



New Scheme of Corporate Taxation including manufacturing companies, start ups, others and MAT

Presentation by:

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S. 115BAA

□ New – Section 115BAA (25% Tax Rate)

- Domestic company can opt from AY 2020-21
- Effective tax rate - 25.17% (22% + 10% + 4%) & **MAT will not apply**
- Subject to the following conditions:
 - Additional depreciation and other specified deductions cannot be claimed
 - Reinstatement of block of asset for the quantum of unabsorbed additional depreciation
 - Losses brought forward attributable to specified deductions to lapse
 - Depreciation to be allowed as per the rates prescribed

Specified Deductions

Section	Deduction / Incentive
10AA	Deduction for units established in Special Economic Zones (SEZ) (Sunset – April 1, 2021)
32AD	Deduction for investment in new plant and machinery in notified backward areas (Sunset – April 1, 2020)
33AB	Deduction in respect of tea, coffee or rubber business
33ABA	Deduction in respect of business consisting of prospecting or extraction or production of petroleum or natural gas in India
35(1)(ii)	Deduction for donation made to approved scientific research association, university college or other institutes for doing scientific research which may or may not be related to business (Sunset – April 1, 2021)
35(1)(iia)	Deduction for payment made to an Indian company for doing scientific research which may or may not be related to business
35(1)(iii)	Deduction for donation made to university, college, or other institution for doing research in social science or statistical research

Specified Deductions

Section	Deduction / Incentive
35(2AA)	Deduction for donation made to National Laboratory or IITs, etc. for doing scientific research which may or may not be related to business (Sunset – April 1, 2021)
35(2AB)	Deduction for capital expenditure (excluding cost of land and building) on in house scientific research relating to business of bio-technology or manufacturing any article or thing (Sunset – April 1, 2021)
35AD	Deduction in respect of capital expenditure incurred in respect of certain specified businesses , i.e., cold chain facility, warehousing facility, etc.
35CCC	Deduction for expenditure on agriculture extension project (Sunset – April 1, 2021)
35CCD	Deduction for expenditure on skill development project(Sunset – April 1, 2021)

Specified Deductions

Section	Deduction / Incentive
80G, 80GGA 80GGB/C	Donations
80-IA	Deduction in relation to infrastructure facility – commencement on or before April 1, 2017
80-IAB	Deductions in respect of development of Special Economic Zone – commencement on or before April 1, 2017
80-IAC	Deduction in relation to Start-up
80-IB	Deduction in respect of mineral oil and natural gas – commencement on or before April 1, 2017
80-IBA	Deduction in relation to affordable housing projects
80-IE	Deduction in relation to undertaking north eastern state
80-LA	Deduction for International Financial Service Centre and Offshore banking unit
80PA	Deduction for producer companies

S. 115BAA

□ New – Section 115BAA (25% Tax Rate)

- Option to be exercised to be by the taxpayer before due date of return of income – flexibility of exercising the option in future years
 - once exercised, cannot be subsequently withdrawn for that year or any subsequent year
 - Issue – conflict of proviso to sub-section (1) and proviso to sub-section(5) – not withdrawal
- Option for S. 115BA companies to opt for this regime
 - Company incorporated after March 1, 2016
 - Manufacturing company

S. 115BAB – new manufacturing company

□ New - Section 115BAB (17.16% Tax Rate)

- Domestic manufacturing company
- Tax rate
 - 17.16% - income derived from/incidental to the manufacturing
 - 25.17% - Capital Gain & Other Sources
- MAT will not apply
- Transfer pricing will apply

S. 115BAB – new manufacturing company

Manufacturing

▪ Includes

- Generation of electricity
- Research & distribution – relating to the product manufactured

▪ Excludes

- development of computer software in any form or in any media;
- mining;
- conversion of marble blocks or similar items into slabs;
- bottling of gas into cylinder;
- printing of books or production of cinematograph film;

Restriction on any other business activity

S. 115BAB – new manufacturing company

- Subject to the following conditions:
 - Company is incorporated on or after October 01, 2019 and commences production on or before March 31, 2023
 - Company is not formed by splitting up or reconstruction of business already in existence
 - Restriction on use of second-hand plant & machinery (more than 20%) and used hotel & convention centre
 - Restriction on any other business activity
 - Same conditions of S. 115BAA
- To exercise option in first year. Once exercised, option cannot be withdrawn for the same or subsequent years.

