



Indian M&A Landscape

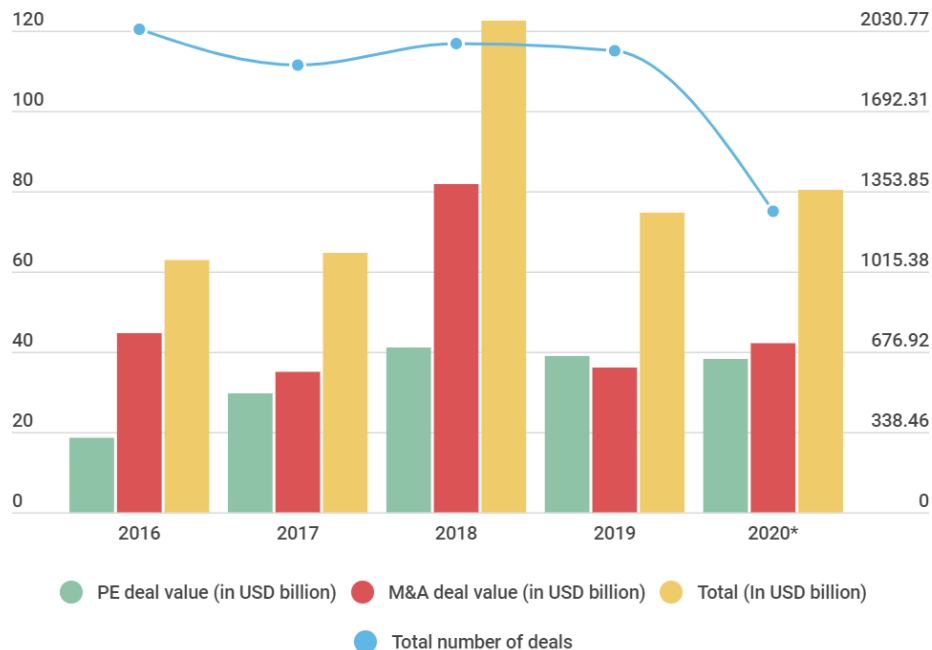
For discussion purposes only | 2021

CA Neha Gupta

M&A in India – an overview

In 2020, deal values retained momentum with the previous year, recording 1,268 transactions worth \$80 billion, up 7% from 2019, despite the Covid-19 pandemic.

M&A deals in India: value and volume



Source: Business Standard

Asset monetization in Private & Public sector Real Estate & Infrastructure

Distressed asset acquisition & debt resolution

Focus on Digital transformation & E-commerce

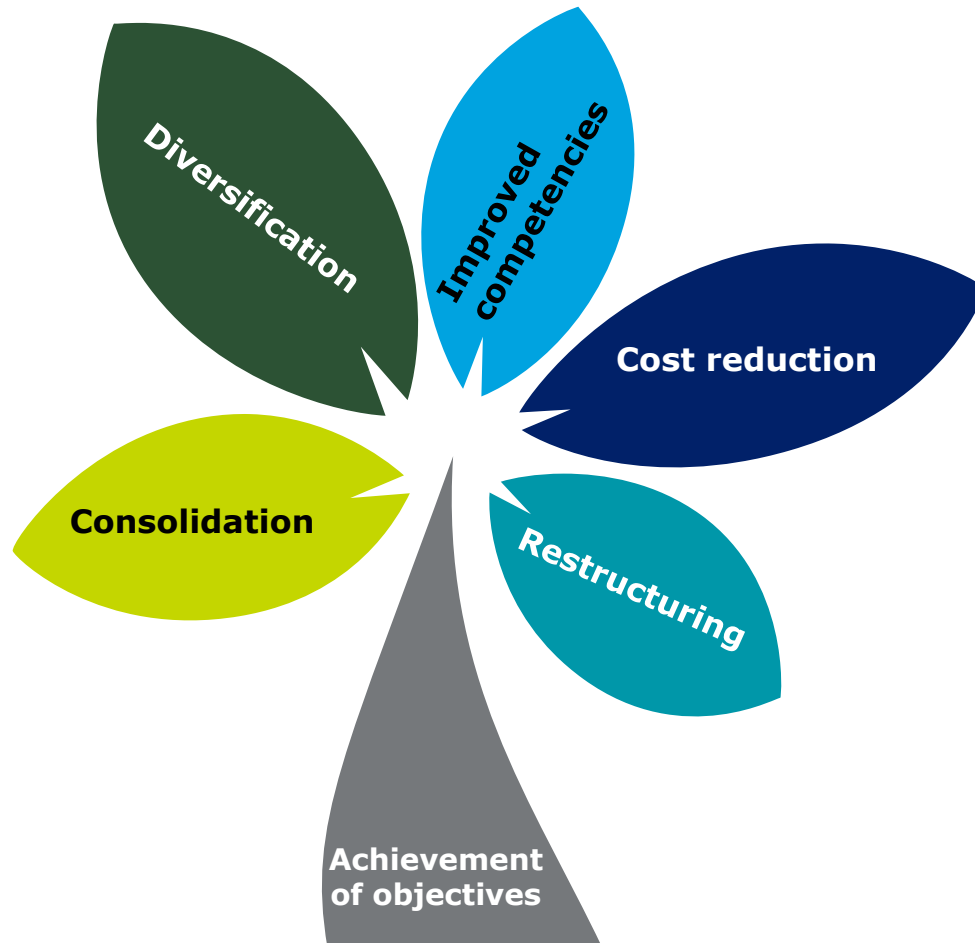
Large value start-up deals

Consolidation of telecom sector

Merger of Public Sector Banks

Major deals in Healthcare

Need of corporate reorganization



Consolidation
Widen market presence, achieving economies and ensuring business growth

