

Opportunity for
Professionals before
NCLT and NCLAT

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What is Tribunal?

- ❖ Tribunals is one of the bodies of quasi adjudication in India.
- ❖ Tribunals were introduced to reduce the workload of courts and expedite decisions.
- ❖ Tribunals are a forum which consist of both lawyers and experts in the areas falling under the jurisdiction of the tribunal.

Genesis of Establishment of Specialised Tribunals

- ❖ The genesis of setting up of specialized tribunals can be traced in the **Supreme Court judgement** in **Sampath Kumar case**. In this case while adopting the theory of alternative institutional mechanism the Supreme Court refers to the fact that since independence, the population explosion and the increase in litigation had greatly increased the burden of pendency in the High Courts. The Supreme Court also referred to studies conducted towards relieving the High Courts of their increased load; the recommendations of the Shah Committee for setting up **independent Tribunals**.

Constitutional Scheme for Setting Up of Tribunals

Part XIVA of the Constitution inserted by Constitution (42nd Amendment) Act, 1976 contains the following articles:-

- ❖ Articles 323A:-
 - for administrative tribunal
- ❖ Articles 323B:-
 - for other matters

Tribunal under Articles 323A and 323B

Under Article 323A

Empowers the Parliament

- ❖ 323A was to be effective only if the Parliament implemented a law in this regard
- ❖ The Administrative Tribunals Act of 1985 was enacted in this regard

Under Articles 323B

Empowers the Parliament or State Legislatures

- ❖ Tribunals could be set up under Art. 323B only if necessary legislation was enacted
- ❖ There are many non-administrative tribunals such as
 1. Income Tax Appellate Tribunal,
 2. Debt Recovery Tribunal,
 3. Customs Excise and Service Tax Appellate Tribunal,
 4. Compensation Tribunals
 5. Foreign exchange, import and export
 6. NCLT/NCLAT Tribunal

Administrative Tribunals Act 1985

- ❑ Using the powers conferred by the **Article 323A** of the Constitution, Parliament passed a law to establish the Administrative Tribunals in India.
- ❑ The **Administrative Tribunals Act 1985** provides for adjudication or trial of disputes and complaints with respect to recruitment and conditions of service of public servants
- ❑ The Administrative Tribunals were thus, **established in November, 1985** at **Delhi, Mumbai, Calcutta and Allahabad.**
- ❑ Today, there are **17 Benches** of the Tribunal located throughout the country wherever the seat of a High Court is located, **with 33 Division Benches.**
- ❑ In addition, circuit sittings are held at Nagpur, Goa, Aurangabad, Jammu, Shimla, Indore, Gwalior, Bilaspur, Ranchi, Pondicherry, Gangtok, Port Blair, Shillong, Agartala, Kohima, Imphal, Itanagar, Aizwal and Nainital.

History of Tribunal

323A and Art. 323B did not provide for the setting up of the tribunals for the first time in the country, but were rather meant to provide a fillip to the tribunal system and provide constitutional authority for the legislations. Further, before the insertion of Art.

323A and Art. 323B, tribunals were under the ambit of the respective High Courts.

The High Courts had appellate jurisdiction in this regard on matters which could be heard by the tribunals.

A writ petition could also be maintained before the Supreme Court and the High Court under Art. 226 and Art. 32 respectively, but after the amendment, an appeal could be preferred only to the Supreme Court by means of a Special Leave Petition under Art. 136 and the writ jurisdiction under both

Procedure by Tribunals

Tribunals do not have to follow any uniform procedure as laid down under the Civil Procedure Code and under the Indian Evidence Act of 1872 but they have to follow the principles of natural justice

This judgment has given by the five judge Bench of the Supreme Court in *S. P. Sampath Kumar v. Union of India*

The provision for Administrative/Technical Members

Many legislations, such as the:-

Administrative Tribunals Act of 1985,

Consumer Protection Act of 1986

The Income Tax Act of 1961,

Competition Act of 2002,

Provide for **Administrative** or **Technical Members** to be a part of the **Tribunal**

- ❖ **Administrative members** are those who have practical experience of the functioning of the services
- ❖ **Technical members** are those who are experts in the field related to the respective Tribunals. These Administrative and Technical Members are, in most instances, appointed by the Executive

Establishment of National Company Law Tribunal

- ❑ The Companies (Second Amendment) Act, 2002 provides for the setting up of a National Company Law Tribunal and Appellate Tribunal to **replace the existing Company Law Board and Board for Industrial and Financial Reconstruction**. It also provides for dealing with various matters, which fall presently under the jurisdiction of High Court pursuant to various provisions contained in the Companies Act, 1956.
- ❑ The setting up of NCLT as a specialized institution for corporate justice is based on the recommendations of the **Justice Eradi Committee** on Law Relating to Insolvency and Winding up of Companies.

What is NCLT ?

The National Company Law Tribunal (NCLT) is a quasi-judicial body established under Section 408 of the Companies Act, 2013 and NCLT was constituted on 1 June 2016

WHAT IS NCLAT ?

The National Company Appellate Tribunal (NCLAT) is a Quasi-judicial appellate body in India that adjudicates issues related to Orders passed by the NCLTs. NCLAT was established under the Companies Act 2013 and was constituted on 1 June 2016.

How many
Benches of NCLT
in India?

In the first phase
the Ministry of
Corporate Affairs
have set up 11
(eleven) Benches,

One Principal
Bench at New
Delhi

Ten Benches at

- i. New Delhi,
- ii. Ahmedabad,
- iii. Allahabad,

- iv. Bengaluru,
- v. Chandigarh,
- vi. Chennai,
- vii. Guahati,
- viii. Hyderabad,
- ix. Kolkata and
- x. Mumbai

Head of the Benches of the NCLT

All Benches of the NCLT are headed by the Hon'ble President, at present NCLT have

- (a) 16 Judicial Members and
- (b) 09 Technical Members

PRESIDENT OF THE NCLAT

HON'BLE JUSTICE SHRI MAHESH MITTAL KUMAR



Powers of NCLT

The NCLT has been empowered to exercise the following powers:

Most of the powers of the **Company Law Board** under the Companies Act, 1956.

All the powers of **BIFR** for **revival and rehabilitation** of sick industrial companies;

Power of **High Court** in the matters of **mergers, demergers, amalgamations and winding up**, etc.;

Power to order repayment of deposits accepted by Non-Banking Financial Companies as provided in section 45QA of the Reserve Bank of India Act, 1934;

Power to wind up companies;

Eligibility of Professionals for appearing before NCLT Section 432

- ❖ A party to any proceeding or appeal before the Tribunal or the Appellate Tribunal, as the case may be, may either appear in person or authorise one or more
- ❖ **Chartered Accountants or**
- ❖ Company Secretaries or
- ❖ Cost Accountants or
- ❖ Legal Practitioners or
- ❖ any other person to present his case before the Tribunal or the Appellate Tribunal, as the case may be.

Schedule of Fees in NCLT

The fees payable are towards various Applications, Petitions, documents etc in **NCLT**. The minimum **fees is Rs 500 and maximum is Rs 10,000**. However, Rs 5 is prescribed towards per page for obtaining a certified copy of the order passed by **NCLT**.

