



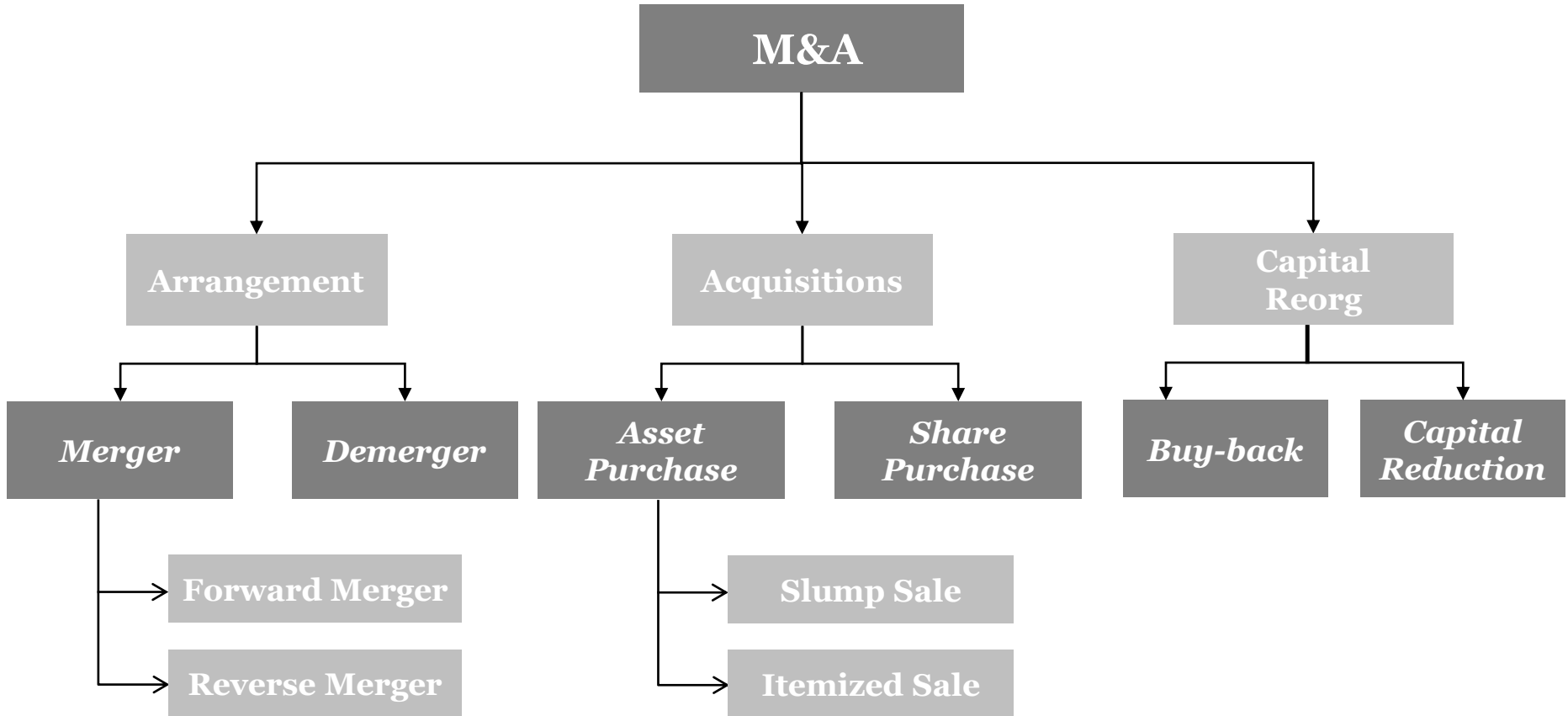
Contents

- Overview
- Business vs. Share Acquisition
- Transfer of Shares
- Slump Sale & Asset Sale
- Merger & Demerger
- Case Studies
- Stamp Duty Matters