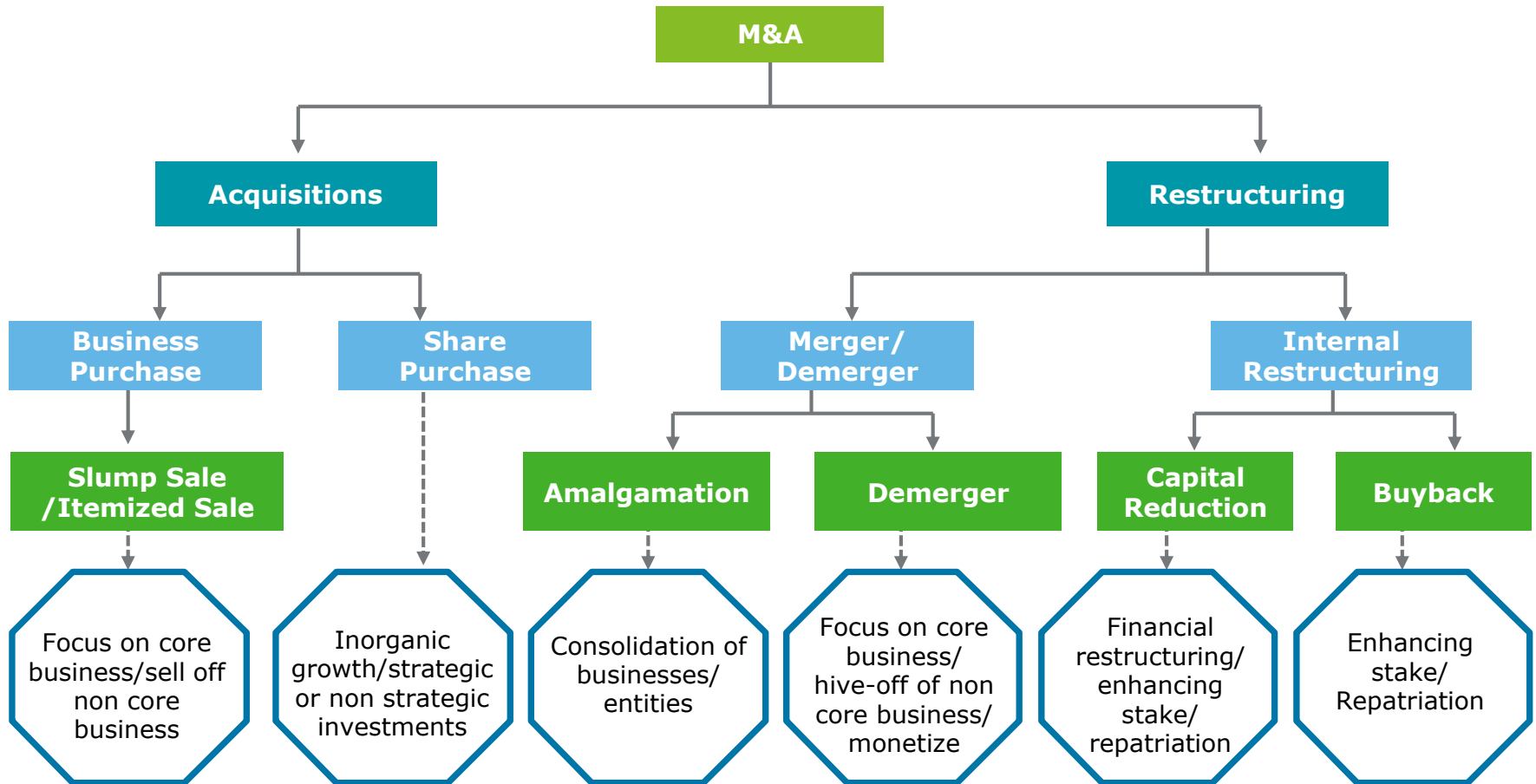
Diversification
De-risking the business model, Entering into new segment

Improved competencies
Integration of business process and consolidation of business resources

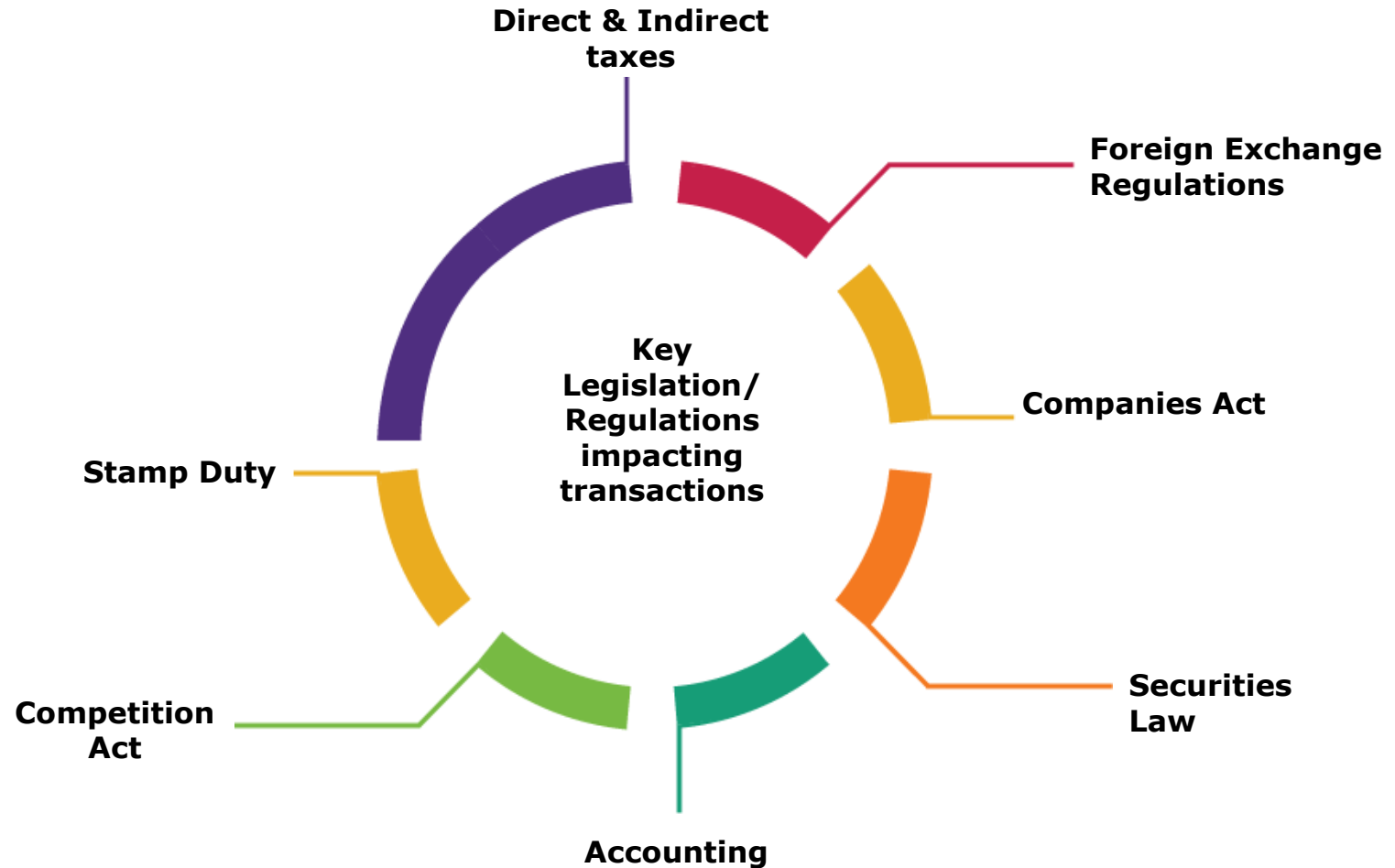
Cost reduction
Pooling of financial resources, Cutting down Effective tax rate, Reduce administrative cost, Regulatory efficiency