- ❖ Application in cases of oppression and mismanagement under Section 241 (1) is Rs **10,000/-**
- ❖ Fees for Application for appointment as MD u/s 243(1)(b), for investigation into company affairs u/s 213, for Voluntary Revision of Financial Statement, for change in financial year u/s 2 (41), Conversion of public company into a private company U/S 14(1) **is Rs.5000/-**
- ❖ Fees for Appeal/Application for rectification of register of member, for calling of AGM under Section 97 (1), compounding of certain offences u/s 441, and other not mentioned above **is Rs. 1000/-**

SCHEDULE OF FEES

S.No.	Section of the Companies Act, 2013	Nature of application / petition	Fees
1.	Sec. 2 (41)	Application for change in financial year	5,000/-
2.	Sec. 7 (7)	Application to Tribunal where company has been incorporated by furnishing false or incorrect info or by any fraudulent action.	5,000/-
3.	Sec. 14 (1)	Conversion of public company into a private company.	5,000/-
4.	Sec. 55 (3)	Application for issue further redeemable preference shares.	5,000/-
5.	Sec. 58 (3)	Appeal against refusal of registration of shares.	1,000/-
6.	Sec. 59	Appeal for rectification of register of member.	1,000/-
7.	Sec. 62 (4)	Appeal against order of Govt. fixing terms and conditions for conversion of debentures and shares.	5,000/-
8.	Sec. 71 (9)	Petition by Debenture-trustees.	2,000/-
9.	Sec. 71 (10)	Application in the event of failure of redeeming of debentures.	1,000/-
10.	Sec. 73 (4)	Application by deposition for repayment of deposit or interest.	500/-
11.	Sec. 74 (2)	Application to allow further time as considered reasonable to the company to repay deposits. I	5,000/-
12.	Sec. 97 (1)	Application for calling of Annual General meeting.	1,000/-
13.	Sec. 98 (1)	Application for calling of general meeting of company other than annual general meeting	1,000/-
14.	Sec. 119 (4)	Petition to pass an order directing immediate inspection of minute's books or directing a copy thereof be sent forthwith	500/-

		to person requiring it.	
15.	Sec. 130 (1)	Application for re-opening of books of account, if made by any person other than Central Government, Income Tax authorities, SEBI or any other statutory regulatory body or authority.	5,000/-
16.	Sec. 131 (1)	Application by company for voluntary revision of financial statement on Board's report.	5,000/-
17.	Sec. 140 (4)	Application for not sending the copy of representation of auditor to the members.	1,000/-
18.	Sec. 140 (5)	Application by any other person concerned for change of auditors.	2,000/-
19.	Sec. 169 (4)	Application for not sending copies of representation	1,000/-
20.	Sec. 213	Application to Tribunal for investigation into company affairs.	5,000/-
21.	Sec. 218 (1)	Application for approval for action proposed against employee.	1,000/-
22.	Sec. 222 (1)	Application for imposition of restrictions on securities.	2,500/-
23.	Sec. 241 (1)	Application in cases of oppression and mismanagement.	10,000/-
24.	Sec. 242 (4)	Application for regulating the conduct of company.	2,500/-
25.	Sec. 243 (1) (b)	Application for appointment as Managing Director	5,000/-
26.	Sec. 244 (1)	Application for waiver of requirement specified in clause (a) or (b) of Sec. 244 (1)	2,500/-
27.	Sec 245	Class action suits	5000/-
28.	Sec. 441	Application for compounding of certain offences.	1,000/-
29.	Section 421	Appeals to NCLAT	5,000/-
30.	Application under any other provisions specifically not mentioned herein above		1,000/-
31.	Fee for obtaining certified true copy of final order passed to parties other than the concerned parties under Rule 50		5/- per page.

What is Advocacy?

Advocacy is the act or process of supporting a cause or proposal.

An advocate is someone who speaks on behalf of a cause or proposal. Advocate may be an individual or an organization.

Advocacy

- ❖ Advocates use every opportunity to support their cause or issue.
- ❖ Advocacy is a process, not an event.
- ❖ It's a marathon, not a sprint.

PREPARATION BEFORE FILING ANY PETITION/APPLICATION

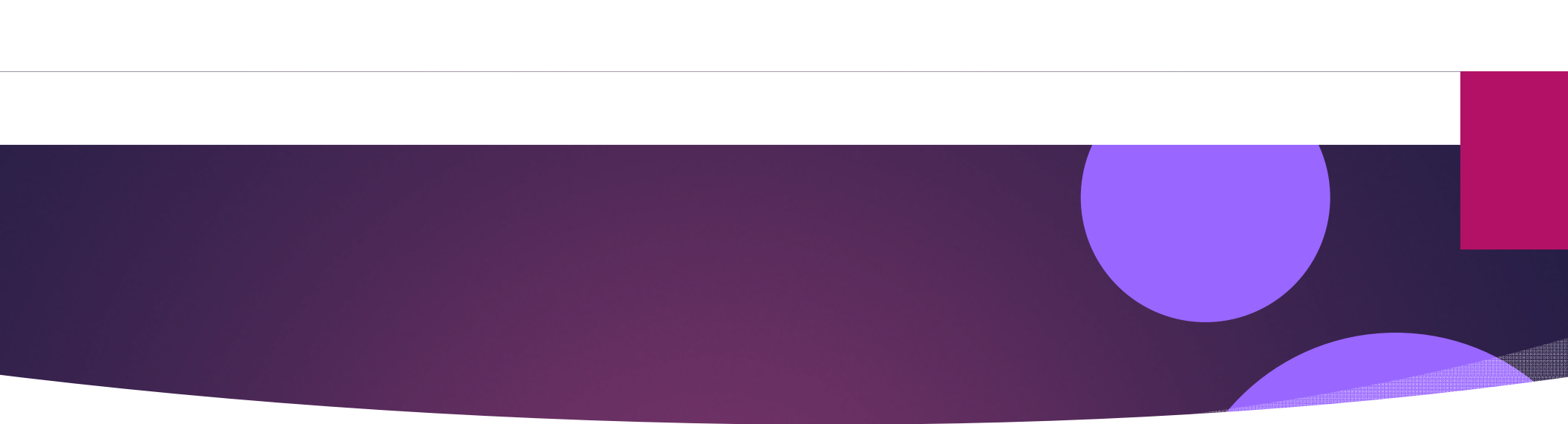
- ❖ Understand the case thoroughly with the client.
- ❖ Read all the papers minutely.
- ❖ Prepare brief of the case with salient points.
- ❖ Take up to date search on MCA and related websites.
- ❖ Do thorough research on various issues involved and make a summary of case laws/precedents in favour or against.
- ❖ Study relevant Rules of Courts/Tribunals.

Preparation before Hearing

- ▶ Read all the case papers thoroughly.
- ▶ Prepare notes on arguments with relevant page numbers.
- ▶ Go through the Judgments. Underline relevant portions of Judgments to be cited.
- ▶ Keep sufficient copies of Judgments to be placed before the Presiding member(s) and to be given to counsel(s) of the opposite parties
- ▶ Follow dress code prescribed by ICSI.

Key Points of Advocacy

- ❖ Make a clear brief on law and evidence. Keep focus of main issues & results to be achieved
- ❖ Avoid frequent interruptions or objections. Wait for a chance.
- ❖ Knowledge of development of law and background helpful in determining purpose and application.
- ❖ Do not argue with the Judges. Explain with reason. Focus on winning war nor battles.
- ❖ Co-operate with Opposite Counsel/Representative... The “Learned Friend”

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- ❖ Look at previous similar cases and their determination. Precedents have a lot of value.
 - ❖ Develop a structure.
 - ❖ Introduce subject, give background and facts, analysis of law, application of law, grounds for your case and prayer for relief.
 - ❖ Study facts and documents carefully. Do not miss any important aspects as the first chance is usually the last chance.
 - ❖ Develop a checklist.
 - ❖ Keep Pen, extra blank full size ledger paper, court fee, stamp etc
 - ❖ Carry reference books
 - ❖ Enough copies of Application, Reply, Rejoinder, Written Submission etc
 - ❖ Be properly dressed. Don't attempt stylistic changes.



Don't look tense.

Don't start the case when you are not prepared. Seek adjournment.

Regardless of the case believe in your submissions.

Speak slowly and clearly.

Keep your phone in silent mode.

Face the bench and bow from the waist whenever you enter or leave the court room.

Stand when addressing the court.

Work hard, Be polite.

Patience is a part of Advocacy.

Avoid being in a lawyerly dress out of the court.

Begin easy and do not jump to your central point too soon because that prevents the thrust of your arguments from sinking in fully.

