International Journal of Research in Social Sciences
Vol. 9, Issue 5, May - 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gate as well as in Cabell's Directories of Publishing Opportunities, U.S.A

A STUDY ON REGULATORY FRAMEWORK OF MERGERS IN INDIA UNDER THE COMPANIES ACT, 2013, RULES UNDER INCOME TAX ACT, 1961, SEBI REGULATIONS, 2015 AND INDIAN STAMP ACT, 1899.

V.SANTHOSH, BBA LLB (FINAL YEAR) VIT SCHOOL OF LAW, CHENNAI

DR.VEERAMANI G., ASSISTANT PROFESSOR, DEPARTMENT OF BUSINESS ADMINISTRATION. VEL TECH RANGA SANKU ARTS COLLEGE, AVADI, CHENNAI – 62.

ABSTRACT

A merger is a combination of two or more entities into one. The mergers seen during the last ten years in the Indian market shows how important mergers are to companies. The law relating to merger is dealt under chapter XV of Companies Act, 2013. Mergers and acquisitions may be undertaken to access the market through an established brand, to get a market share, to eliminate competition, to reduce tax liabilities or to acquire competence or to set off accumulated losses of one entity against the profits of other entity.A business may grow over time as the utility of its products and services is recognized. It may also grow through an inorganic process, symbolized by an instant expansion in work force, customers, infrastructure resources and an overall increase in the revenues and profits of the entity. Mergers and acquisitions are activities of an inorganic growth process. From a legal point of view, a merger is a legal consolidation of two entities into one entity, whereas an acquisition occurs when one entity takes ownership of another entity's stock, equity interests or assets. This paper will analyze the theoretical and legal aspects of mergers in India.

INTRODUCTION

Merger is viewed by many as a marriage in corporate heaven. In mergers, usually two companies combine together for drawing up some synergies. By doing this, companies get certain advantages which they may not get individually. When two entities come together to form a single entity altogether, it becomes a merger. For example, Glaxo Welcome and SmithKline Beecham merged in 2000 to form GlaxoSmithKline, which is a British pharmaceutical company.[1]

[1]*Company History - GlaxoSmithKline Pharmaceuticals Ltd.*, THE ECONOMIC TIMES(Oct. 10, 2018, 04:33 PM) https://economictimes.indiatimes.com/glaxosmithkline-pharmaceuticals-ltd/infocompanyhistory/companyid-13715.cms

While implementing the strategic decision of merger, the transferor/transferee company has to comply with regulations under the Companies Act, 2013, rules under Income Tax Act, 1961, SEBI Regulations, 2015, The Indian Stamp Act, 1899 and The Competition Act, 2002. It involves conducting various board meetings and general meetings, obtaining of various approvals from SEBI, NCLT, Competition Commission of India and filing of e - forms with ROC etc. Chapter XV (Section 230 to 240) of Companies Act, 2013 contains provisions on 'Compromises, Arrangements and Amalgamations', that covers compromise or arrangements, mergers and amalgamations, Corporate Debt Restructuring, demergers, fast track mergers for small companies/holding subsidiary companies, cross border mergers, takeovers, amalgamation of companies in public interest.[2]

THE OBJECTIVE OF MERGERS IN INDIA

The main reason behind merger is to obtain synergy. For example, if A company valued at 100Cr and B company valued at 100Cr combine together to become AB company valued at 250Cr. Here the extra 50cr is the synergy. The reason behind this synergy is economies of scale and scope. Companies get reduced cost, more production, more range of products, diversification, reduced competition, improved revenue, profitability, entry in new markets, tax benefits. M&A activities are important not only for growth but also for survival many times.

ISSUES IN MERGER

Pre-merger issues: The companies having the motive of merger are asked to go through lengthy procedures of getting approval from NCLT and conducting various meetings. Merger is a court driven process in India. The permission of NCLT is necessary even if the majority of shareholders have agreed for the merger. The M&A activities come with lot of legal complications and tax complexities. These types of complexities need lawyers and Company Secretaries who are experienced in Merger and Acquisition. These types of lawyers are less in number and are not affordable for small companies willing to get into M&A activities. Apart from these problems, they also face difficulty in framing the compromise or arrangement distributing or deciding the rights and liabilities between them.