Restructuring
Exploring opportunities for balance sheet re-engineering Revival of sick companies

Modes of M&A in India



Snapshot of Indian laws impacting M&A



Budget 2021 proposals impacting M&A

Goodwill not an intangible asset for tax depreciation

- Presently, goodwill of a business or profession was not included under the definition of block of assets for the purpose of depreciation.
- The Hon'ble Supreme Court has held that goodwill of a business or profession is a depreciable asset.
- Proposed with effect from FY21, to amend the definition of block of assets to not include goodwill of a business or profession and accordingly, depreciation shall not be available on the same.

Slump sale to include slump exchange

- Presently, section 2(42C) defines "slump sale" as transfer of one or more undertakings as a result of sale for lump sum consideration without value being assigned to individual assets and liabilities in such cases.
- This has been blessed by some Court rulings which suggest that other means of transfer including exchange, etc. are excluded and hence not subjected to tax.
- Proposed with effect from FY21, to amend the definition of "slump sale" by including all types of transfer.

To extend tax holiday for eligible startups incorporated on or before 31 March 2022

- Section 80-IAC provides for 100% tax deduction of profits derived from an eligible business by an eligible start-up for 3 consecutive years out of 10 years at the option of the assessee.
- Section 54GB provides capital gains exemption to eligible assessee on transfer of a long-term residential property, if net consideration utilised for subscription in equity shares of an eligible start-up.
- To boost the start up ecosystem in India, the eligibility period for incorporating the eligible start up has been extended by one more year i.e. to be incorporated on or before 1 April 2022.

Transfer of capital asset to partner on dissolution or reconstitution of partnership firm / AOP / BOI

- Presently, on dissolution or reconstitution of firm, capital gains arising from transfer of capital asset shall be deemed to be the income of the firm / AOP / BOI and the FMV of the capital asset on the date of such receipt shall be deemed to be the full value of the consideration.
- Proposed with effect from FY21, the money or assets received by the partner in excess of the capital account balance, shall be chargeable as "Capital gains" for the partnership firm and while calculating the balance in capital account of partners, the increase on account of revaluation of any asset is to be ignored.

Slump sale vs Itemised sale

Recent news

Tata Consumer Products' intimates of slump sale of assets by Australian step-down subsidiary

JSPL to sell operations in Oman at \$1 billion to pare debt

Jindal Steel and Power Ltd said the divestment is in line with its vision and commitment to continuously bring down its debt and deleverage its balance sheet

Siemens Ltd to sell Mechanical Drives business for ₹440 crore

Chevron to Divest Shale Assets in \$735MM Deal

Reliance to hive off oil, chemicals business into separate unit for sale to Aramco

Slump sale vs. itemized sale

Concept

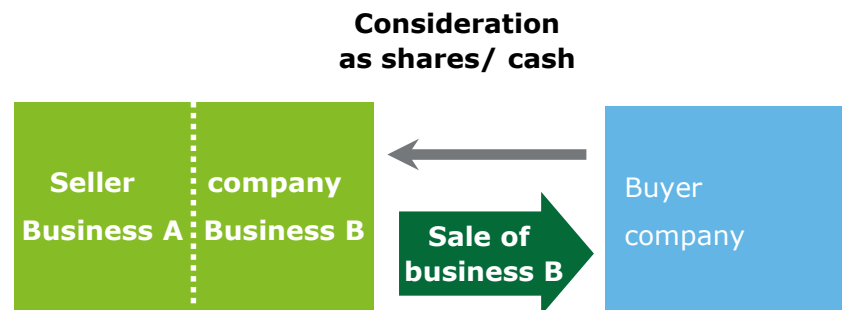
What is slump sale

- Involves transfer of identified business (comprising assets, liabilities, employees etc.) from one company to another.
- In consideration, the buyer company can issue shares/ pay cash to the seller company (unlike demerger)- *issue of slump exchange addressed by proposed amendments in Budget 2021.*
- No NCLT interference- can be achieved through a board resolution/ shareholder resolution

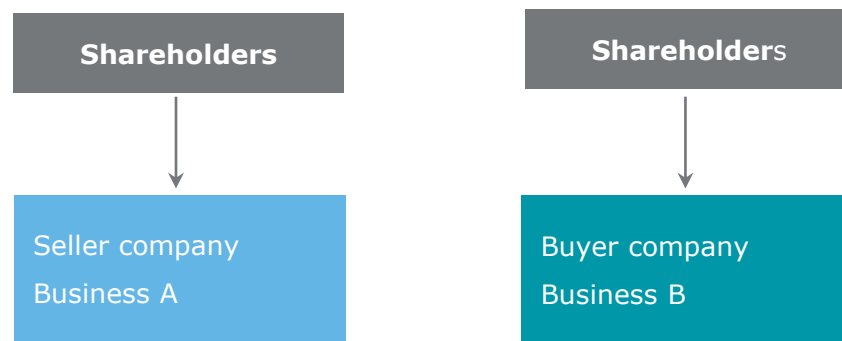
What is piecemeal sale/ asset sale

- While the broad mechanics of piecemeal sale are similar to slump sale, it involves transfer of identified assets/ liabilities (not constituting a business activity in itself).

