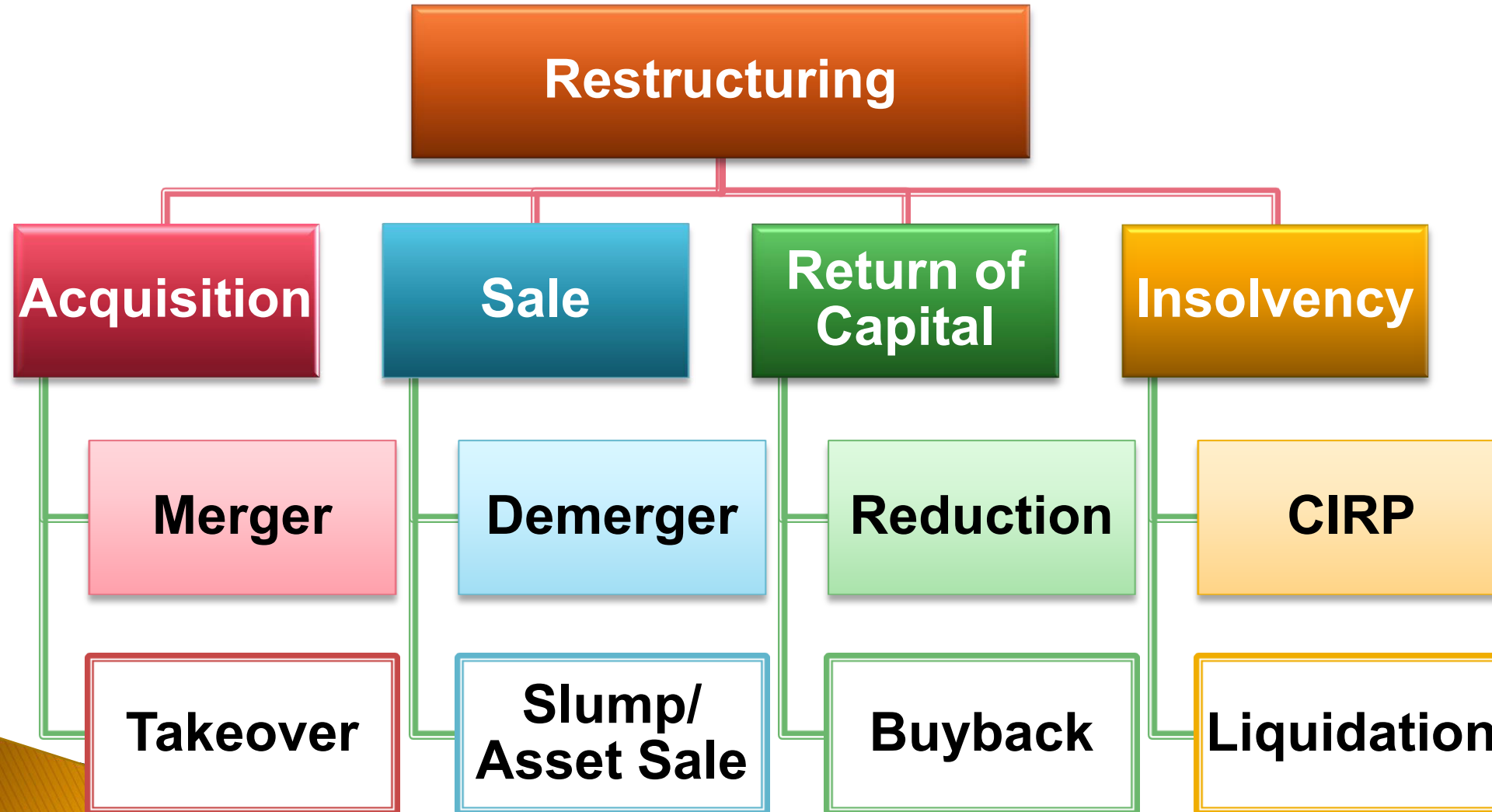


Business Restructuring

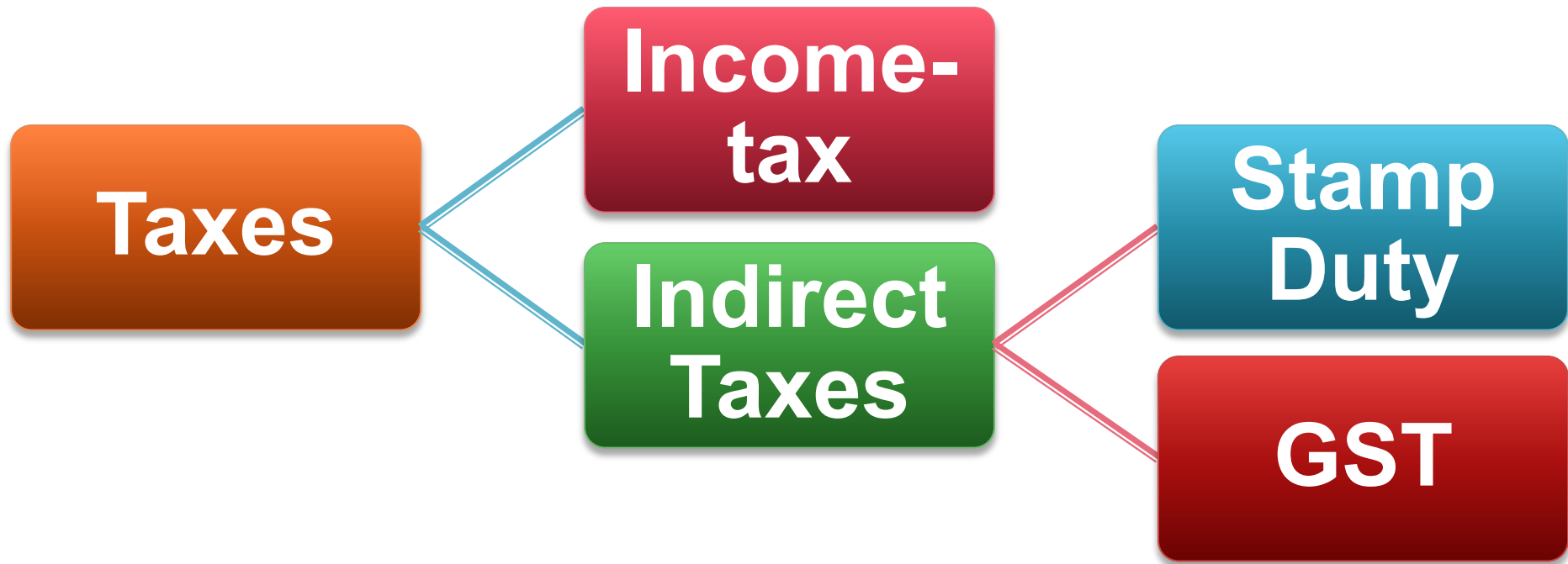


- **Dr. Anup P. Shah**
Chartered Accountant
7th October 2017

Scope



Direct / Indirect Taxes



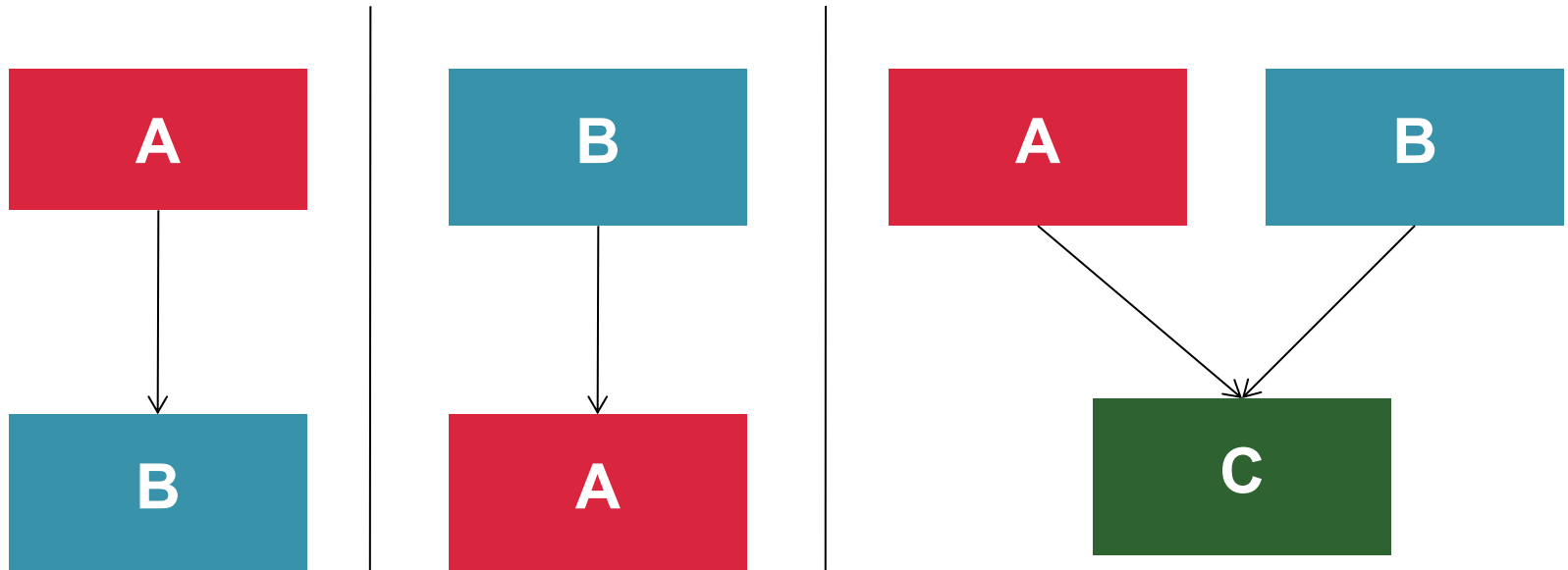
Merger

Key Regulatory Aspects

- **Consolidation of Businesses of 2 / more Cos.**
- **NCLT Approval ~ Court's Stamp**
- **3/4th Majority of Shareholders required**
- **Auditor's Certificate on Method of A/c**
- **Foreign Co. can also merge with ICO & vice-versa**
 - After obtaining Prior RBI Approval

Amalgamation - S.2(1B)

(A) Only of Companies: Not for LLPs / Firms



**Companies Act allows LLP to Co.
but ITA only permits Co. with Co.**

S.2(1B) – Definition

Three Conditions:

- ▶ All properties
- ▶ All liabilities
- ▶ At least 75% shareholders (Valuewise) of T^{or} Co. should become shareholders of T^{ee} Co.