[2]The Institute of Companies Secretaries of India, *Corporate restructuring valuation and insolvency*, ICSI,EDU (Oct. 6, 2018, 6:30 PM) https://www.icsi.edu/media/webmodules/PP-CRVI-2017%20-%20MARCH%207.pdf

Vol. 9, Issue 5, May - 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gate as well as in Cabell's Directories of Publishing Opportunities, U.S.A

Post-Merger Issues: Merger is full of uncertainty and risks. Lack of skill on the part of management to handle the new business at large scale will make the company regret the decision of merger. The company may not get the synergy or financial targets which was planned earlier. The investors may take back their investments if things don't go well. The companies having different corporate culture will have a tough time working together. The biggest problem that a company faces because of merger is the key employees who are not happy with merger, leaving the company. The merger may end up giving the management of merging company upper hand in the decision making. In that case, the fate of the employees of Target Company is uncertain. If the merging company and merged company are located at different states in India, they will face language barriers. Post merger integration where the employees of both the companies are trained to share their experience and work together is also a lengthy and tough process which cannot be skipped.

DIFFERENCE BETWEEN MERGERS, AMALGAMATION AND ACQUISITIONS

The terms merger, amalgamation and consolidation are usually used interchangeably. The word amalgamation contemplates a state of things under which two companies are so joined as to form a third entity or one company is absorbed or blended with another company.[3] Amalgamation is an arrangement for bringing the assets of two companies under the control of one company, which may or may not be one of the original two companies. Amalgamation signifies the transfer of all or some part of the assets and liabilities of one or more existing business entities to another existing or new company. [4] Amalgamation is the blending of two or more undertakings into one undertaking where the shareholders of each blending undertaking becoming the shareholders of the other company which holds blended undertakings**.**[5]

Mergers and acquisition are different from each other, but the industry usually calls them together as M&A activities. Merger is two entities coming together to form third entity whereas acquisition is one entity acquiring another where the acquiring company can retain

[3]S.S. Somajulu v. Hope Pradhomme& Corporation (1963) 2 Comp LT 61 (AP)
[4]*Mergers and amalgamation-the concepts Chapter IV*, SHODHGANGA (Oct. 6, 2018, 6:50 PM) http://shodhganga.inflibnet.ac.in/bitstream/10603/128240/17/13_chapter%204.pdf
[5]DR. G.K. KAPOOR &DR.SANJAYDHAMIJA, TAXMANN'S COMPANY LAW AND PRACTICE A COMPREHENSIVE TEXT BOOK ON COMPANIES ACT 2013, 844 -847, Taxmann publications (p.) ltd (22nd ed. 2017)

the brand. While mergers can be defined to mean unification of two players into a single entity, acquisitions are situations where one player buys out the other to combine the bought entity with itself. It may be in form of a purchase, where one business buys another or a management buyout, where the management buys the business from its owners.[6] A joint venture is the coming together of two or more businesses for a specific purpose, which may or may not be for a limited duration.[7]

TYPES OF MERGERS

1. Horizontal Mergers

This takes place between entities engaged in competing businesses which are at the same stage of the industrial process. This tries to eliminate competitor and move towards monopoly. When two companies in the same industry and in the same stage combine together, it becomes horizontal mergers. Let's assume Flipkart merges with Myntra, this will be a horizontal merger.

2. Vertical Mergers

Vertical mergers can be of two types- forward integration and backward integration. In forward integration, a company merges with another company in the same industry but at a higher stage of value chain and in backward integration, company mergers with another company in the same industry but at a lower stage of value chain. When a company goes to close to the supplier it is backward integration and when it tries to go close to the customer it is forward integration. The object behind vertical mergers is to get independence and self-sufficiency. For example, a car manufacturing company merges with a steel company which supplies steel to it, this will be backward integration. If the same car manufacturing company buys a logistics company in the same industry who sells its products to the customer, it would be forward integration.

3. Congeneric Mergers

[6]*Mergers and Acquisition*, MINISTRY OF CORPORATE AFFAIRS(Oct. 6, 2018, 9:30 PM) http://www.mca.gov.in/MinistryV2/mergers+and+acquisitions.html
[7]Nishith Desai Associates, *Mergers & Acquisitions in India*, NISHITHDESAI(Oct. 10, 2018, 10:30 PM) http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers___Acquisitions_in_India.pdf

Vol. 9, Issue 5, May - 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gate as well as in Cabell's Directories of Publishing Opportunities, U.S.A

These are mergers between entities engaged in the same general industry and somewhat interrelated and having no common customer-supplier relationship. The customers and suppliers of merging and merged companies might be different. For example, a banking company merging with insurance company will be a congeneric merger.

