

Income tax issues in insolvency, insolvent liquidation and voluntary liquidation

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- Vinod Kothari and Company, company secretaries, is a firm with more than 34 years of vintage
 - Based out of Kolkata, Mumbai, New Delhi and Bengaluru
- We are a team of qualified company secretaries, chartered accountants, lawyers and managers.

Our Organization's Credo:

Focus on capabilities; opportunities follow

Overview of discussion

Substantive

- What happens to existing income tax liabilities prior to insolvency?
 - Position as operational creditor, secured or unsecured?
 - Question of priorities u/s 53
 - Treatment under resolution plan
 - What happens to ongoing and future assessments/appeals?
- Tax implications on resolution
 - Carry forward and set-off of losses
 - Taxability of Remission of liability
 - Depreciation claim by RA/successor
 - Tax holiday
- Tax implications on liquidation
 - All of the above
 - Tax on sale of standalone assets/block of assets
 - Taxation of a going concern sale (GCS)
 - Tax on distribution, in cash and in specie
- Tax implication on voluntary liquidation

Procedural

- Regular income tax compliances during CIRP and liquidation
 - TDS
 - Filing returns
 - IP as authorised representative
- Intimations to tax authorities
- Nagging problems
 - Delay in or non-filing of claims
 - Adjustment of outstanding dues against refunds
 - Past assessments, SCNs, penalties
- Obligations of IP in case on non-compliances



Status of Income Tax claims under IBC



Nature of income tax liabilities under IBC

- Position as operational creditor
 - Claims upto the initiation of CIRP: tax dues are a part of sums due to Government authorities
 - Ghanashyam Mishra And Sons vs Edelweiss Asset Reconstruction Company Limited. [SC]. [An operational creditor] would also include a claim of a statutory authority on account of money receivable pursuant to an imposition by a statute. Akshay Jhunjunwala & Anr vs Union Of India. See also, DCIT v. Bhuvan Madan, RP for Diamond Power Infrastructure Ltd., etc.
 - Tax issues arising out of CIRP proceedings - for example, any tax on sale of assets - the tax is part of costs
- Recent SC ruling State Tax officer(I) v. Rainbow Papers Ltd held that the State is a secured creditor under GVAT Act and are to be treated at par with the first priority creditors u/s 53 of IBC.
 - Followed by NCLAT in Principal Commissioner of Income Tax & Ors. v. Assam Company India Ltd.
 - Whether Section 178 (6) of the Act imply that tax liability is just a claim? Is it a secured claim?
- Secured or unsecured?
 - Given Section 238 of IBC it is obvious that the Code will override anything inconsistent contained in any other enactment, including the Income-Tax Act. We may also refer in this connection to Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. & Ors. (2000) 5 SCC 694 and its progeny, making it clear that income-tax dues, being in the nature of Crown debts, do not take precedence even over secured creditors, who are private persons. Pr. Commissioner Of Income Tax vs Monnet Ispat And Energy Ltd. (SC)
 - Tax dues, being an input to the Consolidated Fund of India and of the States, clearly come within the ambit of Section 53(1)(e) of the Code. the Income-tax Department, not being a secured creditor, must necessarily take recourse to distribution of the liquidation assets as per Section 53 of the Code. Leo Edibles & Fats Limited vs The Tax Recovery Officer

How to deal with Govt claims citing Rainbow Papers Ruling

- Tax authorities have started filing claims seeking status at par with secured creditors, citing provisions of respective laws and the SC ruling in Rainbow Papers
- The SC ruling is effective as the law of the land, and therefore, IPs need to abide by it
- However, a secured creditor is one whose security interest is evidenced by certificate of charge registration issued by RoC, record of IU, proof of certification of charge by CERSAI
 - *Reg. 21 of Liquidation Reg-The existence of a security interest may be proved by a secured creditor on the basis of-*
 - (a) *the records available in an information utility, if any;*
 - (b) *certificate of registration of charge issued by the Registrar of Companies; or*
 - © *proof of registration of charge with the Central Registry of Securitisation Asset Reconstruction and Security Interest of India.*
- It is also important to note sec. 26B of the SARFAESI Act, according to which only registered government claims/attachment will be treated at par with secured creditors:
 - provided other secured creditors have filed their claims under CERSAI
 - MCA Discussion Paper dated 18.01.23 proposes to clarify treatment of security interest by statute
 - Also see, Madras HC ruling in Beta Nephthol Ltd.
 - In the case of Rainbow Papers Limited, the aforesaid decision is not applicable in the facts and circumstances of the case as it was confined only to the provisions IBC and definition of secured creditors under the provisions of IBC **which has only been clarified vis-à-vis the provisions of Section 178(6) of the Income Tax Act.**



Tax implications during CIRP



Key issues in CIRP

- Whether the benefit of carry forward and set-off of accumulated losses will be available?
- Whether any write-offs/haircuts being done as part of resolution plan may:
 - result into taxability of income u/s 41/ any other provision of the Act?
 - result into MAT in case of companies subject to MAT?
- Whether any MAT credit to which CD was entitled be applicable to the RA?
- Whether RA can be burdened with past tax claims?
- RA may quite often transfer the CD into a separate entity by way of a merger/demerger:
 - Whether the tax benefits in such a case be available?

Carry forward and set-off of losses u/s 79

*79. (1) Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place during the previous year in the case of **a company, not being a company in which the public are substantially interested**, no loss 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 shares of the company carrying not less than fifty-one per cent of the voting power were beneficially held by persons who beneficially held shares of the company carrying not less than fifty-one per cent of the voting power on the last day of the year or years in which the loss was incurred*

XXX

(2) Nothing contained in sub-section (1) shall apply,—

...