The above conditions are cumulative

Forward Merger



Reverse Merger



Forward v. Reverse Merger

	Forward Merger u/s. 72A	Forward Merger without s. 72A	Reverse Merger
C/f Bus Loss	Available	Available?	Available?
C/f UAD	Available	Available?	Available?
Capital Loss	Lapses	Lapses	Lapses
MAT Credit of Loss making Co.	Transferred - Skol Breweries Mum	Transferred	Remains with it
Can GAAR apply?	Seems No	Seems No	Yes

Forward Merger – S.72A

- ▶ **Available to companies owning a few selected industrial undertakings :**
 - **Mfg. / IT/ Shipping / Telecom/ Hotel / Bank / Mining**
 - **Q. Loss-making companies in trading, finance, real estate, stock broking, etc?**
 - **Q. Hospital - Whether an “Industrial Undertaking”?**
 - **No Apollo Hospitals (Mad)**

Forward Merger – S.72A

- **Conditions u/s. 72A & Rule 9C**
 - **Tor engaged in Bus. For 3 years or more**
 - **Engaged from is different than and wider than commencement of Business**
 - **Tor held 75% of BV of FA for 2 yrs prior to Merger**
 - **Tee continues to hold 75% of BV of FA for 5 years**
 - **Q. Meaning of BV – Purchase Price or Book WDV?**
 - **Only of Tor Co. for which it wants to claim losses – Not for any other merger**
 - **Tee carries on Business of Tor for 5 years**

Forward Merger – S.72A

- **Conditions u/s. 72A & Rule 9C**
 - Tee achieves production level of **50% of Installed Capacity within 4 yrs from merger** and continues till **5 yrs** from Merger
 - This condition can be ascertained only at end of 4th year and not before –
 - CA's Certificate for same - Form 62 – Only in 4th Year not before
 - **Ensures Revival of Business**
 - If desired level of production achieved, then revival automatically ensured
 - **Bayer Material Sciences (Mum)**

C/f of Book Losses

▶ **Book Losses of Tor Co.**

- Available to be C/f to Tee
- Even if conditions of S.72A not complied with?
- S.115JB doesn't prescribe any conditions
- Helps Reduce MAT Liability of Tee Co.
 - **VST Tillers & Tractors (Bang)**
 - **Finolex Cables (Pune)**

Appointed Date Of Merger

- ▶ **Merger with retrospective date – valid?**
 - **Marshall Sons & Co. (SC)**
 - **Appointed Date:**
 - **Effective Date concept under 1956 Act:**
 - **Effective Date relevant for Taxation?**
 - **Scheme must provide for Appointed Date –**
 - **2013 Act provides for same**
 - **Q. GAAR for Retrospective AD?**

Appointed Date & Assessment ...

- ▶ **Transferee Co. can file Revised Return after Merger**
 - To give effect to Merger
 - Even if beyond Due Date u/s. 139(5) – Possible to file Return
 - **Pentamedia Graphics (Mad)**
- ▶ **Assessment on Transferor after Merger - Null**
 - Even for periods prior to amalgamation for which assessment was not completed – **Intel Tech (Bang)**
 - Even if Assessee participates in assessment proceedings on Transferor – **HCL Tech (Del)**

Depn. on Goodwill

- **Goodwill arising on Merger?**
 - Transferee can claim Depreciation on Goodwill
 - **Smifs Securities (SC)**
 - Not a Mere Accounting Entry required under AS-14
 - **Toyo Engg (Bom)**
- **What if Brand Acquired under Merger**
 - Depreciation Allowed? Yes
 - Same as Goodwill – **KEC Int'l (Mum)**

Taxation of Shareholder of T^{or} Co.

- Any transfer by SH of Transferor – Not a Transfer (s.47(vii))
- Period of holding for shares in Transferee = Transferor Co.
- CoA of shares in Transferee = that in Transferor Co.
- If not a tax-neutral Amalgamation
 - Exemption u/s 47 available - No
 - Taxable Transfer – Yes. Grace Collis (SC)
- Exemption u/s. 47 for Trader - No
 - Q. Whether Taxable? Yes
 - How – FMV of Shares in Tee – Cost of Tor Shares = **Orient Trading (SC)**

Taxation of Shareholder of T^{or} Co.

