STRUCTURING OF MERGER AND ACQUISITION IN COMPANY LAW

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ABSTRACT

This research paper examines how mergers and acquisitions (M&A) are structured under corporate law. The importance of M&A transactions has increased in the Indian corporate w as a result of economic liberalisation. The notion of mergers and acquisitions is examined in the paper, with particular emphasis placed on the laws regulating them under the Companies Act and other laws. It places emphasis on the National Company Law Tribunal's (NCLT) function in approving transactions involving M&A. The paper additionally addresses the various M&A forms, including distressed asset purchases, stock purchases, joint ventures, and asset acquisitions. Each structure is thoroughly explained, including any tax and legal repercussions. The final section of the research paper goes through the formalities involved in M&A transactions, such as the paperwork that must be filed with the NCLT. Overall, this paper provides valuable insights into the structuring of M&A transactions in Indian company law and their significance in facilitating business expansion and growth.

Introduction

As the elimination of restrictive structure like restrictive business practices and monopolies and liberalization of Indian economy, the corporate world of India gradually shifting towards mergers. A merger occurs when two separate business entities merge to form a single company, resulting in the formation of a new company with new ownership and management. Whereas an acquisition occurs when one company buys out another, i.e., the company becomes a part of the other and the management of that company is taken over, no new company formed unlike in merger. A merger and acquisition structure, where a in the agreement parties to the agreement mutually agrees on term, condition, duties, rights after discussion on the transfer. It lays up the transaction's goals and possible threats. In most cases, negotiating parties are in charge of transaction structure, with due diligence depending on the company's accounts and finances. The companies enter into the transfer on this reporting, and the agreement's papers are formed based on the report.[1]

There are several structures of merger and acquisition in the corporate world. The companies are finding their own ways and engaging in flexible ways. Asset acquisition, mergers and stock purchase are the three most conventional ways of structure. The companies act, 2013 and several SEBI regulations governs it and has crucial role for expansion of business entity. It comes under the broad domain of scheme of arrangement of companies act and covers under section 230 to 234 of companies act 2013.

Discussion

Merger and Acquisition: The concept

Mergers and acquisitions are the practices that companies use to expand their business in terms of size and area. In today's market, mergers and acquisitions have become extremely significant. In the company act of 2013, section 230 to 234 deals with merger and section 230 to 232 along with Companies (Compromise, Arrangements and Amalgamations) Rules, 2016, provides with the structure for a merger.[2] In the old Company Act, 1956 section 391 to 394 deals with merger. The new statute requires the approval of the National Company Law Tribunal, which is no longer under the supervision of the high court. Fast track mergers became

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[1] Ambika Mehrotra, *Merger & Acquisitions Corporate-Law Perspective*, 108 TAXMANN.COM 11 (2019).
[2] A RAMAIYA, GUIDE TO THE COMPANIES ACT 57 (18th ed. 2014).

a reality in 2015, due to Section 233 of the Companies Act and Rule 25 of the 2016 Rules. It essentially means that minor firms, holding corporations, and fully owned subsidiaries do not need NCLT's consent to merge. In 2018, the Regional Director consented to the merger of "*DEN Ambey Cable Network Pvt. Ltd's*" eight totally owned companies.

An acquisition occurs when one firm buys out another, i.e., the firm becomes a component of the other and its management is taken over. The Merger and acquisition structure are a contract between the parties outlining their rights and responsibilities. According to Regulation 10(D) of the "*Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011*",[3]listed companies are not required to make an offer or file a scheme of arrangement with National company law tribunal unless they receive a No-Objection Letter from the Stock Exchange in under six months. In addition, only listed businesses will be subject to "*SEBI (LODR) 2015 rules*" 11, 37, and 94.[4] The cross-border mergers are regulated by the "*Foreign Exchange Management (Cross Border Mergers) Regulations, 2018*[5]*"*.