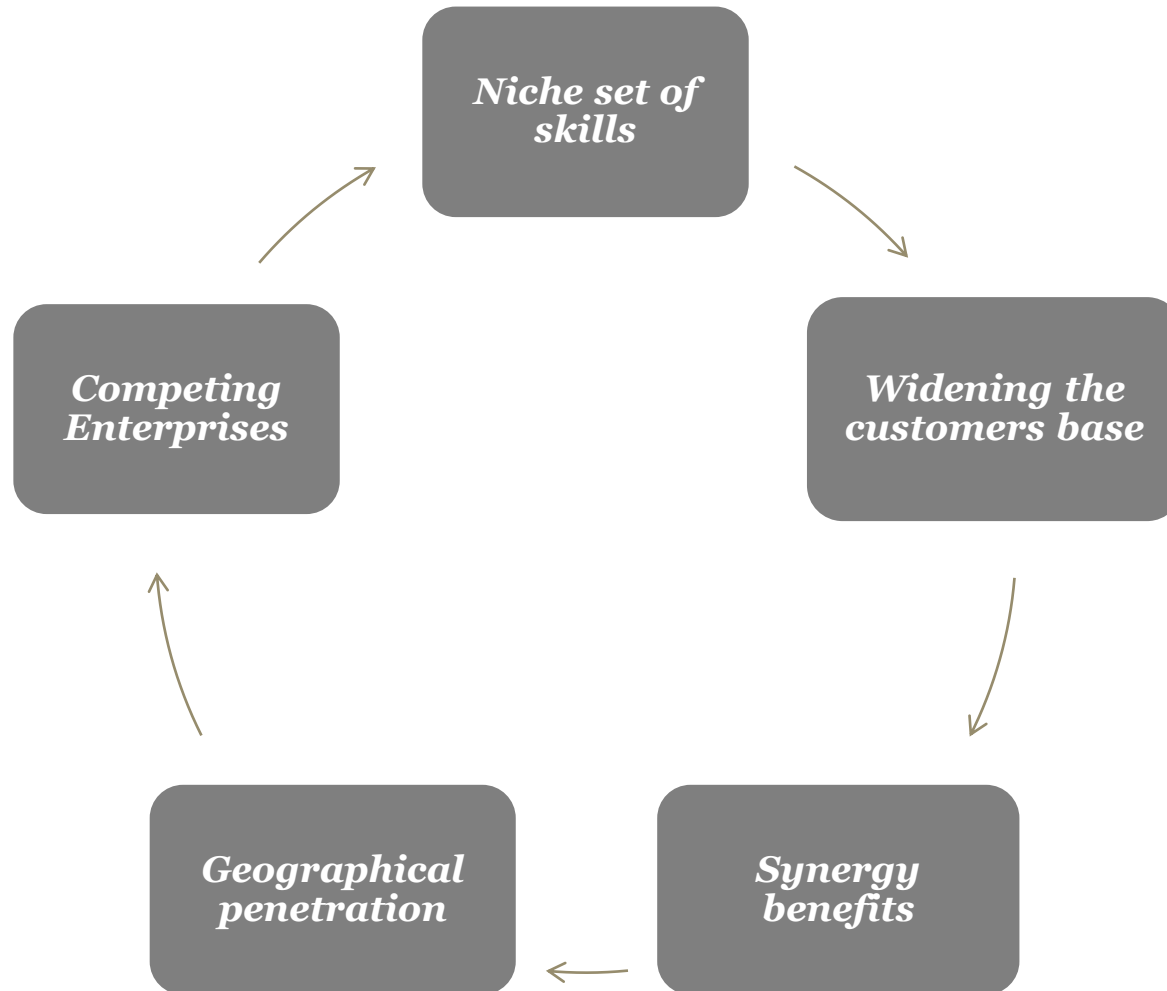
Section 1

Overview

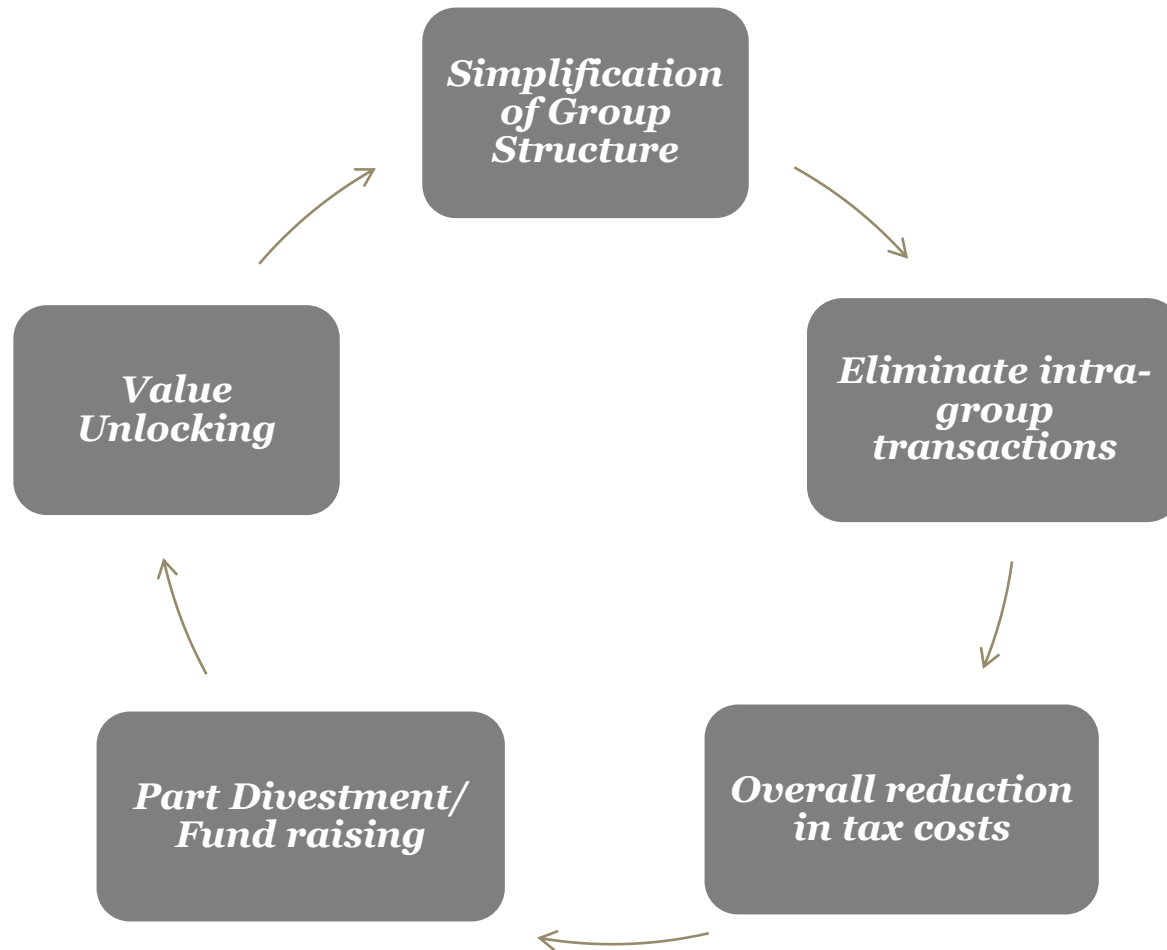
Methods of M&A



Key Drivers – External Reorganisation



Key Drivers – Internal Reorganisation

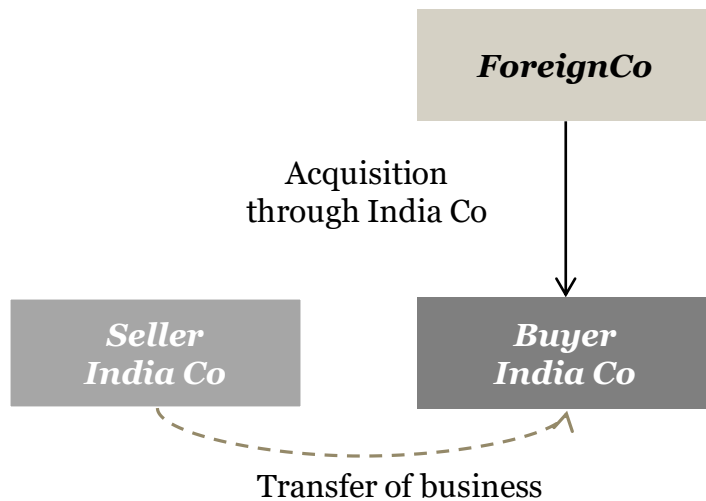


Section 2

Business vs. Share Acquisition

Acquisition Structure

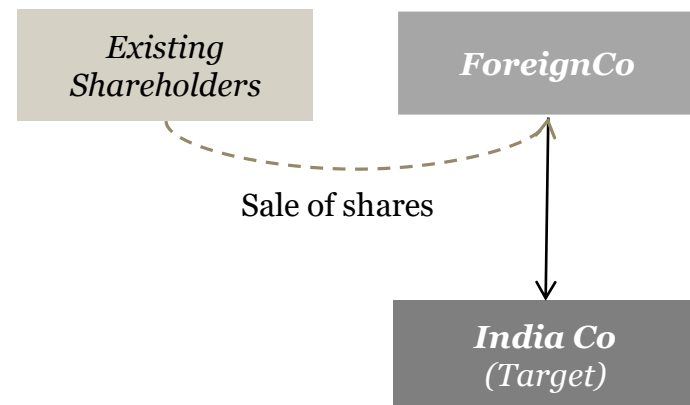
Business Acquisition



Considerations

- Historical Income tax liabilities not carried forward
- Tax depreciation available on acquisition cost
- Goodwill/ intangibles recorded in books and are depreciable
- Other liabilities such as indirect taxes, environment liabilities, etc. to be evaluated

























Share Acquisition



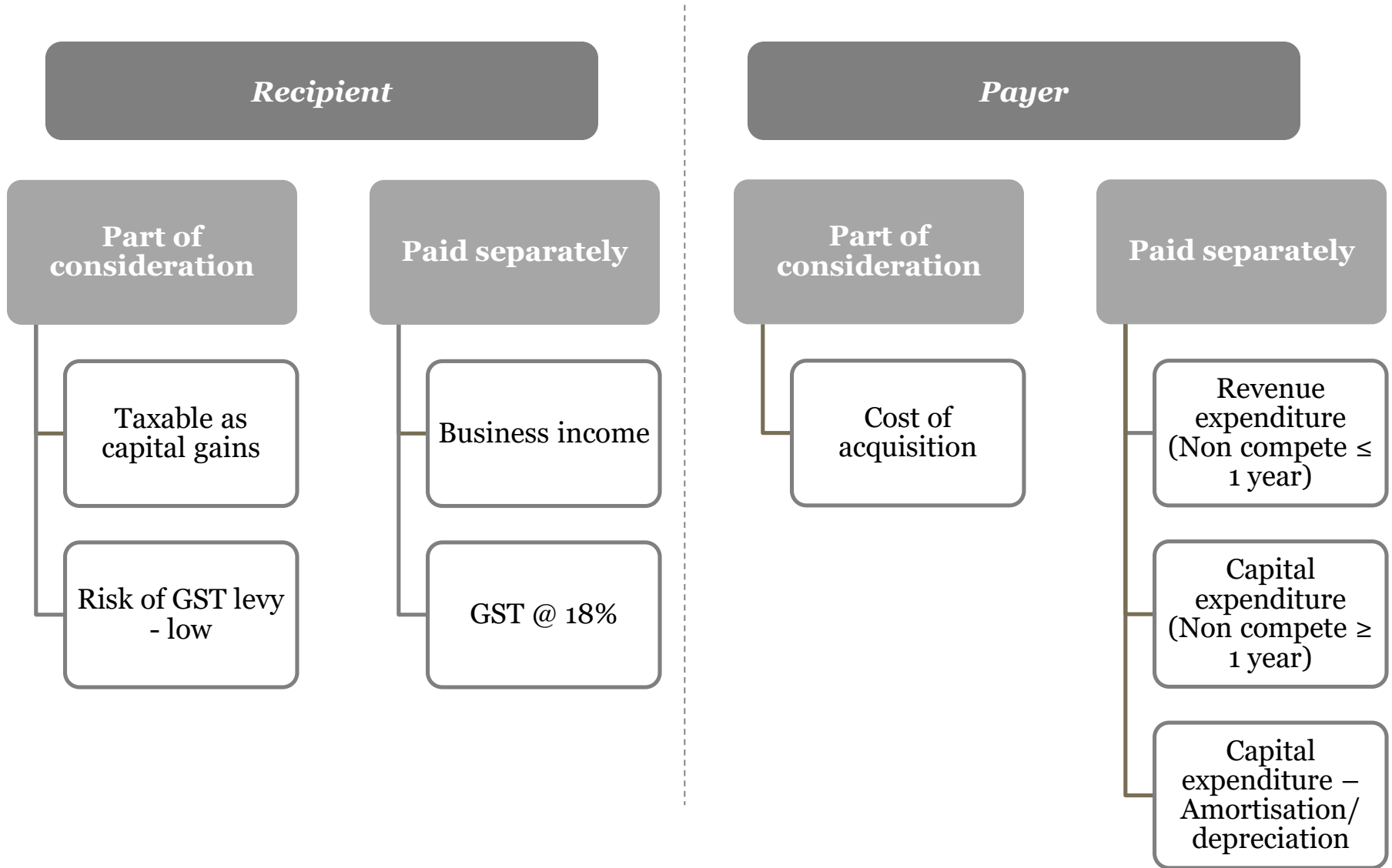
Considerations

- Historical tax liabilities carried forward
- Acquisition cost locked in value of acquired shares of India Co
- Goodwill/ Intangibles not recorded
- Merger facilitates Goodwill creation
- Generally preferred by sellers for both tax and non-tax considerations

Acquisition Structure

Parameters	Perspective	Asset Deal	Share Deal
Historical Risks	Buyer		
Acquisition Funding – Interest Deductibility	Buyer		
Cherry picking of assets and liabilities	Buyer		
Carry forward of losses	Buyer		
Step-up in costs – tax depreciation	Buyer	  	
Stamp duty, GST, etc.	Transaction		
Non assignable contracts	Buyer		
Seller's tax costs	Seller	  	
Goodwill/ PPA	Buyer		
Disruption to business	Buyer		

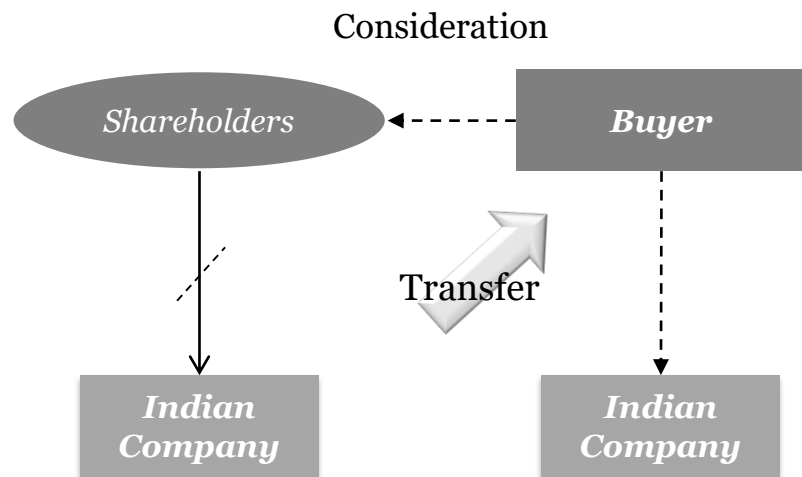
Non Compete



Section 3

Share Transfer

Transfer of Shares



Income Tax – Seller perspective

- Capital gains = Consideration less Cost/ Indexed Cost
- Tax rate – Residents

Particulars	Long Term	Short Term
Listed <ul style="list-style-type: none"> • On market • Off market 12 months	10%, with step-up 10% or 20% with indexation	15% – STT 30%
Unlisted 24 months	20% with indexation	30%