Start with a brief overview of the matter without straying away too far away from your central argument

Don't be argumentative

Traits of Good Advocacy

- ❑ Honesty
- ❑ Integrity
- ❑ Confidence
- ❑ Patience
- ❑ Eloquence
- ❑ Hardworking
- ❑ Wit
- ❑ Firm, dignified and clear in presentation
- ❑ Specialized knowledge of business laws and regulatory practice.

Traits of Good Advocacy (Continued)

- ❖ Never feel uneasy in temporary defeat.
- ❖ Avoid frivolous objections, wait for the main chance to force your points.
- ❖ Clarity, candidness and careful choice of words are important skill in the use of language.
- ❖ Good evidence is the main point in law.
- ❖ Drop all examinations and arguments in the right place.
- ❖ Always consider your opponent powerful and be ready for him.



Combine facts with the application of law.

See that you do your work well.

Always hold on hard to the strong points of law and facts.

Familiarise yourself with facts of both sides.

Advocate controls the case and not the client.

Find out what the opponent is likely to prove and plan how to meet it.

Have common sense in good measure.

Be reasonable and not trouble the court with technicalities.

Marshal the facts and arrange them properly



Do not argue with the Judge.

Put forth best indisputable points and carry the judge with you by reason.

Co-operate with the opposing counsel and the court.

Remember arguments in court are different from speaking in public meetings.

Brevity is fine art in court.

Knowledge of law is not enough to make you great, apply it to facts for Results.

Believe in half of what your client tells and ask him to produce the proof of the other half.

Advocacy is not a business but a profession, not a trade but a duty of honour.

Essentials of a Chartered Accountant to practice Advocacy before NCLT

• Petition/application in Form 1 with attachments, Verification in Form 6, Notice by NCLT in Form 5.

• Name of the company, status, date of inc, registered office, authorized capital, paid up capital, division of class of shares, and terms of issue of preference shares, if any, main objects, present business, latest audited accounts and audit reports, facts of case, grounds for petition and nature of relief sought.

• All documents should be in English or Hindi. If in other languages then such documents should be accompanied with translation in English.

• All the documents filed in the Tribunal should be accompanied by an Index in Triplicate containing the details.

• Parties are required to file three authenticated copies of the Petition, Reply, Rejoinder, Application as the case may be with NCLT and one copy each of such document should be served to the opposite parties.

Essentials of a company secretary to practice Advocacy before NCLT (Continued)

- ▶ Separate numbered paragraphs, type written, printed in double space on one side of paper, 4cm margin from the top, 2.5 cm right margin and 5cm left margin, paginated, indexed and stitched together in paper book form.
- ▶ Attached documents may be attested as true copies and marked as Annexure A1, A2, etc.
- ▶ Number and dates should be mentioned in figures as per English Calender

Road Blocks to Advocacy

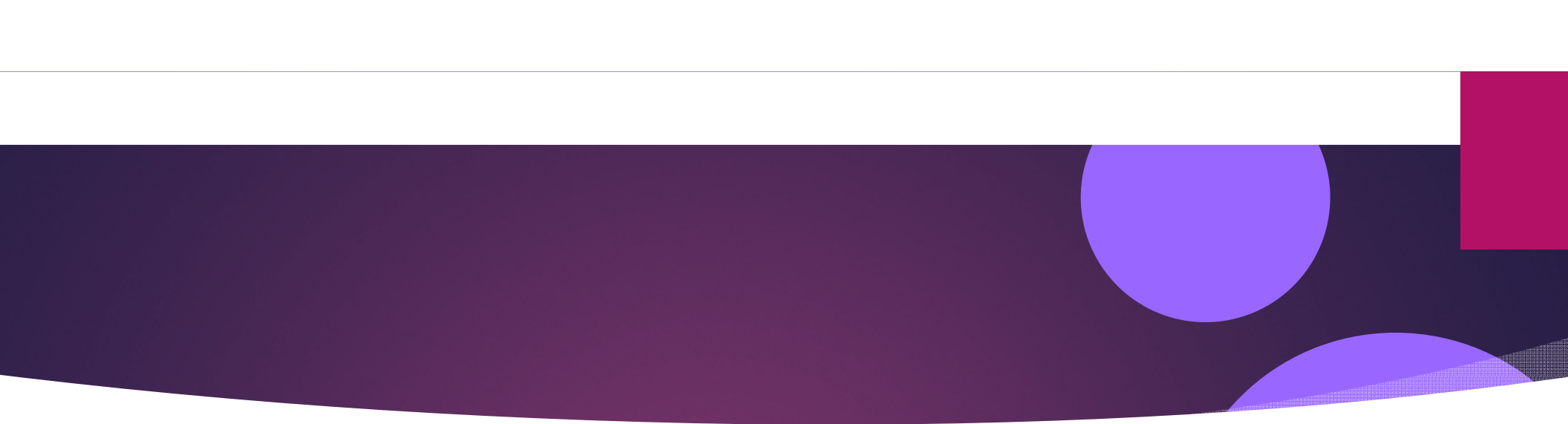
- ▶ Lack of comfort with the advocacy process
- ▶ Don't know where to start
- ▶ Don't know where to get help
- ▶ Don't feel you are “expert” enough to advocate

Pre –requisites of drafting

- ▶ Develop a structure.
- ▶ Introduce subject, give background and facts, analysis of law, grounds for your case and prayer for relief.
- ▶ Study facts and documents carefully. Do not miss any important as the first chance is usually the last chance.
- ▶ Develop a checklist.

Key points of drafting

- ▶ Keep it simple and short. Avoid too much legalese. Avoid detailed description of case precedents as they can be adduced during arguments.
- ▶ Avoid exaggeration
- ▶ Write short sentences not paragraphs with one sentence.
- ▶ Link your law points and facts/evidence to your case. Always stay focused on results.
- ▶ Object of writing must not just be to make judges understand but make it impossible to misunderstand.
- ▶ Always review your writing- self appraisal. There is no better critic than YOU!

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- ▶ Can pray for interim relief in main petition/ application however can also file Interim Application, for condonation of delay, interim application is required.
 - ▶ Form 3A (advertisement detailing Petition)shall be filed with NCLT by an affidavit not less than three days before hearing of the Petition.
 - ▶ Evidence by affidavit. NCLT can order cross examination.
 - ▶ Reply by respondent with application and copies of documents. Specifically admit, deny or explain facts. Rejoinder may be filed.
 - ▶ Investigation, inspection, enquiry- must produce all evidence otherwise cannot do so in petition before NCLT- only if opportunity not given by inspector- bench may allow.

Scope of Services for Practicing Chartered Accountant under NCLT

The establishment of NCLT/NCLAT shall offer various **opportunities to Practicing Chartered Accountant** as they have been authorized under Section 432 of the Companies Act, 2013 to appear before the Tribunal/Appellate Tribunal. Therefore, **Practicing Chartered Accountant** would for the first time be eligible to appear for matters which were hitherto dealt with by the High Court

**Matters for which
Chartered Accountant is
eligible to appear before
NCLT**

- ❖ Insolvency and Bankruptcy.
- ❖ Mergers, Amalgamations.
- ❖ Winding up Proceedings.
- ❖ Oppression & Mismanagement.
- ❖ Damages for Fraud.
- ❖ Compounding of Offence. (U/s 441)
- ❖ Voluntary Revision of Financial Statements.
- ❖ Reduction of Share Capital.
- ❖ Variation of Capital on Re-organisation.
- ❖ Rectification of Registers
- ❖ Matter Related to Transfer/Transmissibility.

A Big and New area of Practice is opened for Professionals under

“Insolvency and Bankruptcy Code, 2016”

The National Company Tribunal has also been empowered to pass an order for initiating Insolvency Resolution Process, Liquidation, Dissolution of Company, there (CA/CS/CMA) may represent the proceedings under Code, 2016 before the Tribunal. Unlike, the earlier position allowing only Government Officers to act as Official Liquidators, now Professionals like (CA/CS/CMA) have been permitted to act as Insolvency Professional, Liquidator in case of Winding-up before Tribunal.