Transaction



The resultant structure



Key tax considerations

Slump sale

- Special provision to compute capital gains [sale consideration– tax net worth of business] on slump sale for the seller. Capital gains tax levied @ corporate tax rate / 20% (depending on holding period of business, surcharge and cess additional). Indexation not available.
- Tax net worth certificate to compute capital gains impact
- Definition of 'undertaking' under ITA- will the transaction be regarded as a slump sale if certain assets or liabilities are not taken over by the purchaser?
- Transfer of business losses or Tax deductions/exemptions (section 80-IA,80-IB,10AA) attributable to the undertaking?
- Applicability of gift tax u/s 56(2)(x) on purchase of undertaking? Recognition of cost of assets as per PPA report in the books of buyer.
- Non-levy of GST and stamp duty on slump sale
- Shareholder approval required (if investment in subject undertaking > 20% of net worth or generates >20% revenue of the seller company).

Itemised sale

- Capital gains [sale consideration– WDV for depreciable asset/ actual cost for non-depreciable asset] on itemized sale for the seller. Capital gains tax levied @ corporate tax rate / 20% (depending on holding period of business, surcharge and cess additional). Indexation available for long term non-depreciable assets.
- Provisions of Section 50C (for land / building) and Section 50CA (for unlisted shares) apply
- Transfer of business losses proportionate to the assets or business specific exemptions?
- Gift tax u/s 56(2)(x) may arise on purchase of assets for lower than FMV
- Possible GST liability on transfer of movable assets
- Stamp duty costs on transfer of immovable assets.
- Shareholder approval required (if investment in subject undertaking > 20% of net worth or generates >20% revenue of the seller company).

Section 281: Requirement to obtain NOC on transfer/ charge of assets* during pendency of any tax proceedings or existence of outstanding demands.

**"assets" means land, building, machinery, plant, shares, securities and fixed deposits in banks, to the extent to which any of the assets aforesaid does not form part of the stock-in-trade of the assessee.*

Other points for discussion

- Risk of undertaking slump sale at book value
- Slump sale with retrospective date
- Treatment of deferred consideration on slump sale
- Treatment of contingent consideration on slump sale

Merger vs demerger (NCLT led processes)

Recent news

Ortin Lab skyrockets 7.5% after NCLT approves the scheme of arrangement with Vineet Lab

Board of Directors of the company is scheduled to be held on Friday, to take on record the sanction of the scheme.

Bharti AXA, ICICI Lombard ink definitive pact to merge non-life businesses

The combined entity, with an expected market share of 8.7 per cent in the non-life business, would be the third-largest non-life insurer in the general insurance business

NCLT clears GSK-HUL merger, paves way for GSK Plc's exit through huge block deal

NCLT approves demerger; Max Healthcare, new company to list on bourses in August

"The demerger will enable Max India to focus on the high potential category of Senior Care," Analjit Singh of Max Group said.

Merger concept

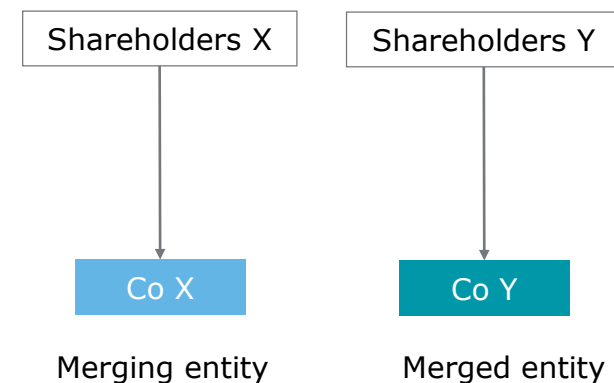
The merger process

- Transfer of entire property, liabilities and employees by merging company (company X or 'Co X') to the Merged entity (company Y or 'Co Y').
- Merging entity would automatically wind up, without separate liquidation proceedings, post-merger.
- Approval of specified majority of creditors/ shareholders of both companies.
- Specific approvals required from regulators (RoC, Registered Director, stock exchanges, in case of listed company) and NCLT where registered offices of companies are situated.
- Appointed Date v. Effective Date

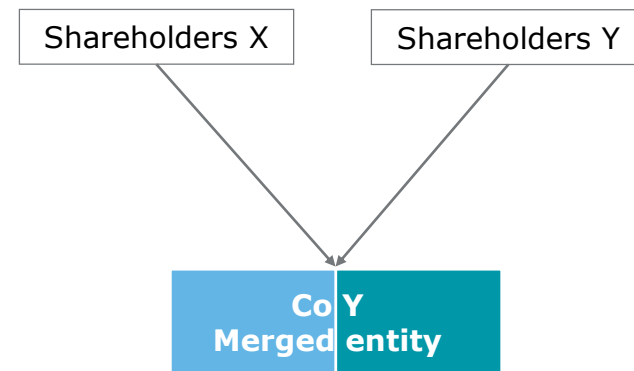
Consideration for the merger

- Shares to be issued to shareholders of merging entity, as consideration (a pre-requisite for achieving tax efficiency).
- Share swap ratio on merger to be determined by registered valuer based on asset and cash flow criteria etc, as appropriate..
- Shares issued may be either preference or equity, depending on the commercial considerations.