Mergers and Acquisitions, as well as takeovers, are aspects of corporate finance, corporate strategy, and management that engage with the buy, sale, and combining of various companies in order to aid, finance, or help a growing company in a given industry grow rapidly without having to create a new commercial enterprise.[6] Mergers and acquisitions are often successful in creating cost savings by leveraging economies of scale. It also might result in tax benefits and, in some cases, a revenue rises due to increased market share. Mergers and acquisitions frequently result in enhanced value generation for the organisation as a whole.

Merger & Acquisition Structure

The term "structure deal" refers to a situation in which two or more firms join together and mutually agree on a structure. Merger and acquisitions transaction structure refers to all of the terms and conditions. The major goal is to establish the company's risks and ambitions.[7]

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[3] DR. N. VENKATESHWARLU, A CRITICAL STUDIES OF LAW RELATING TO MERGER AND ACQUISITIONS OF COMPANIES IN INDIA 64 (2017).
[4] Jayadeep Kaur, *Merger & Acquisition - Legal Framework and Compliance*, 105 SCL 00020 (2011).
[5] Foreign Exchange Management (Cross Border Mergers) Regulations, 2018 (India).
[6] Rabi Naarayon Kar, *Mergers and Acquisition of Enterprises - Indian and Global Experience,* NEW CENTURY PUBLICATION NEW DELHI (2007).
[7] Shaw Richard, *Merger and Acquisition Strategies,* ALTA. L. REV. 630 (1995-1996).

The steps of deal structure are Negotiation, Risk assessment and management, Capacity to tolerate risk, Conditions under which the discussions may be terminated. Although merger and acquisition are thought to be beneficial in bringing competition efficiency to the Indian economy, it might backfire if it is promoted over a certain point. Afraid of vulture capitalists, managements may try to maximise short-term earnings and offer bigger dividends to appease shareholders. This might happen at the expense of the firms' long-term interests.[8]

Initial Deal Planning

In Merger and acquisition, there are three preparatory processes that must be completed prior to the purchase. The following are the details:

First and foremost, both organisations require product market strategy planning. The purchasing firm will need to consider industry statistics, market growth, competitive nature, legislation, ease of entry, and other strengths and weaknesses, as well as corporate goals. With regard to size, the target firm considers the quality of management, the stock market, profitability, and capabilities.

The second step is to find and screen the right party for the trade. The company selects a few prospects and shortlists them, after which it conducts a quick investigation into the individuals.

Finally, calculating the deal's financial value will evaluate the company's cash flows and earnings.

Structure of Merger and Acquisition

In India, private entity acquisitions are often conducted through mergers, demergers, or joint ventures, all of which are handled by the NCLT.

i. Business and asset transfers

Under the Income Tax Act of 1961, business transfers are like a slump sale under which all assets and liabilities are transferred. Because the entire sum is provided to the endeavour rather than being separately allotted to each asset, the tax is lower.[9]

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[8] A RAMAIYA, *Supra* note 2, at 135.
[9] Felton, W. Raymond, *Legal Opinion in Mergers and Acquisitions*, N.J. LAW.52 (2002).

ii. Stock purchases

The most time-efficient method is to purchase shares. It is essentially a secondary acquisition of securities followed by a subscription that is subsequently converted into equity shares.

iii. Collaborative ventures

Essentially, it is the most common option in which one of the parties is a non-resident or foreigner. Both parties work cooperatively for the good of the organisation.

iv. Purchasing distressed assets

Distressed asset dealings have been impacted as a result of the IBC and RBI circulars on mergers and acquisitions. Later, the parties will discuss how the deal will be structured, such as whether it will be signed and closed immediately or at a future stage. It mostly relies on the due diligence report and the time it takes for the courts to authorise the transfer.[10]

Different type of Merger & Acquisition Structure

The different structures used in Merger and acquisition, including sale of asset, sale of share, sale of slump, Amalgamation and Demerger. It determined by the situations of the firms involved

i. Sale of Asset

It is a monetary transaction in which the buyer simply purchases the entity's assets. But there is the flexibility to prefer whatever asset you wish to acquire. When a corporation has debts, this is the optimum transaction structure. The purchasing interest of company is only in the assets of Target Company in the next mode. This indicates the acquiring firm has obligation to the degree of only these shares that get transferred.