4. Conglomerate Mergers

A conglomerate merger is a merger between two entities in unrelated industries. The main reason behind such mergers is diversification. [8] For example, if a Pharmaceutical company merges with a power company, it would be a conglomerate merger.

5. Reverse merger

A small company merging with large company or a private company merging with a listed company is reverse merger. Reverse merger represents a case where the loss making company extends its embracing arms to the profitable company and absorbs it in its fold. The loss making company in such case is called "Shell Company". It is different from demerger which means shedding of a part of undertaking of a company to another company.[9]

PROCEDURES UNDER COMPANIES ACT, 2013

Section 232 says that for the purpose of merger and amalgamation of companies an application is to be made to the Tribunal under section 230 for the sanctioning of a compromise or an arrangement and it should be shown to the Tribunal —

(a) that the compromise or arrangement has been proposed for the purposes of, or in connection with, a scheme for the reconstruction of the company or companies involving merger or the amalgamation of any two or more companies; and

(b) that under the scheme, the whole or any part of the undertaking, property or liabilities of any company (the transferor company) is required to be transferred to another company (the transferee company), or is proposed to be divided among and transferred to two or more companies[10]

[8] *Ibid*
[9] Kapoor, *supra* note 5
[10] The Companies Act, 2013, No. 18, Acts of Parliament, 2013 (India).

Application for compromise or arrangement under section 230

Section 230 of the Act deals power to compromise or make arrangements between members and creditors. A compromise or arrangement can be proposed by making an application under this section to the NCLT. Application can be made by company or creditors or members or liquidator. The tribunal may on this application order a meeting of creditors or members to be held. Compromise is nothing but the adjudication of rights or liabilities of members/class of members/ creditors/ class of creditors. It usually implies the existence of a dispute relating to rights. Arrangement may be made in anticipation of a dispute. Arrangement includes reorganization of the company‘s share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both methods.

Persons or company making an application under section 230 shall disclose:

(a) All material facts relating to the company, such as the latest financial position of the company, the latest auditor‘s report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) Reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) Any scheme of corporate debt restructuring consented to by not less than 75% of the secured creditors in value[11]

Notice of the meeting

If the tribunal orders for a meeting accepting the application then a notice of such meeting shall be sent to all the creditors or class of creditors and to all the members or class of members and the debenture-holders of the company, individually at the address registered with the company which shall be accompanied by a statement disclosing the details of the compromise or arrangement, draft of the scheme of reconstruction, a copy of the valuation report, if any, and explaining their effect on creditors, key managerial personnel, promoters and non-promoter members, and the debenture-holders and the effect of the compromise or arrangement on any material interests of the directors of the company or the debenture

[11] *Ibid*

trustees. The draft of the scheme of reconstruction should be filed with ROC before the meeting.

That notice and other documents shall also be placed on the website of the company. In case of a listed company, these documents shall be sent to SEBI and stock exchange where the securities of the companies are listed, for placing on their website and shall also be published in newspapers. A notice along with all the documents shall be sent to the Central Government, the income-tax authorities, the RBI, the SEBI, the ROC, the respective stock exchanges, the Official Liquidator, the Competition Commission of India, if they are likely to be affected by the compromise or arrangement and shall require that representations to be made by them. The representations shall be made within a period of 30 days from the date of receipt of such notice.

Meeting

Majority of persons representing 3/4 in value of the creditors, or class of creditors or members or class of members, may agree to any compromise or arrangement which is then required to be sanctioned by the Tribunal by an order. It will be binding on the company, all the creditors, or members, or on the liquidator.

Proxies and Objection

The persons to whom the notice is sent may vote in the meeting either themselves or through proxies or by postal ballot to the adoption of the compromise or arrangement within one month from the date of receipt of such notice. Any objection to the compromise or arrangement shall be made only by persons holding not less than 10% of the shareholding or having outstanding debt amounting to not less than 5 % of the total outstanding debt as per the latest audited financial statement.

Order of the Tribunal sanctioning the compromise or arrangement

The tribunal may by order sanction the compromise or arrangement if all the procedures are followed. It may also make provisions deciding the date from which the property or liabilities of the transferor company is transferred to Transferee Company or allotment of shares, instruments etc. The date is usually fixed by parties. If the tribunal is fixing the date it has to record the reasons in writing. The tribunal may also decide on various other aspects like whether the legal proceedings against or by the transferee company will continue in its own name. A transferee company shall not on merger or amalgamation, hold any shares in its own name or in the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company and all such shares shall be cancelled or extinguished on the merger or amalgamation.