- ▶ **If SHs of T^{or} Co. receive Debentures/Cash instead of Shares, would CGT exemption be available? NO**
 - Favourable Decisions on ground that merger is not a Transfer
 - Grace Collis (SC) - Merger is a Transfer
 - S.47(vii) Exemption condition

- ▶ **What if Debentures / Cash issued in addition to Shares?**
 - Shares can be Equity or Preference
 - Exemption Should be Available – **MCTM Corp (Mad)**

Merger – Tax Avoidance

- **Can you do merger for tax avoidance?**
 - **No - Wood Polymers (Guj) / Uma Enterprises (Raj)**
- **What if Tax Benefit Incidental / One of the Objectives?**
 - **Permissible – Indo Continental Hotels (Raj)**
- **Merely because CGT & SD saved is it a Fraudulent Scheme? No- Saroj Poddar (Bom)**
- **GAAR?**

Merger of WOS with HoldCo

- **Q. Whether it would be exempt u/s.47(vi) because no shares issued?**
 - No CG No Loss
 - **Forbes Campbell (Bom)**
- **Whether Deemed Dividend by WOS to Holdco?**
 - No
 - **CBDT Cir of 1967** – Not regarded as a Transfer of Accumulated Profits by WOS to the Holdco

Can Firm be Merged with Co.?

▶ Can a Partnership Firm be merged into a Co?

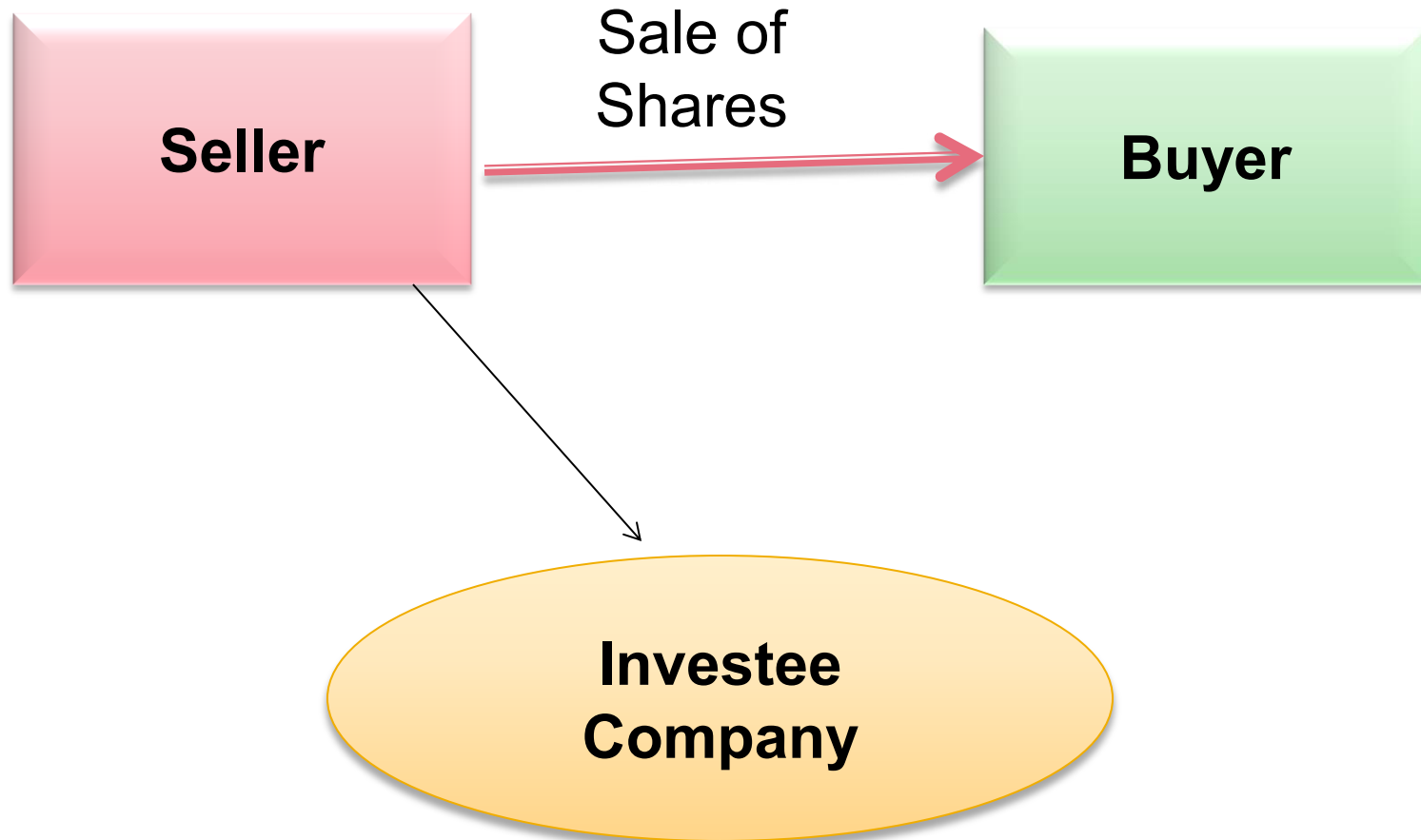
- **Kirtidas Kalidas(Bom) / Manjilas Agro Foods (Ker)** –Firm is an Unregistered Co? Can merge with a Co under s.394 of Companies Act 1956 since body corporates can merge with Company
- S.230-232 of Companies Act, 2013 only allows merger inter se **Companies**
 - Firm is not a Company
 - Hence, now merger of Firm with Company Not Possible
 - **Kediya Ceramics (Ahd NCLT)**

GST on Merger

- **No GST → Sale of Business not of Assets**
- **Transactions between Appointed Date & Date of Order = Deemed to be between distinct Cos.**
 - **GST payable on such transactions**
 - **Effective Date is Order Date**
 - **Tor Registration cancelled wef Date of Order of NCLT**
 - **Tee to be registered from Date of Order**
 - **ITC allowed to be trfd to Transferee Co.**

Acquisition of Shares

Share Transfer



Key Regulatory Aspects

▶ Share Purchase Agr.