- Tax rate – Non Residents

Particulars	Long Term	Short Term
Listed <ul style="list-style-type: none"> • On market • Off market 12 months	10%, with step-up 10% with forex benefit	15% – STT 40% with forex benefit
Unlisted 24 months	10% in INR terms	40% with forex benefit

- Holding period of 36 months for unlisted debt instruments

Long Term Capital Gains – Listed Securities

- LTCG introduced for listed equity shares or equity oriented unit or REIT/ InvIT units
- Chargeable @ 10%++ if amount exceeds INR 100,000 – no indexation
- Gains accrued till January 31, 2018 grandfathered
- Applicable if STT paid both on acquisition and transfer
 - Notification for exemption has been issued
- Cost of acquisition to be calculated as per the specified method

Particulars	Scenario 1	Scenario 2	Scenario 3
Cost of Acquisition (purchased prior to January 31, 2018) – [A]	100	100	20
Fair Market value as on January 31, 2018 – [B]	120	80	120
Full value of consideration on ultimate sale – [C]	130	130	70
Cost of acquisition for tax calculation [Higher of A and (lower of B and C)] –[D]	120	100	70
Capital gains [C-D] for 10% tax	10	30	0

Transfer of Shares

Income Tax – Seller perspective

- Sale below fair value (book value): Fair value deemed as consideration for unlisted shares (Section 50CA)
- Identification of shares transferred – demat vs. physical form
- Pay taxes on transfer of shares
- Transfer pricing implications

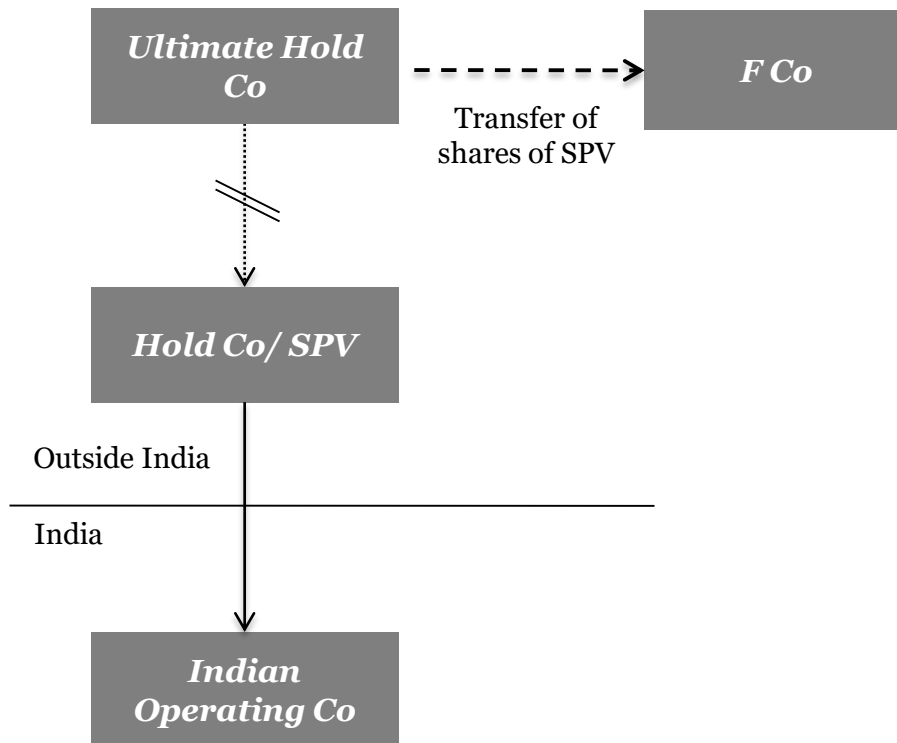
Income Tax – Buyer perspective

- Acquisition of shares below fair value liable to tax
- Fair value = Book value for unlisted companies and market price for listed shares
- Tax at 30% for resident and 40% for non-residents, subject to treaty
- Buyer should withhold taxes on discharge of consideration for purchase of unlisted shares
- Escrow mechanism for tax liabilities
- Earn out structuring

Stamp duty

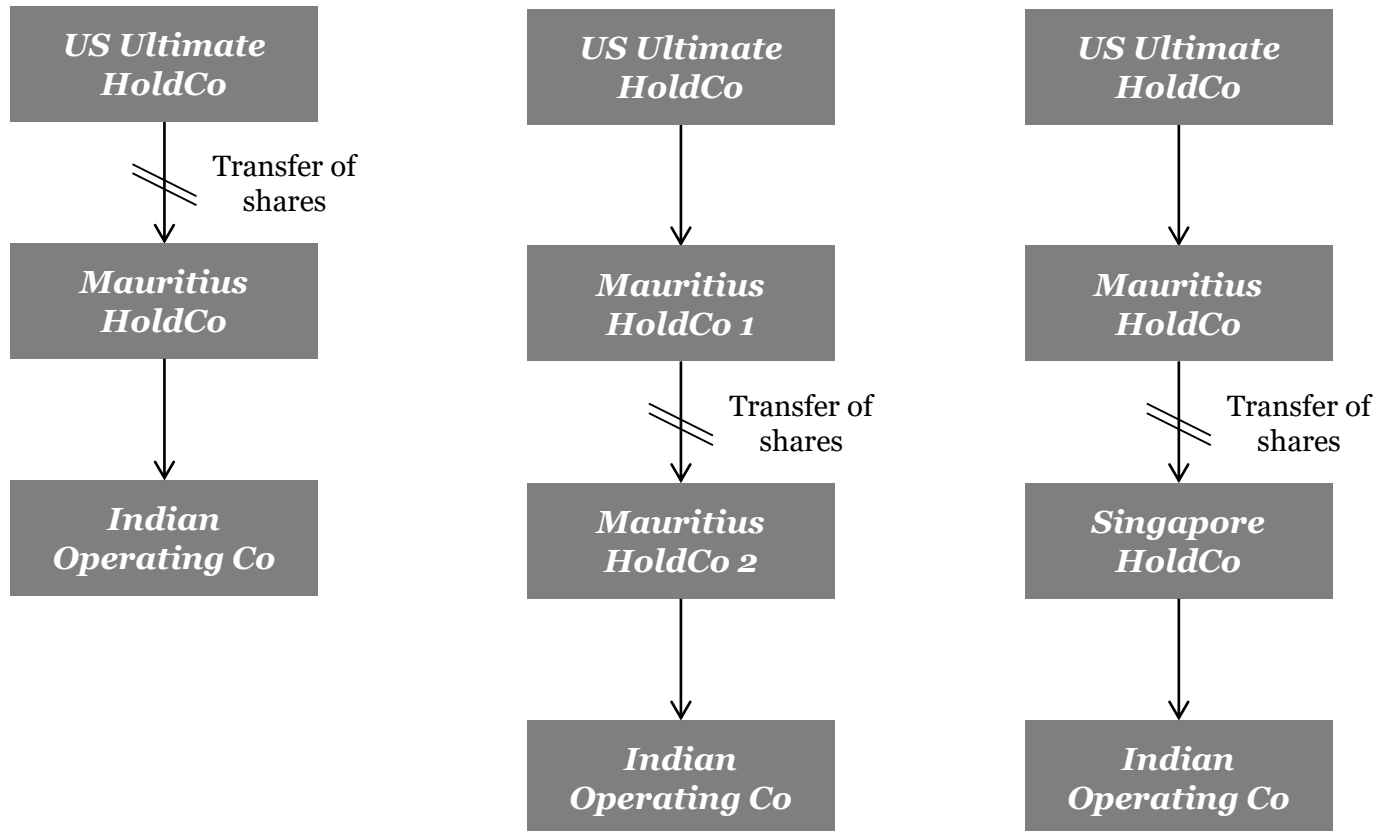
- Stamp duty @ 0.25% on consideration for transfer of shares held in physical form
- Stamp duty not applicable on shares held in dematerialized form

Indirect Transfer



- Transfer of shares of Foreign Co deriving its value substantially from Indian assets liable to tax in India
- Indian assets:
 - Shares in an Indian company
 - Branch in India
 - IP and other assets in India
- Meaning of 'substantial': > 50%
- Gains taxable in a manner similar to direct transfer of shares
- Rules for computation of taxes introduced
- Treaty benefit available

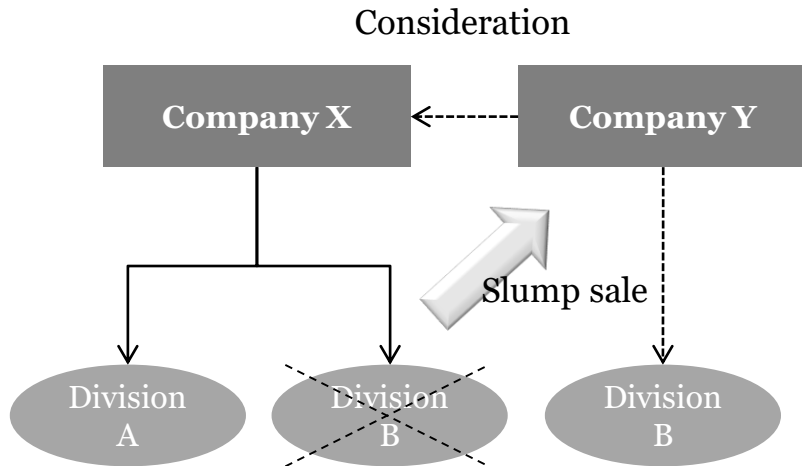
Indirect Transfer – Treaty Applicability



Section 4

Slump Sale & Asset Sale

Concept of Slump Sale



Slump Sale Ingredients – Section 2(42C)

- Transfer
- One or more undertakings
- Lump sum consideration (without values being assigned to the individual assets and liabilities)
- Going concern basis – precedent linked
- Consideration received by Seller and not shareholders

Explanations

- Undertaking – 2(19AA) even part included/ should constitute business activity
- Valuation for stamp duty purposes would not affect transaction being treated as slump sale

