INDIA

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1. INTRODUCTION

The guide introduces a number of key aspects relating to mergers and acquisitions, based on the current tax and regulatory environment in India.

a. Forms of Legal Entity

An overview of available types of legal entities used for investment in India are as follows:

i Company

A company is an artificial jurisdictional person having a separate legal entity. It is incorporated and regulated by the provisions of Companies Act, 2013 (CA 2013) and governed by the Ministry of Corporate Affairs. A company is permitted to carry out only those activities that are specified in its memorandum of association.

Funding options available for a company inter alia include equity shares, preference shares, other forms of permitted borrowings (local and overseas as per prescribed norms) or internal accruals. Foreign investments in a company are subject to Foreign Direct Investment ("FDI") Regulations. The income of a company is liable to tax based on domestic tax rates. Dividends received from a company are liable to tax in the hands of shareholders.

ii Limited Liability Partnership ("LLP")

An LLP is a form of business entity through which individual partners are shielded from the liabilities created by another partner's business decision or misconduct. An LLP is a body corporate existing as a legal person separate from its partners. LLPs are incorporated and regulated by the Limited Liability Partnership Act, 2008 and they are governed by the Ministry of Corporate Affairs. An LLP is permitted to carry out those activities which are agreed between the partners in the LLP Agreement.

An LLP is generally funded with partner's capital. Foreign Direct Investments ("FDI") are permitted in an LLP engaged in activities/sectors for which 100% FDI is allowed under the automatic route (i.e. without prior approval of the Government or the Reserve Bank of India ("RBI") and there are no sector specific conditions for receiving foreign investment). The profits of an LLP are liable to tax based on domestic tax rates. Profits after tax in the hands of the LLP, are freely distributable to the partners as their share in the profit of the LLP and are not liable to any further tax in India in the hands of the LLP or the partner.

iii Partnership

A partnership is created by two or more persons, by entering into an agreement to share the profits of a business carried on by them. The ownership and liability of all partners of the partnership is joint, unlimited and several. Partnerships are created and regulated by the Indian Partnership Act, 1932 and are governed by the regional registrar of firms. A partnership agreement forms the constitutive documents of a partnership and lays down the manner in which the partners would operate the business. A partnership is generally funded through the partners' capital contribution. Any investment by foreign entities is permitted in Indian partnerships subject to prior approval of the RBI. Profits of a partnership are liable to tax based on domestic tax rates. Such profits after tax in the hands of the partnership, are freely distributable to the partners as their share in profit of the partnership and are not liable to any further tax in India in the hands of the partnership or the partner.

iv Liaison Office ("LO")

The LO functions as a representative office of a foreign company and it has no separate legal existence in India. A LO can undertake only liaison activities and the role of such offices is thus, limited to representing, promoting export/import, promoting technical/ financial collaborations, and acting as a communication channel. A LO can be set up with prior consent of an Authorised Dealer ("AD") banker in a sector in which 100% FDI is allowed. For the remaining sectors, RBI approval may be required.

Generally, a LO does not constitute a permanent establishment ("PE")/business connection in India. However, this issue has been a subject matter of litigation and depends on the facts of each case. If a LO is held to be constituting a PE/ business connection in India, then the profits attributable to such PE/business connection in India shall be subject to tax in India.

v Branch Office ("BO")

A BO represents a foreign company in India and is generally not treated as a separate legal entity. The operations of a BO are restricted in India due to limitations under exchange control regulations. The activities permitted for a BO in India are limited to export/import of goods, rendering of professional/consultancy services, carrying out research work, promoting technical and financial collaborations, acting as a buying/selling agent, rendering services like information technology, development of software, technical support to the products supplied. Accordingly, a BO is generally set up where the activities carried out in India are limited. The BO is permitted to remit surplus revenues to its foreign head office subject to applicable taxes being discharged in India. A BO is treated as a PE/business connection of the foreign enterprise and profits attributable to the BO are taxed at 40% (plus applicable surcharge and education cess). A BO of foreign company can claim only limited tax deductions for general administrative expenses incurred by the BO. These expenses should not exceed 5% of the annual income of the BO or the actual payment of head office expenses attributable to Indian business, whichever is lower.