(c) to a company where a change in the shareholding takes place in a previous year pursuant to a resolution plan approved under the Insolvency and Bankruptcy Code, 2016 (31 of 2016), after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner;

(d) to a company, and its subsidiary and the subsidiary of such subsidiary, where,—

(i) a change in shareholding of such company, and its subsidiary and the subsidiary of such subsidiary, has taken place in a previous year pursuant to a resolution plan approved by the Tribunal under section 242 of the Companies Act, 2013 (18 of 2013) after affording a reasonable opportunity of being heard to the jurisdictional Principal Commissioner or Commissioner;

Carry forward and set-off of business losses u/s 79

- Section 72 permits carry forward of business losses for 8 AYs
- Section 79 - Special provisions for C/F of losses in cases of **companies in which public is not substantially interested**
 - Sub-section (1) - C/F is conditional on continuation of beneficial holding of not less than 51% of the voting power
 - Status of company at the time when the change in shareholding pattern takes place is relevant to determine the applicability - see, *ITO v. Edelweiss Commodities Services Ltd.*
 - Exemptions carved out in Sub-section (2)- amendment vide Finance Act, 2018
 - Change in shareholding should have taken place pursuant to a resolution plan approved under IBC
 - Exemption is subject to reasonable opportunity of hearing Pr. Commissioner/Commissioner
 - How is this opportunity to be extended?
 - No carve-out for liquidation sales/GCS in liquidation
 - Various NCLT orders provide for relief, but subject to consideration of tax authorities
- Position in case of listed companies?
 - Sec. 79 is not applicable
- Reference to sec 242 of the CA, in case of subsidiaries - is it relevant? Seems conflicted with the Statement of Objects

Scheme of Arrangement during CIRP

- As per Reg. 37 of IBC- Resolution may provide for restructuring of CD, by way of merger, amalgamation and demerger
- Points to note-
 - Whether scheme forming part of Resolution plan will be given the benefits of tax neutrality?
 - Whether benefits of set off and carry forward of losses will be available in case of such schemes?
 - What will be the procedural requirements in case of scheme of arrangement forming part of Resolution Plan?
- Prayers for concessions/relaxations under IT Act are not explicitly granted by AAs, but the RAs are allowed to apply to competent authorities:
 - See, NCLT order for Bhushan Steel (relying on order of Bhushan Energy) where AA remarked it would not be competent for the AA to grant relaxation, concession or waiver which is wholly within the domain of competent authority.
 - In case of DHFL, while approving reverse merger of SRA PCHFL with DHFL, NCLT observed that waivers, etc. shall be subject to approval of competent authorities in light of the rulings in *Ghanshyam Mishra*.

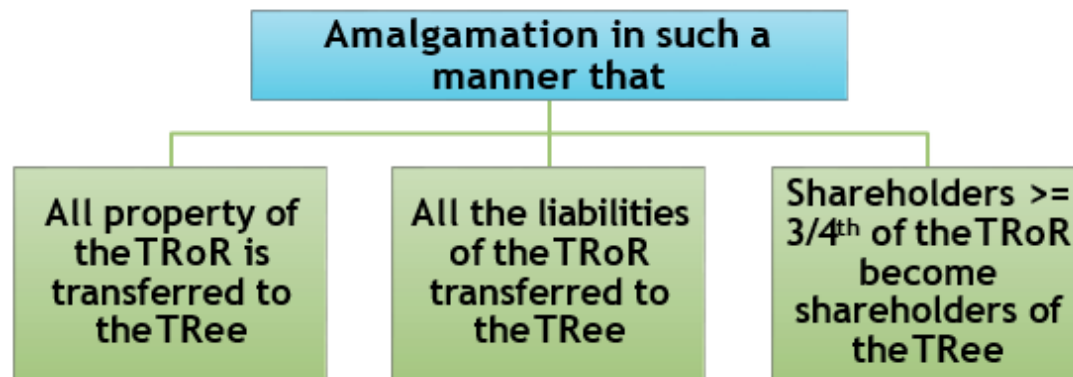


Tax implications on amalgamation



Definition of Amalgamation

- There are no specific provisions under IT Act dealing particularly with tax implications in case of corporate restructuring pursuant to IBC provisions
- As per Section 2(1B) of the Income Tax Act, 1961 "amalgamation", in relation to companies, means
 - Merger of one or more companies with another company or
 - Merger of two or more companies to form one company



- Points to note-
 - Merger as a result of acquisition of property by one company shall not tantamount to merger u/s 2 (1B)
 - Merger as a result of distribution of property of one company to the other company after the winding up of the first mentioned company shall not tantamount to merger u/s 2 (1B)
 - W.r.t. the shareholding condition- Shares already held by the TRee co. or its nominees, in the TRoR shall not be included;
 - The definition is only applicable in case of merger of companies;
 - So as to avail tax neutrality, the TRee co. (Amalgamated Co.) must be an Indian Company;
 - The shares allotted to shareholders of TRoR Co. is not subject to any lock-in;
 - A share-swap agreement either pursuant to the Scheme, or otherwise is a common transaction;
 - It is not mandatory that the shareholders of TRoR constitute the same % of holding in the TRee- For eg: if shareholders holding 80% in TRoR become shareholders of TRee- it is not mandatory that they constitute 80% in TRee also.

Taxation in Amalgamation

Tax Neutrality for company- No capital gain implications [sec 47 (vi)]; depreciation shifts to amalgamated company

Tax neutrality for shareholders - no transfer on a/c of amalgamation [sec 47 (vii)] holding period is also inclusive

Carry forward of losses and accumulated depreciation [sec 72A; Rule 9C]

Amalgamation Expenses and Bad Debts - sec. 35DD

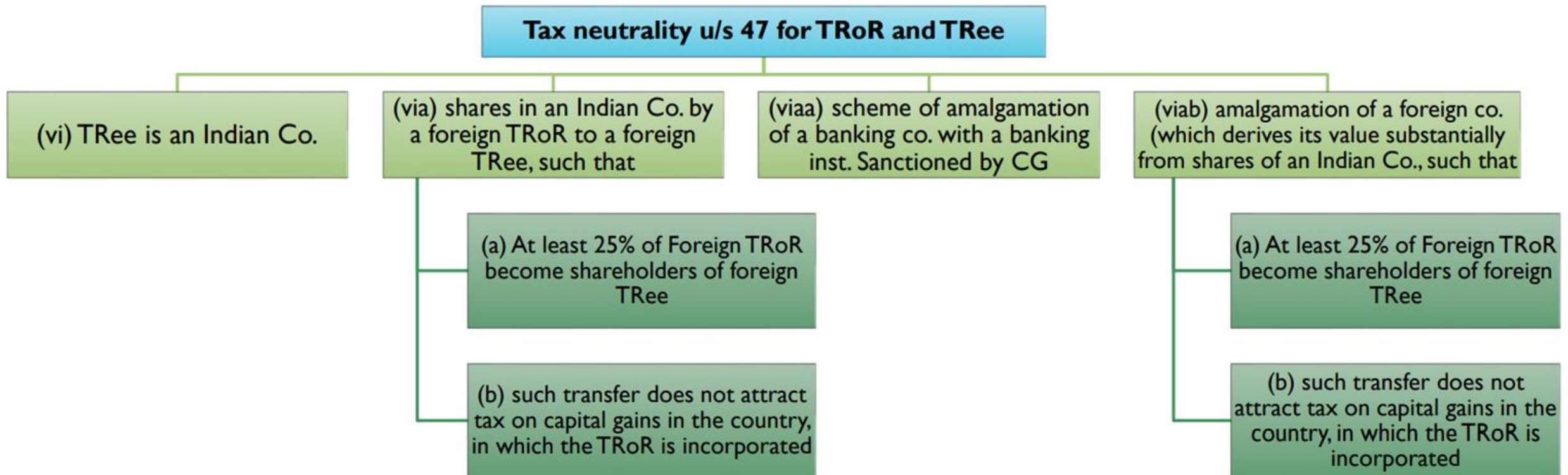
Apportionment of Depreciation [sec 32(1); 43 (1); 43 (6)]