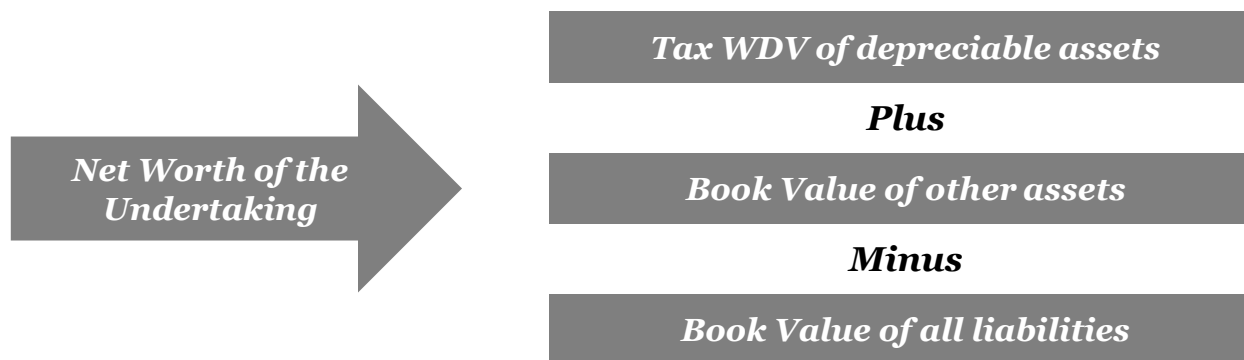
‘Undertaking’ – Ingredients

- Going concern
- Integrity of the business

Computation provision – Section 50B

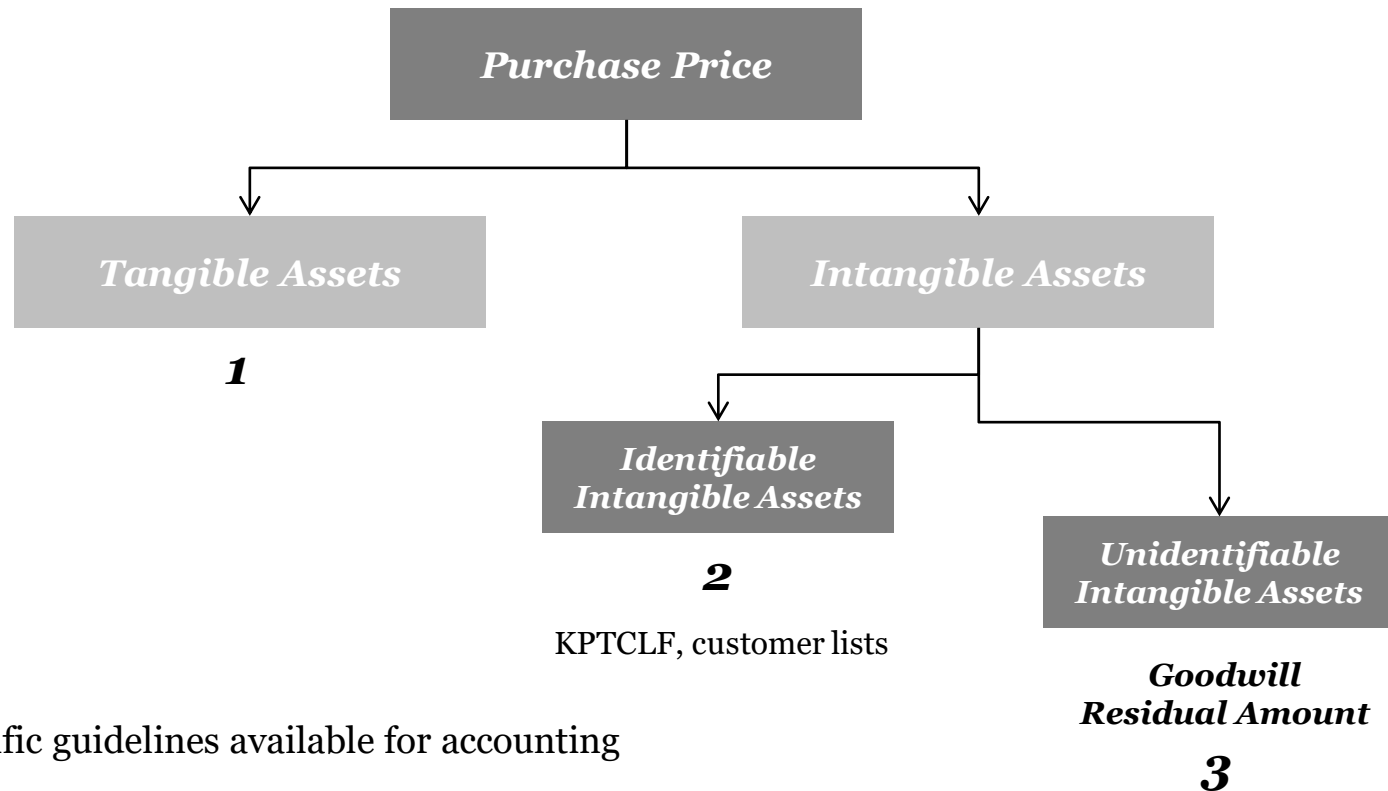
Tax Implications – Capital Gains

- Capital Gains = Sale consideration – “Tax” Net Worth
- Long Term Capital Gains, if undertaking is held for more than 36 months
- Tax rate:
 - Long term capital gains: 20%
 - Short term capital gains: 30%
- No indexation benefit
- Domestic transfer pricing implications not applicable to Slump Sale
- WDV of assets need to be reduced from the Seller’s books



Section 50B and 50C are mutually exclusive. 50C applicable where immovable property is transferred separately

Purchase Price Allocation – Buyer Perspective



- No specific guidelines available for accounting
- Reference in AS-10 – Apportionment of value on a fair value basis
- Allocation towards identifiable tangibles and intangibles
- Specified intangibles: Know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights (Section 32)
- Balance consideration treated as goodwill

Other Implications

GST Implications

- Business on a going concern basis not regarded as 'goods'
- No GST implications
- GST credit pertaining to division sold can be transferred to Buyer, if the division is sold in entirety

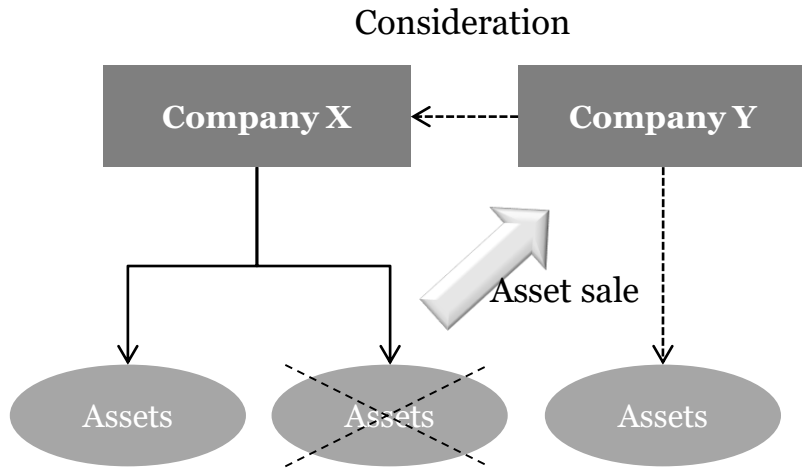
Stamp Duty

- Stamp duty leviable on instrument conveying/ transferring ownership – Conveyance
- No stamp duty on transfer of assets by delivery
- Alternate approach – Transfer pursuant to an 'Agreement to Sell'
 - It is at best an intent to transfer on a future date
- Closing mechanism
- Transfer of land, IP and Actionable Claims requires conveyance/ assignment – Transfer of Property Act
- Slump sale through a Scheme of Arrangement – NCLT Process

Issues for Discussion

- Transfer without monetary consideration or Slump Exchange
- Whether transfer of liabilities is necessary for slump sale
- Transfer of all assets – required or not
- Negative net-worth
 - Net-worth – (INR 500 mn)
 - Consideration – INR 100 mn
 - Capital gains – INR 100 mn or INR 600 mn
- Presence of two undertakings – required or not
- Depreciation on Goodwill
- Carry forward of losses pertaining to the division transferred – Seller & Buyer perspective
- Impact on tax holiday – SEZ units
- Section 281 clearance certificate

Asset Sale/ Itemized Sale



- Meaning – Sale transaction that does not satisfy the definition of Slump Sale
- Values attributed to individual assets
- Tax implications for Seller:
 - Capital gains on transfer of non-depreciable assets:
 - $\text{Capital gains} = \text{Sale consideration} - \text{Cost/Indexed Cost of acquisition}$
 - Long term CG: 20%
 - Short term CG: 30%
 - Capital gains on transfer of depreciable assets:
 - $\text{Capital gains} = \text{Sale consideration} - \text{WDV of the block of assets}$
 - Gains always regarded as Short Term
 - Business Assets, including stock, etc.
 - Business income taxable at 30%

Asset Sale/ Itemized Sale

- Example: WDV of block of assets = INR 100 (Assets: A - 60, B - 40)
 - Situation A: Sale consideration on sale of Asset B INR 50
 - No capital gains
 - WDV of block – INR 50 (100- 50)
 - Situation B: Sale consideration on sale of asset B INR 120
 - Capital gains = $120 - 100 = \text{INR } 20$
 - WDV of block – INR 0 (100-120)

GST Implications

- GST implications on transfer of business
- Challenging to transfer GST credit pertaining to the Buyer

