

J.K. SHAH[®]

**TEST
SERIES**



SUGGESTED SOLUTION

CS PROFESSIONAL

Subject - Corporate Restructuring

Topic - Part-I - Test-1 Chp- 8 to 13

Head Office : Shraddha, 3rd Floor, Near Chinai College, Andheri (E), Mumbai – 69.

Tel : (022) 26836666

Answer to Q1.A.

'Demerger' is a form of corporate restructuring in which the entity's business operations are segregated into one or more components. In simple words, it means division or separation of different undertakings of a business functioning under a common corporate umbrella, it is in fact a corporate partition of a company in two undertakings. A demerger is often done to help each of the segments operate more smoothly, as they can focus on a more specific task after demerger.

Demerger under section 2(19AA) of the Income-tax Act, 1961 means the transfer, pursuant to a scheme of arrangement under section 230 to 232 of the Companies Act, 2013, by a demerged company of its one or more undertakings to the resulting company. 'Slump sale' is transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities. If a company sells or disposes of the whole or substantially the whole of its undertaking for a predetermined lump sum consideration called slump price, then it results in a slump sale.

Section 2(42C) of the Income-tax Act, 1961, recognizes 'slump sale' as a transfer of an 'undertaking' i.e. a part or a unit or a division of a company, which constitutes a business activity when taken as a whole. Sale includes transfer of an asset from one person to another for some consideration, where consideration can be in kind or in cash.

The conceptual difference lies in the valuation methodology and the end purpose to be achieved for the specific action taken.

(5 marks)

Answer to Q1.B.

Extra Territorial Jurisdiction of Commission Section 32 of the Competition Act, 2002 extends the jurisdiction of Competition Commission of India to inquire and pass orders in accordance with the provisions of the Act into an agreement or dominant position or combination, which is likely to have, an appreciable adverse effect on competition in relevant market in India, notwithstanding that,

- (a) an agreement referred to in section 3 has been entered into outside India; or
- (b) any party to such agreement is outside India; or
- (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or
- (e) any party to combination is outside India; or
- (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India.

Hence if any one of the parties to a combination is situated outside India but having an effect on competition in India, it will be subject to the jurisdiction of Commission.

The Competition Commission of India will have jurisdiction if combination entered into has an appreciable adverse effect on competition in the relevant market of India and can pass appropriate orders.

(5 marks)

Answer to Q1.C.

Steps involved in Fast Track Mergers

The following steps need to be followed in a fast track merger:

1. First of all, both the companies need to check their Articles of Association (AoA) and assess if they have the requisite authority under them to enter into a merger. If no, then the AoA need to be amended before such merger can take place.
 2. Convene the Board Meeting and prepare a draft scheme of merger or amalgamation.
 3. Prepare a financial statement of assets and liabilities and get an auditor's report prepared.
 4. Get the draft scheme approved in the Board Meeting.
 5. Both the companies need to send a notice to the Registrar of Companies (RoC) and Official Liquidator (OL) of their respective regions inviting suggestions/objections to the scheme, if any within 30 days of issuing the notice.
 6. Such notice to the RoC should be in Form CAA 9 and have the following attachments:
 - Copy of the scheme
 - Shareholding pattern of the transferee pre and post-merger
 - Last 3 years audited financial statements
 - Memorandum and Articles of Association
 - Board Resolution
 - Valuation Report
 7. Both the companies are required to file a declaration of solvency with their respective ROCs. This declaration of solvency shall be accompanied by the following:
 - Board Resolution
 - Statement of Assets and Liabilities
 - Auditors Report
 8. Sending notice of shareholders' meeting and creditors' meeting.
 9. Conducting the shareholders' meeting and getting the scheme approved.
 10. Conducting creditors' meeting and getting the scheme approved.
 11. Filing of the results of each meeting with the Regional Director and the Official Liquidator by the transferee company.
 12. Objections/Suggestions to be sent to the Regional Director by the RoC/Official Liquidator.
 13. Regional director may file an application with the Tribunal if he is of the opinion that the scheme is against public interest.
 14. The Tribunal can approve or disapprove the scheme.
- If approved it shall be filed with the RoC of the transferee company and the transferor company respectively.