vi Project Office ("PO")

A foreign company preferably engaged in one off turnkey or installation project, generally sets up a PO in India. A PO does not constitute a separate legal entity in India. A PO can be set up with approval from the AD Banker. A PO is permitted to operate a bank account in India and may remit surplus revenue from the project to the foreign company. Like the LO, if a PO is held to be constituting a PE/business connection in India then the profits attributable to such PE/business connection shall be subject to tax in India.

b. Taxes, Tax Rates

Tax rates in India are subject to change every year. The applicable effective rates of tax proposed for tax year 2022-23 are as follows:

Particulars	Taxable income below INR10 million	Taxable income between INR10 million to INR100 million	Taxable income exceeding INR100 million
Domestic Company - if turnover or gross receipt does not exceed INR4 billion in the FY 2020-21)	26.00%	27.82%	29.12%
Domestic company - Other cases	31.20%	33.38%	34.94%
Other domestic companies not availing incentives (optional regime)	25.17%	25.17%	25.17%
New manufacturing companies set up and registered on or after 1 October 2019 and has commenced manufacturing and production on or before 31 March 2024 not availing incentives (optional regime)	17.16%	17.16%	17.16%
LLP/ Partnership firm	31.20%	34.94%	34.94%
Foreign company	41.60%	42.43%	43.68%

The effective tax rate is a basic tax rate plus applicable surcharge and health and education cess ("cess") representing an additional levy that is computed on the basic tax and surcharge liability.

2. RECENT DEVELOPMENTS

The following key recent changes to the Indian tax and regulatory framework may affect the mergers and acquisition landscape in India.

a. Taxation of Virtual Digital Asset

The Finance Act, 2022, introduced taxation on virtual digital assets ("VDA"). As per the proposed definition, VDA would include any information or code or number or token (not being Indian currency or any foreign currency), generated through cryptographic means or otherwise, by whatever name called, providing a digital representation of value which is exchanged with or without consideration, with the promise or representation of having inherent value, or functions as a store of value or a unit of account and includes its use in any financial transaction or investment, but not limited to, investment schemes and can be transferred, stored or traded electronically. Non fungible tokens and any other token of similar nature are included in the definition.

From 1 April 2022, 30% tax shall be charged on the incomes arising from the transfer of any VDA, whether in cash or kind. Cess and surcharges, if any applicable, would be charged over and above that tax. The Finance Act, 2022 clearly enunciates that no deduction would be allowed from the income except the cost of acquisition thereof. Nor would the losses, if any, be allowed for set off of any losses or other income(s), in any manner. Withholding tax at source at 1% of the payment amount and directly depositing with the government has also been incorporated. Exceptions for small transactions have also been proposed from withholding tax requirements.

b. Tax on bonus stripping

Bonus stripping refers to a concept wherein an artificial capital loss is created by the taxpayers by way of purchase of cum-bonus securities and their disposal immediately after the allotment of bonus shares. Bonus stripping in the case of units of mutual funds was not permissible in India and any artificial loss created using such method would be reversed for taxation purposes. Finance Act, 2022 extended the applicability of such provisions to securities and units of Infrastructure Investment Trust ("InvIT"), Real Estate Investment Trust ("REIT") and Alternative Investment Funds ("AIFs"). This would discourage investors in such securities from wallowing in investment practices that previously provided them with unintended tax benefits.

c. Capping of Surcharge on Long Term Capital Gains

Currently, Individuals and Hindu Undivided Families ("HUFs") are subject to a maximum rate of surcharge at 37% in respect of entire income, other than capital gains on listed shares and dividends, wherein surcharge is capped at 15%. The Finance Act, 2022 extended capping of surcharge at the rate of 15% for long term capital gains arising on sale of any capital asset. The proposal reduces the maximum effective tax rate on long term capital gains from 28.5% to 23.92%.