Asset Purchase Agreements are used to transfer certain assets. Sections 45 and 46 of the Income Tax Act applies to the capital gains. In the scenario of non-depreciable assets, the tax is paid

[10] Shailesh Prajapati, *Amalgamation, Demerger and Slump Sale,* 7 17 CAT 528(2010).

by the transferor on gains following the sale of the company's assets. If the asset is depreciable, the capital gains are always limited to the short term.[11]

The law of GST will be applied to each asset separately, increasing the purchasing cost. Stamp duty is determined by the state and is based as per the document in which the assets are indeed being transferred. Stamp duty would be reduced in case the documents has been agreements.[12]A resolution issued by the board of directors is required to transfer assets under Section 179 of the companies act 2013. It will also be controlled by the corporation's articles of incorporation. The transfer of workers from the target firm to the acquired company is optional and relies on the acquirer's interests.[13]

The most recent example is Orient Company's asset acquisition deal with Manishri Refractories & Ceramics Private Limited in Orissa in 2019. They merged it since adding components like lime magnesia Carbon Bricks allows them to simplify their offering. In order to recover debts, banks typically require businesses to liquidate their assets. Ruia's essar group, for example, has a lot of debts and is trying to sell the Essar oils and Vadinar refineries.

The buyer has the option of choosing the assets he wants to buy. Unless the winding-up procedure is started, the firm will continue to exist. The selling of non-tangible assets is restricted. The outcome will be a tax rise for both buyers and sellers.

ii. Sale of Slump

When the whole business is transferred, it is referred to as a slump sale. The company's operation will continue, but the assets will be liquidated, leaving the business in the control of the purchaser. It simply refers to when a business is 'transferred as a going concern.' The business segment is purchased as is and is completed through a Business Transfer Arrangement (BTA), that is essentially a sale or transfer agreement. This procedure can be carried out in court, in which the judiciary approves the merger arrangement. However, because such judicial proceedings may be time taking, most parties prefer to use sale agreements.[14]

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[11] DR. N. VENKATESHWARLU, *supra* note 3, at 273.
[12] DR. N. VENKATESHWARLU, *supra* note 3, at 109.
[13] Ambika Mehrotra, *supra* note 1.
[14]A RAMAIYA, *supra* note 2, at 295.

Because money is involved in the form of considerations, there are a variety of tax ramifications. If capital gains are retained for above than 36 months, they are considered realized and long-term profits on transfer of undertaking, however if held for less than 36 months, they are considered short-term capital gains and are taxed accordingly. The stamp tax on the instruments is another source of worry. Stamp duty in times of slow sales varies by state. The procedure for a slump sale is the most complicated of all the Merger and acquisitions options. They are subject to shareholders' approval by a special resolution, as required by section 180 of the Companies Act. Essentially, all of the company's previous acts, including legal repercussions, are transferred to the purchased business. Employees are transferred as well provided their approval is obtained. They can seek retrenchment under section 25 FF of the Industrial Disputes Act, 1947 if employees don't want to.[15]

Sanofi India announced the most recent slump sale in June 2020, including the transfer of a manufacturing plant from Gujarat to Zentiva. The cash flow was roughly 320 cores. The entity and BTA mutually agreed on a number of terms and conditions. Tata Steel also bought Usha Martin for Rs. 4700 crores.

The acquirer's business increases and diversifies as a result. The business exists, and the only thing that happens is that the assets are liquidated. Assets and liabilities have no monetary worth. If the slump sale is done for fewer than 36 months before it is completed, the cap gains interest rate is 34 percent.[16]

iii. Sale of Share

The corporation is purchased with the purpose of obtaining the whole underlying responsibility and assets. The firm must have a strong reputation and be well-established before it can be acquired. The purchase of shares is the second technique of acquisition. Share Subscription Agreements, Share Purchase Agreements, and Shareholders' Agreements are used to carry out the transfer. If a foreign entity is involved, the Foreign Exchange Management Act of 1999 (FEMA),[17] the Foreign Direct Investment (FDI) policy and the RBI Regulations would apply.[18]