(5 marks)

Answer to Q1.D.

Where a NBFC is proposed to be amalgamated with a banking company, the banking company shall obtain the approval of the Reserve Bank of India after the scheme of amalgamation is approved by its Board and the Board of NBFC, but before it is submitted to the Tribunal for approval.

When according its approval to the scheme, the Board of the banking company shall give consideration to the matters listed in paragraph 9, Chapter III above.

In addition, the Board shall examine whether:-

- a. The NBFC has violated / is likely to violate any of the RBI / SEBI norms and if so, shall ensure that these norms are complied with before the scheme of amalgamation is approved.
- b. The NBFC has complied with the "Know Your Customer" norms for all the accounts, which will become accounts of the banking company after amalgamation.
- c. If the NBFC has availed of credit facilities from banks / FIs, whether the loan agreements mandate the NBFC to seek consent of the bank / FI concerned for the proposed merger /amalgamation.

(5 marks)

Answer to Q2.A.

Yes, exemption notification has been issued by the Central Government for Sections 5 and 6 of the Competition Act, 2002 in relation to Banking Companies.

In exercise of the powers conferred by Section 54(a) of the Competition Act, 2002, the Central Government in the public interest vide its Notification S.O. 2828(E) dated 30th August, 2017 exempts, all cases of reconstitution, transfer of the whole or any part thereof and amalgamation of nationalized banks, under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 and the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980, from the application of provisions of Sections 5 and 6 of the Competition Act, 2002 for a period of ten years from the date of publication of this notification in the Official Gazette.

(3 marks)

Answer to Q2.B.

'Conveyance' as is defined under section 2(10) of the Indian Stamp Act, 1899 refers to any instrument by which any moveable or immovable property is transferred inter vivos. Section 2(g)(iv) of the Bombay Stamp Act, 1958 specifically included orders under section 394 of Companies Act, 1956 that relates to amalgamation and absorption.

The landmark decision of Bombay High Court in *Li Taka Pharmaceuticals v. State of Maharashtra* (1996) 8 SC 102 (Bom.) has serious implications for mergers covered not just by the Bombay Stamp Act, 1958 but also mergers covered by Acts of other States. The following are the major conclusions of the Hon'ble Court:

- (1) An amalgamation under an order of Court under Section 394 of the Companies Act, 1956 is an instrument under the Bombay Stamp Act, 1958.

(2) States are well within their jurisdiction when they levy stamp duty on instrument of amalgamation.

(3) Stamp duty would be levied not on the gross assets transferred but on the “undertaking”, when the transfer is on a going concern basis, i.e. on the assets less liabilities. The value for this purpose would thus be the value of shares allotted. This decision has been accepted in the Act and now stamp duty is leviable on the value of shares allotted plus other consideration paid.

Calcutta High Court has held in Emami Biotech Ltd (2012) with a similar view.

(3 marks)

Answer to Q2.C.

Some of the risks posed by cross border mergers are:

- Despite Double Tax Avoidance Agreements, the tax implications in the host countries may prove to be complex and tedious. This may increase costs as a local professional is required to be hired.
- Regulatory landscape: The laws and regulations in the host country would be different and may be difficult to comply. An unusable regulatory landscape may pose risks to a cross border merger.
- Political scenario: It is essential to assess the political situation of the country before one enters into a merger with an entity belonging to that country. Unstable politics may lead to difficulties in carrying out business.

(3 marks)

Answer to Q2.D.

The Registrar shall have the following powers and functions, namely:-

- (a) registration of appeals, petitions and applications;
- (b) receive applications for amendment of appeal or the petition or application or subsequent proceedings.
- (c) receive applications for fresh summons or notices and regarding services thereof;
- (d) receive applications for fresh summons or notice and for short date summons and notices;
- (e) receive applications for substituted service of summons or notices;
- (f) receive applications for seeking orders concerning the admission and inspection of documents;
- (g) transmission of a direction or order to the civil court as directed by Appellate Tribunal with the prescribed certificate for execution, etc; and
- (h) such other incidental or matters as the Chairperson may direct from time to time.