Stamp Duty

- Position similar to Slump Sale

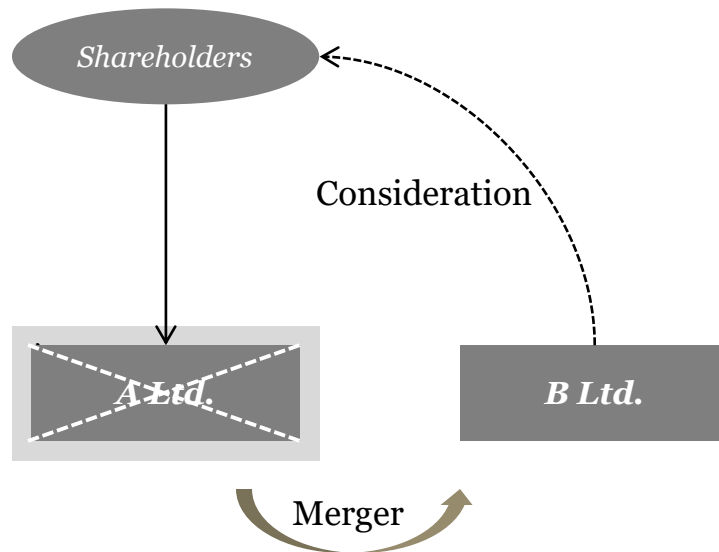
Shump Sale vs. Asset Sale

- Immediate capital gains
- Capital gains tax rate
- Impact on depreciation
- Flexibility in PPA for the Buyer
- Goodwill incidence
- Impact of past liabilities
- GST incidence
- Stamp duty

Section 5

Merger & Demergers

Merger of Indian Companies



- Merger to take place through a Scheme of Amalgamation
- Jurisdictional NCLT's sanction required
- Approval of the Board/ Shareholders/ Creditors of all companies required
- Regulatory authorities involved: RoC, RD and OL
- Results in transfer of assets, liabilities, contracts, employees, etc.
- Allotment of shares as consideration directly to shareholders
- Merger will take effect from the Appointed Date prescribed in the Scheme

Merger of Indian Companies

Income-tax Implications – Companies Perspective

Definition of Amalgamation

- All assets and liabilities are transferred on amalgamation
- At least 75% of transferor company shareholders become shareholders in transferee company
- Shares held by transferee company or its subsidiary should be excluded for 75% criteria
- Value of shares – Face Value/ Fair Value/ Book Value
- Cash consideration ??

Transfer of assets

- Exemption on transfer of assets
- Cost of assets for transferor company deemed as cost for transferee company
- Period of holding by transferor company included for transferee company

Depreciation

- Apportionment of depreciation based on Appointed Date

Goodwill

- Supreme Court in case of Smifs Securities
- Goodwill is covered within 'any other business or commercial rights of similar nature'
- Goodwill is an asset eligible for depreciation
- Goodwill arose on merger of WOS
- Potential challenges

Merger of Indian Companies

Income-tax Implications – Shareholders' Perspective

Amalgamation, whether a transfer?

- Cancellation of shares on amalgamation amounts to extinguishment
- Supreme Court in case of Grace Collis

Exemption on allotment of shares

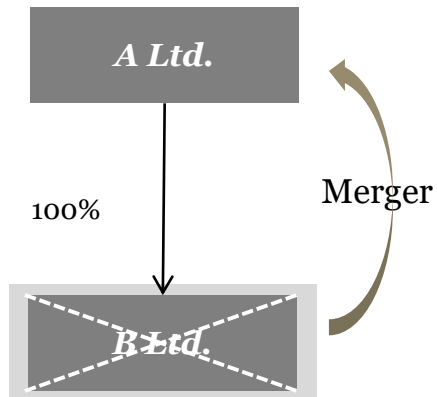
- Allotment of shares against cancellation of shares exempt
- Possibilities:
 - Equity to Equity
 - Equity to Preference
 - Preference to Equity
 - Preference to Preference
 - Combination
- Position in case of cash/ other modes of consideration

Other aspects

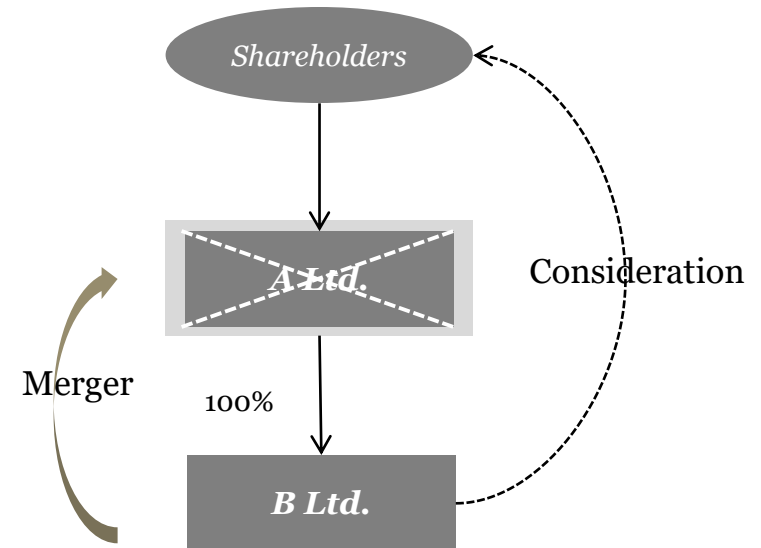
- Cost of shares in transferor company deemed as cost of shares in transferee company
- Period of holding in shares of transferor company included

Merger of Indian Companies – Illustrations

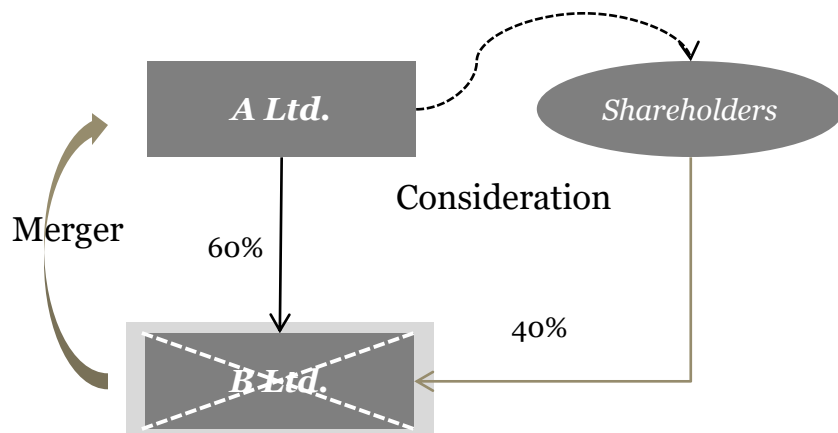
Straight Merger – I



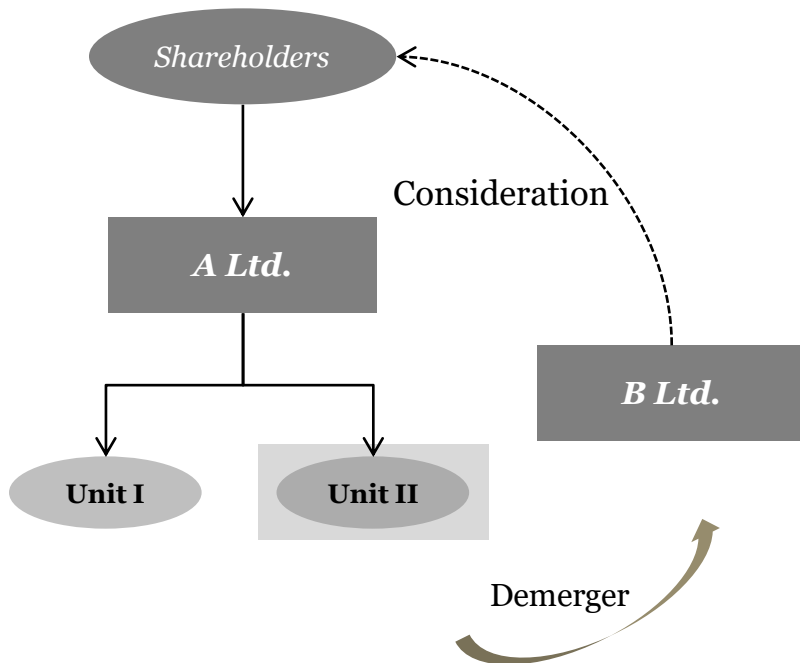
Reverse Merger



Straight Merger – II



Demerger of Indian Companies



- Demerger to take place through a Scheme of Arrangement
- Jurisdictional NCLT's sanction required
- Approval of the Board/ Shareholders/ Creditors of all companies required
- Regulatory authorities involved: RoC and RD
- Results in transfer of assets, liabilities, contracts, employees, etc. pertaining to the division
- Demerged Company continues to exist post demerger
- Allotment of shares as consideration directly to Demerged Co shareholders
- Demerger will take effect from the Appointed Date prescribed in the Scheme

'Resulting Company' includes WoS and 100% HoldCo

Demerger of Indian Companies

Income-tax Implications – Companies Perspective

Definition of Demerger

- Transfer of one or more undertaking(s)
- Transfer of all properties and liabilities at book values – Fair Valuation Possibility ??
- Discharge of consideration by issue of shares on proportionate basis
- Allotment of shares to shareholders holding not less than 3/4th in value of the shares in the demerged company (other than the shares already held by resulting company)
- Transfer to be going concern basis
- Cash consideration ??
- Undertaking – Unit or division of a business activity taken as a whole, but does not include individual assets or liabilities or any combination thereof not constituting a business activity

Transfer of assets

- Exemption on transfer of assets for demerged company
- Cost of assets for demerged company deemed as cost for resulting company
- Period of holding by demerged company included for resulting company

Depreciation

- Apportionment of depreciation based on Appointed Date

Key Issues

- Can “single investment” be considered as an undertaking?
- Can “treasury business” or “investment business” be considered as undertaking?

Demerger of Indian Companies

Income-tax Implications – Shareholders' Perspective

Demerger, whether a transfer?