d. Chargeability to Equalisation Levy ("EL")

The Finance Act, 2016 introduced EL with effect from 1 June 2016, to be levied at 6% on the gross consideration received by non-residents for online advertisement and related services from specified persons. Further, the Finance Act, 2020 which came into effect from 1 April 2020 extended the scope of EL to charge a 2% levy on gross consideration received from online sale of goods or provision of services (including facilitation) by a non-resident operator of a digital facility or platform. The Act provided for an exemption from income tax where the amount was subject to EL (i.e. mutual exclusion as well). The Finance Act, 2021 provided as follows:

- Taxation as royalty or fee for technical services under the income tax law would have priority over EL.
- In order to be regarded as "online sale of goods" and "online provision of services" for e-commerce supply or service, one or more of the following activities need to be undertaken online. These are, namely: a) acceptance of offer for sale; b) placing purchase order; c) acceptance of purchase order; d) payment of consideration or e) supply of goods or provision of services, partly or wholly.
- Consideration received/receivable for sale of goods and provision of services will be included for computation of gross consideration regardless of whether the e-commerce operator owns the goods or provides the service.

Based on the Multilateral Convention, all jurisdictions are required to remove all Digital Services Taxes and other relevant similar measures and provide a commitment to refrain from introducing such measures in the future. In view of this, no newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023, or the coming into force of the MLC.

On 8 October 2021, India and the US joined 134 other members of the OECD/G20 Inclusive Framework (including Austria, France, Italy, Spain, and the UK) in reaching agreement on the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. India and the US have agreed that the same terms that apply under the 21 October Joint Statement shall apply between the US and India with respect to India's charge of 2% equalisation levy on e-commerce supply of services and the US's trade action regarding the said Equalisation Levy. However, the interim period that will be applicable will be from 1 April 2022 until implementation of Pillar One or 31 March 2024, whichever is earlier. The final terms of the Agreement shall be finalised in 2022.

e. Abolition of dividend distribution tax

Previously, domestic companies paying dividends to shareholders were required to pay dividend distribution tax ("DDT") at 20.56% and such dividend was tax exempt in India in the hands of the shareholders. Finance Act, 2020 abolished DDT and shifted the taxability of dividends to the classical system wherein the shareholders are taxed on dividend income. New provisions have been introduced to remove the cascading effect of tax on dividends received by a holding company from its subsidiary company on payment of a dividend to the shareholders of the holding company. Dividends distributed to non-resident shareholders are liable to withholding at 20% or the respective Double Tax Treaty ("DTT") rate, whichever is more beneficial. Non-resident shareholders may, subject to the domestic laws of their jurisdiction, be eligible to avail credit of taxes withheld on dividend which was a disputed issue under the existing regime. Further, the Finance Act provided that dividends paid to Foreign Institutional Investors ("FII") from certain securities shall be subject to withholding tax at the rate of 20% or the DTT rate, whichever is lower, subject to the FII furnishing a Tax Residency Certificate to the payer.

Presently, dividend income received by an Indian company from a specified foreign company is eligible to claim concessional tax at 15% plus surcharge and cess. Finance Act, 2022 withdrew the benefit of concessional rate of tax on the dividend income received by the Indian company from a specified foreign company on or after 1 April 2023.

f. Clarifications on the interpretation of Most Favoured Nation ("MFN") clause

Tax treaties entered into by India with certain jurisdictions including France, the Netherlands, and the Swiss Confederation ("MFN jurisdictions") contain a MFN clause. By virtue of the MFN clause, India has restricted its right to tax certain income (i.e. interest, dividends, fees for technical services, etc), on the basis of a scope more restricted or a reduced rate as India may have agreed in its tax treaty or protocol to such treaty with a third state. Recently, the Central Board of Direct Taxes ("CBDT") has issued a Circular clarifying the applicability of the MFN clause. The CBDT issued the following clarifications regarding interpretation of tax treaties in the circular:

- Unilateral interpretation does not represent India's understanding on the MFN clause;
- There is a requirement for the third state to be an OECD member on the date of conclusion of the tax treaty;
- Concessional tax rates/restricted scope applies from the entry into force of the tax treaty with the third state; and
- The MFN clause benefit cannot be availed as India has not issued any notification in the Official Gazette.

