

# Cross Border Merger



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- Vinod Kothari Consultants Private Limited, consultants and advisors
  - Based out of Kolkata, New Delhi & Mumbai
- We are a team of consultants, advisors & qualified professionals having over 30 years of practice.

***Our Organization's Credo:***

***Focus on capabilities; opportunities follow***

# Meaning

- **‘Cross border merger’** means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamation) Rules, 2016 notified under the Companies Act, 2013.
- For the purpose of cross border merger, a **‘foreign company’** means any company or body corporate incorporated outside India whether having a place of business in India or not.
- There are **2 types** of Cross Border Mergers:
  - **‘Inbound merger’** - A cross border merger where the resultant company is an Indian company;  
i.e. Foreign company merge with an Indian Company.
  - **‘Outbound merger’** - A cross border merger where the resultant company is a foreign company.  
i.e. Indian company merge with a Foreign Company.

# Did the provision exist in CA, 1956?

- Answer: Yes it did!
- However, a foreign Company could merger with an Indian Company but not vice-versa.
- Because as per Section 394(4)(b) of Companies Act 1956:

**"transferee-company" does not include** any company other than a company within the meaning of this Act ; but

**"transferor-company"** includes any body corporate, whether a company within the meaning of this Act or not.



# Provisions governing such mergers in India

Section 234 of the Companies Act, 2013

Rule 25A of CAA Rules, 2016

FEM (Cross Border Merger) Regulations, 2018

FEMA (Non-Debt Instruments) Rules, 2019

FEM (Transfer or issue of any foreign security) Regulations, 2004

FEMA (Mode of payment and Reporting of Non-Debt Instruments) Regulations, 2019

.SEBI (Substantial Acquisition of shares and Takeover) Regulations, 2011

Competition Act, 2002

Indian Stamp Act, 1899

Income Tax Act, 1961




## SECTION 234:

# MERGER AND AMALGAMATION OF A COMPANY WITH FOREIGN COMPANY



# Types of Merger

## INBOUND MERGER

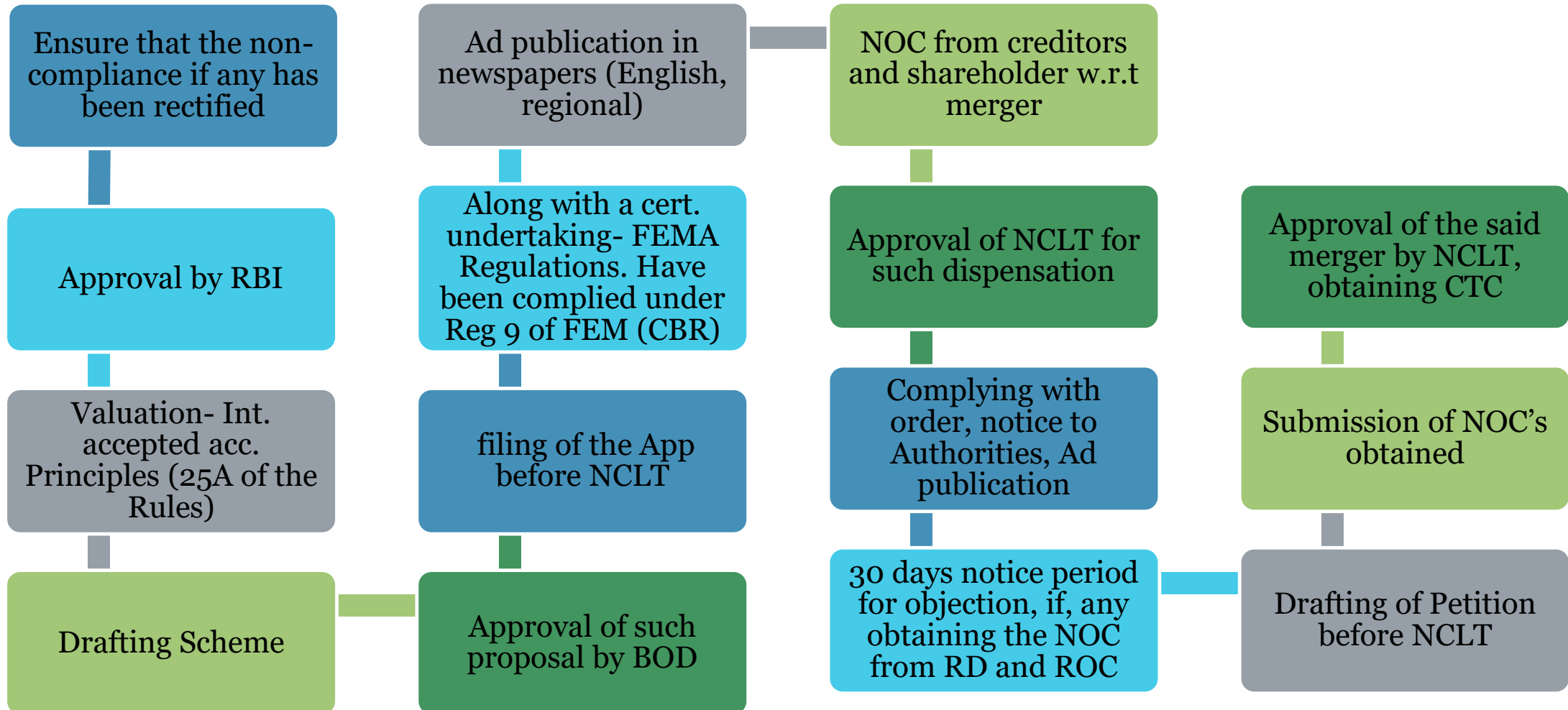
- Resultant Company is an Indian Company.
- Resultant company may issue/transfer securities to PROI.
- Need to comply with pricing guidelines, entry routes, sectoral caps as per applicable regulations.
- Office of foreign company situated outside India = Branch/office of resultant Indian company situated outside India.