- Grey area, as shares in demerged company continue to exist post demerger

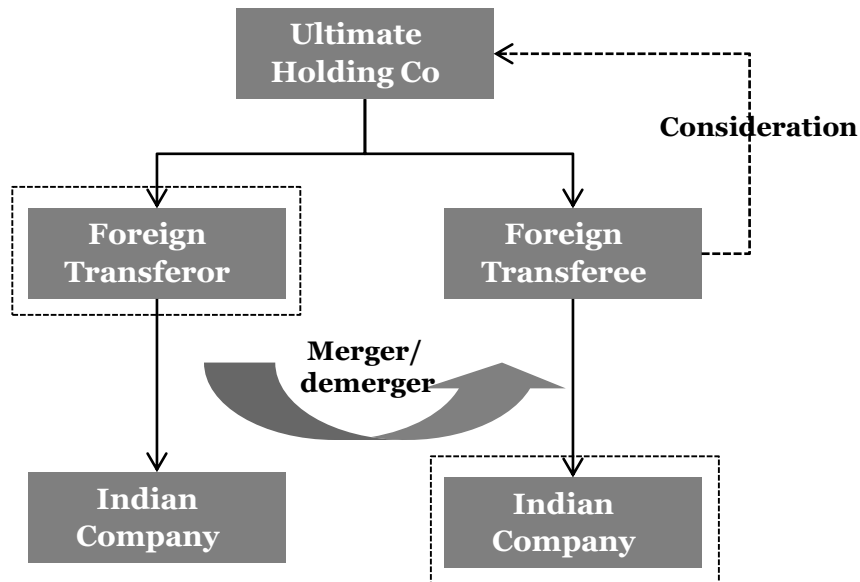
Exemption on allotment of shares

- Allotment of shares in addition to shares held is exempt
- Possibilities:
 - Equity to Equity
 - Equity to Preference
 - Preference to Equity
 - Preference to Preference
 - Combination
- Position in case of cash/ other modes of consideration

Other aspects

- Cost of shares in demerged company split between demerged company and resulting company
- Split is based on net assets retained vs. transferred
- Period of holding in shares of demerged company included

Merger/ Demerger of Foreign Companies



Merger of Foreign Cos

- Transfer of shares in Indian company on amalgamation of two foreign companies
 - At least 25% of transferor company continue to remain shareholders of transferee company
 - No taxation in transferor company home jurisdiction
- Compliance with amalgamation definition ?

Demerger of Foreign Cos

- Transfer of shares in Indian company on demerger of two foreign companies
 - At least 75% of transferor company continue to remain shareholders of transferee company
 - No taxation in transferor company home jurisdiction
- Compliance with demerger definition ?

Sec 72A – Specific Provision – Amalgamation

Available to

- Company owning an industrial undertaking, ship, hotel
- Banking company
- Public sector engaged in the operations of aircrafts business

Losses covered

- Business (cash) losses
- Unabsorbed depreciation

Industrial Undertaking

- Manufacture or processing of goods
- Manufacture of computer software
- Business of generation or distribution of electricity or any other form of power
- Telecommunication services
- Mining
- Construction of ships, aircrafts or rail systems

ITES Companies – Industrial Undertaking ?

Fresh Lease of 8 years for Business Losses

Conditions to be satisfied – Amalgamation

Amalgamating Company

- Engaged in the business in which the accumulated loss has occurred and depreciation remains unabsorbed for 3 or more years
- Held $\frac{3}{4}$ th of the book value of fixed asset for 2 years prior to the date of amalgamation

Amalgamated Company

- Holds $\frac{3}{4}$ th of the book value of fixed asset for 5 years from date of amalgamation
- Continues business of amalgamating company for at least 5 years from the date of amalgamation
- To achieve production of at least 50% of the installed capacity of the undertaking before the end of 4 years from the date of amalgamation and to maintain the said minimum level till the end of 5 years from the date of amalgamation (Rule 9C)

Sec 72A – Specific Provision – Demerger

Allowability

- Loss and unabsorbed depreciation directly relatable to the demerged undertaking
- In case loss and unabsorbed depreciation is not directly relatable to the demerged undertaking, loss and unabsorbed depreciation to be apportioned in the ratio of assets retained and assets transferred

Definition of “industrial undertaking” not applicable

No fresh lease of life available in case of demerger

Sec 79 – Change in substantial shareholding

Carry forward and set-off

- Where in any year a change in shareholding of a company (in which public are not substantially interested), then no loss incurred prior to the year of change shall be carried forward and set-off if:
 - On the last day of the previous year the shares of the company carrying not less than 51% of the voting rights are held by persons who held at least 51% of the shares of the company on the last day of the year in which the loss had incurred

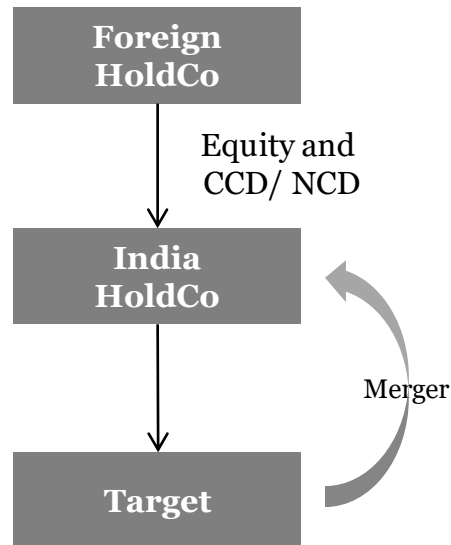
Exception

- Change in the shareholding of an Indian company which is a subsidiary of a foreign company due to amalgamation or demerger of the foreign company subject to the condition that 51% of the shareholders of the amalgamating or demerged foreign company continue to be shareholders of the amalgamated or resulting company

Section 6

Merger & Demergers – Case Studies

Share Acquisition Structure/ LBO



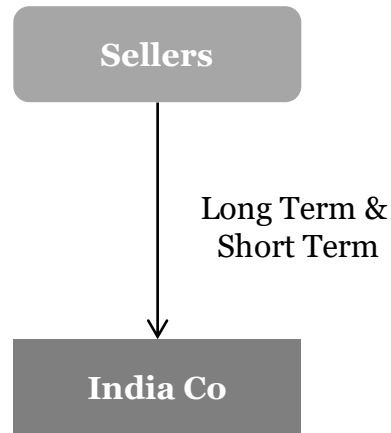
Mechanics

- India HoldCo to acquire shares in the Target
- India HoldCo to be funded through equity and CCD/ NCD
- Target to be merged upstream into India HoldCo

Key Issues

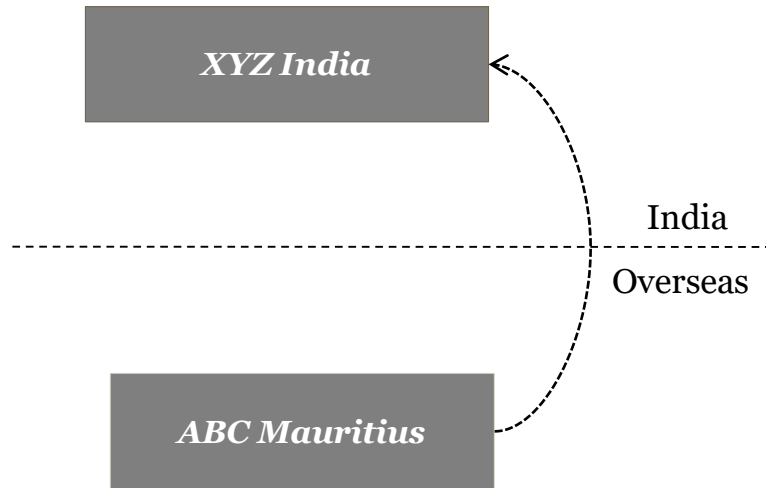
- Tax break on interest cost used for acquisition
- Difference between cost of acquisition and fair value of assets recognized as Goodwill
- Goodwill depreciable for tax purposes
- Goodwill recognition mandatory under IndAS

Long Term/ Short Term Capital Gains



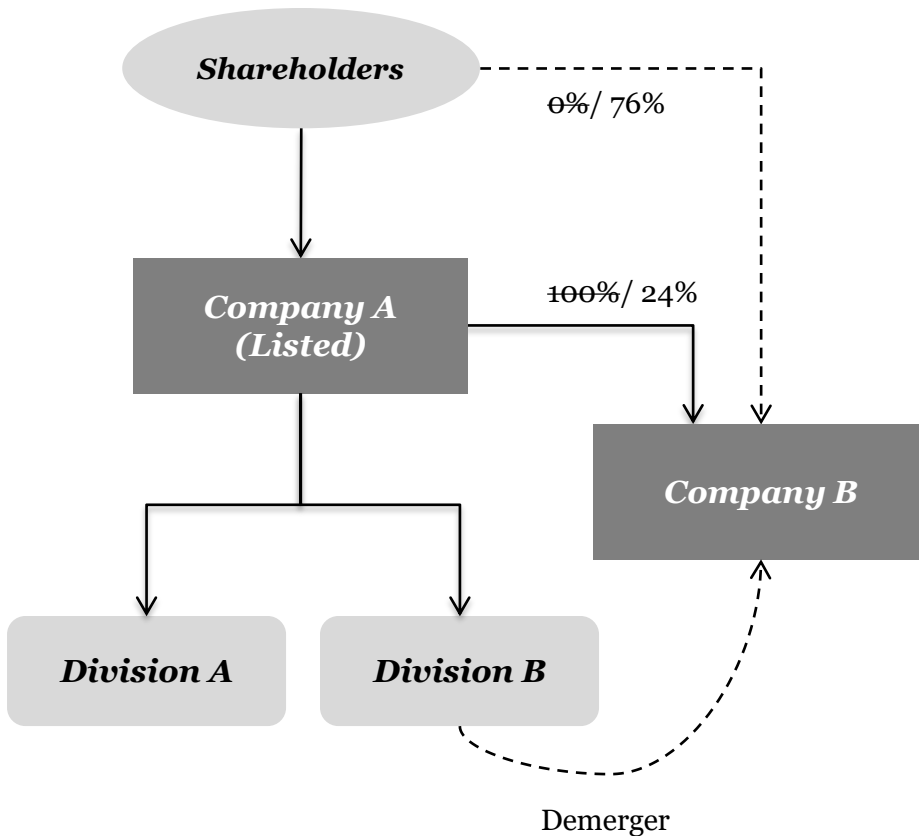
- Existing shareholders hold equity shares in India Co
- India Co has issued bonus shares in the past 18 months in ratio of 4 : 1
- Sale of equity shares to result in long term and short term capital gains
- Planning: Buy-back of shares issued as Bonus
- Flat rate of 20%++ applicable on buy-back irrespective of period of holding
- Balance shares to be sold as long term capital assets
- Critical to identify the exact tranche