Start-up – S. 80-IAC Deduction

❑ Start-up conditions

- Registered with DPIIT
- Incorporated – 1/4/2016 to 1/4/2021
- Business turnover is less than Rs. 100 crores – in the in which deduction is claimed
- Should be working towards innovation, development or improvement – high potential of employment generation and wealth creation

❑ Deduction

- 100% profit from the start-up business

❑ Tenure

- 3 years out of 7 years from the year of incorporation

❑ General conditions

- Not formed by splitting up, or the reconstruction
- Restriction on use of 2nd hand plant & machinery

Start-up – DPIIT Registration

☐ Requirements for registration with DPIIT

▪ Four cumulative conditions –

- Age of the company/LLP is less than 10 years (date of incorporation/registration)
- Turnover is less than Rs. 100 crores
- Should be working towards innovation, development or improvement – high potential of employment generation and wealth creation
- Not formed by splitting-up or reconstruction of existing business

Start-up – S. 56(2)(viib)

❑ Exemption from S. 56(2)(viib).

❑ Requirements –

- Registration with DPIIT for S. 56(2)(viib)
- Requirements for registration –
 - Total paid-up capital & share premium is less than Rs. 25 crores (other than non-resident, venture capital fund, venture capital company and specified company)
 - It does not invest in any of the following assets for a period of 7 years from the end of the latest financial year in which the shares are issued at premium:
 - Land or building, other than that occupied by start-up for its business;
 - Loans and advances, if start-up is not engaged in ordinary business of lending of money;
 - Capital contributions to any other entity;

Sec. 56(2)(viib) – Start-up

❑ Start up exemption – requirements

- It does not invest in any of the following assets for a period of 7 years from the end of the latest financial year in which the shares are issued at premium:
 - Shares and securities;
 - Motor vehicle, aircraft, yacht or any other mode of transport, if the cost of such an asset exceeds Rs. 10 lakhs
 - Jewellery held otherwise than as stock-in-trade;
 - Archaeological collections, drawings, paintings, sculptures, any work of art or bullion.

❑ Subsequent non-compliance of conditions will trigger tax u/s 56(2)(viib) & 200% penalty u/s 270A.

MAT

- Judicial precedent permitting deviation from profit as per Statement of Profit and Loss
 - MAT cannot be levied on Revenue reflected in Statement of Profit and Loss which is not chargeable to normal tax -
 - Government Subsidy – PCIT v. Ankit Metal & Power Ltd. (2019) (109 taxmann.com 93) (Cal. HC)
 - Double Tax – CIT v. Nagarjuna Fertilizers & Chemicals Ltd. [2014] 373 ITR 252 (AP HC)
 - Waiver of Loan – JSW Steel Ltd. v. ACIT (2017) (82 taxmann.com 210) (Mum. Trib.)
 - Sub-section (5) of Section 115JB – S. 54EC – CIT v. Metal & Chromium Plater (P.) Ltd. (2016) (76 taxmann.com 229) (Mad. HC)
 - Notes to accounts form a part of the P&L account – Depreciation not charged to P&L – CIT v. Sain Processing & Wvg. Mills (P.) Ltd. (325 ITR 565) (Del. HC)

Business Combination – Common Control

- ❑ Appendix C to Ind AS 103 – governs accounting of common control business combination
- ❑ ICAI Educational Material – common control business combination to be given effect from the date of common control or the 1st day of the previous year whichever is later [Para 9(iii) of Appendix C to Ind AS 103].

Para 9(iii) The financial information in the financial statements in respect of prior periods should be restated as if the business combination had occurred from the beginning of the preceding period in the financial statements, irrespective of the actual date of the combination. However, if business combination had occurred after that date, the prior period information shall be restated only from that date.

- ❑ For example a merger of wholly owned subsidiary with the Holding Company with an appointed date of January 1, 2020 has to be accounted as if merger is effective from April 1, 2018.
 - Consequently, profits of April 1, 2019 to December 31, 2019 would be reflected at both the places i.e. standalone accounts of the subsidiary and also the standalone accounts of the holding company.

Business Combination – Common Control

☐ Income Tax

- Subsidiary – profits – April 1, 2019 to December 31, 2019
- Holding Company – profits – January 1, 2020 to March 31, 2020

- Support –
 - S. 170(1) of Income Tax Act
 - Principle – same income cannot be taxed twice

☐ MAT

- Subsidiary – profits – April 1, 2019 to December 31, 2019
- Holding Company – profits – January 1, 2020 to March 31, 2020 or from April 1, 2019 to March 31, 2020 ?
 - SC – Apollo Tyres ?
 - Purposive interpretation ?