## OUTBOUND MERGER

- Resultant Company is a Foreign Co.
- PRII may hold/acquire securities of resultant foreign company in accordance with FEM (Transfer or issue of any Foreign Security) Regulations, 2004.
- Resident individual may acquire securities outside India at FMP within limits prescribed under LRS.
- Office of Indian company situated in India = Branch/office of resultant Foreign company situated in India.



# Process of Merger



# Post Merger Compliance Inbound Merger (1/2)

Issuance  
of  
securities

In case of PROI – in acc. With TISPRO –  
sectoral cap, pricing guidelines etc.

In case of breach of sectoral cap,  
prior approval of CG to be taken

In case of JV/WoS – ODI Regs

Should not exceed 100% of the  
net worth of the Indian Co.

In case of SDS of JV/WoS – Reg 6&7 of ODI  
Regs

# Post Merger Compliance Inbound Merger (2/2)

Borrowings/ guarantees of the foreign co. becomes the borrowing of the RC

Assets of the Foreign Co to be acquired by RC as per RBI directions

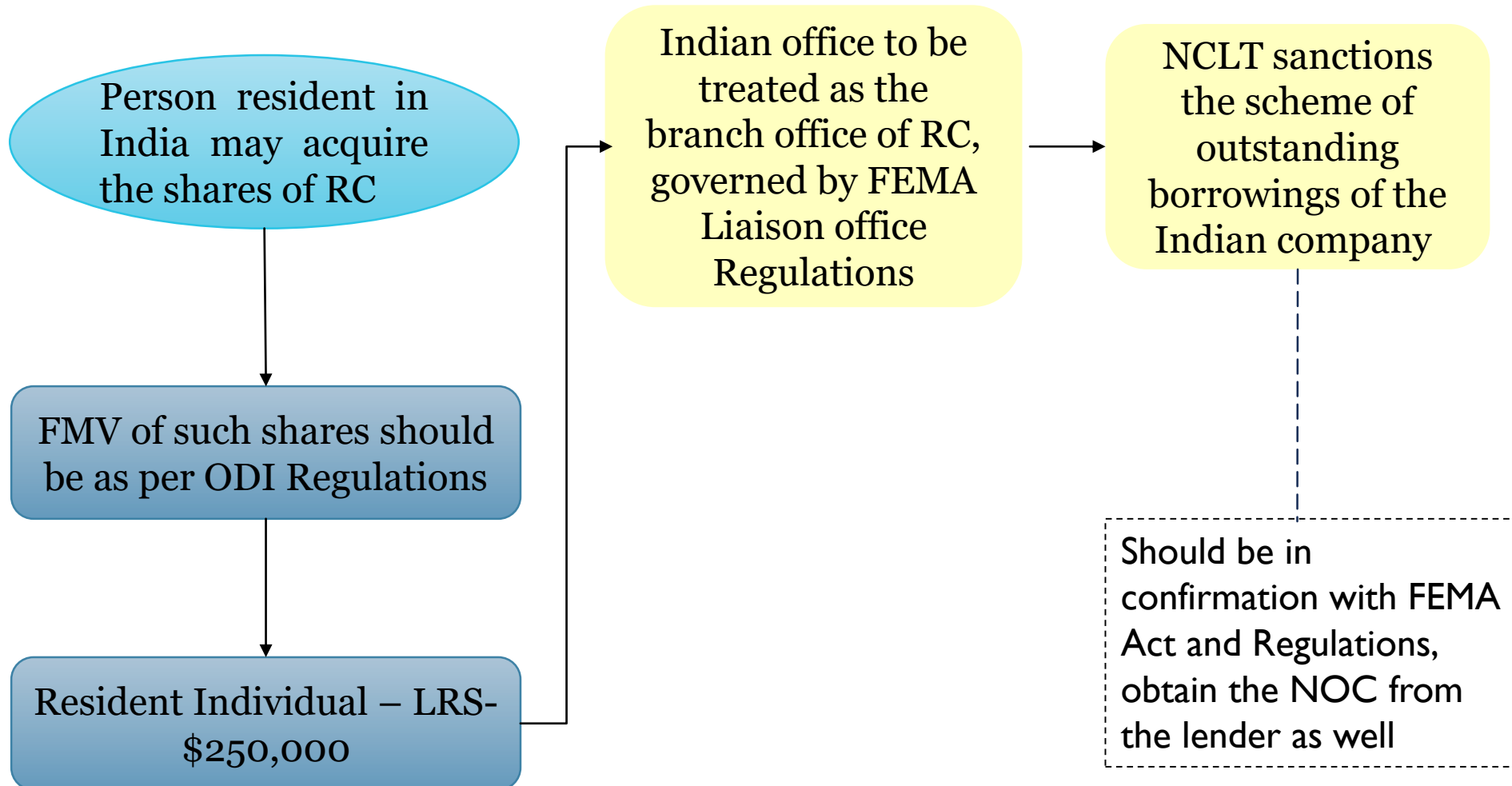
RC to comply with all the ECB norms post such merger