Cross Border Merger



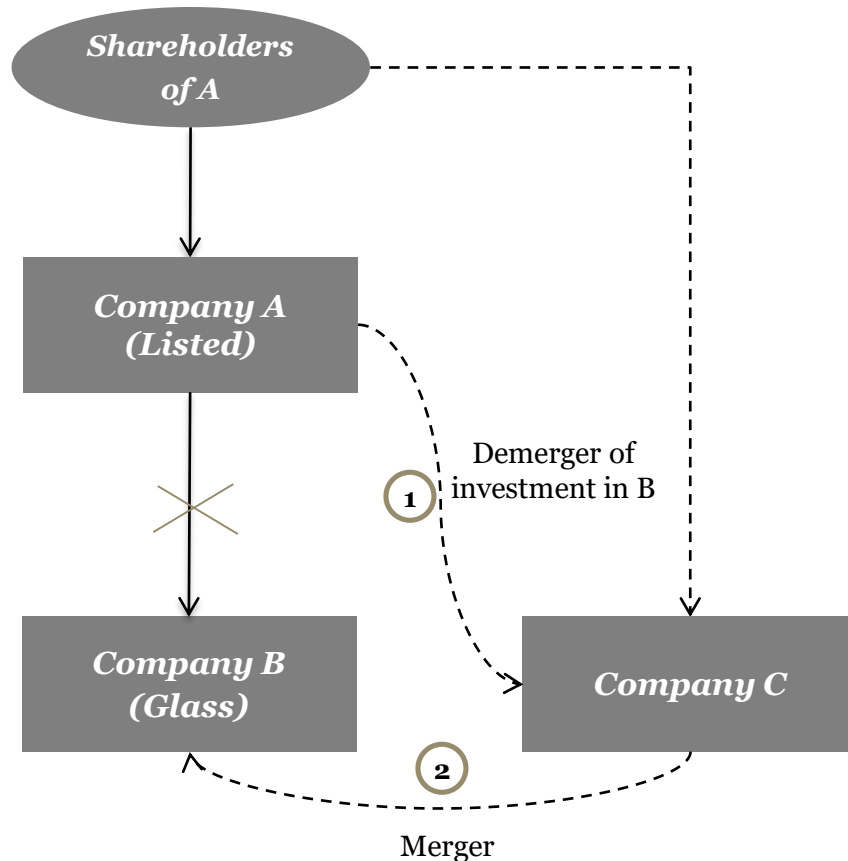
- ABC, a Mauritius entity is proposed to be merged into XYZ, an Indian entity
- Companies Act, 2013 permits both inbound as well as outbound merger
- Income-tax Act exemption only in relation to inbound mergers
- It's one of the efficient modes of extracting dividend from Overseas Holding Company
- Merger for Indian purposes and Liquidation in Overseas Jurisdiction ??

Demerger & Value Unlocking



- Company A is an Indian listed company having Division A and Division B
- Division B is sought to be hived-off into a separate company
- Company A also intends to hold 24% stake in Company B, post listing
- Company A to incorporate Company B as a subsidiary and appropriately fund it
- Demerger swap ratio to facilitate the target shareholding pattern
- Company A can dispose shares in Company B when appropriate
- Long term capital gains tax and MAT payable on exit

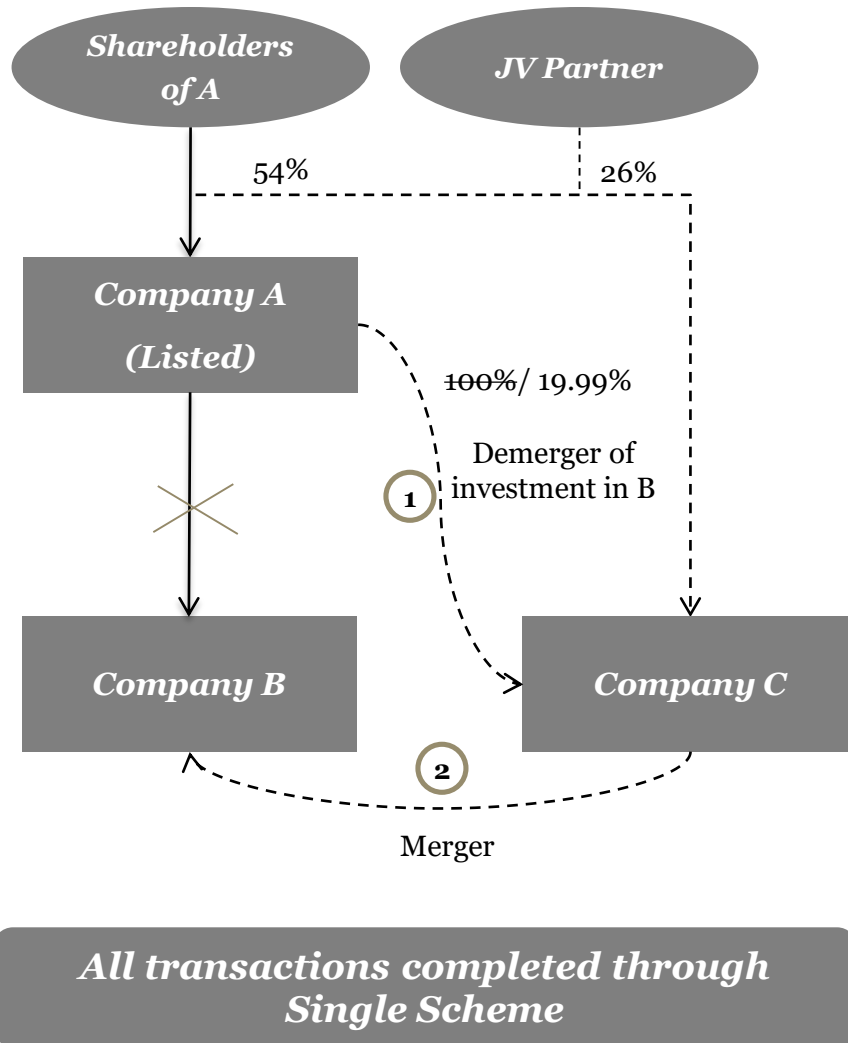
De-subsidiarisation & Value Unlocking



- Company A is a pharmaceutical company listed in India
- Company B is a glass manufacturing company and is a subsidiary of A
- A demerged its investments in B to Company C, a new investment company
 - C becomes holding company of B
 - C issues shares to shareholders of A
 - C was listed with relaxation from SEBI
- Subsequently C was merged with B
 - Upon merger C's holding in B got cancelled; and
 - Shares equivalent to shares held by C in B were issued to C's shareholders

Objective was to desubsidiarise glass business and list the same

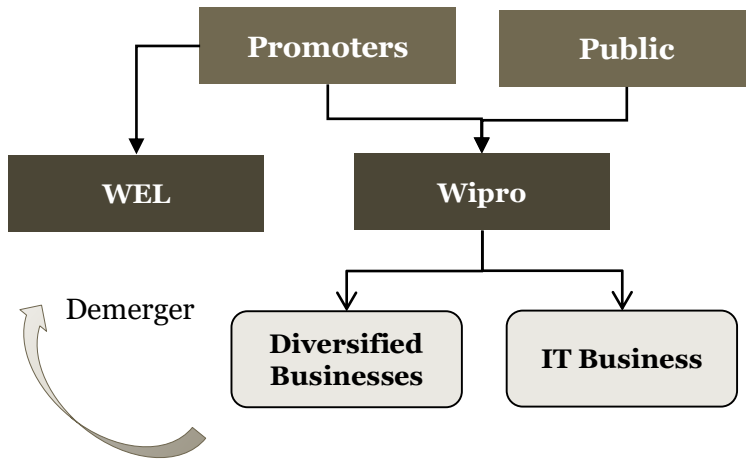
De-subsidiarisation & Value Unlocking – Variant



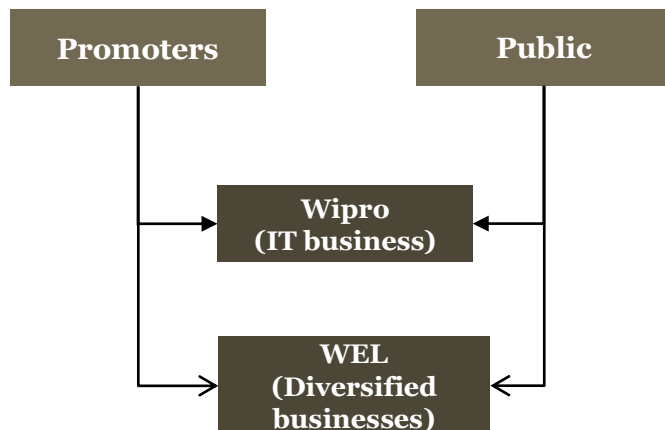
- Company A is a listed company in India
- Company B is a JV and is engaged in a different line of business
- Company A holds 74% and JV partner holds 26% in Company B
- A demerged its investments in B to Company C, a new investment company
 - C to be appropriately capitalized
 - C becomes holding company of B
 - C issues shares to shareholders of A and JV partner
 - C was listed with relaxation from SEBI
- Subsequently C was merged with B
 - Upon merger C's holding in B got cancelled
 - Shares equivalent to shares held by C in B were issued to C's shareholders