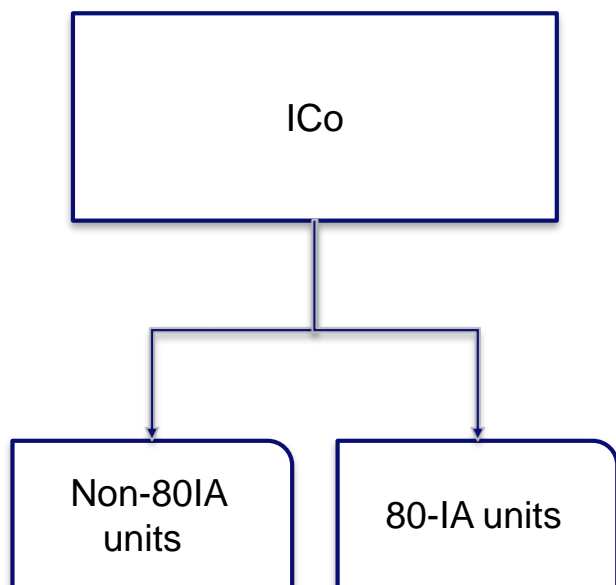
Business Combination – Common Control

□ Purposive interpretation. Arguments in support –

- Principle – same income cannot be taxed twice (Holding Company and Subsidiary Company)
- ‘Profit’ for S. 115JB does not include profit prior to the date of merger
- MAT cannot be levied on Revenue reflected in statement of Profit and Loss which is not chargeable to normal tax
- Section 115JB (5) provides that *“save as otherwise provided in this Section, all other provisions of this Act shall apply”*.
- Profit after considering Notes to Accounts
- Accrual of Income relevant also for S. 115JB

Case Study 1: Restructuring to obtain benefit u/s 115BAA

Background



- ❑ ICo had set up a pipe manufacturing unit 10 years ago. Further, 4 years ago, it extended its operations in the business of execution of various water supply and irrigation projects.
- ❑ The undertaking engaged in execution of water supply and irrigation projects is eligible for 80IA deduction.
- ❑ It has been making consistent profits and has reserves of approximately Rs. 30 crore.
- ❑ The Company wants to take the benefit of lower tax rate u/s 115BAA (25.17%)

Options

❑ Transfer of Non-80IA unit

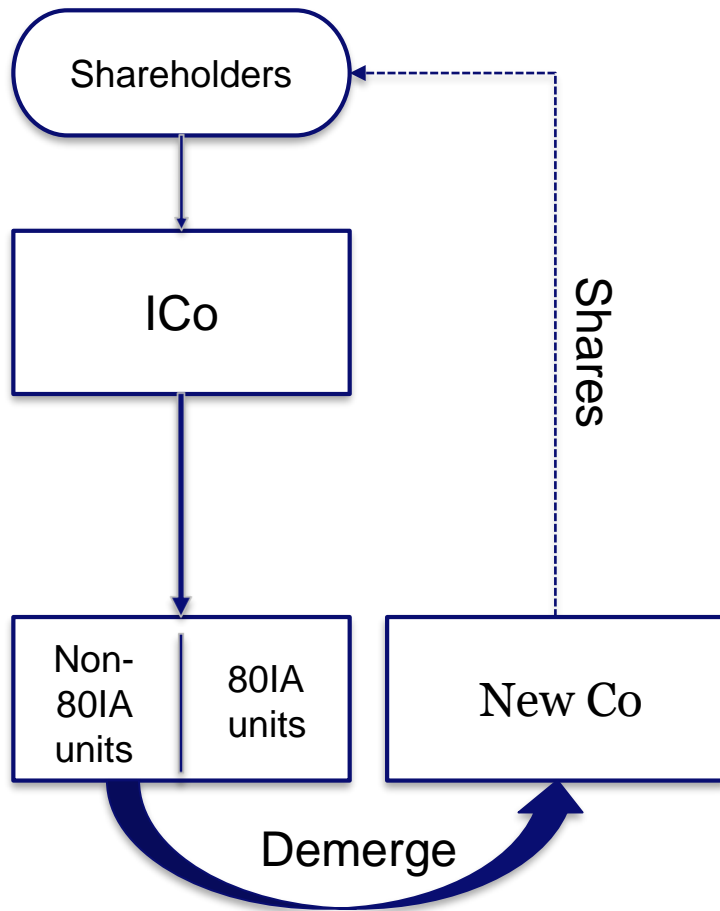
- Demerger
 - With NCLT approval
 - Without NCLT approval
- Slump Transfer
 - At book value
 - At Fair value
 - Slump Exchange
 - Gift of undertaking

❑ Transfer of 80IA unit

- Slump Transfer
 - At book value
 - At Fair value
 - Slump Exchange
 - Gift of undertaking
- Demerger without NCLT approval