Other Aspects

Important Case Laws

Tax Neutrality in case of Amalgamation (1/2)

Transfer of any capital asset is subject to capital gains tax in India; However, amalgamation enjoys tax-neutrality with respect to tax on transfer.



Tax Neutrality in case of Amalgamation (2/2)

Taxability in the hands of shareholder – Sec 47 (vii) – not regarded as transfer

- any transfer by a shareholder, in a scheme of amalgamation, of a capital asset being a share or shares held by him in the amalgamating company, if—
 - the transfer is made in consideration of the allotment to him of any share or shares in the amalgamated company except where the shareholder itself is the amalgamated company, and
 - the amalgamated company is an Indian company

Carry Forward of Losses and Unabsorbed Depreciation (1/3)

Conditions to avail carry forward of losses and unabsorbed depreciation

For the Amalgamating Co. (TRoR) Sec 72A (2)(a)

The TRoR been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed > 3 yrs

has held continuously as on the date of the amalgamation at least 3/4th of the book value of fixed assets held by it two years prior to the date of amalgamation

For the Amalgamated Co. (TRee) Sec 72A (2)(b)

holds continuously for a min. period of 5 yrs from the date of amalgamation at least 3/4th of the book value of fixed assets of the TRoR acquired in a scheme of amalgamation;

continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation

fulfils such other conditions as may be prescribed to ensure the revival of the business of the TRoR or to ensure that the amalgamation is for genuine business purpose (see next slide)

Carry Forward of Losses and Unabsorbed Depreciation (2/3)

Conditions for set-off, under Rule 9C [pursuant to sec 72A (2) (b) (iii)]

The TRee (owning an industrial co.) shall:
achieve $\geq 50\%$ of the installed capacity before the end of 4 years; and maintain till end of 5 years

The TRee shall:
furnish to the Assessing Officer a certificate in Form No. 62, duly verified by an accountant, to establish that production levels have been achieved

Carry Forward of Losses and Unabsorbed Depreciation (3/3)

Points to note-

- All conditions (u/s 72A (2)(a) and (b)) must be fulfilled.
- Where such conditions are fulfilled,
 - Accumulated loss of the TRoR will be allowed to carried forward for a **fresh period of 8 years**;
 - *Supreme Industries Ltd. vs DCIT : 2007 17 SOT 476 (Mum ITAT)*
- Unabsorbed depreciation can be carried forward indefinitely
- If the conditions mentioned in the previous slide are not fulfilled- [Sec. 72A (3)]
 - The set off of loss or allowance of depreciation made in any previous year in the hands of the TRoR Co.
 - Shall be deemed to be the income of the TRoR Co. chargeable to tax
 - For the year in which such conditions are not complied with.
- Accumulated loss means loss of the TRoR under the head “Profit and Gains of business or profession” (not being a loss due to speculation business)
- Accumulated losses b/f under the head “house property” or “capital gain” will get lost, and neither co. will be able to avail c/f benefit

Apportionment of Depreciation

For apportionment of depreciation b/w the TRoR and TRee, following steps should be followed [proviso to S. 32(5)]

- Assume that there has been no amalgamation; and compute depreciation for the TRoR;
- Once computed, the depreciation amount shall be:
 - Apportioned b/w the TRoR and TRee
 - In the ratio of the number of days for which the assets were used by them

Important Case Laws (1/2)

- Tax Neutrality [Section 47(vii)] will not be applicable where
 - the shareholder of the amalgamating company
 - is allotted bonds or debentures in exchange of shares in the amalgamating company -

[CIT vs. Gautam Sarabhai Trust : 173 ITR 216 (Guj.)]

- On amalgamation, rights of shareholder of the TRoR in the capital asset, i.e., the shares stand extinguished, resulting in a transfer under section 2(47)

[CIT vs. Mrs. Grace Collis and Ors. : 248 ITR 323 (SC)]

Important Case Laws (2/2)

- Whether, TRee would be entitled to carry forward and set off of credit of Minimum Alternate Tax available to the TRoR under section 115JAA of the Income Tax Act.?

YES. [Refer: SKOL Breweries Ltd. v. ACIT, 28 ITAT India 998 (Mum.) ITA No. 313/Mum./07 A.Y. 2003-04 dated 15-5-2008]

M/s. Caplin Point Laboratories Ltd. v. Assistant Commissioner of Income-tax Order dated January 31, 2014 in ITA No.667/Mds/2013 (ITAT Chennai).]

Ambuja Cements Ltd. v. Deputy Commission of Income-tax Order dated September 5, 2019 in ITA no.3643/Mum./2018 (ITAT Mumbai).

- Whether the indexation will be available from the date of acquisition of shares in TRoR or date of acquisition of shares in TRee
 - Where the shares transferred to a 100% subsidiary company were exempt under section 47, the indexation of cost has to be taken from the date of first holding of shares by the holding company- *Kotak Mahindra Bank Ltd. v. ACIT: 2009 TIOL 383 ITAT MUM-*
 - Capital asset transferred by way of gift - held that indexation of cost in the hands of donee from the date of holding of asset in the hands of donor