Pre-merger scenario



Post-merger scenario



Key tax considerations

- Tax neutral subject to fulfilment of certain conditions: Section 2(1B)
 - All properties of the amalgamating company becomes the properties of amalgamated company
 - All liabilities of the amalgamating company becomes the liabilities of amalgamated company
 - Shareholders holding 75% or more in value of shares in amalgamating company become shareholders of amalgamated company
- Carry forward & set off of losses / unabsorbed depreciation for a fresh period: Should comply with conditions of Section 72A
- Merger expenses amortizable over 5 years: Section 35AD
- Cost of acquisition (COA) and Period of holding of shares of amalgamated company received
- COA of capital assets transferred to Transferee Co = Cost incurred by Transferor Co for acquiring such assets

Other Tax Considerations

- Transfer of tax holiday benefits: Section 80-IA specifically provides that tax incentives would not be available to merged entity on amalgamation
- Transfer of MAT credit
- Change in shareholding – lapse of losses u/s 79
- Goodwill on merger – Supreme Court decision in the case of Smifs Securities- Proposed amendment under Budget 2021

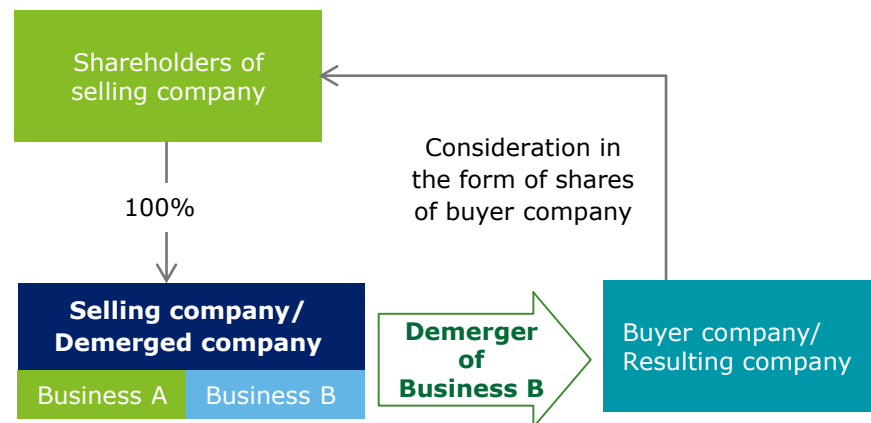
Demerger concept

Concept

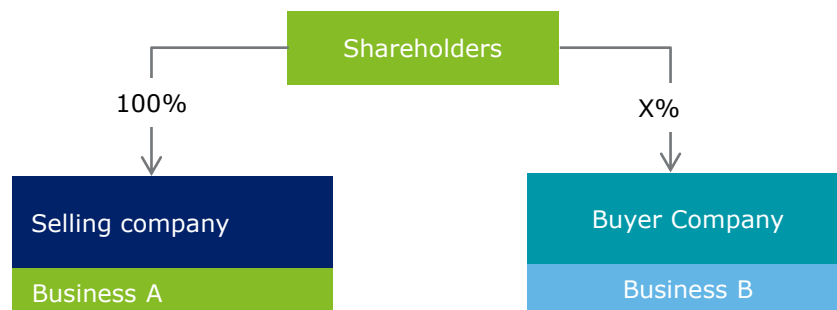
What is demerger?

- Demerger involves transfer of identified business (undertaking) from one company to another.
- In consideration, the company which acquires the business issues shares to the shareholders of the selling company.
- Demerger requires NCLT approval, similar to merger

Transaction



The resultant structure



Key tax considerations

- Tax neutral subject to fulfilment of certain conditions: Section 2(19AA)
 - All properties and liabilities of the demerged undertaking become the properties of Resultant company at book value
 - Consideration is discharged by issue of shares to the shareholders of demerged company on proportionate basis
 - Shareholders holding 75% or more in value of shares in demerged company become shareholders of resultant company
 - the transfer of the undertaking is on a going concern basis
 - the demerger is in accordance with the conditions, if any specified in section 72A of ITA
- Carry forward & set off of losses / unabsorbed depreciation relating to demerger undertaking
- Demerger expenses amortizable over 5 years: Section 35AD
- Cost of acquisition (COA) and Period of holding of shares of demerged company and resultant company

Other Tax Considerations

- Transfer of tax holiday benefits
- Transfer of MAT credit
- Stamp duty and GST on demerger

Other points for discussion

- Issue of RPS to equity shareholders
- Issue of shares to NR under merger/ demerger
- Issue of cash to shareholders holding upto 25% shares
- Continuity of shareholding in amalgamated company or resultant company
- Cross border merger/ demerger
- Section 72A vs Section 79
- Transfer of MAT credit on merger/ demerger
- Implications for non-compliant merger/ demerger
- Merger of foreign companies- condition of both section 2(1b) and 47(via) required to be complied?
- Direct/ indirect transfer of shares of Indian company on foreign merger

Accounting for reorganisation

Accounting under IGAAP and Ind AS

Type of reorganization	IGAAP	Ind AS
Merger	<p>AS 14 'Accounting for Amalgamations' apply:</p> <ul style="list-style-type: none"> • In the nature of merger: 'Pooling of Interest' method • In the nature of purchase: Purchase method 	<p>Ind AS 103 'Business Combinations' apply:</p> <ul style="list-style-type: none"> • Common control accounting • Non-common control/ acquisition accounting
Demerger	<p>No specific Accounting Standard – Generally Accepted Accounting Principles applied</p>	<p>Appendix C of Ind AS 103 states that it deals with accounting under common control transactions. Whilst Ind AS 103 uses the terms - 'Acquirer' and 'Acquiree', Appendix C uses the terms - 'transferor' and 'transferee'. A view is possible that Ind AS 103 would also apply on accounting for demergers under common control</p> <p>Appendix A of Ind AS 10 - Distribution of non-cash assets to owners' may be applied for accounting for demerger for entities under non-common control.</p>