Benefit of 80IA will be lost
on demerger with NCLT
approval of 80IA unit

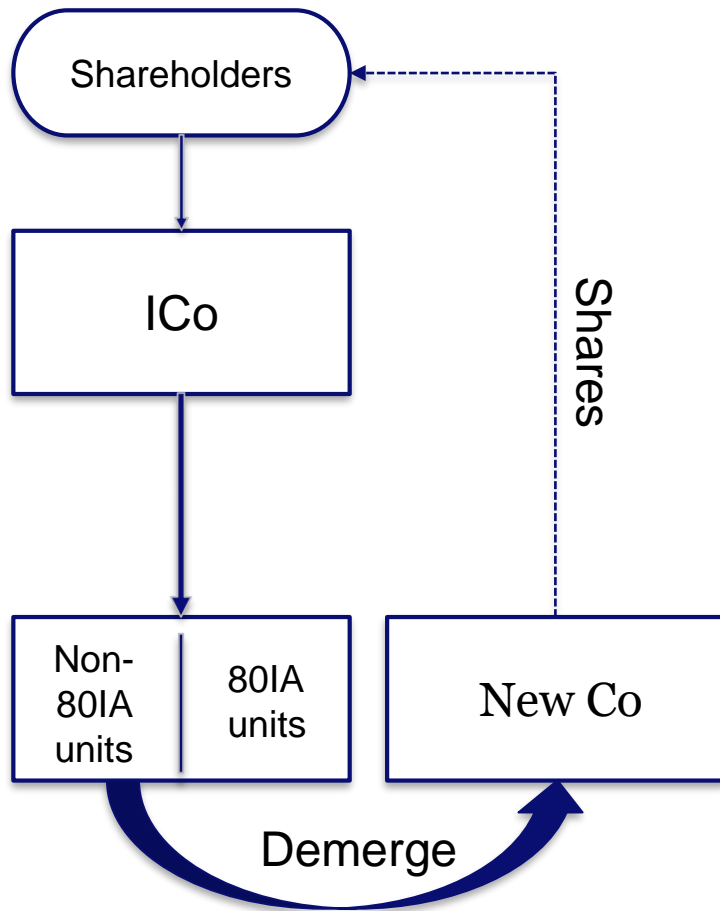
Demerger of Non-80IA unit (1/6)



❑ Demerger with NCLT approval

- Scheme u/s 230 r.w. S. 232 of the Co's Act
- Increased time frame (3-6 months)
- Lower stamp duty - if concessional rate available in the State
- Compliant demerger u/s 2(19AA) of IT Act

Demerger of Non-80IA unit (2/6)



❑ Demerger without NCLT approval

- Transfer - S. 180 of Co's Act - special resolution - providing for direct allotment to shareholders of transferor instead of allotment to transferor
- Lesser time frame (1-2 months)
- Lower stamp duty possible - Transfer of immovable property effected by conveyance and transferring the movable property by agreement to sell followed by delivery
- Non-compliant demerger

Demerger of Non-80IA unit (3/6)

Issues in Demerger without NCLT Approval:

- ❑ Distribution of dividend in kind
 - S. 123 prohibits distribution of dividend in kind
 - Indian Seamless Enterprises Ltd., In re [2015] 61 taxmann.com289 (Bom. HC) – Rejected scheme u/s 230 for distribution of assets to shareholders
 - S. 180 exception to S. 123?
- ❑ Non-compliant demerger under IT Act
 - Diversion of income at source? – S. 180(4) of Co's Act – “.... *Stipulate conditions ... including conditions regarding the use, disposal or investment of sale proceeds...*”
 - However reduction of capital not permitted
 - CIT v. Salora International Ltd. [2016] 386 ITR 580 (Del. HC) (SLP granted)

Demerger of Non-80IA unit (4/6)

- Capital gains in the hands of Company
 - Slump exchange?
- Dividend in the hands of shareholders u/s 2(22)(a)
- 56(2)(x) - Receipt of shares – loss in value of existing shares is consideration given by the shareholders
 - Miss Dhun Dadabhoy Kapadia v. CIT [1967] 63 ITR 651 (SC)
 - Sudhir Menon HUF v. ACIT [TS-146-ITAT-2014] (Mum. Trib.) – rights issue
 - DCIT v. Dr. Rajendra Pai [TS-299-ITAT-2016] (Bang. Trib.) – bonus issue

Demerger of Non-80IA unit (5/6)

Benefits of a compliant demerger:

- ❑ In the hands of demerged company - Exempt u/s 47(vib)
- ❑ S. 56(2)(x) – not applicable to transactions covered under
 - S. 47(vib) – receipt by resulting company; and
 - S. 47(vid) – receipt by shareholders of demerged company
 - Assumption of legislature is not law
 - CIT v. Madurai Mills [1973] 89 ITR 45 (SC)
- ❑ No deemed dividend