- **SCRA ~ Spot Delivery Contract if off-market**
 - Payment and Delivery of shares must take place in 2 days
 - Applicable for Unlisted Public Companies also
 - Private Companies not covered
- **If On-market St. Ex. Settlement**
- **Consider Limits under s. 186 of Companies Act for Buyer Company**

Sale of Listed Shs

- If STT not paid on Purchase – LTCG Exemption NA in 3 cases:
 - Infrequently Traded Shs. bought through Pref. Issue
 - Existing Listed Shs. not bought through St. Ex.
 - Acqn. Between delisting and relisting of a share
- Above Ban Not Applicable to foll. acquisitions

Type	Infrqnt Trd Shs	Off-Market Listed Shs
Approved by Court / NCLT/SEBI / RBI	✓	✓
By NR under FDI Regs.	✓	✓
By AIF-I /AIF-II	✓	✓
By Banks /ARCs	--	✓
ESOPs	--	✓
Under SEBI Takeover Code	--	✓
By Exempt Transfers if Previous Owner has not bought under above 3 cases	--	

Sale of Listed Shs

- **Specific Cases**

- Bonus / Rights – Not in specific exclusions but doesn't fall under 3 Banned Cases
- Mergers / Demergers – Specific Exclusion
- Off Market Inter-Se Promoter Trf – covered by Exclusion of SEBI TOC?
- Acquisition by Gift / Will / Partition – Specific exclusion as long as PO did not fall under 3 Banned Cases

Sale of Unlisted Shares

- **Sale at below FMV**
 - **Notional CGT on Seller? Deemed CG?**
 - **S.50CA same concept as s.50C**
 - **What is FMV – Book Value / DCF / Other Method?**
 - **S.56(2)(x) for any Buyer**
 - Purchase price at or above FMV
 - Currently FMV = Book Value u/R. 11UA for Unquoted Eq. Shares
 - Misconception that DCF can be used

Sale of Shares

- **S.56(2)(x) Valuation**
 - **Audited B/S on Valuation Date required – Do you need to get an Audited B/s for every Share Transfer?**
 - **No Discount for Non-marketability**
 - **Revalued Assets cannot be devalued – *as is where is***
 - *But Reserves to be excluded from Liabilities – Hence, Revaluation Reserve to be excluded*
 - **Unquoted Preference / CCDs – No Methodology specified**
 - CA / MB can select any valid Method

Sale of Shares

- ▶ **Rule 11UA – Value of Unquoted Eq. Shs**
 - **NAV as per Balance Sheet**
 - **Imm. Property as per SD RRV**
 - **Shares as per R.11U**
 - **Jewellery FMV as per Valuer**
 - **All Other Assets Book Value Method of Valuation**

S. 79 - Sale of Unlisted Shares

- ▶ **Consider applicability of s. 79 in case of sale of shares**
 - Applies to Indian Co. whose:
 - Shares not listed or
 - More than 51% is held by Unlisted Cos.
 - S/o Unabsorbed Losses not available if more than 51% equity shares of such Co are sold
- ▶ S.79 applies to UAD or only to Business Loss?
- ▶ S.79 applies to c/f of Book Losses?

S. 79 - Sale of Unlisted Shares

▶ Beneficial Shareholding Approach?

- Q. What if shares change hands but ultimate BO remains within same Group? One Co-Subsidiary to another
 - Veil cannot be lifted – s.79 is attracted - **Yum Restaurants India (DelHC) / Just Lifestyle (Mum)**
 - Substance over Form Approach. Though Legal ownership changed, BO remains the same. Hence, look-through approach adopted and s.79 not attracted – **Amco Power Systems (Kar)**

Voting Rights on Pref Shares

- **S.79 & Companies Act 2013**
 - Preference Shares also get Voting Rights if no Dividend Paid for 2 years
 - Whether Dividend declared or not
- **If default in Dividend & RPS get Voting Rights > 50%**
 - **Would s.79 get triggered? Yes**
 - **Very dangerous scenario**
 - **Exemption now available for Private Companies**
 - Amend MA /AA accordingly

Issue of Fresh Shares

- **Q. Would fresh issue trigger s. 56(2)(x)?**
- **Q. Would Rights Issue trigger s.56(2)?**
- **Arguments Against s.56(2)(x)**
 - Is it existing property or does it come into existence?
 - Is Allotment a Transfer?
- **Arguments in Favour of S.56(2)(x)**
 - Mum ITAT – Sudhir Menon HUF
 - Unjust enrichment at cost of others
 - What if pro-rata to all SHs at same price? No