DCIT vs. Manjula J. Shah : 35 SOT 105 / 318 ITR (AT) 417

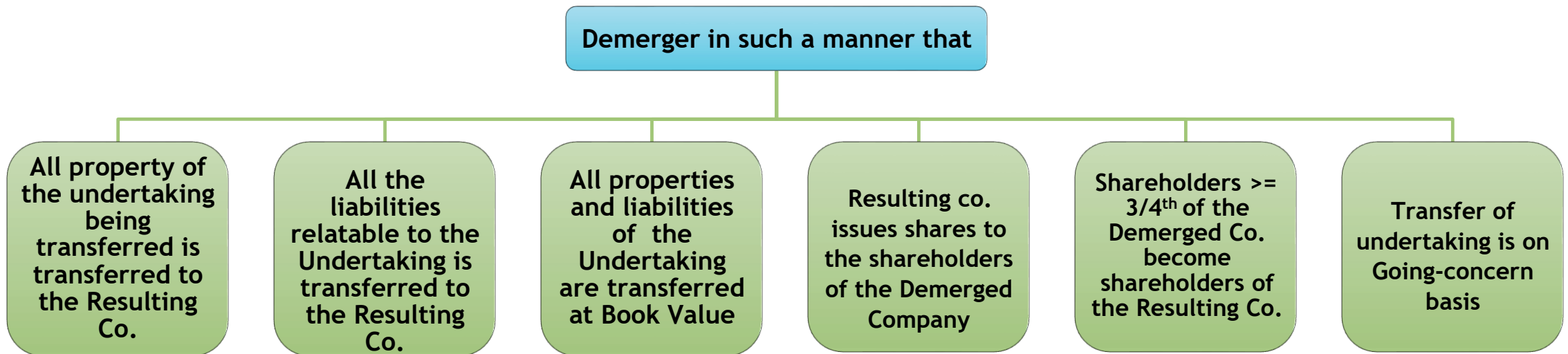
(Mum.)(SB) [affirmed by Bombay High Court: 2011-TIOL- 808-HC-MUM-IT]-



Tax Implications on Demergers

Definition of Demerger

- As per Section 2(19AA) of the Income Tax Act, 1961 “demerger”, in relation to companies, means the transfer by a demerged company of its one or more undertakings to any resulting company



- Demerged Co. [Sec. 2(19AAA)]**- company whose undertaking is transferred, pursuant to a demerger, to a resulting company
- Resulting Co. [Sec. 2(41A)]**- company (including a WoS) to which the undertaking of the Demerged Co. is transferred in a demerger and, the Resulting Co. in consideration of such transfer of undertaking, issues shares to the shareholders of the demerged company

Meaning of “Undertaking” (1/2)

- **Explanation 1- Meaning of “Undertaking”-**

It includes

- any part of an undertaking; or
- a unit or division of an undertaking; or
- a business activity taken as a whole
- **But does not include**
 - Individual assets or liabilities
 - Or any combination thereof
 - Not constituting a business activity.

- **Key Considerations**

- Can assets and liabilities be cherry picked?
- What does “going-concern” mean?
- What is business activity?

Meaning of “Undertaking” (2/2)

Cherry-picking of Assets & Liabilities

- The Hon’ble Delhi High Court *vide* its judgement in *Indo Rama Textile Ltd* [Co. Petition No. 4 of 2003, Co. Appl. No 762 of 2009, July 23, 2012], held that-

“in a demerger, transfer of all common assets and/or liabilities relatable to undertaking being demerged is not required so long as the assets and liabilities transferred, by themselves, constitutes a running business and the business can be carried on uninterruptedly with such assets and liabilities alone”

- The Delhi High Court further held that-
 - To ensure that the undertaking has been transferred as a going concern or not, while sanctioning a scheme of arrangement, **the Court can examine whether essential and integral assets like plant, machinery and manpower without which it would not be able to run as an independent unit have been transferred to the resulting company**

Taxation in Demerger

Tax Neutrality- No capital gain implications for the company [sec 47 (vib)] or shareholders and 47 (vic and vid)]

Cost of acquisition of the shares of demerged co, for shareholders proportionate to the net book values [49 (2C)/(2D)]

Carry forward of losses and accumulated depreciation [sec 72A (4) and (5)]

Demerger Expenses [35DD] and Bad Debts

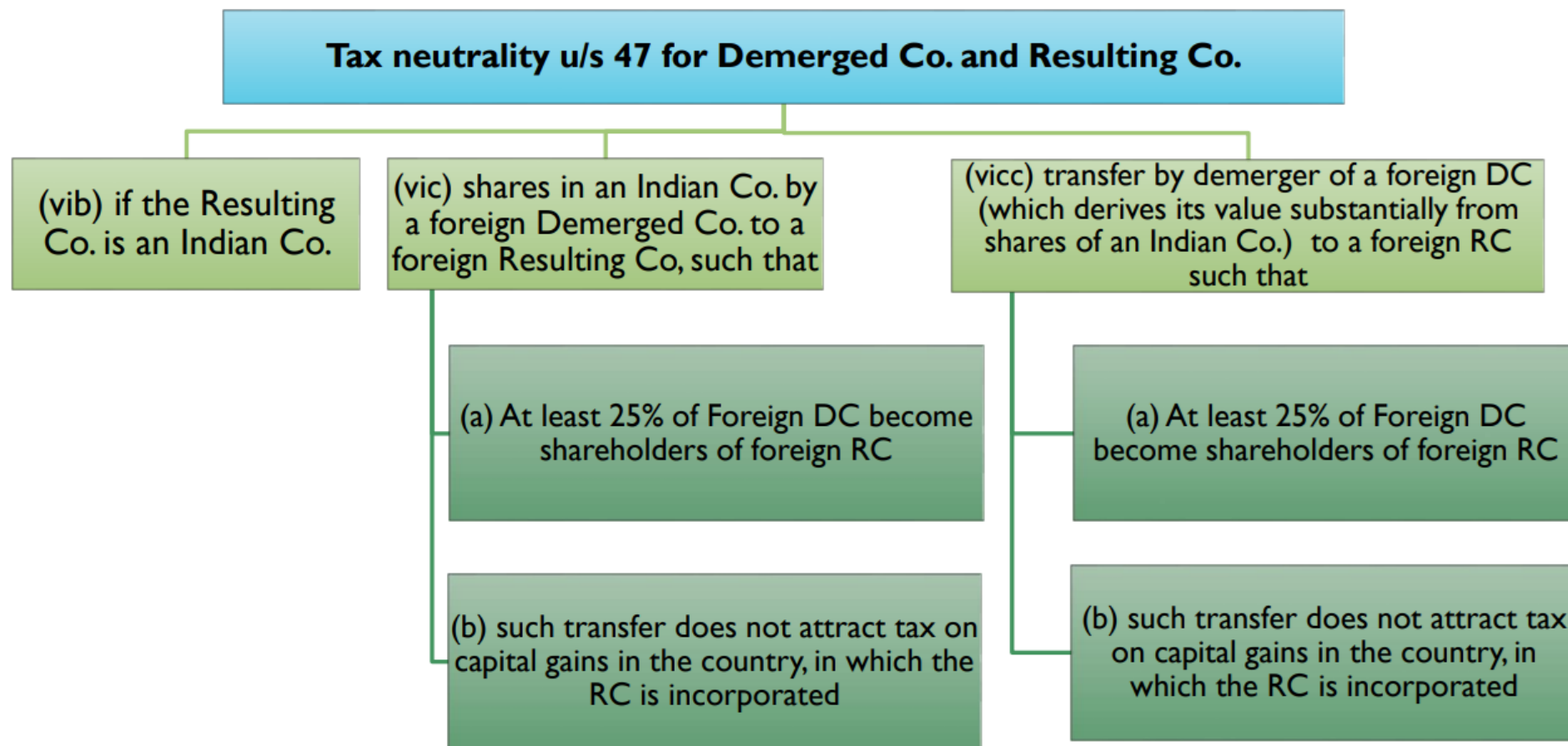
Apportionment of Depreciation [sec 32(1); 43 (1); 43 (6)]