Structure of Insolvency and Bankruptcy Board of India (IBBI)

IBBI divided into 3 Main Structures

Insolvency Professional Agency (IPAs)

IPAs would admit IPs as Members

Currently there are 3 IPAs

- Indian Institute of Insolvency Professionals if ICAI
- ICSI Insolvency Professional Agency
- Insolvency Professional Agency of Institute of Cost Accountants of India

Insolvency Professionals (IPs)

IPs are licensed Professionals registered with IPAs who would act as Resolution Professional/Liquidator or/Bankruptcy Trustee in an Insolvency Resolution Professional

Information Utilities (IUs)

IUs would collect, store and distribute information related to indebtedness of Companies

Pre-requisites for becoming an Insolvency Professional (IP)

The Insolvency and Bankruptcy Board of India (IBBI), is the Apex Body and has notified Insolvency and Bankruptcy Board of India (Insolvency Professionals) Regulations, 2016. The Salient features are as under:

- ▶ Eligibility & Qualification for registration of IP (Reg. 5)
 - ▶ Any person resident of India who:
 - ▶ has passed National Insolvency Examination; or
 - ▶ Has passed the Limited Insolvency Examination, and has 15 years of experience in management after graduation;
 - ▶ **Has passed the Limited Insolvency Examination, and has 10 years of experience as a member of ICAI, ICSI, ICAI (Cost) and Bar Council**

Application for Becoming I.P.

Application for Resolution

- ▶ An individual enrolled with an Insolvency Professional Agency may make an application to IPA with Application Fee of Rs. 10,000/-

Recognition of IP Entities (Reg. 12)

- ▶ LLP, Partnership Firm or Company if:
- ▶ A majority of partners of the LLP or Partnership Firm or a majority of Whole Time Directors of the Company are registered as Insolvency Professionals
- ▶ Witworth Insolvency Professionals Pvt. Ltd., Gyan Shree Insolvency Professionals LLP, A2Z Insolvency Services Pvt. Ltd., Turnaround Insolvency Professionals LLP, IRR Insolvency Professionals Pvt. Ltd. and AAA Insolvency Professionals LLP have been recognised by IIBI.

Insolvency Resolution Process (IRP)

- ▶ **Commencement of IRP on Order of admission of Application by NCLT;**
- ▶ **Declaration of Moratorium;**
- ▶ **Appointment of Interim Insolvency Resolution Professional**

Interim Resolution Professional

Any Person registered with the IBBI shall be appointed as an Interim Resolution Professional by the Adjudicating Authority (i.e. NCLT) within 14 days from the insolvency commencement date. The Interim Resolution Professional shall either be proposed by the Applicant (i.e. Financial /Corporate Debtor) if no disciplinary proceedings are pending against him.

Where an Application is filed by an Operational Creditor and no proposal for appointment of Interim Resolution Professional is made then the Adjudicating Authority shall make reference to IBBI and the Board shall within 10 days of receipt of reference shall recommend the name of Interim Resolution Professional.

Tenure

- ▶ The tenure of Interim Resolution Professional shall not exceed 30 days from date of his appointment.


Duties of Interim Resolution Professional (Section 18)

To make Public Announcement (Form A, Regulation 6 of IBBI (Insolvency Resolution Professional Process for Corporate Persons) Regulations, 2016) of Insolvency Process in English language newspaper and Regional language newspaper circulating at the Registered Office and principal office of the Corporate Debtor.

Collect all information relating to assets, finances and operations of the Corporate Debtor for determining the Financial Position, including information related to:

- ❑ Business operations for previous 2 years (Section 18(a)(i) of the Code)
- ❑ Financial and operational payments for previous two years; (Section 18(a)(ii) of the Code)
- ❑ List of assets and liabilities as on the initiation date; and (Section 18(a)(iii) of the Code)
- ❑ Other matters as may be specified; (Section 18(a)(iv) of the Code)

Receive and collate all claims submitted by creditors to him pursuant to the Public Announcement. (Last Date for submitting Proof of Claim shall be 14 days from the date of appointment of Interim Resolution Professional)



Constitute a Committee of Creditors
Monitor the assets of Corporate Debtor
Manage operations until a Resolution Professional (Insolvency Professional) is appointed by the Committee of Creditors
Provide information collected with the Information Utility, if necessary
Take control and custody of any asset over which Corporate Debtor has ownership rights recorded in the Balance Sheet of the Corporate Debtor or with Information Utility or Depositories, Securities or any other registry that records the ownership of assets including

- Assets over which the Corporate Debtor has ownership rights which may be located in a foreign country
- Movable or immovable tangible assets
- Intangible assets including Intellectual Property
- Securities including shares held in any subsidiary of the Corporate Debtor, Financial Instruments, Insurance Policies
- Assets subject to determination by Court or authority

Perform such duties as specified by the Board.

Constitution of Committee of Creditors

The Interim Resolution Professional after collation of claims received against Corporate Debtor and determination of Financial Position of the Corporate Debtor shall constitute a Committee of Creditors (CoC).

The CoC shall comprise of all Financial Creditors of the Corporate Debtor.

Where a person is a Financial Creditor and Operational Creditor, he shall be considered as a Financial Creditor only to the extent of Financial Debts owed by such creditor.

Where an Operational Debt is transferred to a Financial Creditor, the assignee or transferee shall be an Operational Creditor to the extent of such transfer.

Where a financial debt is extended as part of a consortium arrangement or syndicate facility or issued as securities, each financial creditor may provide for a single trustee or agent to act on their behalf.

All decisions of the CoC shall be taken by a vote of not less than 75% of Voting Share of the Financial Creditors. (Voting Share shall be calculated in terms of Fair Value) (Section 5(28) of the Code)

Appointment of Resolution Professional

- ▶ The CoC within 7 days of their constitution shall by a majority of not less than 75% of the voting share of Financial Creditors, either appoint the Interim Resolution Professional as the Resolution Professional or replace the Interim Resolution Professional with another Resolution Professional.
- ▶ The appointment of the Interim Resolution Professional as the Resolution Professional shall be communicated to the Corporate Debtor and Adjudicating Authority.
- ▶ In case of replacing the Interim Resolution Professional, an Application shall be made to the Adjudicating Authority and the Adjudicating Authority shall forward the name of the Resolution Professional to the Board and shall make such appointment after confirmation from the Board.

Duties of Resolution Professional (Section 25)

To issue Notices and conduct the Meetings of Committee of Creditors.

The Notice of the meeting of the Committee of Creditors shall be sent to Member of Committee of Creditors, members of suspended Board of Directors or partners of Corporate Persons, Operational Creditors or their representatives holding an aggregate of not less than 10% of the total debt.

To protect the assets of the Corporate Debtor, including the continued business operations Of the Corporate Debtor.

Take immediate custody and control of all assets including the business records of the Corporate Debtor.

Represent and act on behalf of the Corporate Debtor with third parties, exercising rights for the benefit of the Corporate Debtor in judicial, quasi-judicial and arbitration proceedings.

Duties of Resolution Professional (Section 25)

Raise interim finances subject to the approval of the Committee of Creditors.

Appoint Accountants, legal or other professionals in the manner specified by the Board.

Maintain an updated list of claims

Prepare the Information Memorandum (CIM) in accordance with Section 29. (IM defined under Section 5(10) of the Code)

Invite prospective lenders, investors, and any other persons to put forward resolution plans. (Section 25(h) of the Code)

Present all resolution plans at the meetings of Committee of Creditors. (Section 25(i) of the Code)

File application for avoidance of transactions in accordance with Chapter (Liquidation Process)

Emerging Areas for Professionals under Insolvency and Bankruptcy Code

- To assist the Financial as well as Operational Creditors to assess the viability of the Debtor as a business decision and formulate the revival plan.
- Studying the business of the Company and the various business verticals in which it operates.
- Studying and understanding the entire debt profile of the Company with specific focus on the debt owed to the Financial Creditor, Operational Creditor and other stakeholders.
- Analysing the financial statements of the Company for the last 3 years.
- Preparation and filing of the Corporate Insolvency Resolution Process with the Adjudicating Authority.
- Suggesting the appointment the Interim Resolution Professional/Resolution Professional in consultation with the clients.