Indian Accounting Standard (Ind AS) 103

A business combination is a transaction or other event in which an acquirer obtains control of one or more businesses

- Ind AS 103, Business Combination applies to all business combinations except:
 - a. the accounting for the formation of a joint arrangement in the financial statements of the joint arrangement itself.
 - b. the acquisition of an asset or a group of assets, including any liabilities assumed that does not constitute a business under the definition of Ind AS 103. No goodwill would arise in such a case.
- Ind AS 103 provides for 2 methods of accounting: **The Acquisition accounting process** and **Accounting for common control transactions**

Common control transactions

- A business combination involving common control transactions is a transaction in which
 - The combining entities or businesses are ultimately controlled by the same party (or parties) both before and after the transaction, and
 - Control is not transitory
- The extent of non-controlling interests in each of the combining entities before and after the business combination is not relevant

Goodwill under AS 14 vs Ind AS 103

- Under AS 14, goodwill (arising from an Amalgamation in the nature of purchase) is allowed to be amortised over an useful life not exceeding 5 years. Impairment testing of goodwill is allowed if circumstances indicate that the carrying value may not be recoverable.
- Under Ind AS 103, goodwill arising from an 'acquisition' is not allowed to be amortised, unless such goodwill is a separately identifiable intangible asset. The existing partially amortised goodwill is frozen at its net amount at the date of transition. Goodwill impairment have to be carried out annually.

Appointed date v/s effective date

IGAAP

- Date as defined in Court scheme
- Accounts redrawn to give effect to scheme once approved by Court



Ind AS

- Date on which acquirer obtains control of the acquire
- Generally the date on which the acquirer legally transfers the consideration, acquires the assets and assumes the liabilities of the acquiree - the closing date
- MCA circular provides for 'Appointed date' to be considered as 'Effective date'

Investment mechanism and key considerations

Recent news

Indian Angel Network plans to invest over Rs 100 cr in start-ups in 2021

IAN has invested in start-ups like FarEye, Fab Alley, HungryZone, Staqu etc. In 2020, IAN exited 3-4 companies after registering 15 times growth on the invested capital

Reliance to expedite Future deal after CCI nod

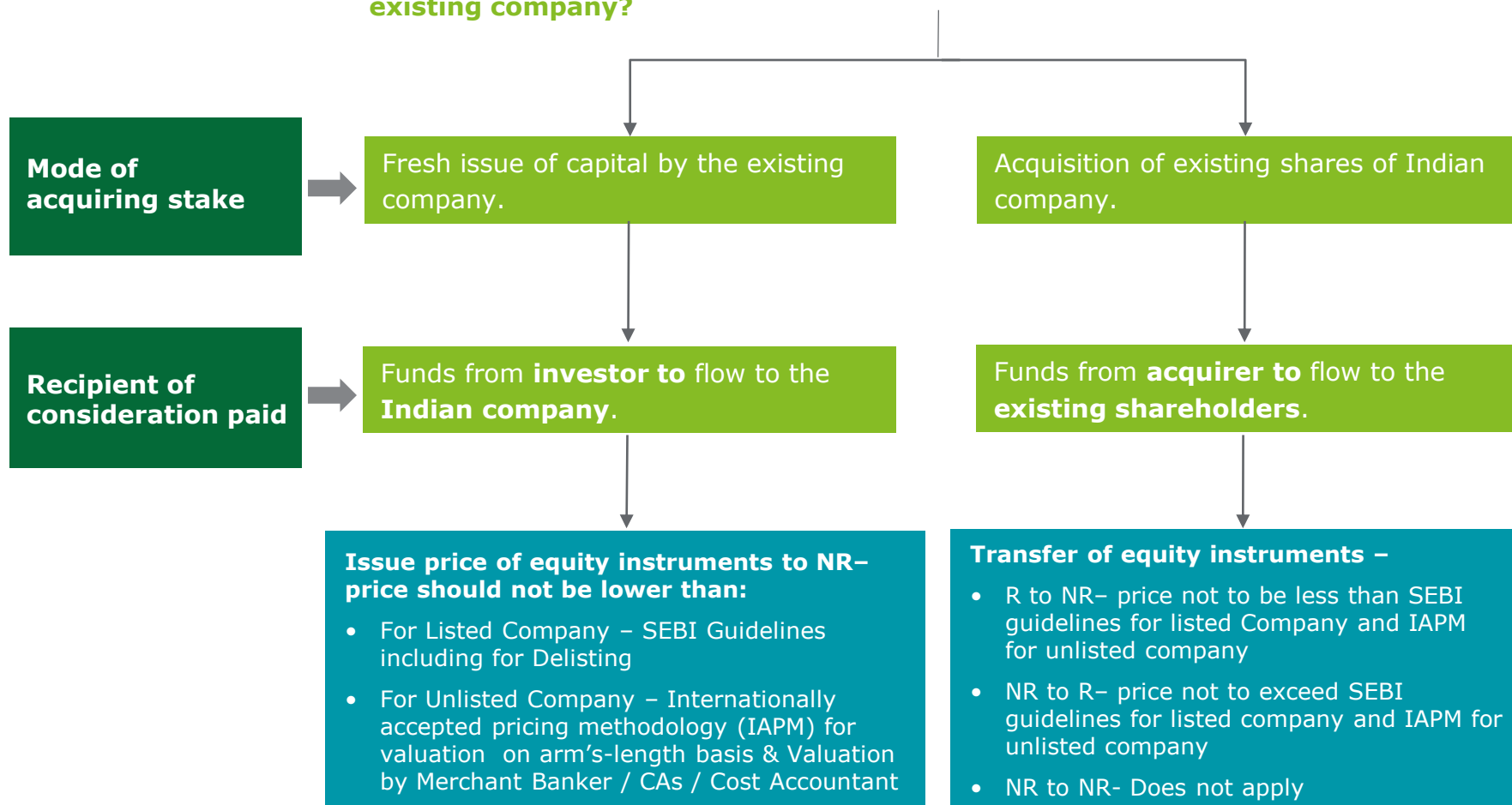
Reliance earlier stated that Reliance Retail Ventures (RRVL), the holding company of its retail businesses, intends to enforce its rights and complete the transaction in terms of the scheme and agreement with Future group without any delay

Piramal group gets RBI approval for debt-ridden DHFL's acquisition

CCI okays Facebook's investment of Rs 43,574 crore in Jio Platforms

Mode of acquiring stake

Subject to FDI limits*, what are the possible options for setting up a JV with an existing company?