Other Aspects

Important Case Laws

Tax Neutrality in case of Demerger (1/2)

Transfer of any capital asset is subject to capital gains tax in India; However, de-merger enjoys tax-neutrality with respect to tax on transfer.



Tax Neutrality in case of Demerger (2/2)

Taxability in the hands of shareholder - Sec 47 (vid)

- any transfer or issue of shares by RC, to the shareholders of the DC if the transfer or issue is made in consideration of demerger of the undertaking
- In case of a demerger, the existing shareholders of the DC will hold:
 - (a) Shares in the resulting Co.; and
 - (b) Shares in the demerged co.

- Cost of acquisition will be computed as under-

By virtue of Section 49(2D) the COA of shares in the Demerged Company shall be:

- COA of original shares in the demerged company
Less: COA of shares in the resulting company as calculated in section 49(2C)

- Cost u/s 49 (2C)=
CoA of the shares held, in the same proportion as the Net Book Value : Net Worth of the DC

Carry Forward of Losses and Unabsorbed Depreciation- Sec 72 (A)(4)

- **Losses and unabsorbed depreciation of the Demerged Co, shall be carried forward-**
 - **where such loss or unabsorbed depreciation**
 - is directly relatable to the undertakings transferred to the resulting company,
 - be allowed to be carried forward and set off in the hands of the resulting company
 - **where such loss or unabsorbed depreciation**
 - is not directly relatable to the undertakings transferred to the resulting company,
 - be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company,
 - and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be

Other Aspects

- By virtue of Section 2(22)(v) there will be no dividend in the hands of shareholders on distribution of shares pursuant to a demerger by the resulting company to the shareholders of the demerged company.
- By virtue of amendment in section 2(42A), for calculating the period for which the shares are received upon demerger are held, the period for which shares were held in the demerged company shall also be considered.
- The Resulting Company must record the cost of assets transferred pursuant to the demerger, as equal to the cost that would have been recorded in the books of the Demerged Co., i.e. **the actual cost:**
 - However, exception made for companies which have adopted IndAS



Tax Implications on Slump Sale

Introduction to Slump Sale

Provisions

- As per Section 2(42C) slump sale means transfer of business **undertaking** as a going concern for lump sum consideration without values being assigned to individual assets and liabilities.
- As per Section 50B transferor company is liable to short/long term capital gains (holding period 36 months)
 - Capital gains computed by deducting 'net worth' from the sale consideration
- *Undertaking has same meaning as under Explanation 1 to Sec 2(19AA)*
- Computation of WDV as per sec. 43 (6)

- **Whether Undertaking is a capital asset?**

The Supreme Court in the case of *R.C. Cooper V. UOI* : AIR 1970 SC 564 (610) held that

“the undertaking is distinct from the various assets which comprise the undertaking”

- **Undertaking must be a business activity as a whole**
- **Whether in a slump sale some of the assets could be retained by the transferor?**

If some assets are retained by the transferor / liabilities not taken over by the transferee, the same does not militate against the concept of slump sale.

[CIT v F.X. Periera and Sons Pvt. Ltd.: 184 ITR 461 (Ker.) ; Premier Automobiles Ltd. v. ITO: 264 ITR 193 (Mum.); ACIT v. Raka Food Products Ltd.]

Key Aspects

- Consideration is paid to the Transferor Company, not its shareholders
- Capital gains = Full value of consideration - Net worth of undertaking
 - Net worth = Aggregate value of WDV of the block of assets and book value of other assets of the undertaking - Value of liabilities of undertaking
 - Change in value of assets on revaluation be ignored for computing net worth
 - **Benefit of indexation not available**
 - Revaluation is completely ignored
- If values of individual assets are considered while computing the lumpsum value, or where it is possible to attribute prices to individual assets, the transaction may not amount to slump sale - *CIT vs Artex Manufacturing*, 227 ITR 260 (SC)
- If the net worth of the undertaking is negative, the entire sale consideration is capital gain - *Zuari Industries v CIT* (2006) SOT 563 (Mum.)
- Any business loss/ accumulated depreciation stays with the transferor.
- Slump sale provisions do not provide tax treatment for the purchaser. Hence, purchaser may split the actual consideration paid for the going concern and treat the assets/liabilities accordingly as if acquired in normal course of business
 - In *DE Nora India Limited vs CIT* (2015) 370 ITR 391 (Del), the transferee's right to allocate values based on valuations was also upheld

Slump Exchange

- Slump Sale, in simple words, essentially means “*sale*” of a business or an undertaking as a going concern for a lump sum monetary consideration without assigning values to individual assets and liabilities.
- Slump Exchange, on the other hand, means transfer of business in exchange of assets (viz. shares, debentures etc.) other than by way of monetary consideration.
- Taxability of Slump exchange-
 - The definition of ‘slump sale’ was amended *vide* Finance Act, 2021 to expand its scope and include in its ambit all forms transfer
 - However, inadvertently, the reference to word ‘sale’ was given instead of ‘transfer’
 - The error was later rectified *vide* Finance Act, 2022

Tax implications on sale of assets, partial resolution

- Transfer of assets under resolution plan
 - Capital gain/loss implications?
 - Whether taxable as a slump sale
 - Section 2(42C) - "slump sale" means the transfer of one or more undertaking, by any means, for a lump sum consideration without values being assigned to the individual assets and liabilities in such *transfer*.
 - Sec. 50B
- Implications in case of partial sale
 - Recently proposed under MCA Discussion Paper
 - Already a part of regulation 37(1)(m) of CIRP Regulations
 - However, the present provisions of Income tax Act do not accommodate such sales. Hence, provisions of slump sale under sec 50B may be applicable