(3 marks)

Answer to Q2.E.

The practical difficulties are:

- Merging the authorised capital of all companies in the transferee company may not be practically viable.

- Form INC 28 which finally registers the scheme does not provide for the following:
- A separate drop-down menu for Section 233
 - Change in the status of the transferor company
- There is doubt regarding whether the Regional Director can suggest changes to the scheme. It appears that if the ROC, Official Liquidator does not have objections to the scheme, the Regional Director has to confirm without any suggestions of his own.

(3 marks)

Answer to Q3.A.

Inbound and outbound merger as defined in the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 are explained hereunder:

Inbound Merger

An inbound merger is one where a foreign company merges with an Indian company (or domestic company) resulting in an Indian company being formed. Following are the key aspects which need to be followed during an inbound merger:

1. The resultant company post cross-border merger can transfer any security including a foreign security to a person resident outside India.
2. An office/ branch outside India of the foreign company shall be deemed to be the resultant company's office outside India.
3. The borrowings of the transferor company would become the borrowings of the resulting company.
4. Assets acquired by the resulting company can be transferred in accordance with the provisions of the Companies Act, 2013 or any regulations framed thereunder for this purpose.
5. The resultant company is allowed to open a bank account in foreign currency in the overseas jurisdiction.

Outbound Merger

An outbound merger is one where an Indian company (or domestic company) merges with a foreign company resulting in a foreign company being formed. The following are the key aspects governing an outbound merger:

1. The securities issued by a foreign company to the Indian company, may be issued to both, persons resident in and outside India.
2. An office of the Indian company in India may be treated as the branch office of the resultant company in India.
3. The borrowings of the resultant company shall be repaid in accordance with the sanctioned scheme.
4. Assets which cannot be acquired or held by the resultant company should be sold within a period of two years.
5. The resultant company can now open a Special Non-Resident Rupee Account.

(5 marks)

Answer to Q3.B.

The ICSI has approved the following Guidelines for Professional Dress Code for Company Secretaries to appear before judicial / quasi-judicial bodies and tribunals like NCLT, NCLAT, SAT, etc.

1. For Male Members:

- a. Navy Blue Suit (Coat & Trouser), with CS logo, Insignia or Navy Blue Blazer over a sober colored Trouser
- b. Neck Tie(ICSI)
- c. White full sleeve Shirt
- d. Formal Black Leather Shoes(Shined)

2. For Female Members:

- a. Navy Blue corporate suit (Coat & Trouser), could be with a neck tie/Insignia or
- b. Saree / any other dress of sober colour with Navy Blue Blazer with CS logo
- c. A sober footwear like Shoes/ Bellies/ Wedges, etc.(shined)

3. Members in Employment – As prescribed in 1 or 2 above Members are advised to strictly adhere to the Dress Code prescribed by the ICSI.

(5 marks)

Answer to Q3.C.

Amalgamation between a Holding and a Subsidiary company is exempt from the payment of Stamp Duty subject to certain conditions.

These conditions are as under:

1. When at least 90% of the issued capital of the transferee company is in the beneficial ownership of the transferor company, or
2. When the transfer is between a parent and a subsidiary company, one of which is a beneficial owner of not less than 90% of the issued share capital of the other, or
3. When the transfer takes place between two subsidiary companies each of which is having not less than 90% of the share capital in the beneficial ownership of the parent company.

Stamp duty being a State subject, these exemptions will be applicable only in those States where the State Government follows the notification of the Central Government in this regard.

Stamp duty on transfer of assets is governed by the relevant State Stamp Act. In terms of stamp duty, though the State laws provide for rates of stamp duty to be paid on various instruments, it is observed that generally there is no specific entry for a High Court (now NCLT) order sanctioning the scheme of amalgamation or demerger, in the absence of which High Courts have taken the view that the High Court (now NCLT) order involving the transfer between two juristic persons of certain movable and immovable property, is a 'conveyance' and should therefore be chargeable to stamp duty.

(5 marks)