Wipro Demerger

Current Structure



Resultant Structure

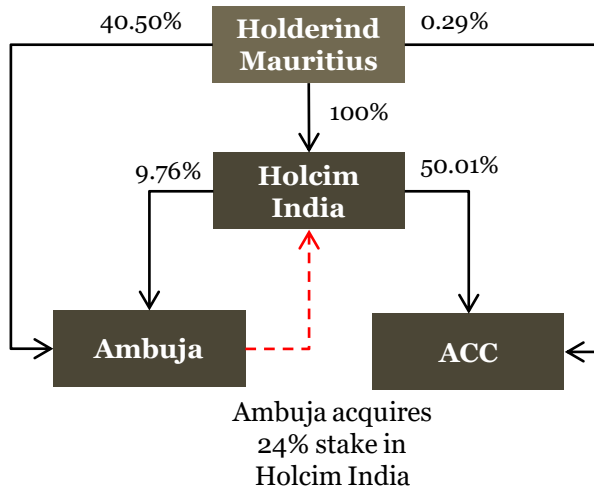


Objective – Privatization of diversified businesses without undergoing the delisting process

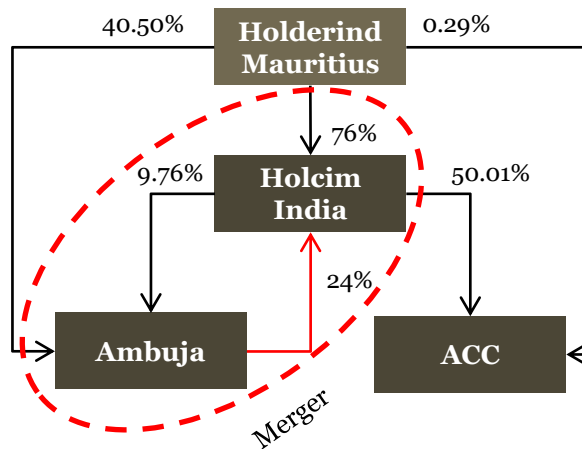
- Wipro demerged its diversified businesses division into WEL through Scheme of Arrangement (Scheme)
- Scheme specifically provides that WEL shall not be listed
 - Facilitates privatization of diversified business division of Wipro, without undergoing the delisting process
- Scheme provides the following options to shareholders for discharge of consideration on demerger:
 - Continue as equity shareholders of WEL; or
 - Seek cash exit from redemption of Redeemable Preference Shares; or
 - Exchange equity shares of WEL with Promoters of Wipro for additional equity shares of Wipro

Ambuja and ACC

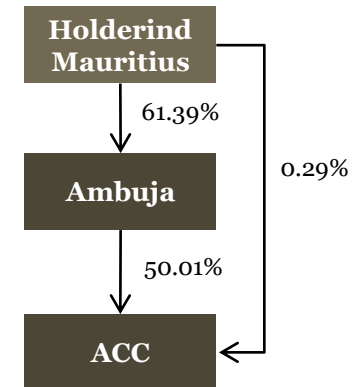
Step 1: Ambuja to acquire 24% stake in Holcim India



Step 2: Merger of Holcim India into Ambuja



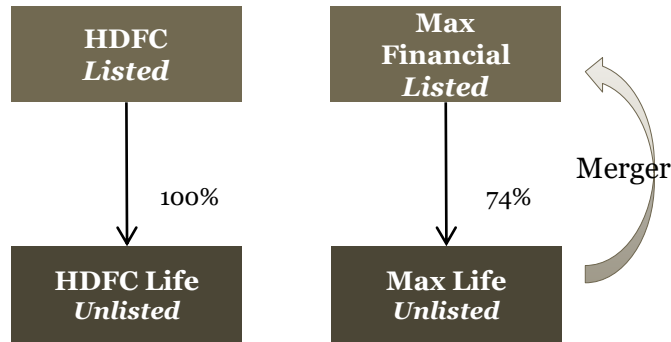
Resultant Structure



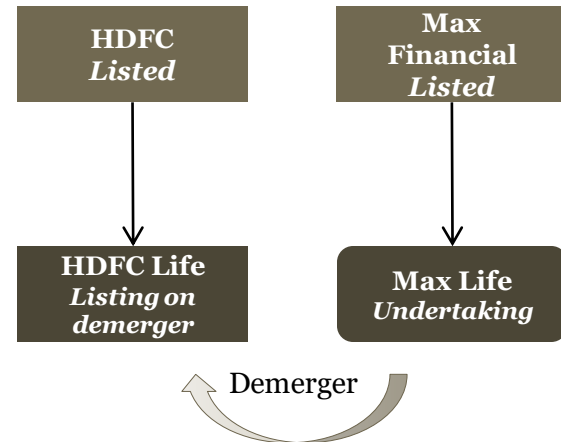
- Step 1: Ambuja to acquire a 24% stake in Holcim India from Holderind Mauritius for a cash consideration of INR 3,500 crores
- Step 2: Merger of Holcim India into Ambuja through High Court approved Scheme of Amalgamation
 - Ambuja will issue equity shares of Ambuja of Holcim India as a consideration of merger
 - Holcim India's 9.76% shareholding in Ambuja Cements will stand cancelled

HDFC Life & Max Insurance

Step 1: Merger of Max Life with Max Financial

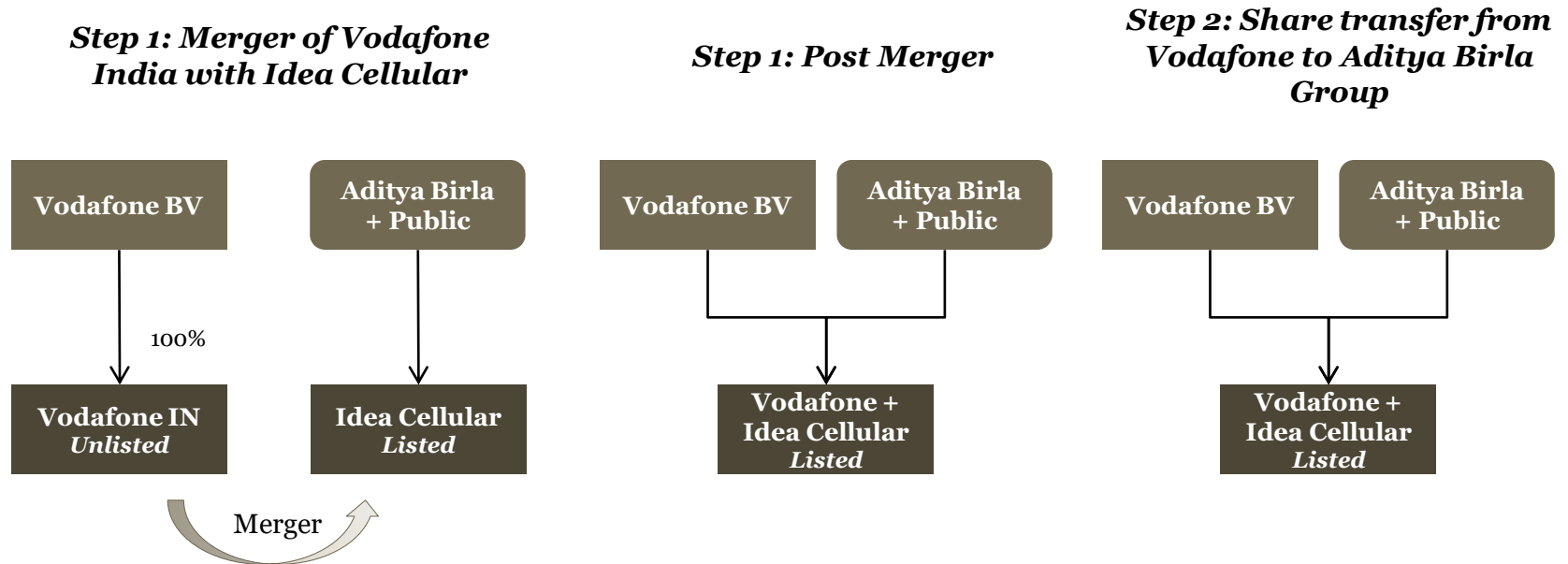


Step 2: Demerger of Max Life undertaking into HDFC Life



- Step 1: Merger of unlisted Max Life with listed Max Financial
 - External shareholders of Max Life to allotted shares in Max Financial
- Step 2: Demerger of Max Life undertaking into HDFC Life
 - Undertaking of listed Max Life to be demerged into unlisted HDFC Life
 - HDFC Life to be listed pursuant to the demerger

Vodafone & Idea Merger



- Step 1: Merger of unlisted Vodafone India with listed Idea Cellular
 - Vodafone Group to become the majority shareholders in Idea Cellular, post merger
 - No takeover code implications on merger
- Step 2: Share transfer from Vodafone to Aditya Birla Group
 - Inter se promoter transfer

Section 7

Stamp Duty Matters

Stamp Duty on Merger/ Demerger

State	Particulars
Karnataka	3% of the market value of property situated in the State or 1% of the consideration, whichever higher Allotment and cancellation – both covered
Maharashtra	5% of Market value of immovable property, situated in Maharashtra or 0.7% of the consideration, whichever higher, but limited to 10% of consideration
Delhi	No specific duty for merger. However, based on judicial precedents merger would attract 3% duty under Conveyance
TN	2% of the market value of property situated in the State of Tamil Nadu or 0.6% of the consideration, whichever higher Yet to be notified
AP	2% of the consideration paid or value of shares issued

Court order an 'Instrument' leviable to stamp duty – similar position applicable for NCLT orders as well

Stamp Duty Planning

- Shifting of Registered Office
- “Transfer of Movable Assets by Delivery” wording in the Scheme
- Slump Sale post Appointed Date but before Effective Date or NCLT Order Date
- Slump Sale or Asset Sale through a Scheme, terming the transaction as hive-off/ demerger
- Reduction in current assets through payment of current liabilities
- Subsidiarisation prior to merger, ensuring that there would be no allotment of shares
 - Only few states levy stamp duty on cancellation of shares

Thank You

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Views expressed in the presentation are personal