If the acquirer is in a nation that has signed the DTAA, there is no requirement for capital gains

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[15] Shecter Howard L.,*Risk Issues in Mergers and Acquisitions Transaction*, 51 U. MIAMI L. REV. 719 (1996-1997).
[16] O'Brien, Timothy J., *The Conduct of Merger and Acquisition Tax Due Diligence,* Vol. 1 MAJ. TAX (1997).
[17] Foreign Exchange Management Act, 1999 (India).
[18] Shailesh Prajapati*, supra* note 10.

tax. Stamp duty is determined by the state and the value of shares. If the shares are in DMAT form, there's also no stamp duty. There is no need to get the existing entity's shareholders' permission first. They are expected to follow the rules set out by the authorities. The personnel will be the same, but they will work for the acquirer. There will be no transfers.[19]

The seller profits from the sale of the shares in terms of tax consequences. It is the most straightforward and uncomplicated method of acquisition. In most cases, this is the best option for a corporation to recover losses while simultaneously avoiding corporate tax responsibilities. After this manner of transaction, the rights, liabilities, and relationships of the client, banks, and suppliers are transferred. In some cases, third-party clearance is required, which might result in destruction and a conflict of opinion. The transfer of such assets might sometimes have an impact on patents and licensing. It's difficult to figure out how much tax you owe.[20]

iv. Amalgamation

When two entities' assets are combined, it is known as amalgamation. Mergers do not result in the formation of a single firm, but amalgamations do. Merger is a court-ordered procedure in which the NCLT approves a plan of amalgamation under section 391-394 of the Companies Act of 2013. The tax procedure is fair and adheres to the Income Tax Act as well as other rules of the Companies Act. Amalgamated Corporation and Amalgamating Company are the names of the newly established company and the entities.[21]

In other words, the merged entity will inherit the liabilities of the merging firms. Essentially, the owners of the firms with 75% shares will own 25% of the combined company, resulting in a tax exemption under the Income Tax Act. Also, because judicial mergers are tax-free, there will be no capital gains for the new firm and its stockholders. In terms of workers, the parties to the merger and the agreement they reached are in charge. Employees might be fired or kept in the company based on the agreement.[22]

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[19] Nathani, Suhail, *Chhabra, Gauri, Merger Control in India: Is There a Long Road Ahead*, WORLD COMPT. 281 (2015).
[20] Kumar, K. Satish, *The New Mergers Control Regulation in India* 4 INT'LAW REV. (2010-2011).
[21] Umang Agarwal, *The Conundrum of India LLP merger with Private Company- Thinking Beyond Judicial Pronouncement,* 103 TAXMANN.COM 5 (2019).
[22] Reeves Tony, *India's New Merger Control Regime: When Do You Need to File 26 Antitrust* CLIFORD CHANGE (May 27, 2023, 9:29 PM), https://www.cliffordchance.com/briefings/2011/12/india_s_new_mergercontrolregimewhendoyouneedtofile.html.

v. Demerger

Demerger occurs when a firm splits into one or more companies and reorganizes through the courts. The involvement of shareholders in the management of the new company's decisions and operations grew. It allows for a more efficient and well-understood business functioning. There will be no blame game because the responsibility is limited, as it would be in a large corporation. When a demerge occurs, specialized labor is expected. Reduced economic scale and conflicts of interest due to the lack of a single top authority to adjudicate, resulting in the loss of staff.[23]

Procedure In Merger and Acquisition Transaction

The company's memorandum of association should include a paragraph stating that they have the right to merge easily. The draught of the merger scheme should be authorised in a board meeting first.[24]

In a nutshell, the NCLT-1 form should be used to file an application with the tribunal, and the NCLT-2 form should be used to file a notice with the tribunal.

In NCLT -6 forms, there is an affidavit in which the disclosure must include all information about the entity, their financial position, any current legal concerns, and the company's audit report. The tribunal next asks the parties by notice if they believe the application is genuine, as per rule 5 of the 2016 rules. This notification must be sent to each of the company's creditors or debenture holders separately. The chairman of the entity, or any other person if the court orders, is the person permitted to communicate by post, mail, or any other means.