* Indirect foreign investment to be considered for determining the FDI limits

Key tax considerations

Primary investment

For the Indian Company: Anti-abuse gains u/s 56(2)(viib) of the ITA, if shares issued to resident shareholder at a price exceeding FMV.
(FMV = price derived as per valuation report or adjusted net book value method as per Rule 11UA of ITR, 1962)
Issue price less FMV = 'Income from other sources' in the hands of the issuer company.

For the Investor: Gift tax u/s 56(2)(x) of the ITA, if shares purchased for a price lower than FMV.
(FMV = adjusted net book value method as per Rule 11UA of ITR, 1962 for unlisted company or lowest traded price on last trading day for listed company)
FMV less Price paid = 'Income from other sources' in the hands of investor

Secondary investment

For the Indian Company: None

For the Acquirer: Gift tax u/s 56(2)(x) of the ITA, if shares purchased for a price lower than FMV.
(FMV = adjusted net book value method as per Rule 11UA of ITR, 1962 for unlisted company or lowest traded price on last trading day for listed company)
FMV less Price paid = 'Income from other sources' in the hands of investor

For the Seller: Capital gains in the hands of seller

Listed company		Unlisted company	
In the hands of Indian shareholder	In the hands of foreign shareholder	In the hands of Indian shareholder	In the hands of foreign shareholder
Long term (held more than 1 year) @ 10% Short term @ 15%.		Long term (held more than 2 years)@ 20% Short term @ applicable corporate tax rate/ slab rate.	Long term (held more than 2 years) @ at 10% (without adjusting the cost for inflation) or at 20% (after adjusting the cost for inflation), whichever is more beneficial to the taxpayer Short term @ 40%.

Cess and surcharge additionally applies

Section 79: Lapse of losses

- In case of a **closely held company**, no **loss (except UAD)** incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year, unless on the last day of the previous year the **beneficial shareholding carrying at-least 51% voting power** remains same as compared to the last day of the year or years in which the loss was incurred.
- For eligible startup u/s 80-IAC, if the said condition is not satisfied – losses shall be allowed to be carried forward if all the shareholders who held shares carrying voting power on the last day of the year or years in which the loss was incurred, continue to hold those shares and such loss has been incurred during the period of seven years from incorporation.
- Exceptions:
 - Change in voting power or shareholding upon the death of a shareholder or on gift of shares
 - Change in the shareholding of an Indian company due to amalgamation or demerger of foreign parent company (51% of shareholders of the amalgamating or demerged foreign Co. continue to be the SHs of the amalgamated or the resulting F Co.)
 - Change in the shareholding of a company pursuant to an approved resolution plan under IBC
 - Change in shareholding of a company, its subsidiary and step down subsidiaries due to suspension of BoD or approval of resolution plan u/s 242 of the Companies Act, 2013 (application to Tribunal for relief in cases of oppression, etc.)

Capital Re-organization

Savita Oil to buy back at ₹1,390/share

**GAIL India share hits 52-week high on
buyback approval; Kotak expects further
upside**

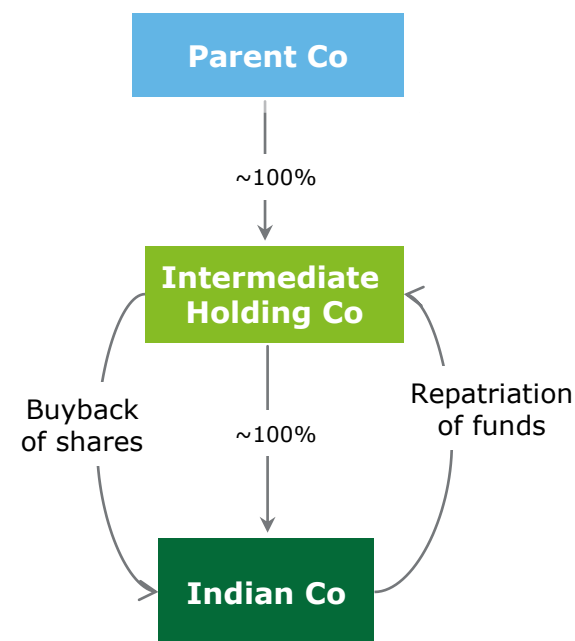
Brokerage firm ICICI Direct recommends holding the stock with target of Rs 150 per share.

Airtel to buy back 20% stake in DTH arm from Warburg Pincus for Rs 3,126 cr

Bharti Airtel said it will issue about 36.5 million shares to a Warburg Pincus affiliate at Rs 600 per share, and up to Rs 1,038 cr in cash

Buyback of shares

Particulars	Buyback
Income tax	<ul style="list-style-type: none"> An Indian unlisted company has to pay additional tax of 20% on any 'distributed income' (differential between consideration paid by the unlisted Indian company for buyback of the shares and the amount that was received by the unlisted Indian company) on buyback of shares. No tax will be levied on the shareholder on income arising from the buyback.
Implications under company law	<ul style="list-style-type: none"> Buyback upto 10% of paid up capital and free reserves can be authorized by Board of Directors. For buyback of more than 10% during the year- authorization to be obtained through a special resolution passed in the general meeting of the company.
Limits of buyback	<ul style="list-style-type: none"> Maximum cash outlay in a financial year is 25% of (paid up capital + free reserves). Company can buyback a maximum of 25% of its equity shares. Prior board and shareholder approval (75% majority) would be required. Post buyback debt equity ratio not to exceed 2:1.
Funding	<ul style="list-style-type: none"> Free reserves (i.e. reserves which as per latest audited balance sheet are free for distribution as dividend); or Securities premium account; or Proceeds of any other shares or securities (other than security being bought back).