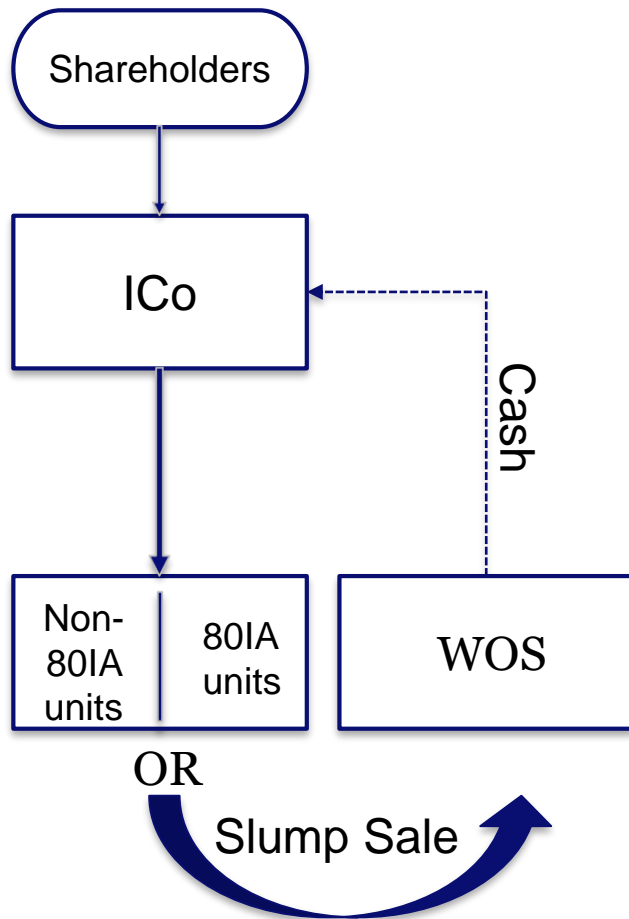
Demerger of Non-80IA unit (6/6)

Common Issues:

- ❑ MAT Credit transfer? – Adani Gas Ltd. ACIT [2016] TIOL146 (Ahm Trib) – transferred to resulting company; DCIT v. TCS E-Serve International Limited [2019] TS 516 (Mum T) – continued with demerged company
 - If not transferred – 80IA unit will have to utilize higher MAT credit

- ❑ Commercial justification of split – risk of GAAR?

Slump Sale of 80IA / Non-80IA unit (1/4)



Key Considerations:

- ❑ 80IA deduction to continue - CBDT Circular 1/2013 dated January 17, 2013
- ❑ Lower stamp duty possible – Transfer of immovable property effected by conveyance and transferring the movable property by agreement to sell followed by delivery
- ❑ Easy implementation as compared to demerger.
- ❑ Time: 1-2 months

Slump Sale of 80IA / Non-80IA unit (2/4)

❑ Slump sale at book value

- Exempt u/s 47(iv) of IT Act
- If WOS is delinked before 8 years - Nil capital gains - GAAR?
 - Slump sale through NCLT
 - Ind AS -103 – Appendix C – book value accounting

❑ Slump sale at fair value

- Exempt u/s 47(iv) of IT Act
- If WOS is delinked before 8 years – capital gains

Slump Sale of 80IA / Non-80IA unit (3/4)

❑ Slump exchange

- S. 50B to not apply – no capital gains
 - SREI Infrastructure Finance Ltd. v. ITSC (251 CTR 129) (Delhi HC) – Against
 - CIT v. Bharat Bijlee Ltd. (365 ITR 258) (Bom HC)
 - ITO v. Datex Ohemda (India) Pvt. Ltd. (TS-320-ITAT-2018) (Kol. Trib)

❑ Gift of undertaking

- Achievement of segregation without loss of value to shareholders / company
- If WOS is delinked before 8 years - Nil capital gains - GAAR?
 - Slump gift through NCLT

Slump Sale of 80IA / Non-80IA unit (4/4)

- ❑ Implications in the hands of buyer (applicable to all alternatives)
 - 56(2)(x) - Is 'Undertaking' a property u/s 56(2)(x)?
 - If immovable property transferred by conveyance and movable property under agreement to sell followed by delivery – itemized sale?
 - No ascertained / determined consideration
 - CIT v. B.C. Srinivasa Shetty [1981] 128 ITR 294 (SC)

Common considerations for all options

- ❑ 80IA unit to continue to be liable to MAT @ 17% - MAT credit to be absorbed over the years and then it can opt for lower rate of tax

- ❑ No GST implications –
 - Transfer of business – neither supply of goods nor service
 - Transfer of business – not in the course of business
 - Specific exemption (under service notification) for transfer of business as a going concern

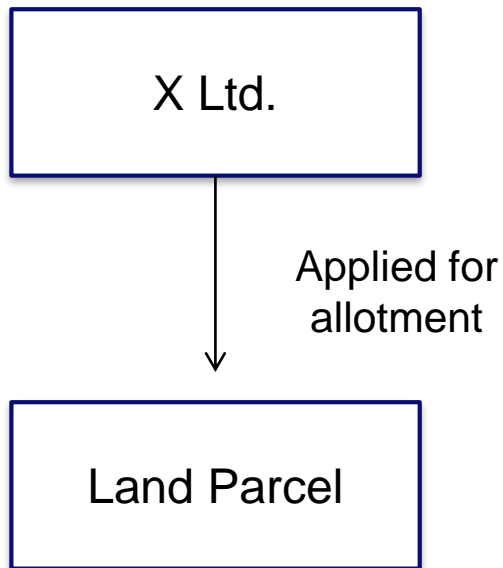
- ❑ Transfer of unutilized ITC pertaining to transferred unit – optional
 - ITC shall be apportioned in the ratio of value of assets of the new unit as specified in the demerger scheme (CBIC Clarification – Circular No. 133 03/ 2020-GST dt. March 23, 2020 – explained in the next slide)