Treatment of tax proceedings/claims - during and after resolution

- Moratorium under section 14 of the Insolvency and Bankruptcy Code, 2016 (IBC) will also apply to appeals being made by the Income Tax Department against the orders of Income Tax Appellate Tribunal, in respect of tax liability of a debtor under CIRP. *Pr. Commissioner Of Income Tax v. Monnet Ispat And Energy Ltd.* [SC upholding Delhi HC ruling]
- Proceeding before the Income-tax Department which has resulted in freezing of the bank accounts is a proceeding of quasi-judicial nature and continuation of such a proceeding during moratorium period is illegal in view of the prohibitions under section 14(1)(a) of the Code. *Kitply Industries Ltd. Vs. Assistant Commissioner of Income Tax (TDS) and Anr.*
- Section 31: Resolution plan shall be binding on the corporate debtor and its employees, members, creditors, **including the Central Government, any State Government or any local authority** to whom a debt in respect of the payment of dues arising under any law for the time being in force, such as authorities to whom statutory dues are owed, guarantors and other stakeholders involved in the resolution plan.
- SC in *Committee of Creditors of Essar Steel India Limited Vs. Satish Kumar Gupta & Ors.* held that *Successful Resolution Applicant is not to be burdened with undecided claims at the stage of implementation of the Resolution Plan.* See also, *State of Haryana Vs. Uttam Strips Ltd* (NCLAT)
- Claims, which are not part of the resolution plan, shall stand extinguished and the proceedings related thereto shall stand terminated. Since the subject matter of the petition are the proceedings, which relate to the claims of the respondents prior to the approval of the plan, in the light of the view taken by us, the same cannot be continued. *Ghanashyam Mishra And Sons ... vs Edelweiss Asset Reconstruction Company Limited.* [SC].
- Other rulings as well - *EMC v. State of Rajasthan* [Rajasthan HC], *Ultra Tech Nathdwara Cement Ltd vs Union Of India* [Rajasthan HC]
- Section 32A, MCA Discussion Paper

Continuation of assessment on successor

- Section 170 provides that the successor shall be assessed in respect of the income of the previous year after the date of succession.
 - The proceedings and assessments done on the predecessor shall be deemed done on the successor after succession
- Amendments in sec. 170 - Sub-section (2A) inserted as non-obstante clause
 - *where there is succession, the assessment or reassessment or any other proceedings, made or initiated on the predecessor during the course of pendency of such succession, shall be deemed to have been made or initiated on the successor and all the provisions of this Act shall, so far as may be, apply accordingly.*
 - *“pendency” means the period commencing from the date of filing of application for such succession of business before the High Court or tribunal or the date of admission of an application for CIRP by the Adjudicating Authority as defined under IBC and ending with the date on which the order of such High Court or tribunal or such Adjudicating Authority, as the case may be, is received by the Principal Commissioner or the Commissioner.*
- Sec 170A permits filing of returns of income by the successor entity; see rule 12AD
 - These provisions apply to all business reorganization, including the one under IBC
 - definition of “business reorganization” includes *IBC proceedings, as per 170 (2A), Explanation*

Sec 156A - does it give overriding jurisdiction to AA to modify tax demands?

- While sec 156A has been explained in the Objects and Reasons, and in the detailed Circular as if it is connected with sec. 170A, however, looking at the language of the section, it seems there is a power to AA to modify a demand as a part of the resolution process

■ Sec 156- *“When any tax, interest, penalty, fine or any other sum is payable in consequence of any order passed under this Act, the Assessing Officer shall serve upon the assessee a notice of demand in the prescribed form specifying the sum so payable :
Provided that where any sum is determined to be payable by the assessee or the deductor or the collector under sub-section (1) of section 143 or sub-section (1) of section 200A or sub-section (1) of section 206CB, the intimation under those sub-sections shall be deemed to be a notice of demand for the purposes of this section.”*

■ Sec 156A- *“Where any tax, interest, penalty, fine or any other sum in respect of which a notice of demand has been issued under section 156, is reduced as a result of an order of the Adjudicating Authority as defined in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016, the Assessing Officer shall modify the demand payable in conformity with such order and shall thereafter serve on the assessee a notice of demand specifying the sum payable, if any, and such notice of demand shall be deemed to be a notice under section 156 and the provisions of this Act shall accordingly, apply in relation to such notice”*

Book profits tax on write-back of liabilities - sec 115JB

- Sec 115JB deals with book profits tax or MAT
- while computing the book profits tax, the brought forward loss or depreciation, as per books of the company, is allowed to be deducted for computing book profits.
- In case of CIRP cases, as the company would have done for restructuring, the carried forward loss/depreciation would have been wiped out from the books. Consequently there may be a tax on the write back of liabilities.
- To avoid this, Finance Act 2018 allowed deduction of tax loss/brought forward depreciation in CIRP cases
 - *(iih) the aggregate amount of unabsorbed depreciation and loss brought forward in case of a company against whom an application for corporate insolvency resolution process has been admitted by the Adjudicating Authority under section 7 or section 9 or section 10 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016).*
Explanation.—*For the purposes of this clause, the expression “Adjudicating Authority” shall have the meaning assigned to it in clause (1) of section 5 of the Insolvency and Bankruptcy Code, 2016 (31 of 2016) and the loss shall not include depreciation; or*
 - *(iii) the amount of loss brought forward or unabsorbed depreciation, whichever is less as per books of account in case of a company other than the company referred to in clause (iih)*

Tax implications on waiver/remission of liability (1/2)

- In terms of sec. 28(iv) “the value of any benefit or perquisite, whether convertible into money or not, arising from business or the exercise of a profession” is taxable as PGBP. SC in Mahindra and Mahindra ruling, “for the applicability of the said provision, the income which can be taxed shall arise from the business or profession. Also, in order to invoke the provision of Section 28 (iv) of the IT Act, the benefit which is received has to be in some other form rather than in the shape of money. In the present case, it is a matter of record that the amount of . . . is having received as cash receipt due to the waiver of loan. Therefore, the very first condition of Section 28 (iv) of the IT Act which says any benefit or perquisite arising from the business shall be in the form of benefit or perquisite other than in the shape of money, is not satisfied in the present case.
- However, recent amendment in sec. 28 vide Finance Bill, 2023: “the value of any benefit or perquisite arising from business . . . whether (a) convertible into money or not, or (b) in cash or in kind or partly in cash or partly in cash and partly in kind”
- Section 41 of IT Act provides for tax on “any amount in respect of which loss or expenditure was incurred by the first-mentioned person or some benefit in respect of the trading liability referred to in clause (a) by way of remission or cessation thereof” in the hands of the successor. SC in Mahindra and Mahindra ruling (supra): “we deem it proper to mention that there is difference between ‘trading liability’ and ‘other liability’. Section 41 (1) of the IT Act particularly deals with the remission of trading liability. . . .Section 41(1) of the IT Act does not apply since waiver of loan does not amount to cessation of trading liability.
- Allotment of shares to RA
 - tax implications under sec.56?
 - Section 56(2)(x) / section 50CA refers to fair market value of shares to be determined as per rule 11UA. No specific carve-outs for IBC cases
 - whether any need for fair valuation, when valuation arrived through IBC process?