No compromise or arrangement shall be sanctioned by the Tribunal unless a certificate by the company's auditor has been filed with the Tribunal to the effect that the accounting treatment, if any, proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133. A certified copy of the order of the tribunal should be filed with the ROC for registration within 30 days of the receipt of certified copy of the order. Until the completion of the scheme, company should file a statement with the ROC every year duly certified by a chartered accountant or a cost accountant or a company secretary in practice indicating whether the scheme is being complied with in accordance with the orders of the Tribunal or not.[12]

Punishments

Section 232(8) says if company contravenes the section 232 it shall be punishable with fine 1 lakh – 25 lakh. Any officer in default will be punishable with 1 year imprisonment or fine 1 lakh – 3 lakh or both. As per section 240, liability of offences committed by the officers in default, of the transferor company prior to its merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.[13]

POWER OF CENTRAL GOVERNMENT

As per section 237, the Central Government in the public interest order amalgamation of two or more companies into a single company by notification in the Official Gazette. The rights and liabilities will be specified in the order itself. The order should be laid in the both the houses of parliament after being made.

As per section 239, the books and papers of a company which has been amalgamated with shall not be disposed of without the prior permission of the Central Government. Before

[12] DhruvKhandelwal,*Analysis of section 230 of companies act, 2013*,TAX GURU (Oct. 13, 2018, 09:30 PM) https://taxguru.in/company-law/analysis-section-230-companies-act-2013.html
[13] *Supra* note 10

Vol. 9, Issue 5, May - 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gate as well as in Cabell's Directories of Publishing Opportunities, U.S.A

granting such permission, Government appoints a person to examine the books and papers for the purpose of any evidence of the commission of an offence in connection with the promotion or formation, or the management of the affairs, of the transferor company or its amalgamation.

TAX BENEFITS

The tax benefits under Income Tax Act, 1961 shall be available to both amalgamating company and amalgamated company only when all the conditions mentioned in section 2(1B) are satisfied. 'Amalgamating company' means company which is merging and 'amalgamated company' means the company with which it merges or the company which is formed after merger.[14] Section 2 (1B) of Income Tax Act, 1961 defines amalgamation as the merger of one or more companies with another company or the merger of two or more companies to form one company in such a manner that

(i) All the property of the amalgamating company immediately before the amalgamation becomes the property of the amalgamated company

(ii) All the liabilities of the amalgamating company immediately before the amalgamation become the liabilities of the amalgamated company

(iii) Shareholders holding not less than ¾ value of the shares in the amalgamating company become shareholders of the amalgamated company[15]

Tax benefits under Income Tax Act, 1961are as follows:-

1) The Amalgamating Company is exempted from Capital Gains Tax under Section 47(vi) if the capital gain is arising from the transfer of assets by the amalgamating companies to the Indian Amalgamated Company.
2) According to Section 47(vi-a), the transfer of shares held in Indian company by amalgamating foreign company to amalgamated foreign company is exempt from tax, if at least 25% per cent of the shareholders of the amalgamating foreign company continue to remain shareholders of the amalgamated foreign company, and such transfer does not attract tax on capital gains in the country, in which the amalgamating company is incorporated.

[14] Sanjay Gupta, *Taxation Aspect of Mergers and Amalgamation*, CACLUBINDIA(Oct. 10, 2018, 10:45 PM) https://www.caclubindia.com/articles/taxation-aspect-of-mergers-and-amalgamation-9630.asp
[15] The Income Tax Act, 1961, No.43, Acts of Parliament 1961(India).

Vol. 9, Issue 5, May - 2019,
ISSN: 2249-2496 Impact Factor: 7.081
Journal Homepage: http://www.ijmra.us, Email: editorijmie@gmail.com
Double-Blind Peer Reviewed Refereed Open Access International Journal - Included in the International Serial Directories Indexed & Listed at: Ulrich's Periodicals Directory ©, U.S.A., Open J-Gate as well as in Cabell's Directories of Publishing Opportunities, U.S.A

3) The Amalgamating Company is exempted from Capital Gains Tax for transfer of shares under section 47(vii), if the transfer is made in consideration of the allotment of shares in the Indian amalgamated company
4) Section 72A deals with the mergers of the loss making companies with Indian profit making companies. The accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or allowance for unabsorbed depreciation of the Indian amalgamated company for the previous year in which the amalgamation happened.
5) Under Section 35 DD, for expenditure incurred in connection with the amalgamation the assessee shall be allowed a deduction of an amount equal to 1/5 of such expenditure for each of the 5 successive previous years beginning with the previous year in which the amalgamation takes place.
6) As per sections 36(1)(ix), 35 ABB(6) and 35D(5), deductions to the amalgamated company are allowed in the same manner as would have been allowed to the amalgamating company in case of amount of preliminary expenses, expenditure for obtaining license to operate telecom services, capital expenditure on family planning.[16]