Assets to be sold off which are not permitted to be acquired/held.

Repayment cannot be made for a period of 2 years

Within 2 years of sanction of the scheme

# Post Merger Compliance Outbound Merger (1/2)



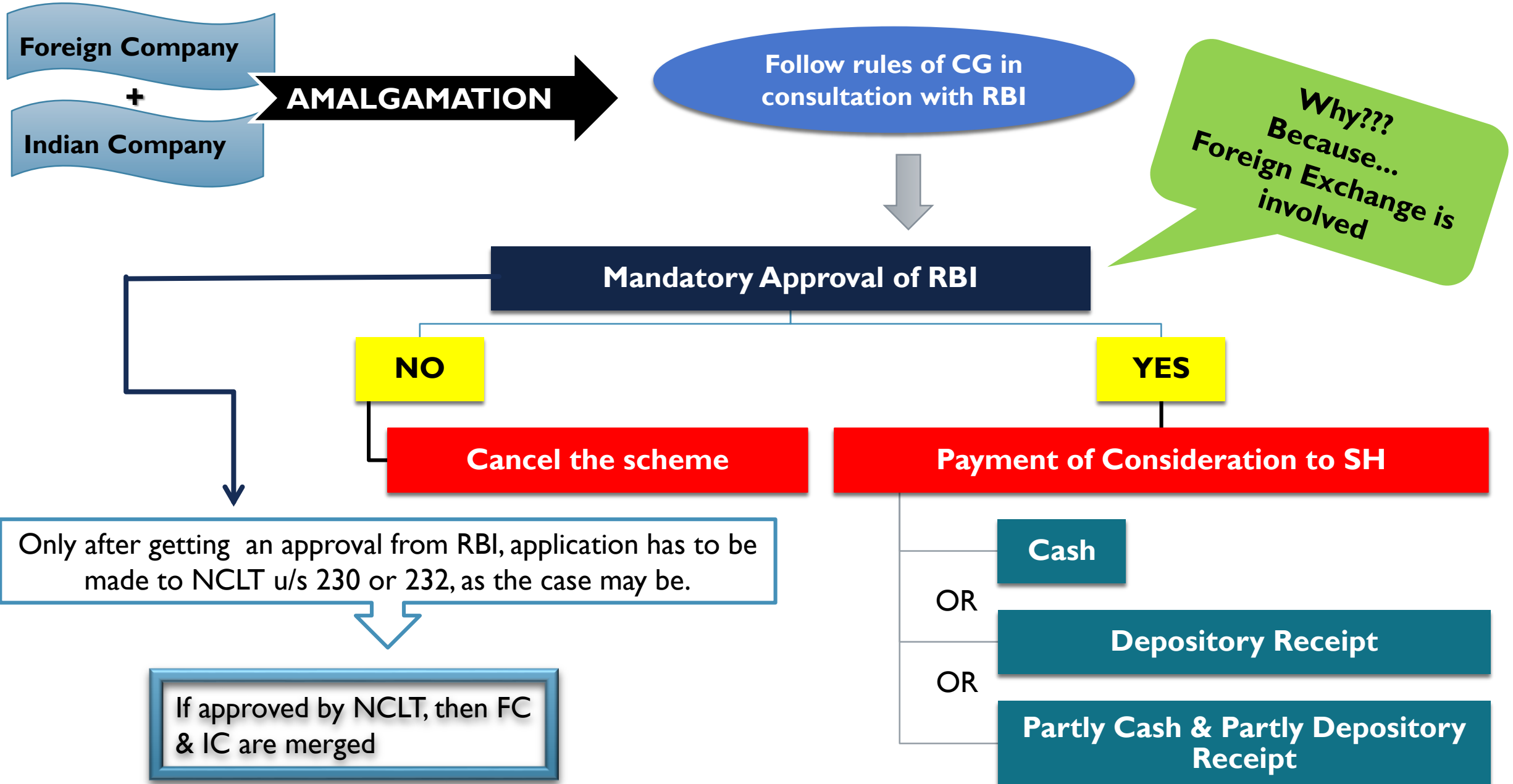
## Post Merger Compliance Outbound Merger (2/2)