Emerging Areas for Professionals under Insolvency and Bankruptcy Code

Assisting in preparation of Public Announcement as required under the Code.

Advising on preparation of Information Memorandum and Statement of Affairs may be desired by the Insolvency Professional in terms of the Code.

Studying the Sanctions Letters and the correspondences with the Financial Creditors, Operational Creditors, Committee of Creditors and IBBI during the Corporate Insolvency Resolution Process.

Assisting the client in all correspondences with the Lenders, Committee of Creditors, NCLT, NCLAT and IBBI.

Assisting the client in appointing the Registered Valuers, Legal and other Professionals.

Reviewing the Minutes of the Meeting of Committee of Creditors and any other Meetings of similar nature by Creditors and advising the Company on content therein.

Emerging Areas for Professionals under Insolvency and Bankruptcy Code

Assisting the Company in evolving strategy from Legal/Financial point of view in the meetings of Committee of Creditors/ various other similar meetings with Creditors.

Exploring various available restructuring options. Conceptualize and thereafter strategize the best fit restructuring options or a combination of two or more options for the best possible recovery of dues.

Preparation of financial model and a Resolution Plan based on the mutually agreed commercial and viable financial structure.

Meeting, conference and discussion with the Insolvency Professional on resolution plan and making necessary changes as suggested therein.

Conferences, Consultations, legal opinions and advice, etc. with respect to any issues relating to proceeding under the Code.

Filing and defending of any Applications which may be filed by the Company or against the Company with NCLT/NCLAT.

Performing all duties of an Interim Resolution Professional/Resolution Professional.

A Big and New Area of Practice is opened for P.C.A. under Compromise and Arrangement

A whole New area of practice is opened for P.C.A. with respect to advising, assisting and representing in matters related to Compromise and Arrangements

- ❖ Merger,
- ❖ Amalgamation,
- ❖ Demerger,
- ❖ Reverse merger,
- ❖ Compromise and other
- ❖ Arrangements

Merger Process under Companies Act, 2013

Convening of Shareholders and Creditors Meetings for approval of Scheme and discussion on the representation given by regulatory authorities – decision reported to NCLT

If creditors having atleast 90% value agree and confirm by way of affidavit to the scheme, then NCLT may dispense creditors meeting.

Notice to Regional Director and Official Liquidator and submission of their NOC with NCLT

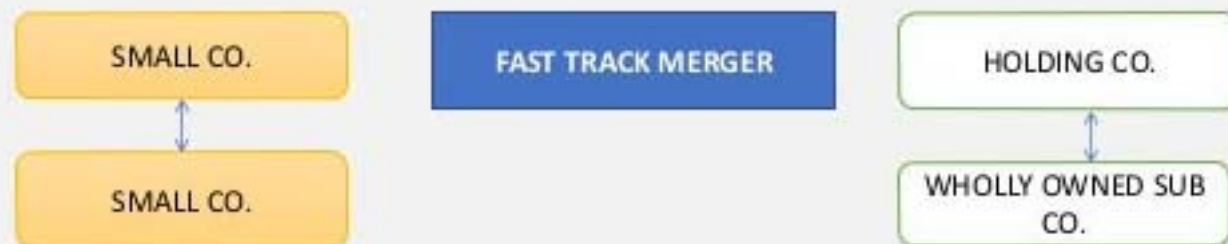
Final Hearing by NCLT

Obtaining NCLT Order and filing with Registrar of Companies

NCLT may provide exit opportunity to the dissenting shareholders

Post Merger compliances

Fast Track Merger



Small Company means Company other than PUBLIC CO. having PAID Up CAPITAL not more than Rs. 50 Lakh and TURNOVER not more than Rs. 2 Crores. *(Govt. can raise the limits)*
Not applicable to Holding -Subsidiary Co., Charitable Co. & Co. Governed by Special Acts

Central Government has the power to sanction the scheme, no requirement to approach NCLT*

* Central Government has delegated power to Regional Director

Fast Track Merger Process under Companies Act, 2013

Considering proposal for Merger and Amalgamation by BOD's of Companies

Finalisation of Scheme of Amalgamation

Approval of the Scheme by Board of Directors of the Companies

Notice of Proposed Scheme would be given to ROC, OL and any other person affected through scheme for their objections and suggestions

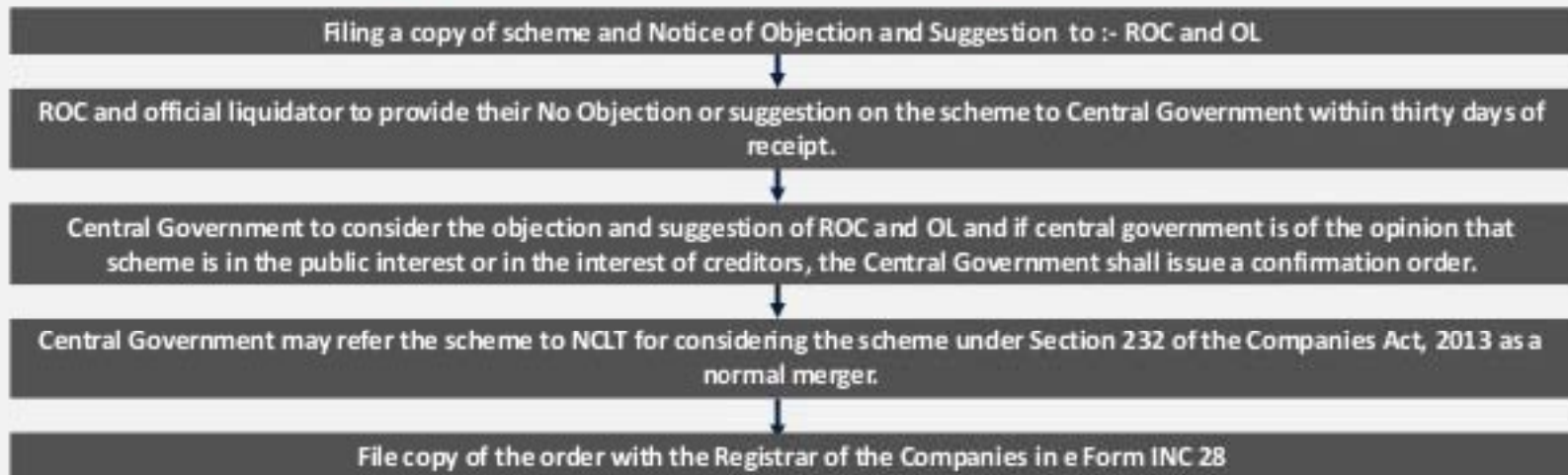
Filing of Declaration of solvency with the Registrar of Companies (RoC) along with the Scheme of Arrangement

Issue of notice by Transferor and Transferee Company for convening the meeting of the members and creditors and notice

Meeting of the shareholders and Creditors of the Company for scheme approval with requisite majority

Filing the copy of Scheme along with the result of each meeting with the Central Government by the Transferee Company

Fast Track Merger Process under Companies Act, 2013



Fast Track Merger (Cont.)