FAMOUS MERGERS IN INDIA

Vodafone - Idea merger

On March 20th, 2017 Vodafone and Idea announced their merger. Vodafone will hold 45.1 percent of the newly formed entity. Idea is paying Rs. 3,874 crores to Vodafone for 4.9 percent of the company. Idea will have 26 percent, with the rest being held by the public. Idea will also have the sole authority of appointing the Chairman. Vodafone-Idea Ltd (new entity) will become the biggest telecom operator in India, both by subscribers and revenue.[17]

Lipton India & Brooke bond

Brooke bond and Lipton India, the two subsidiaries of Unilever, were merged in July 1993 to form Brooke Bond Lipton India (BBLIL). The reason was for rapid diversification.

---

[16] *Ibid*
[17] Gopal Sathe, *Vodafone-Idea Merger Explained in 10 Simple Points*, GADGETS 360 (Oct 10, 2018, 10:33 PM) https://gadgets.ndtv.com/telecom/features/vodafone-idea-merger-explained-in-10-simple-points-1671353

The company increased its turnover to Rs 1,839 crore in the year ended December 1994 from Rs 1,303 crore in 1993, a rise of around 41 per cent.[18]

Tech Mahindra - Satyam Computer Services

Tech Mahindra and Mahindra Satyam have formally completed the merger in 2013. The announcement came four years after the Mahindra Group Company acquired Satyam, then

hit by an accounting scandal by its promoter Ramalinga Raju. The merged entity will be called Tech Mahindra and Anand Mahindra will be its chairman.[19]

ICICI Ltd. - ICICI bank

In October 2001, the Boards of Directors of ICICI and ICICI Bank approved the merger of ICICI and two of its wholly-owned retail finance subsidiaries, ICICI Personal Financial Services Limited and ICICI Capital Services Limited, with ICICI Bank. Consequent to the merger, the ICICI group's financing and banking operations, both wholesale and retail, have been integrated in a single entity.[20]

ANALYSIS

Mergers are similar to rebirth rather than marriage. The most important factor determining the fate of merging and merged companies and their shareholders is the compromise or arrangement that they agree upon. The terms and conditions in the compromise or arrangement should be framed well. It should fulfill the objective of merger at the same time it shouldn't affect the existing strengths of the company. Human capital is equally important as financial capital. The companies are going for M&A activities keeping the tax benefits and synergy in mind. They forget or ignore importance of human capital and customer acceptance. Key employees whose talent cannot be replaced should not be sacrificed in the name of merger. The companies before going for merger should think about the language barriers, post integration process, and cultural differences also.

[18] *BrookeBond Lipton India Rapid Diversification,*30 EPW (1995)(Oct 10, 2018, 11:20 PM) https://www.epw.in/journal/1995/29/companies-uncategorised/brooke-bond-lipton-india-rapid-diversification.html
[19] *Tech Mahindra Satyam Computer complete merger*, MONEY CONTROL (Oct 10, 2018, 10:00 PM) https://www.moneycontrol.com/news/business/companies/-1814309.html
[20] *History,*ICICI BANK (Oct 13, 2018, 10:00 AM) https://www.icicibank.com/aboutus/history.page

The process of mergers in India is court driven. The order of NCLT is required to make the merger valid even if majority of the shareholders have agreed to it. This makes it time consuming. The punishment for not following the procedures under the act is very low. 25 lakhs may not be a huge amount for many companies in India. However, the provisions of the Companies Act, 2013 makes sure no person or company escapes liability in the name of merger. The Companies Act, 2013 has given the central Government power to order merger in public interest. This power may be misused to eliminate the companies which are against the government in the name of merging. As the rights and liabilities of the new entity will be fixed by the government in its order, it can be partial and have a great influence in the corporate world.

CONCLUSION

The growth of business is usually slow when it's based on utility of its products and services. In order to attain instant growth by way of expansion of work force, customers and infrastructure, the companies opt for mergers. The process of mergers in India is court driven. The process is lengthy as well as complex. It carries lot of benefits with equal amount of risks. There are no true mergers. In the end there will be one dominant over another no matter how friendly the merger might be.