RC can hold and transfer assets in India in accordance with the FEM (Acquisition and transfer of immovable property in India) Regulations, 2018.

Assets not permitted to be sold off within 2 years of the sanction of the scheme.

Proceeds to repatriated outside India immediately, repayment of Indian liabilities within 2 years.



Foreign Company

+

Indian Company

**AMALGAMATION**

Follow rules of CG in consultation with RBI

**Mandatory Approval of RBI**

Why???  
Because...  
Foreign Exchange is involved

**NO**

**Cancel the scheme**

**YES**

**Payment of Consideration to SH**

**Cash**

OR

**Depository Receipt**

OR

**Partly Cash & Partly Depository Receipt**

Only after getting an approval from RBI, application has to be made to NCLT u/s 230 or 232, as the case may be.

If approved by NCLT, then FC & IC are merged

# Approval

Earlier, As per Rules 25A, a prior approval of RBI was necessary in order to enter into such merger

Post the notification under FEMA, it shall now be considered as a deemed approval given by RBI, provided that the cos. are complying with all the provision, and a certificate undertaking such compliance is furnished in this regard before NCLT.

However, if the transaction does not comply with the regulations, it shall be necessary for the companies to obtain such prior approval from RBI.

# Examples of cross border merger

## *M/s Trisa Jewels and 7 Ors*

*(CA/22/CAA/CB/2018) [INBOUND MERGER] :*

The Hon'ble NCLT Chennai Bench approved the said merger keeping in view of the Cross Border Merger Regulations notified by the RBI. While approving the scheme, the Hon'ble NCLT directed for the dissolution of every transferor company but the foreign companies (the same to be dissolved as per the jurisdiction of the tribunal where the companies are registered in.)

*M/s Reliance Life Sciences B.V. with Reliance Life Sciences Private Limited (CA(CAA) NO. 2200 OF 2019) [INBOUND MERGER]:*

The Hon'ble NCLT, Mumbai Bench, while observing that all the statutory details has been complied with by the companies which includes deemed approval of RBI as per **Reg. 9 of FEM (CBR)**, along with the required affidavit, approved the said scheme of merger of the company with its WoS.



# TAXATION

- Concept of Tax Neutrality
- tax-neutrality w.r.t. taxes and both the amalgamating company transferring the assets and the shareholders transferring their shares in the amalgamating company are exempt from tax.
- For amalgamating company – it should be as per Section 2(IB) of the IT Act
  - All the assets and liabilities immediately before amalgamation becomes that of the RC
  - 75% of the shareholders of amalgamating company are retained
  - the entire consideration should comprise of shares in the amalgamated company.
- Stamp Duty: the transfer of immovable assets is backed by stamp duty which depends upon the state in which the same is registered. Therefore, calculation of Stamp Duty can prove to be a bit more tricky when the companies involved operate on a larger scale and it is not easy to determine such stamp duty in those cases.

# Challenges to be solved

- While Indian Company may declare a dividend to the foreign shareholders, it shall be liable to pay a DDT u/s 115O of the IT Act
- The Indian Co. may consider to distribute its profit to the foreign shareholders as buy back or reduction of the share capital
  - In case no. 1 BBT shall be liable to be paid
  - In case no. 2 DDT shall be liable to be paid, along with a possibility of Foreign Tax Credit (which ultimately leads to double taxation)
- The question of taxation arises in case of an Inbound Merger, where the Indian Company acquires the assets of the Foreign Company, will it be liable to CGT? (is there any gain arising at all?)
- The shareholders shall also be taxable in case of receiving shares of a foreign co. (LTCG/STCG).

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