Applicability

- ❖ Scheme of merger between holding company and its wholly-owned subsidiary company; or
 - ❖ Between two or more small companies (*not applicable for listed companies*).
-

Features

- ❖ Section 233 of Companies Act, 2013 provide for the fast paced merger mechanism for the class of companies mentioned above ;
 - ❖ Requirement to go to NCLT for sanctioning of scheme of arrangement has been done away with;
 - ❖ Objections only from Registrar and Official Liquidator (and from no other authority/regulator)are invited as envisaged in the provisions;
 - ❖ if opined to be against public interest, NCLT may order merger in normal course, that is, through NCLT route;
 - ❖ Equally applicable to Demergers and other schemes of arrangement.
-

Impact Analysis of Fast Track Merger

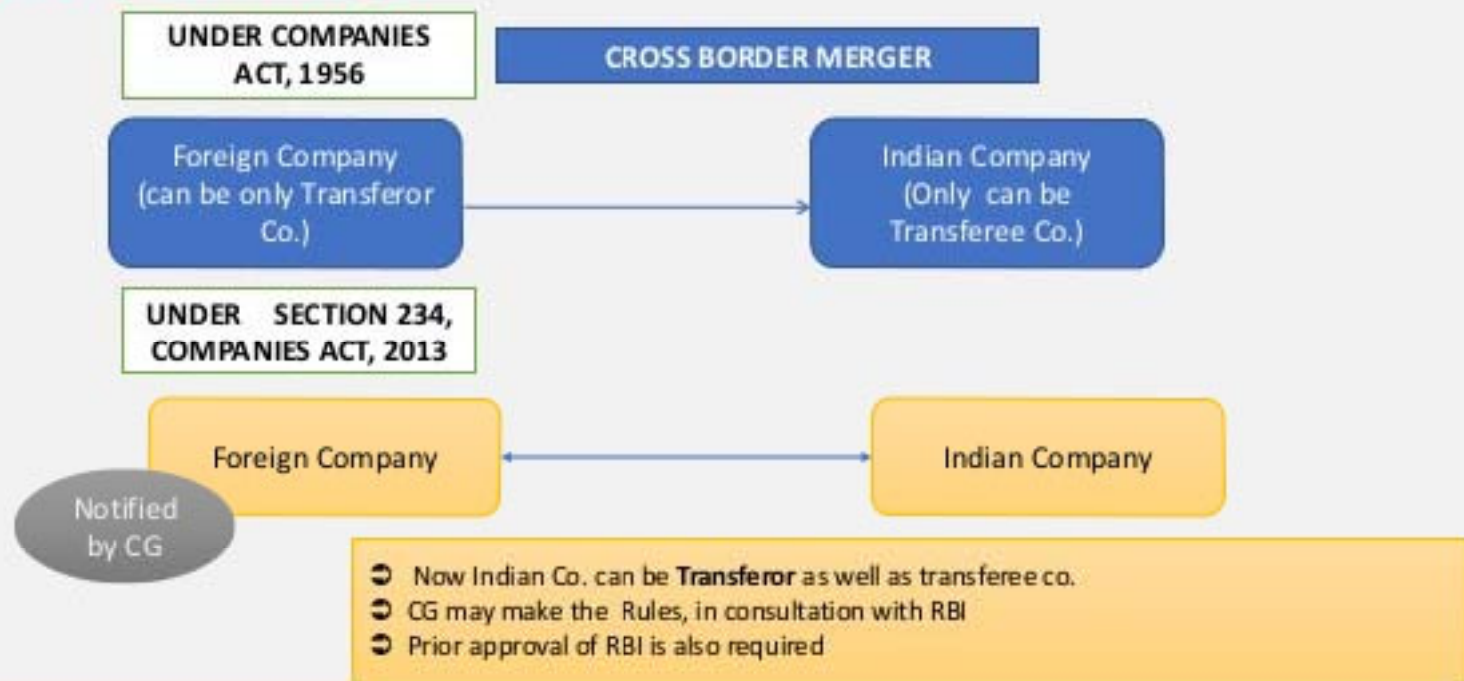


- ▲ Encourage corporate restructurings for small and group companies
- ▲ Will result in faster disposal of the matters
- ▲ Only relevant cases would go to NCLT
- ▲ No need of separate RBI / IT approval
- ▲ Provisions of valuation by Registered Valuer are not specified



- ▲ Approval required from majority of each class of Creditors holding 90% in value, may be difficult especially from trade creditors
- ▲ There is no clarity on which person to be considered as affected by the scheme for giving the notice
- ▲ No clarity, what shall be impact of objections, if any

Cross Border Merger



Impact Analysis of Cross Border Merger



- Flexibility for company structuring overseas
- Cross Border restructuring will increase
- Opportunity for Indian companies to form corporate strategies on a global scale



- Scope of inbound mergers may get restricted to notified jurisdictions

Minority Exit Opportunity

ACQUISITION U/S 235 / 236

Where acquirer becomes registered holder of 90% or more of the issued shares due to scheme or contract involving transfer of shares or by virtue of an amalgamation, shares exchange, Conversion of Securities, then Acquirer have to buy the minority shares as per following formula for price determination :-

➤ IN CASE OF LISTED COMPANY

- ❖ Price as per SEBI Regulations; *[It implies that through Merger a person may go beyond 75%]*
- ❖ Registered valuer to provide valuation report to the Board of Directors of the company justifying the methodology of arriving at such price

➤ IN CASE OF UNLISTED CO. (INCLUDING PVT)

- ❖ The highest price paid by the acquirer, person or group of persons for acquisition during last twelve months;
- ❖ fair price of shares of the company to be determined by the registered valuer after taking into account valuation parameters

Impact Analysis of Minority Exit



Provides an exit option to minority shareholders in unlisted companies as well .

Issues:

- Inconsistency between Companies Act, 2013 and SEBI delisting regulations which provide that purchase price for minority shareholders should be determined as per reverse book building
- Duty is casted but No right to Squeeze out provided for acquirer

Merger of listed company with unlisted company

- On merger of listed company with unlisted company, the transferee company shall remain an unlisted company until it becomes a listed company
- Provision for an exit route for shareholders of the Transferor Company
- Payment of value of shares and other benefits in accordance with pre-determined price formula or as per prescribed valuation

Impact Analysis of Merger of listed company with unlisted company



- Streamlined the entire process of merger
- Dissenting shareholder will get exit opportunity

Issue: Inconsistency between Companies Act, 2013 and SEBI Delisting Regulations

Single Window Clearance

When a scheme envisages various incidental proposals as an integral part of the scheme, the procedures prescribed under the Companies Act, need not be separately undertaken.

Single Window Clearance

- *Change of name of the amalgamated company to the name of amalgamating company*
- *Change of Registered Office of the transferee company*
- *Reduction of Share capital*
- *Conversion of status of a company (Private Limited to Public Limited and vice-versa)*
- *Sanction of a Scheme without power to amalgamate in the memorandum of association*
- *Increase in authorised Share Capital post amalgamation*
- *Change of object clause through the Scheme*



Merger Tax Laws

When its Amalgamation within the meaning of Income Tax Act

- Carry forward and set off of accumulated loss and unabsorbed depreciation allowance
- Capital Gains Tax Exemption
- Amortisation of Preliminary Expenses
- Capital Expenditure on Scientific Research
- Expenditure on Acquisition of Patent Right or Copyright
- Expenditure on Amalgamation
- Expenditure on know-how
- Expenditure for obtaining Licence to Operate Telecommunication Services

Demerger



The Companies Act, 2013 provides for the reference to the concept of 'de-merger' in the following sections–

- (a) Section 230/232 – as a scheme of compromise, arrangement or reconstruction ; a scheme involving a division, wherein the undertaking, property and liabilities of the company in respect of which the compromise or arrangement is proposed are to be divided among and transferred to two or more companies each of which is either an existing company or a new company; and
- (b) Section 180(1)(a) – sale, lease or otherwise dispose of –
 - the whole of the undertaking of the company; or
 - substantially the whole of the undertaking of the company; or
 - if the company owns more than one undertaking, of the whole, or substantially the whole, of any such undertaking.