Apportionment of ITC on partial transfer of business

- ❑ Rule 41(1) of CGST Rules to be applied to all forms of partial transfer of business
- ❑ Value of entire assets of business (whether ITC has been availed or not) to be considered
- ❑ Value of assets on the appointed date as per the scheme to be considered
- ❑ Value of assets to be taken at State level and not all India level
- ❑ Form ITC 02 (for transfer of ITC) to be filed only in those States where both transferor and transferee are registered
- ❑ Ratio of value of assets to be applied to total unutilised ITC (C+S/U+I)
- ❑ Transferor at liberty to decide ITC to be transferred under each head (C/S/U/I) within total eligible amount of ITC
- ❑ Unutilised ITC balance available as on the date of filing Form ITC 02 to be taken

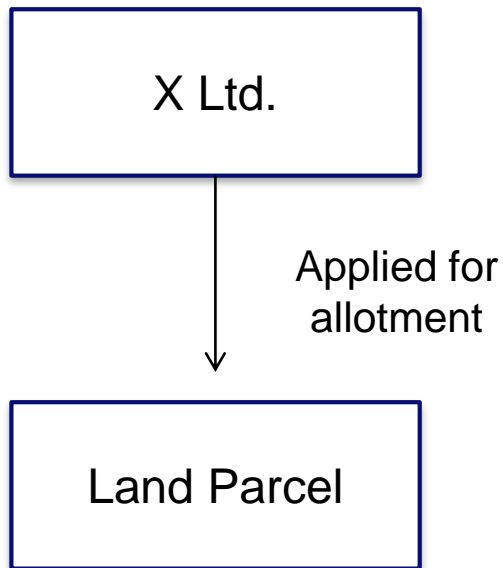
Case Study 2: Restructuring to obtain benefit u/s S. 115BAB

Background (1/2)



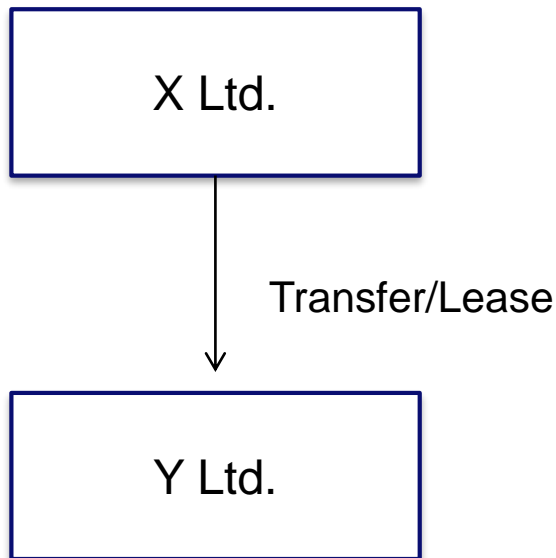
- ❑ X Ltd. is a domestic closely held Co. incorporated in June 2019 for the purpose of textile manufacturing. It is a Joint Venture Co.
- ❑ It intends to set-up a manufacturing facility in Rajasthan
- ❑ It has applied to Rajasthan State Industrial Development and Investment Corporation ('RIICO') for allotment of a land parcel on which it intends to set-up the manufacturing facility

Background (2/2)



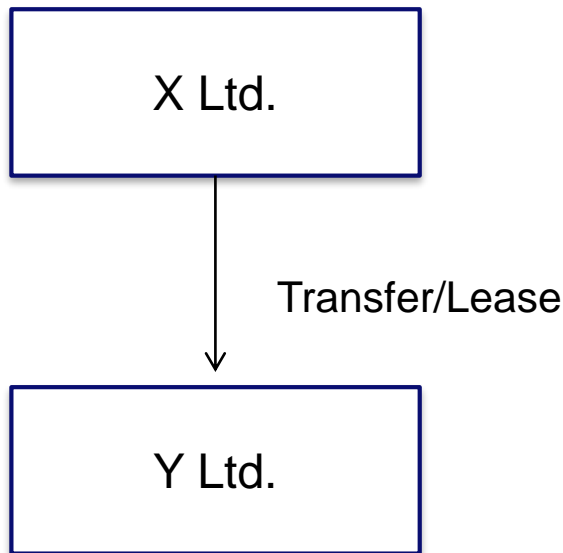
- ❑ The manufacturing activity is yet to commence and the project is still under development stage
- ❑ It has also entered into know-how agreement for the purpose of set-up of manufacturing facility and production of textiles
- ❑ It is not eligible to claim benefit of lower-rate of tax available under S. 115BAB since it is not incorporated on or after October 1, 2019
- ❑ It is evaluating various options which can be adopted to claim benefit of S. 115BAB