Demerger

Key Regulatory Aspects

- **Vertical Split of B/s – Focus on one Business**
- **Demerged Co. & Resulting Co.**
 - For Court to sanction a Scheme of demerger, compliance of section 2(19AA) of ITA is not essential.
 - Same cannot be said to be a pivot around which the Scheme revolved or essential to its workability.
 - Non-compliance with s.2(19AA) of ITA, would not render the Scheme unworkable
 - **Indo Rama (Del) / Kishore Vadilal (Guj)**
 -

Tax Neutral Demerger

- **Demerger of Undertaking by a Co. to a Co.**
 - All property of Undertaking becomes that of Resulting Co.
 - All Liabilities of Undertaking becomes that of Resulting Co.
 - Specific Loans
 - General Loans trfd. in ratio of Value of Assets demerged to Total Value of Assets
 - Q. Value means Book Value?
 - All Transfers @ Book Value

Tax Neutral Demerger

- **Demerger of Undertaking by a Co. to a Co.**
 - R Co. only issues shares to Shs. of Demerged Co.
 - Except when R CO. is the SH of Demerged Co.
 - SHs holding $> 3/4^{\text{th}}$ Value become SHs in R CO
 - Except Shares already held
 - Value of Shares = all Shares Eq & Pref.
 - Transfer of a Going Concern Basis
 - Business must be on at stage of Demerger
 - Meets Other Conditions prescribed – None

Undertaking

- **Demerger of Undertaking ~ Undertaking includes:**
 - any part of 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 a combination thereof not constituting a business activity
- **Q. Definition of Business?**
 - Business is a systematic, organised course of activity
 - Volume, Frequency, Regularity of Transactions are Factors
 - Profit Motive relevant

Undertaking

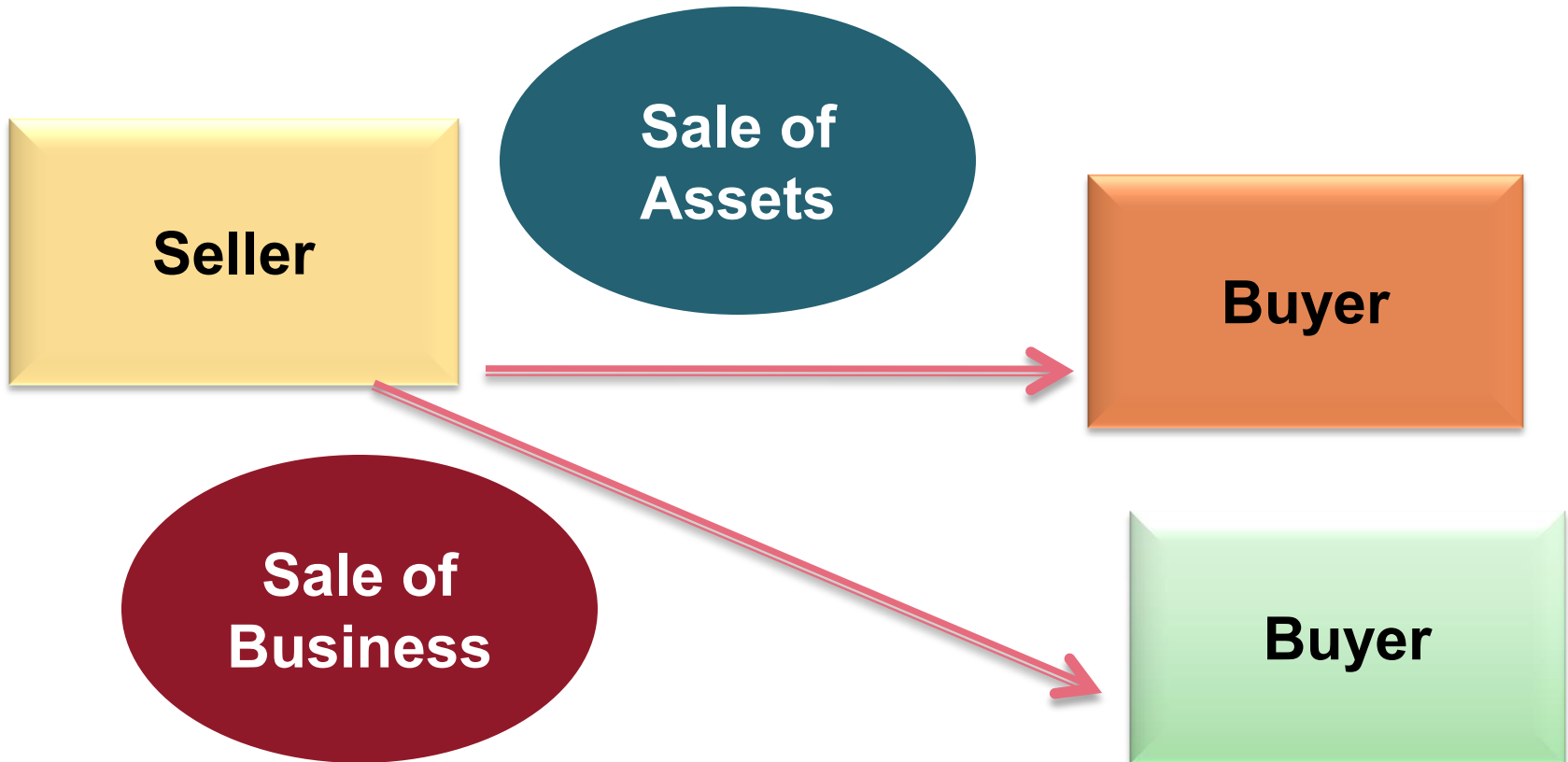
- **Q. Are the following an Undertaking?**
 - Shares held as Investment
 - Securities held as Stock-in-trade by a Trader
 - Land
 - Property given out on rent / lease