Tax holiday/benefits to companies resolved under IBC

- Various provisions dealing with tax holidays, e.g. 10A, 10AA, 10B, 10C, 80-IA, 80-IB, 80-IC
- Certain conditions are common, e.g.:
 - undertaking should not be formed by the splitting up or reconstruction of a business already in existence
 - undertaking is not formed by the transfer to a 'new business' of plant/machinery previously used for any purpose
- Provisions usually apply “*to the amalgamated or the resulting company as they would have applied to the amalgamating or the demerged company if the amalgamation or demerger had not taken place*”.
 - No deduction shall be admissible under this section to the amalgamating or the demerged Unit, being the company for the previous year in which the amalgamation or the demerger takes place; and
 - **No clarity on slump sale, IBC resolutions, GCS sale in liquidation**
- See, rulings like *Commissioner Of Income Tax vs Tata Communications Internet Services Ltd.* wherein it was held, “Insofar as the objection of the revenue that there had been change in the name of pattern of shareholding it does not make any difference as it is a well settled rule of law that benefit under Section 80IA of the Act is available to an undertaking and not to the assessee since the undertaking **continues to carrying on its business without any reconstruction of business already in existence.**” Cited by *Ultratech Cement Ltd, Mumbai vs Dcit Cen Cir 1(4), Mumbai, ITAT Mumbai*



Liquidation Stage



Tax implications in liquidation

- Tax on sale of assets
 - standalone, block/parcel of assets, slump sale, GCS
- Whether tax liabilities be carried along, in a GCS sale in liquidation
 - Liabilities for GCS are only those liabilities earmarked by COC/liquidator. Both sale of the CD and the business(es) of CD as a going concern under IBC do not contemplate automatic transfer of all pre-CIRP liabilities of the corporate debtor to the auction purchaser. See *Kashvi Power & Steel Pvt. Ltd. vs. VVB State Electricity Dist. Company* [Calcutta HC]
- Whether capital gains, if any, arising on sale of assets during liquidation should be treated as liquidation costs?
 - NCLT Allahabad contends that the same shall be payable as per sec. 53. *LML Limited Vs. Office of Commissioner of Income Tax, Mumbai*
 - However, the same will lead to breach of tax provisions, as the tax liability arises during liquidation, and is not a claim on liquidation estate
- Whether TDS deductible on sale of assets us 194-IA [1% on sale of immovable property]
 - There is inconsistency between sec. 194-IA of IT Act and sec. 53 of IBC. Section 53 shall prevail. *Om Prakash Agarwal Vs. Chief Commissioner Of Income Tax (TDS) & Anr.* [NCLAT]. See also, *Ms. Pooja Bahry, Liquidator and Anr. Vs. Gee Ispat Pvt. Ltd.*
- Tax implications on extinguishment of liability remaining after distribution
 - Whether extinguishment of liabilities pursuant to statutory provisions same as remission?
 - In liquidation, all liabilities become claim against 'liquidation estate'
- Tax demands against buyer in liquidation
 - Same principles as in case of a resolution applicant
 - Proposal in MCA Discussion Paper - to clarify that post approval of the resolution plan, no proceedings can be commenced or be continued by any government or authority regarding the claims arising before the commencement of the CIRP, unless otherwise provided for in the resolution plan, and such claims shall stand extinguished.

Income tax provisions do not override IBC

- where there is a conflict between provisions of the Code and those of the Income tax Act, will the Code prevail over the Act
- Sec 178 (6) of the Income tax Act specifically states that the Act overrides other laws, however, not the IBC
 - Sec 178 (6)- *“The provisions of this section shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force **except the provisions of the Insolvency and Bankruptcy Code, 2016**”*
- Hence, the principles of the Code in terms of priorities, etc shall prevail
- Requirements of giving notice etc are not conflicting with the Code - hence these need to be complied with
- ITAT Delhi in *Jcit, Circle-22(2), New Delhi vs S R Foils & Tissue P. Ltd.*
 - *“...in view of the provision of section 238 of CIRP code, the proceedings before Ld. NCLT would have over-riding effect.”*
- ITAT Delhi in *ACIT Vs. ABW Infrastructure Ltd.*
 - *“It is well settled now that, IBC has overriding affect on all the acts including Income Tax Act which has been specifically provided u/s 178(6) of the I.T. Act as amended w.e.f. 01.11.2016’*
- However, the IBC provisions cannot be interpreted in a manner which is inconsistent with any other law in the time being in force
 - See Madras HC ruling in *Dishnet Wireless Limited v. ACIT*



Going Concern Sale



Carry forward and set-off of business losses u/s 79 in GCS in liquidation

- No exemption/carve-out u/s 79 (unlike resolution)
- NCLT Mumbai in case of a GCS in the liquidation stage in the matter of Gaurav Jain v. Sanjay Gupta, liquidator of Topworth Pipes & tubes Pvt. Ltd. observed that-
 - “*The Corporate Debtor is entitled to get the benefits of brought forward losses, if any, **subject to permission of the appropriate authority if so entitled under the relevant provisions of the Income Tax Act, 1961.**”*
- Similarly, NCLT Ahmedabad in Nitin Jain, Liquidator of PSL Limited v. Lucky Holdings Pvt.. Ltd. observed that
 - “*in our considered view, **the reliefs and concessions on the parallel line of an approved resolution plan can be granted subject to one condition that such reliefs/concessions must be central issues** and also in relation to or arising out of liquidation proceedings of a Corporate Debtor so as to confer jurisdiction on Adjudicating Authority under Section 60 (5) (c) of IBC, 2016.”*
 - “*As regard to carry forward of losses under Income Tax Act, 1961, we hold that the Corporate Debtor under the new management under section 79(2) of Income Tax Act, 1961 would have to **approach concerned Income Tax Authority who may grant such relief, if permissible under law**”*
- Similar ruling in Sterling Biotech.