Recent news

NCLT Allows Reduction Of Paid Up Share Capital Structure Of Josco Jewellers Pvt. Ltd. From Rs. 120 Crores To 1 Crore At Its Request

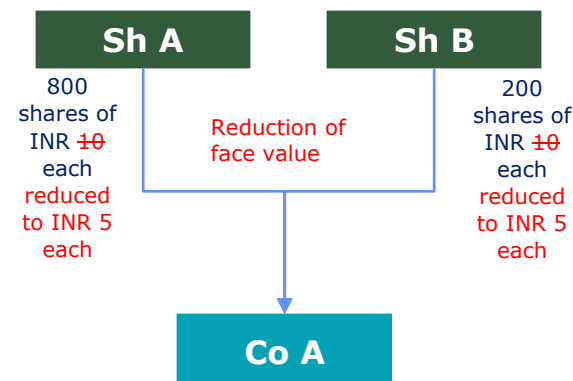
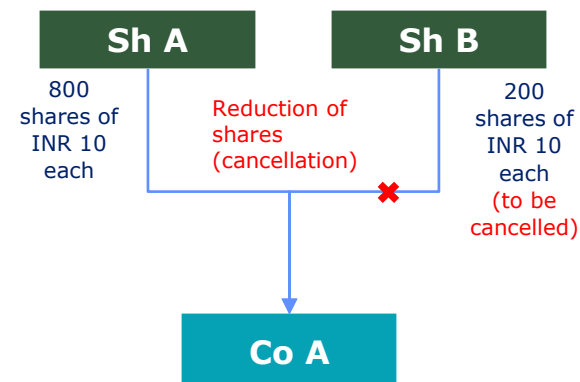
Subex receives NCLT approval for scheme of reduction of share capital

Max India To Explore Rewarding Shareholders Via Capital Reduction

Capital reduction

Particulars

Concept	<ul style="list-style-type: none"> A capital reduction is a NCLT regulated process whereby a company can cancel its capital against some consideration or accumulated losses- law provides freedom to structure capital reduction.
Utility	<ul style="list-style-type: none"> To return funds to shareholders (like a buyback). To enhance own stake by paying off/ cancelling shares of other shareholders. To cancel share capital against accumulated losses.
Tax	<ul style="list-style-type: none"> Reduction of capital would be considered as deemed dividend to the extent company possesses accumulated profits. Gains to the shareholder in excess of the amount deemed as dividend is taxable as capital gains. <i>Reduction in the face value of the shares without any payment to the shareholders would result in a capital gain or loss?- Bennett Coleman & Co. Ltd</i>
Key provisions under the CA, 2013	<ul style="list-style-type: none"> Capital reduction not permitted if company has not repaid deposits (under default) or interest payable thereon. Statutory auditor certificate required for confirming accounting treatment is in accordance with Indian GAAP. Application of capital reduction to be forwarded to Central Government, SEBI and creditors (representations, if any, to be made within 3 months). No provision requiring the insertion of word 'and reduced'. Discretionary power of NCLT to order publishing of reason's of reduction has been made mandatory. Fixation of a date by NCLT for ascertaining of debts and claims has been withdrawn.



GAAR

GAAR provisions

The Concept

- To deny tax benefit in an arrangement which:
 - Has been entered into with the **main purpose to obtain tax benefit**;
 - Which lacks commercial substance;
 - Creates rights and obligations which are not at arm's length principle;
 - Results in misuse of tax law provisions or is carried out by means or in a manner which are not ordinarily employed for bona fide purposes.

Application & exemption

- Under the current provisions, GAAR not applicable to:
 - Arrangements where tax benefit does not exceed INR 3 Cr;
 - Investors in Foreign Portfolio Investors ('FPI');
 - FPIs if they do not claim treaty benefits.
- Investments made prior to 1st April 2017 will be grandfathered.

CBDT Circular dated 27 January 2017

- If law allows taxpayer to select between two alternatives of implementing a transaction, GAAR cannot be invoked to challenge the alternative selected by the taxpayer.
- GAAR would not apply to an arrangement in respect of which an advance ruling has been obtained from the AAR.
- GAAR will not be applied to an arrangement sanctioned by the Court where the Court has explicitly and adequately considered the tax implications of the arrangement.

There is a two-step approval process in place before GAAR provisions can be invoked.

Stamp duty costs

Brief overview of stamp duty

- Stamp duty is a state levy and is levied on merger order/ demerger order/ share transfer/ business transfer/ asset transfer/ share purchase agreement.

Particulars	Stamp duty rate	Remarks
Merger/ demerger	As per specific entry for the scheme of arrangement in respective state laws. In absence, of such rates, at the rate of conveyance.	<p>States with specific entry for charging stamp duty on schemes: Maharashtra, Andhra Pradesh, Gujarat and Karnataka, etc.</p> <p>States where there are no specific provisions for stamp duty on schemes: There are judicial pronouncements treating High Court/ NCLT orders that sanction schemes as instruments of conveyance and subject them to stamp duty. Such as state of Delhi.</p> <p>Usually, stamp duty is charged as a proportion of the value of shares issued, which in return is referenced to the value of the property transferred on merger/ demerger. However, different states have different rules for levy of stamp duty on these kinds of transactions.</p>
Slump sale/ Itemised sale	On value of immovable properties, at the rate specified in respective state laws.	<ul style="list-style-type: none"> Nominal stamp duty may be applicable on execution of Transfer Agreement, where it is structured as an agreement to sell.
Issue of shares	@ 0.005% of the value of shares issued or the consideration	
Transfer of shares	@ 0.015% of the value of shares transferred, or the consideration paid for the shares.	
Share purchase or subscription agreement	May be payable on the agreement (in addition to the stamp duty on the share transfer form/ share certificate).	



Discussion...

THANK YOU