. To penetrate in new market; and
8. To develop focused brand image.
<table>
<thead>
<tr>
<th>FINANCIAL SYNERGIES</th>
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<td>1. To reduce operating cost by merging the entities;</td>
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<td>2. To unlock the value of entities;</td>
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<td>3. To avail tax efficiency; and</td>
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<td>4. To take advantage of financial structuring.</td>
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LEGAL & REGULATORY FRAMEWORK OF MERGER / AMALGAMATION
THE COMPANIES ACT, 1956

COMPETITION ACT, 2002

COMPANIES COURT RULES, 1959

THE INDIAN STAMP ACT, 1899

LISTING AGREEMENT

INCOME TAX ACT, 1961

July-2012

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<table>
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<tr>
<th><strong>COMPANIES ACT, 1956</strong></th>
<th>Section 390 to 396A of the Companies Act, 1956 contains provisions for merger and amalgamation of companies.</th>
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<td><strong>COMPANIES COURT RULES, 1959</strong></td>
<td>Rule. 67 to 87 deal with merger and amalgamation of the companies.</td>
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<tr>
<td><strong>INCOME TAX ACT, 1961</strong></td>
<td>Various sections of Income Tax Act contains provisions for merger and amalgamation of the companies.</td>
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<td>LISTING AGREEMENT</td>
<td>Listed company is required to submit copy of scheme to the stock exchange and obtain “No Objection Certificate” for the proposed scheme.</td>
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<td>THE INDIAN STAMP ACT, 1899</td>
<td>The stamp act has to be verified on the basis of the duties applicable in the respective states.</td>
</tr>
<tr>
<td>COMPETITION ACT, 2002</td>
<td>Provisions relating to the combination are to be complied.</td>
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MAJOR TAX IMPLICATIONS

1. No capital gain on transfer of capital assets by amalgamating company to an Indian amalgamated company. [Section 47(vi)]

2. No capital gain on transfer of shares held in an Indian company by an amalgamating foreign company to an amalgamated foreign company. [Section 47(via)]

3. No capital gain on allotment of shares by an Indian amalgamated company to the shareholders of the amalgamating company. [Section 47(vii)]
4. Proportionate depreciation shall be allowed to amalgamating and amalgamated company in relation of number of days assets are used by them during the financial year. [Fifth Proviso to Section 32(1)]

5. Expenditure on amalgamation is allowed to be deductible in five equal installments during five successive previous years. [Section 35DD]

6. Actual cost of assets to the amalgamated company shall be same as would be to amalgamating company. Hence amalgamated company shall be in position to avail depreciation on the basis of written down value of the assets. [Explanation 7 of Sec.43(1) & Explanation 2 of Sec.43(6)]
7. Cost of shares, allotted by amalgamated company in lieu of shares held in amalgamating company, shall be the cost of acquisition in the amalgamating company [Section 49(2)]

8. Accumulated business loss of the amalgamating company shall be allowed to be carried forward and set off in the hands of amalgamated company for a fresh period of 8 years subject the fulfillment of certain conditions. Similarly, unabsorbed depreciation of amalgamating company is allowed to be carried forward indefinitely and set off in the hands of amalgamated company: [Section 72A(1), (2) & (3)]
Properties, assets and liabilities of amalgamating company are vested with amalgamated company by virtue of an order of High Court sanctioning the scheme.

Vesting of property takes place by operation of law without any further acts or deeds, hence no stamp duty used to be payable.

The Bombay Stamp Act, 1958, first time brought order of High Court sanctioning the scheme of amalgamation under the term “Conveyance” and thus rendered it liable for stamp duty.

Constitutional validity for levy of stamp duty was upheld by an order of division bench of Bombay High Court in the case of *Li Taka Pharmaceuticals Ltd v State of Maharashtra* (1996) 22 CLA 154(BOM).
Supreme Court of India in the case of Hindustan Lever v State of Maharashtra (2004) CLC 166 held that amalgamation scheme sanctioned by High Court shall be an “Instrument” and state legislature has full competence to impose stamp duty on transfer of assets under the scheme approved by High Court.

Some of the States have amended their stamp laws and imposed duty on order of High Court sanctioning scheme of amalgamation.

Calcutta High Court in the case of Madhu Intra v ROC (2006) 130 Comp Ca 510 (Cal) (DB) held that transfer of assets as per order sanctioning scheme of merger shall not be liable for stamp duty.

There are contradictory decisions on this issue, please check the applicable stamp act and consult the expert in this aspects
PROCEDURE FOR MERGER / AMALGAMATION
Check object clause of Memorandum and Articles of Association (MOA) of transferee company to ensure that it covers objects of transferor company.

Convene a board meeting to consider and approve the scheme of merger/amalgamation.

Convene board meeting of transferee and transferor companies and approve the scheme of merger/amalgamation.

Appoint an expert to determine the valuation of shares and exchange ratio.

Prepare a scheme of merger/amalgamation in consultation with legal advisors, auditors and company secretary.