Types

- **Partial Demerger** - one of the undertakings or a part of the undertaking or a department or a division of an existing company is separated and transferred to one or more new company/companies
- **Complete Demerger** - In the first case, i.e. in the case of partial demerger, the existing company also continues to maintain its separate legal identity and the new company, a separate legal identity, carries on the separated or spun off business and undertaking of the existing company.

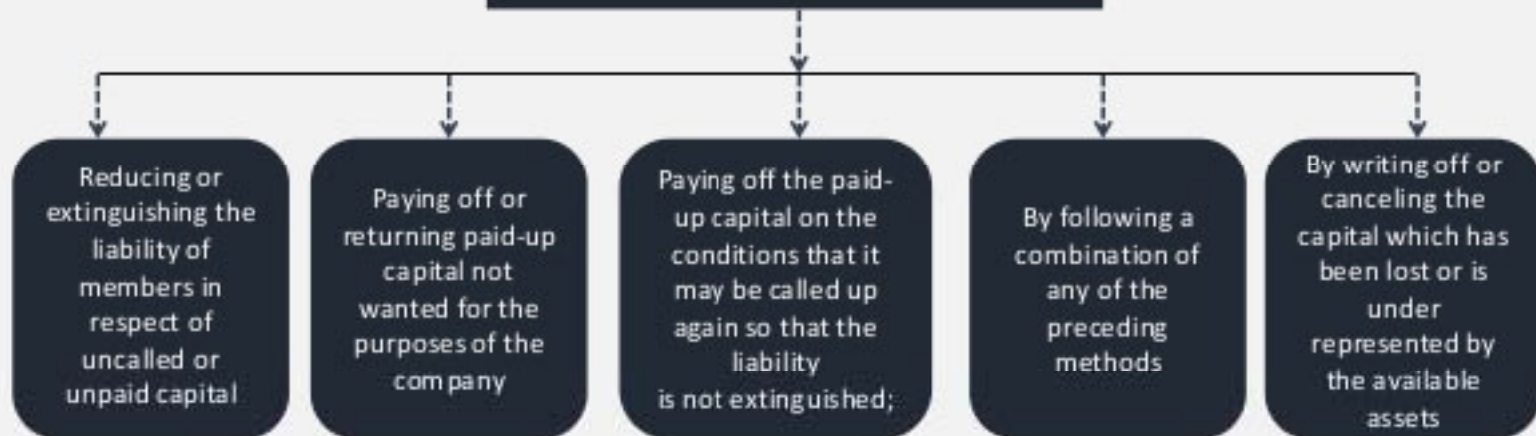
Demerger Tax Laws

When its Demerger within the meaning of Income Tax Act

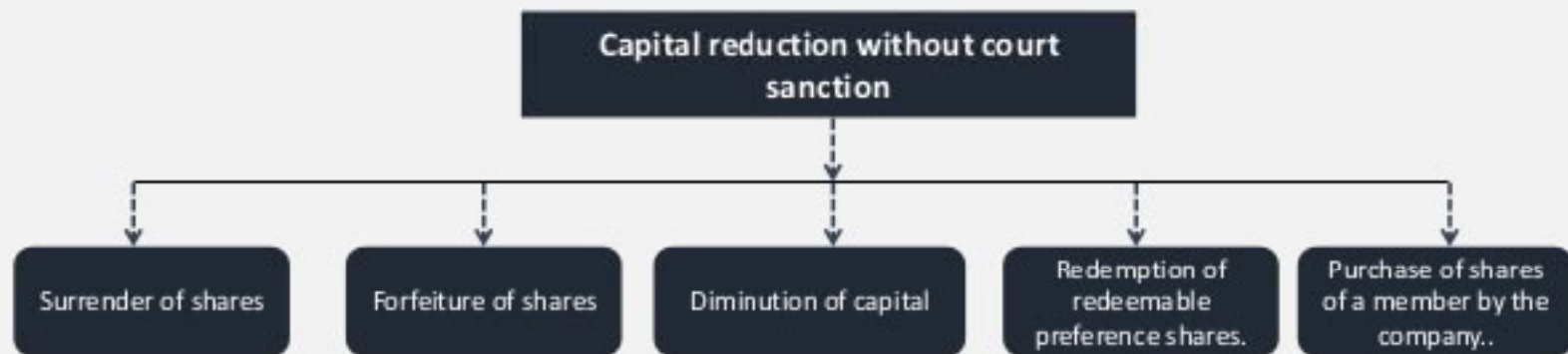
- ⦿ Capital gains tax not attracted [Section 47(vib)]
- ⦿ Tax concession to a foreign demerged company [Section 47(vic)]
- ⦿ Carry forward and set off of business losses and unabsorbed depreciation of the demerged company [Section 72A(4) & (5)]
- ⦿ Deduction available under section 80-1A(12) or 80-1B(12)
- ⦿ Amortisation of expenditure in case of demerger [Section 35DD]
- ⦿ Treatment of bad debts [Section 36(1)(vii)]

Reduction of Share Capital

Modes of reduction of share capital



Reduction of Share Capital



Reduction of Share Capital

Reasons

- Trading Losses
- heavy capital expenses and assets of reduced or doubtful value
- To write off unrecognized expenditure
- To maintain debt-equity ratio
- For raising fresh finance.

Judicial Pronouncements



Increase in authorized capital due to clubbing on account of amalgamation does not require the payment of registration fee or the stamp duty again.

[Jaypee Cement Limited v. Jayprakash Industries Limited [2004] 2 Comp LJ 105 (All) / [2004] XXXIV CS LW 50]



Insufficient authorized capital on appointed date is not a ground of rejection. Company can increase its authorized capital after sanctioning of the scheme.

[Re: Mahavir Weaves Pvt. Ltd. (1985) 83 Comp. Cas 180]



A *bona fide* scheme can be sanctioned even if an order of winding-up has been made and a liquidator has been appointed.

[In Meghal Homes Private Limited v. Shreeniwas Girmikk Samiti and others (2007) 78 SCL 482 (SC)]

SEBI Latest Development

Fast Track Merger in true sense

Exemption from filing with SEBI
and its observations thereof

Merger of Wholly-owned subsidiary with Parent
Company

Where Unlisted Company is
being merged with Listed
Company

Disclosure of material Information by the unlisted
company as per the format of abridged format

Allowed only if listed company is listed on Stock
Exchange having nationwide trading terminal

A target with several arrows hitting the bullseye, set against a dark background.

Stamp Duty aspects

Stamp Duty is leviable :

- ✓ On the execution of an instrument (not on transactions)
- ✓ Only on Instruments mentioned in the Schedules
- ✓ At the rate prescribed in the Schedule by the particular State Government

Whether order of the Court for amalgamation is an instrument of conveyance under the Stamp Act or not?

Stamp duty aspects

Constitution of India

Power of Union Government to prescribe rates

Entry 91 - bills of exchange, cheque, promissory notes, bills of lading, letters of credit, Policies of Insurance, Transfer of Shares, Debentures, Proxies and Receipts

Power of State Government to prescribe rates

Entry 63- Stamp duty in respect of documents other than those specified in the provisions of list I with regard to rates of stamp duty.

Concurrent list

Stamp Duty aspects – Judicial Pronouncements

- ✓ Court order is an instrument of conveyance citing inter-vivos transfer

[Hindustan Lever Vs. State of Maharashtra (2004) 1 CLJ 148 (SC)]

- ✓ States can levy stamp duty on High Court's order considering it as instrument on the number of shares issued plus consideration and not on gross value of assets transferred.

[Li Taka Pharmaceuticals v. State of Maharashtra (Bombay High Court)]

A Big and New area of Practice is opened for Professionals under “Sick Companies”

1. Timely detection of sick company

Professionals can identify the sickness of the company as defined under the Act and place the matter before the Board of Directors of the company to take necessary action for making reference to the Tribunal for revival and rehabilitation of the Company.