The following papers must be sent: first, the drafted Merger and acquisitions scheme; second, the order passed of the tribunal; and third, the company's information. The ideal structure is one that provides a win-win situation for all parties in terms of their goals and risks. Sections 391 to 394 of the 1956 Statute differed somewhat from the current act. To cope with complicated corporate law disputes, the new statute relocated Merger and acquisitions adjudication from the High Courts to the NCLT. It also created a fast-track merger that will

[23] Zandt Manuel, *Merger Control and Best Practice*, EUR. COMPET. LAW ANN. 361 (2010).
[24] Rukmini Bose, *Mergers and Acquisitions between India and UK* 98 SCL 1 (2010).

benefit many small businesses in terms of filings and approvals.[25]

Legal Framework for Merger and Acquisition

Mergers and acquisitions have become increasingly important in the corporate sector, as well as under tax regulations, as technology has advanced and a wave of globalisation has swept the globe. Essentially, M&As are carried out to limit competition, get access to markets and technology, and manage taxation.[26]

In India, the following statute controls M&A: To begin, the Companies Act of 2013, as well as the "*SEBI (Substantial Acquisition of Shares and Takeovers) Regulations of 2011 & SEBI (LODR)*", are in effect. Second, the "*Competition Act &1961, Income Tax Act 2002*". Finally, there are the "*Indian Stamp Act of 1899, the Foreign Exchange Management Act of 1999, and the GST Acts*". The substantive part of M&A transactions is discussed in Sections 230 to 240 of the Companies Act, 2013. The 2016 CAA (Compromises, Arrangements, and Agreements) also contains procedural elements.[27]

In the instance of "*Ikisan Limited., In re*.",[28] the company's shareholders and SEBI filed an application under sections 230 and 391 of the 2013 Act to set aside a court-approved plan of arrangement. The complaint was rejected since the stock exchanges, shareholders, and regional directors all gave their assent, and there was no evidence of fraud. Simply not adhering to accounting rules does not include a thorough investigation of the situation.

In terms of taxation, the Income Tax Act governs the situation. Later, the competition act supervises the transfers to prevent them from becoming anticompetitive and affecting the competition market in any way.

Conclusion

Essentially, an M&A transaction structure is indeed an agreement between merging or acquiring organisations regarding their roles and responsibilities to one another. These transactions must be designed to meet the needs of both the buyer and the target firms. It is

[25] V.V. VARA PRASAD, *MERGERS AND ACQUISITIONS*, 708 (2009).
[26] Shaw Richard, *supra* note 7.
[27] Khushi Sharma, *Laws regulating mergers and acquisitions in India*, IPLEADERS (May 30, 2023, 11:29 PM), https://blog.ipleaders.in/laws-regulating-mergers-and-acquisitions-in-india/.
[28] Ikisan Ltd.., In re, 61 taxmann.com 324 (Bom.) (2015).

essentially the transfer's goal that determines how the agreement is structured. Slump selling, for example, is a possibility if the object is vertical or undertaking. It's an asset buy if there are simply a few assets and no other liabilities. It's a share purchase if you're buying the whole company and all of its liabilities.

An M&A deal can be structured in a variety of ways. Corporate organisations are interacting in more imaginative and flexible ways in today's society. Stock purchase, asset acquisition, stock purchase, and mergers are the three most conventional techniques of structure.

The purchaser can select assets from the seller's firm to purchase using the Asset Acquisition process. If done in cash, this is the most advantageous approach for the selling firm. The business continues to exist even after the assets are sold. The buyer is unable to take non-transferable assets such as the company's reputation. It takes a long time and can cost both parties a lot of money.

The assets are not immediately transferred to a buyer via the Stock Purchase method; instead, the buyer acquires the most of the seller's voting stock shares, i.e., the seller's assets and liabilities. The seller pays less in taxes, is less time consuming, and spends less money. The sole disadvantage is that it may result in numerous legal and financial responsibilities. Through, a merger is when two or more business firms join forces to form a single entity. It is less difficult than making a purchase.