Demerger sans Consideration

- **Demerger of Und. without any Consideration**
 - Absence of Consideration – Computation of CG fails
 - No notional gains can be imputed unlike s.50C/50CA
 - 50D N.A. since consideration not indeterminate or not ascertainable but it was NIL
 - Not a Slump Sale – Sale requires money
 - Exemption for Gifts u/s. 47(iii) – Gifts can be by Cos. Also
 - Business Und. Not Property u/s. 56(2)(x) for Recipient Co.
 - **Aditya Birla Telecom (Mum) / Vodafone Essar (Guj)**

Slump / Itemised Sale

Sale of Business / Assets



Slump vs Itemised Sale

Factors	Slump Sale	Itemised Sale
What is sold	Business as a Going concern	Individual A & L
Valuation	DCF / ECM / Ad-hoc without assigning separate Values	Separate Values to each A & L
Undertaking	Must constitute a Business– sale of entire running business with liabilities was Sl. Sale – Equinox Solution (SC)	No such condition
Must all A&L be sold?	Generally yes, unless facts permit otherwise	No
Sale only	Slump Sale – not Exchange	Can be both

Key Regulatory Aspects

Factors	Slump Sale	Itemised Sale
Internal Process	Yes	Yes
Court Approval Required	No	No
Shareholders' Resolution	Ordinary / Special + Postal Ballot if Seller is a Listed Co.	Only if it is an Undertaking under 2013 Act
Other Approvals	Lenders / Bankers / Creditors	Lenders / Bankers / Creditors

Tax Consequences

◦ Slump Sale

- Lump sum consideration – No itemised break-up
- Excess of SC over Networth = LTCG / STCG
 - Revaluation to be ignored
- Gains Taxable u/s. 45 r.w. s.50B

◦ Itemised Sale

- Itemised Break-up over A&L
- Gains Taxable:
 - S.50C applicable even to S.50 - Building? **United Marine (Mum SB)**

Slump Sale - Undertaking

Factors	Income-tax Act	Companies Act 2013
Monetary Thresholds prescribed?	None	<ul style="list-style-type: none"> • Invst. > 20% of Net Worth; or • Income > 20% of Gross Income
Must Undertaking constitute a Business Activity?	Yes.	Not required
Is mere combination of A&L an Undertaking?	No	Yes as long as Thresholds met
Can Key assets be omitted from Sale?	Yes but Fact based – as long as Business Activity not hampered	Yes as long as Thresholds met
Can Shares constitute an Undertaking?	?	Yes as long as Thresholds met

Valuation Challenges

Not a Slump Sale	Not a Slump Sale
Itemised Valuation of Land, Building and Plant carried out – Vatsala Shenoy (SC)	Finding that Assets taken over at individual prices – not a Slump sale – Shahibaug Entrepreneurs (Guj)
AO informed that Valuation based on Individual Items / Balance Sheet Break-up although Deed mentioned lump sum price– Artex Mfg (SC)	Documents contained notings which showed that the sale was of individual assets and not a slump sale – LH Sugar Factories
1 st Agreement mentioned lump sum consideration but 2 nd one gave break-up – Jayantilal Bhogilal (Guj)	Regd. Valuer appointed by seller to ascertain FMV of Land and Building to be sold – Mahindra Sintred (Mum)

Computation

- ▶ **Net worth = Cost of Undertaking**

IT WDV of Fixed Assets of Undertaking

(+) Total Book Value of Other Assets (Excl'd Revaluation)

(-) Book Value of Liabilities

- ▶ **PNB Finance (SC)**

- **Without S.50B no mechanism to ascertain cost of unit**
- **S.48 computation fails and hence, no tax**

S.50 & 50C Applicability

- ▶ **S.50C applicable to transfer of land & bldg.**
 - Applicable to Slump Sale?
 - S.50C applicable to sale of L&B
 - S.50C applicable to slump sale if unit includes L&B?
 - **Hyderabad Ind (Hyd) / Summit Securities (Mum)**
- ▶ **S.50 applicable to transfer of Depreciable Assets**
 - Applicable to Slump Sale?
 - S.50 NA to slump sale if unit includes Bldg, P&M
 - **Sankeya Chem (Mum) / Salora Int'l (Del)**
- ▶ **Is it Transfer of Individual Assets?**

Negative Networth

▶ Excess Liabilities Taken Over

- **Should it be Ignored or Considered u/s. 50B?**

- Eg Net worth -10 crores & Sale Consideration Rs. 1 lakh
- **Capital Gains** = Rs. 1 lakh -(-10 cr.) = Rs. 10.01 cr.; **OR**
Rs. 1 lakh – (Nil) = Rs. 1 lakh?