Option 1: Sale of project-in-progress (1/2)



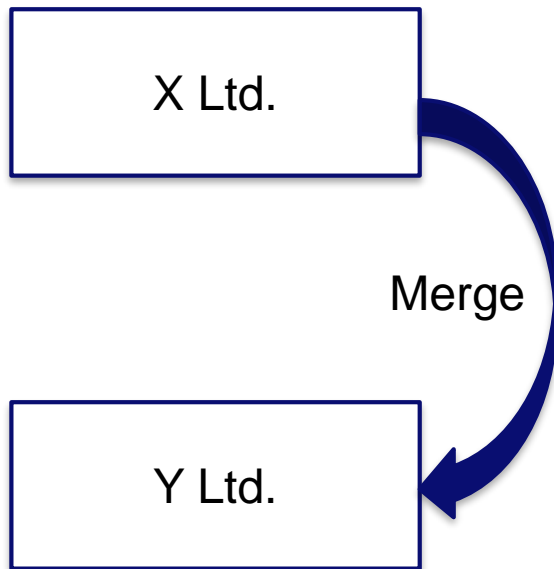
- ❑ A new company, say Y Ltd., can be incorporated.
- ❑ The shareholding pattern, MOA and AOA of Y Ltd. can be identical to that of X Ltd.
- ❑ The project which was originally proposed to be undertaken in X Ltd. can be taken over by Y Ltd.
- ❑ Two options available for take over of land by Y Ltd. from X Ltd.:
 - Transfer of land from X Ltd. to Y Ltd.;
 - Y Ltd. to take the land on long term lease from X Ltd.

Option 1: Sale of project-in-progress (2/2)



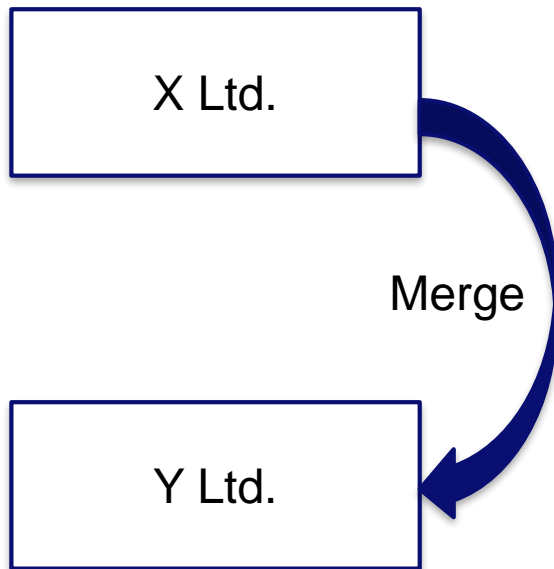
- ❑ Transfer of concept and development on arm's length terms
- ❑ The know-how agreements can be re-entered in the name of Y Ltd. Other agreements, etc. should be executed in the name of Y Ltd.
- ❑ Disadvantages:
 - Stamp-duty cost
 - Regulatory restrictions on transfer / lease
 - Delay in commencement of manufacturing process
- ❑ GST
 - On transfer of land – No GST
 - On lease premium / lease rentals - GST payable - ITC can be claimed

Option 2A: Incorporation of New Co. followed by a merger (1/2)



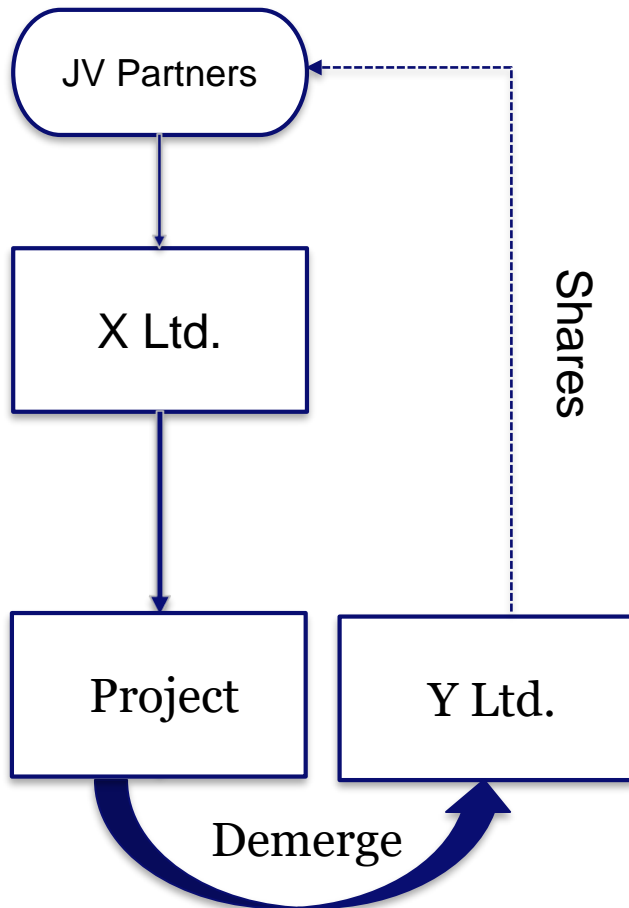
- ❑ A new company, say Y Ltd., can be incorporated at any date on or after October 1, 2019
- ❑ The shareholding pattern, MOA and AOA of Y Ltd. can be identical to that of X Ltd.
- ❑ X Ltd. to be merged with Y Ltd.
- ❑ As a result of merger, the Land and the know-how agreement will be vested in Y Ltd.