GCS during liquidation stage & resolution stage: set-off & carry forward of losses (Snap shot)

- Law permits going concern sale in both liquidation stage and CIRP stage (by way of a resolution plan)
- Following is the difference between GCS in liquidation stage and CIRP stage from tax perspective

<u>Basis</u>	<u>GCS in liquidation</u>	<u>GCS in CIRP by way of a resolution plan</u>
Set- off and carry forward of losses	<ul style="list-style-type: none"> ● Benefit of set-off and carry forward of losses is not expressly provided in law ● However, in certain rulings, the Hon'ble NCLT has allowed carry forward of losses, but again, subject to approval of IT Authorities. <ul style="list-style-type: none"> ● See <i>Gaurav Jain vs. Sanjay Gupta (Liquidator of Topworth Pipes & Tubes Pvt Ltd.</i> ● <i>Nitin Jain Liquidator of PSL Limited vs. Lucky Holdings Private Limited</i> 	<ul style="list-style-type: none"> ● Section 79(2)(c) of the Income Tax Act, allows the benefit of carry forward losses ● where a change in shareholding takes place pursuant to a resolution plan.



Voluntary Liquidation



Distribution of assets by companies in liquidation- Capital gains & deemed dividend

- Assets distributed to the shareholders of a company on its liquidation **shall not be regarded as a transfer** by the company [Sec 46(1)]
- Money or other assets received by the shareholders from the company shall be **chargeable to income-tax under the head "Capital gains"**
- Capital gains shall be levied on -
 - money so received or the market value of the other assets on the date of distribution, as reduced by the amount assessed as dividend within the meaning of section 2(22)(c)
 - and the sum so arrived at shall be deemed to be the full value of the consideration for the purposes of computation of capital gains
- Any distribution made to the shareholders of a company on its liquidation
 - to the extent to which the distribution is attributable to the accumulated profits of the company immediately before its liquidation, whether capitalised or not **be treated as deemed dividend** [Sec 2(22)(c)]
 - Wef. 01/04/2020 concept of CDT was omitted, taxable in the hands of shareholders



Procedural aspects under Income-tax law vis-a-vis IBC



Periodic compliances during CIRP & liquidation stage- Income Tax

Type of compliance	Compliances required to be done
TDS	<ul style="list-style-type: none"> ● TDS deducted to be deposited as per following timelines- <ul style="list-style-type: none"> ● Month ending April to February: 7th of the next month ● Month ending March: 30th April
	<ul style="list-style-type: none"> ● TDS return to be filed on a quarterly basis
Regular income tax payment	<ul style="list-style-type: none"> ● Tax to be assessed and accordingly the same is to be paid
	<ul style="list-style-type: none"> ● Where estimated tax liability in any year is $\geq 10,000$, advance tax to be paid in accordance with sec. 208
Tax return filing related	<ul style="list-style-type: none"> ● IT return to be filed by - <ul style="list-style-type: none"> ● 30th Sept. of the assessment year - Where tax audit is not applicable ● 30th Oct. of the assessment year - Where tax audit is applicable
Tax audit	<ul style="list-style-type: none"> ● Applicable only in case business is carried on and total sales, turnover or gross receipts, as the case may be, in business $> \text{Rs. } 1 \text{ Cr.}$ [Sec 44AB]

Miscellaneous

- Intimation to tax authorities
 - Sec. 178 of IT Act not applicable. However, public announcement as per IBC.
- Verification of IT returns
 - In case of companies under IBC, return to be verified by IP appointed by the Adjudicating Authority. [sec. 140 read with rule 12AA]
- IP as authorised representative prescribed under sec. 288 (2)(viii) read with rule 51B.
- Claiming refund
 - Sec 238(2) empowers liquidator to claim refund due to the CD
- Ensuring periodic compliances
 - IP appointed is under the obligation to ensure period compliances in relation to TDS, tax payment & return filing
 - An insolvency professional shall not include any amount towards any loss, including penalty, if any, in the insolvency resolution process cost or liquidation cost, incurred on account of non-compliance of any provision of the laws applicable on the corporate person while conducting. Reg. 27A and 27B of IP Regs.
- Sec 276A which provides for rigorous imprisonment for a term which may extend to two years in case of non compliance with sec 178(1) & (3) has been decriminalized w.e.f. 1st April, 2023 vide Finance Act, 2023
 - However, sec. 178, itself, is not applicable to IBC cases
- Adjustment of refunds against outstanding dues
 - Goes against sec. 14, 33, 53, 238 of IBC

Facilitation paper from IBB for Government agencies

Illustrative facilitations which Government agencies may facilitate, including -

- submit claims, including contingent claims, along with proof of claim, within specified time, to the IP in response to the public announcement under section 15 of the Code in relation to a CIRP (public announcements are available on the IBB website which provides alerts to subscribers)
- refrain from raising or submitting any claim in respect of the CD after the timelines;
- make use of the legal remedies available under the Code in respect of claims;
- refrain from insisting on payment of the pre-admission dues during moratorium period;
- refrain from instituting or continuing suits or proceedings against the CD to the extent prohibited under sections 14 of the Code
- release attachments over properties of the CD undergoing CIRP/liquidation
- receive the amounts due under resolution plans/distribution of proceeds in liquidation towards full settlement of claims as against the CD;
- refrain from raising claims / issuing demand notices in respect of unpaid dues already dealt with under resolution plan, after the plan is approved;
- refrain from initiating or continuing proceedings against the CD in respect of offences committed prior to commencement of CIRP, after resolution plan is approved
- seek all assistance and co-operation of the CD in investigating any offence committed prior to the commencement of the CIRP;
- refrain from taking action - attachment, seizure, retention, or confiscation - against the property of the CD in relation to an offence committed prior to commencement of CIRP where such property is covered under a resolution plan approved by the AA;
- initiate / continue proceedings against the persons responsible for offences committed by the CD prior to commencement of the CIRP;
- honour the resolution plan approved by the Adjudicating Authority;
- consider requests of the successful resolution applicant for necessary approval under section 31 of the Code;
- expedite refunds to the CD as claimed by the liquidator;
- demand claims relating to dues such as TDS, etc., collected by the CD on behalf of the Government, on priority

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