- **S.Kartikeyan (Mad) - adverse**

- Subsequent Mumbai and Del ITAT decisions – favourable

- **Current adverse Delhi HC & Mumbai Special Bench decision**

- **Aradhana Beverages (Del) & Summit Securities (Mum SB)**

Slump or Asset Sale?

- **Retention of Some Assets by Seller**
 - **Is a Slump Sale if going concern not disturbed**
 - Tech. K-how sold later on
 - Building for IT Co.
 - Doubtful Loans & Contingent Liabilities
 - **Treated as Itemised Sale (on Facts)**
 - Factory not sold
 - Land because of ULCR Act

Slump Sale v Slump Exchange

- **Slump Exchange**
 - **Issue of shares in lieu of Transfer as Going Concern**
 - **Sale v Exchange ~ Difference?**
 - Barter / Exchange v Consideration discharged by issue of shares
 - **Is it Taxable?**
 - **What if Slump Sale done via Court Order – Is it taxable?**

Sale Consideration-Upstreaming

▶ If Seller is a Company

- While distributing consideration to its Shareholders
 - Consider DDT @ 20% OR
 - Buyback Tax
- Consider MAT if Gains otherwise exempt / tax losses

Slump Acquisition

- **Buyer acquired a Going Concern by Slump Acquisition**
 - **Excess Payment over NAV was termed by Buyer as Goodwill**
 - **Depreciation claimed on Goodwill**
 - **Depreciation allowed?**
 - **Areva T&D (Del)**
 - **Coca Cola (Del)**

GST

- **If Itemised Sale? Yes**
- **If Slump Sale? No**
- **Others**
 - **Seller & Buyer jointly & severally liable for Seller's taxes prior to date of transfer**
 - **Buyer's liability from date of transfer**
 - **Unutilised ITC of Seller's Undertaking trfd to Buyer**

Return of Capital

Reduction of Capital

- **Capital in Excess paid back to Shareholders**
- **Capital Gains:**
 - Amount Received (-) Cost of Shares
 -
- **Receipt on Reduction : Accumulated profits taxed as Deemed Dividend**
 - Who pays Tax on Deemed Dividend?
 - Any Exemption?
 - Excess over Dividend

Buyback by Co.

- **Buyback by Listed Co.**
 - **Capital Gains on Shareholder**
 - **Gains = SC – Cost of Acquisition**
 - **Indexation** also available
 - **No Deemed Dividend on Company**

Buyback Tax

- **Buyback by Unlisted Public / Private Cos.**
 - No longer yields Capital Gains in hands of Investors
 - DDT @ 20% + Surcharge + Cess on Co. buying back
 - No Tax on Investor
 - Tax payable even if no other Income of Co.
 - No credit for Tax to Co.
 - No credit for Tax by Co. to an International Investor
 - Tax payable on “**Distributed Income**” = Consideration paid on buyback (-) Amount received by Co. for issue of such shares

Buyback Tax

► Issues / Implications

- **Buyback out of Securities Premium / Free Reserves**
 - Tax applies irrespective of source of buyback?
 - Tax even if not out of Accumulated Profits
- **Shares purchased – What is amount received by Co?**
 - Original Investment / Nil / Premium Paid
-

Insolvency & Bankruptcy Code

IBC Process Flow



Corporate Insolvency Resolution Process

Corporate Debtor's Default

Financial Creditor can initiate CIRP

Apply to NCLT

NCLT to ascertain default

Admit – CIRP Starts

Operational Creditor can initiate CIRP

Demand from Debtor

10 D to raise Dispute or Pay

If neither = Apply to NCLT

NCLT to ascertain Default

Admit- CIRP starts

CIRP Steps

Once CIRP starts – Complete in 180+90D

**Moratorium on all suits /
proceedings**

**Public Announcement for
making of Claims by Creditors**

Appoint IRP to manage CD

**Mgmt of Debtor by IRP – Board's
powers suspended**

Committee of Crs.

Voting by CoC- 75% Majority

**RP to prepare IM + submit Plan
for CoC 's approval**

**Once Approved NCLT to Order
Approval**

Liquidation

Resl. Fails / rejected

Liquidation by NCLT

RP becomes Liquidator

Liquidation Estate of Debtor

Determine Value of Creditors' Claims

Realise Assets & Distribute Proceeds

If Assets liquidated NCLT would dissolve CD

Tax Consequences of CIRP

- **Write-back of Liabilities – Haircut to Lenders**
 - Tax u/s.41(1) – Interest / Principal
 - MAT on w/back of Liabilities
- **Sale / Merger of Corporate Debtor by RP**
 - Same as any Merger / Sale
 - S.72A / S.79 in case of Merger
 - S.79 in case of sale of shares
 - Q. Does NCLT have powers to grant relaxation from ITA?
 - See Resolution Plan in **Synergies Dooray Automotive Ltd**

Tax Consequences of Liquidation

- **Amount Distributed**
 - Taxable as Deemed Dividend to the extent of Acc. Profits, if any
 - Company must pay DDT on the same
- **FMV of Assets received over & above Dividend**
 - No Tax on Company
 - SHs taxable wrt FMV of Assets as Sale Consideration
 - Cost of Shares cancelled allowed as Deduction

Thank You !!