Option 2A: Incorporation of New Co. followed by a merger (2/2)



- ❑ Post-merger, the manufacturing activities can be commenced in Y Ltd.
- ❑ NCLT approval required
- ❑ Disadvantages:
 - Stamp-duty cost
 - NCLT approval – 3-6 months

Option 2B: Demerger of Project (1/4)



- ❑ A new company, say Y Ltd., can be incorporated at any date on or after October 1, 2019
- ❑ X Ltd. can demerge the project (which includes land and know-how agreement) to Y Ltd.
- ❑ Lower stamp duty - if concessional rate available in the State

Option 2B: Demerger of Project (2/4)

Issues:

- ❑ Non-compliant demerger? – No ‘undertaking’ in existence

- ❑ Tax implications under the IT Act for non-compliant demerger:
 - Capital Gains in the hands of the demerged company:
 - No receipt by Demerged Co. – diversion of income at source
 - Deemed receipt? – Hindustan Unilever v State of Maharashtra [AIR 2004 SC 326]; CIT v. Salora International Ltd. [2016] 386 ITR 580 (Del. HC) (SLP granted)

Option 2B: Demerger of Project (3/4)

- 56(2)(x) – It specifically exempts cases of qualifying demerger – Whether 56(2)(x) gets triggered in case of non-qualifying demerger?:
 - Demerged Company:
 - No receipt
 - Deemed Receipt? – Refer earlier slide
 - Issue of adequacy will have to be examined
 - Resulting Company:
 - Demerger of specific asset i.e., property – adequacy of consideration to be examined
 - Aamby Valley Ltd. v. ACIT [TS-80-ITAT-2019 (Del. Trib)] – Statutory vesting v. receipt

Option 2B: Demerger of Project (4/4)

- Shareholders of demerged company:
 - Receipt of shares – loss in value of existing shares in consideration given by the shareholders
 - Miss Dhun Dadabhoy Kapadia v. CIT (1967) (63 ITR 651) (SC)
 - Sudhir Menon HUF v. ACIT [TS-146-ITAT-2014] (Mum. Trib.) – rights issue
 - DCIT v. Dr. Rajendra Pai [TS-299-ITAT-2016] (Bang. Trib.) – bonus issue

- Shareholders of resulting company:
 - Receipt of benefit is not a thing (property)

Common Income-tax issues (1/3)

- ❑ Whether 're-construction of business already in existence'?
 - X Ltd. has no business in existence as on date
 - Project is still under development stage
 - Land to be acquired is still under acquisition stage
 - Manufacturing activity to commence in the Y Ltd. – business came 'in existence' in Y Ltd.

- ❑ Business can be said to have been set-up once the manufacturing facility is in place:
 - CWT v. Ramaraju Surgical Cotton Mills (63 ITR 478) (SC)
 - CIT v. Sarabhai Sons (P.) Ltd. (90 ITR 318) (Guj. HC)
 - Western India Vegetable Products Ltd. v. CIT (26 ITR 151) (Bom. HC)

Common Income-tax issues (2/3)

- ❑ GAAR? – objective of S. 115BAB achieved inasmuch as new company set-up on or after October 1, 2019 for manufacturing

- ❑ GAAR - None of the tainted element present since the merger –
 - Is an arm's length transaction
 - Will not result in misuse or abuse of provisions of the Act;
 - Will not lack commercial substance since resources, namely Land in X Ltd. and project under Y Ltd., can be effectively used
 - Transfer/Merger/Demerger are some of the bonafide means and is commonly used by companies for various reasons

Common Income-tax issues (3/3)

- ❑ Option 2A & 2B– additional arguments for GAAR
 - Whether ‘re-construction of business already in existence’:
 - Re-construction of company but not re-construction of business?

- ❑ SAAR test passed - seeking benefit provided by section is misuse or abuse of the Act?

Thank You