Preparation of valuation report for transferor and transferee companies.
PROCEDURE AT HIGH COURT

1. Filing of application in the high court to call, hold and conduct meeting of shareholders / creditors.

2. Issue of direction by the high court to convene shareholders/ creditors meeting.

3. Appointment of chairman of the shareholders/ creditors meeting.

4. Printing and dispatching of notice of meeting along with explanatory statement.

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Publication of notice of meeting in two newspapers → Convening of meeting and passing of resolution for approval of the scheme of merger/amalgamation → Chairman will submit a report to the High Court indicating the results of the meeting within 7 days of conclusion of the meeting.

Fixation of date of hearing by High Court. → Forwarding of petition to Director (MCA) → Submission of petition to the High Court within 7 days of submission of report by the Chairman.

Publication of notice of such hearing in two newspapers. → Consideration of and approval of scheme of merger/amalgamation by the High Court.

Consideration of and approval of scheme of merger/amalgamation by the High Court.

Note: If two companies are in different states, similar procedure will be applicable in both the courts.
COMPLIANCES SUBSEQUENT TO APPROVAL OF THE SCHEME

Filing of certified Copy of High Court order with Registrar of Companies (MCA) within 30 days of receipt of order.

Affixing of copy of High Court order in all copies of MOA of the transferee company.

Listing of shares at stock exchanges, if company is listed.

Allotment of shares to the shareholders of the transferor company.
IMPORTANT ISSUES AND JUDICIAL INTERPRETATIONS
ISSUES & INTERPRETATIONS

1. Whether High Court has power to sanction a scheme of amalgamation/merger, when the MOA of the Company does not have specific reference to amalgamate/merge with other company?

Held by Calcutta High Court [Marybong & Kyel Tea Estate Limited In re (1977) 47 Comp Case 802 (Cal)] that Court has power to grant sanction to a scheme of amalgamation despite there is no express power in the MOA of the Company.

2. Does the authorised share capital of the transferor and transferee Company integrate under scheme of amalgamation/merger and there is no requirement for payment of fee to the ROC?

Allahabad High Court in the case of Jaypee Greens Limited, In re (2006) 134, Comp Case 542 held that authorised share capital of transferor and transferee company merge and no further fees is required to be paid to ROC.
3. Determination of Appointed date

Appointed date is also referred as transfer date or cut off date. This date determines the date from which all assets and liabilities of amalgamating company shall be transferred to the amalgamated company.

Observed by the Supreme Court in the case of *Marshal Sons & Co.(India) Ltd vs. ITO(1977) 1 Comp LJ P.1* that it is open to the Court to modify the appointed date and prescribe such date as it thinks appropriate in the facts and circumstances of the case.

If Court does not prescribe any date, but merely sanctions the scheme, then date specified in the scheme shall be regarded as appointed date.
4. Can a joint application be moved where registered offices of transferor and transforee Company are situated in the same State?

In the case of *Mohan Export Ltd vs. Tarun Overseas P. Ltd* (1994)14 CLA 279 *(Del)*, it was held that joint application can be made.

5. Whether Court is bound to follow the opinion of Regional Director (MCA)?

High Court is not bound to follow the opinion of Regional Director (MCA). It may form its independent opinion over the matter [ *In re Sakamari Steel & Alloys Ltd* (1981) 51 Comp Case 266 (Bom)].

6. Whether order of the High Court shall be binding on all creditors, class of creditors or shareholders despite 3/4th of creditors, class of creditors or shareholders voted in favour of the scheme of compromise or arrangement?

The scheme sanctioned by the High Court shall be binding on all creditors, class of creditors and shareholders.
7. Is there any need to give notice to the Income Tax Department of the proposed scheme?

No special notice needs to be given to the Income Tax Department to find out whether there is a motive of tax evasion in the proposed amalgamation; the general public notice in newspapers is sufficient [Re Vinay Metal Printers Pvt.Ltd (1996) 87 Comp Cas 266 (AP)].

8. Can High Court sanction the scheme and order for dissolution of transferor company without the report of the official liquidator?

No order of dissolution can be passed by the High Court unless the Official Liquidator has, on scrutiny of books and papers of the company, made a report to the Court that affairs of the Company have not been conducted detrimental to the interest of members or to the public interest. [Webb’s Farm Mechanisation P. Ltd v. Official Liquidator (1966) 7 SCL 81 (Kar- FB) and Section 394(1) second proviso]
9. Can shareholder dispute the valuation of shares and swap ratio?

Shareholder cannot object to the valuation of shares and swap ratio unless valuation is grossly unfair and court is satisfied with their contention[ Hindustan Lever Employees’ Union v. Hindustan Lever Ltd. (1995) 83 Comp Cas 30 (SC): (1994) 15 CLA 318 (SC)].

10. Frivolous objection by minority shareholders

There have been some instances where shareholders holding a fraction of the shares make some frivolous and untenable objections against the scheme with an ulterior objective to defer the implementation of the scheme. Courts on number of occasions turn down these frivolous objections and proceeded for approval of the scheme.
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