2. Making a reference of sick industrial company to NCLT

Professionals may assist and advise the Sick Company in making reference to the Tribunal, preparing scheme of rehabilitation, seeking various approvals from the Tribunal as may be required

**Scope for Professionals under
the head of
“Reduction of Capital”**

As per Section 66 of companies act, 2013 subject to confirmation by the Tribunal, a Company Limited by Shares or a Company Limited by Guarantee and having a Share Capital not so authorized by its articles may pass a Special Resolution to reduce its share capital.

The Professionals (CA/CS/CL) will be able to represent cases for reduction of capital before the tribunal.

Professionals can be Member of the NCLT

Professionals
(CA/CS/CMA) can
be appointed as a
Technical Member
of NCLT, provided
he has 15 years
working
experience as
Secretary in
Whole-Time
Practice.

Professionals can be a Registered Valuer.

- ❖ All valuation under the Act can be done by a Registered Valuer.
- ❖ Professionals (CA/CS/CMA) can be Registered as Registered Valuer (having 5 years continuous experience after taking Membership M

Definition of Registered Valuer

[Rule 2(1)(f) of the Companies (Registered Valuers and Valuation) Rules, 2017]

“Registered Valuer” Is A Valuer Registered With The Registration Authority Under Rule 7(6) For Carrying Out Valuation Of Assets Belonging To A Class Or Classes Of Assets

Eligibility for Registered Valuers

Eligibility:- Rule -5 of the COMPANIES (REGISTERED VALUERS AND VALUATION) RULES, 2017

- (1) No individual shall be eligible to be a registered valuer if he**
 - (a) has not passed the Valuation Examination in the three years preceding the date of making an application under Rule 7;**
 - (b) does not have the qualification and experience specified in Rule 6**
 - (c) is a minor;**
 - (d) has been declared to be of unsound mind;**
 - (e) is an undischarged bankrupt, or has applied to be adjudicated as an bankrupt;**
 - (f) is a person not resident in India;**

Eligibility for Registered Valuers

is a person not resident in India;

has been convicted by any competent court for an offence punishable with imprisonment for a term exceeding six months or for an offence involving moral turpitude, and a period of five years has not elapsed from the date of expiry of sentence:

Provided that if a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be registered;

is not a valuer member (holding certificate of practice) of a valuation professional organisation; or

is not a fit and proper person:

Qualifications and Experience for Registered Valuer

Individual shall have the following qualifications to be eligible for registration under Rule 5 -

post-graduate degree, in the specified discipline, from a University established, recognized or incorporated by law in India and at least three years of experience in the discipline thereafter; or

a Bachelor's degree, in the specified discipline, from a university established, recognized or incorporated by law in India and at least five years of experience in the discipline thereafter; or

membership of a professional institute set up under an Act of Parliament and at least five years' experience after such membership.

Valuation Examination.

Rule -4 Companies (Registered Valuers And Valuation) Rules, 2017

The Registration Authority shall, either on its own or through a designated agency, conduct Valuation Examination to test the knowledge, practical skills and ethics of individuals in respect of valuation.

The Registration Authority shall, on the recommendations of a Committee of Experts constituted by it, determine the syllabus for the Valuation Examination.

The format and frequency of the Valuation Examination, including qualifying marks, shall be published on the website of the Registration Authority at least three months before the examination.

A person may appear for the Valuation Examination any number of times.

Section 2(1)(g) “Registration Authority” means the Insolvency and Bankruptcy Board of India established under the Insolvency and Bankruptcy Code, 2016 (31 of 2016)

Application for certificate of registration.

Rule -7 Companies (Registered Valuers And Valuation) Rules, 2017

(1) An individual eligible for registration as a registered valuer under Rule 5 may make an application to the Registration Authority in Form A of Schedule II, along with a non-refundable application fee of ten thousand rupees in favour of the Registration Authority.

(2) A partnership entity eligible for registration as a registered valuer under Rule 5 may make an application to the Registration Authority in Form B of Schedule II, along with a non-refundable application fee of ten thousand rupees in favour of the Registration Authority or partnership entity

Schedule of Fees in NCLT

The fees payable are towards various Applications, Petitions, documents etc in **NCLT**. The minimum **fees is Rs 500 and maximum is Rs 10,000**. However, Rs 5 is prescribed towards per page for obtaining a certified copy of the order passed by **NCLT**.

- ❖ Application in cases of oppression and mismanagement under Section 241 (1) is Rs **10,000/-**
- ❖ Fees for Application for appointment as MD u/s 243(1)(b), for investigation into company affairs u/s 213, for Voluntary Revision of Financial Statement, for change in financial year u/s 2 (41), Conversion of public company into a private company U/S 14(1) **is Rs.5000/-**
- ❖ Fees for Appeal/Application for rectification of register of member, for calling of AGM under Section 97 (1), compounding of certain offences u/s 441, and other not mentioned above **is Rs. 1000/-**

SCHEDULE OF FEES

S.No.	Section of the Companies Act, 2013	Nature of application / petition	Fees
1.	Sec. 2 (41)	Application for change in financial year	5,000/-
2.	Sec. 7 (7)	Application to Tribunal where company has been incorporated by furnishing false or incorrect info or by any fraudulent action.	5,000/-
3.	Sec. 14 (1)	Conversion of public company into a private company.	5,000/-
4.	Sec. 55 (3)	Application for issue further redeemable preference shares.	5,000/-
5.	Sec. 58 (3)	Appeal against refusal of registration of shares.	1,000/-
6.	Sec. 59	Appeal for rectification of register of member.	1,000/-
7.	Sec. 62 (4)	Appeal against order of Govt. fixing terms and conditions for conversion of debentures and shares.	5,000/-
8.	Sec. 71 (9)	Petition by Debenture-trustees.	2,000/-
9.	Sec. 71 (10)	Application in the event of failure of redeeming of debentures.	1,000/-
10.	Sec. 73 (4)	Application by deposition for repayment of deposit or interest.	500/-
11.	Sec. 74 (2)	Application to allow further time as considered reasonable to the company to repay deposits. I	5,000/-
12.	Sec. 97 (1)	Application for calling of Annual General meeting.	1,000/-
13.	Sec. 98 (1)	Application for calling of general meeting of company other than annual general meeting	1,000/-
14.	Sec. 119 (4)	Petition to pass an order directing immediate inspection of minute's books or directing a copy thereof be sent forthwith	500/-

		to person requiring it.	
15.	Sec. 130 (1)	Application for re-opening of books of account, if made by any person other than Central Government, Income Tax authorities, SEBI or any other statutory regulatory body or authority.	5,000/-
16.	Sec. 131 (1)	Application by company for voluntary revision of financial statement on Board's report.	5,000/-
17.	Sec. 140 (4)	Application for not sending the copy of representation of auditor to the members.	1,000/-
18.	Sec. 140 (5)	Application by any other person concerned for change of auditors.	2,000/-
19.	Sec. 169 (4)	Application for not sending copies of representation	1,000/-
20.	Sec. 213	Application to Tribunal for investigation into company affairs.	5,000/-
21.	Sec. 218 (1)	Application for approval for action proposed against employee.	1,000/-
22.	Sec. 222 (1)	Application for imposition of restrictions on securities.	2,500/-
23.	Sec. 241 (1)	Application in cases of oppression and mismanagement.	10,000/-
24.	Sec. 242 (4)	Application for regulating the conduct of company.	2,500/-
25.	Sec. 243 (1) (b)	Application for appointment as Managing Director	5,000/-
26.	Sec. 244 (1)	Application for waiver of requirement specified in clause (a) or (b) of Sec. 244 (1)	2,500/-
27.	Sec 245	Class action suits	5000/-
28.	Sec. 441	Application for compounding of certain offences.	1,000/-
29.	Section 421	Appeals to NCLAT	5,000/-
30.	Application under any other provisions specifically not mentioned herein above		1,000/-
31.	Fee for obtaining certified true copy of final order passed to parties other than the concerned parties under Rule 50		5/- per page.

THANK YOU