Further, the Circular restricts the applicability of the MFN clause in a tax treaty between India and another country (the second State) to cases where all the following conditions are satisfied:

- The second tax treaty (with the third state) is entered into after entry into force or signature of India's tax treaty with the first state;
- The third state is an OECD member at the time of signing of tax treaty with India;
- India limits its taxing rights in the tax treaty with the second jurisdiction in relation to rate/scope of taxation in respect of relevant income; and
- A separate notification has been issued by India for importing benefits of second tax treaty into India's tax treaty with First State.

g. General Anti-Avoidance Rules ("GAAR")

GAAR provisions were first introduced in India by Finance Act, 2012. However, after its introduction, the GAAR's applicability was deferred and finally, it came into force from FY 2017/18. Further, the CBDT via circular 7 of 2017 dated 27 January 2017 issued certain clarifications in the form of frequently asked questions ("FAQs") on the provisions of the GAAR. One of the key clarifications in the circular was that GAAR will not apply to an arrangement where the Court/National Company Law Tribunal ("NCLT") has explicitly and adequately considered the tax implications while sanctioning such arrangement.

CBDT via letter dated 7 April 2021 has notified the composition of the Approving Panel for making references under GAAR. Further CBDT, via letter dated 11 February 2022 has notified that GAAR Secretariat has been set up in Delhi and all the references need to be sent directly to the GAAR Secretariat. GAAR reference can be made to the Approving panel, in cases where a taxpayer objects to a notice issued declaring an arrangement as an impermissible avoidance arrangement and determining the consequences thereof and where the taxpayer's explanation is found unsatisfactory.

h. Benefits available to International Financial Service Centre (“IFSC”) in India

In 2015, the Government of India announced establishment of Gujarat International Financial Tech-City, in Gujarat as India’s first IFSC. The purpose of setting up the IFSC is to develop a world class smart city that becomes a global financial hub. The IFSC seeks to bring to the Indian shores, those financial services transactions that are currently carried on outside India by overseas financial institutions and overseas branches /subsidiaries of Indian financial institutions. The IFSC is an emerging clean and transparent offshore finance jurisdiction for international financial services. Special benefits, exemptions and deductions are allowed to the units located in an IFSC. Some of the key tax benefits provided to units located in an IFSC are:

- Relaxations in Long Term Capital Gains (“LTCG”) and short term capital gains : LTCG on transfer of Equity Share in a Company or units of an equity-oriented fund or units of a business trust on which Securities Transaction Tax (“STT”) is paid, is usually taxable at 10%. However, the LTCG on transfer of the above mentioned capital asset through a stock exchange located in IFSC is totally exempt even if STT is not paid. Further, short-term capital gains in certain situations, where the transaction is undertaken on a stock exchange situated in IFSC, the concessional rate of 15% will be available on such transaction, even if STT is not paid.
- Lower minimum alternate tax : concessional minimum alternate tax regime for a company and certain persons other than a company located in an IFSC.
- Transactions not regarded as transfer : Any transfer of below capital assets, made by a non-resident on a recognised stock exchange located in any IFSC and where the consideration for such transaction is paid or payable in foreign currency is not considered as a transfer and hence not liable to Capital Gain Tax. These capital assets include:
  - Bond or Global Depository Receipt;
  - Rupee denominated bond of an Indian company;
  - Derivatives; and
  - Such other securities as may be notified by the Central Government in this behalf.
- Concessional rate to bonds listed in stock exchanges in IFSC : The tax shall be withheld and 5% on interest paid to non-residents, in respect of monies borrowed by it from a source outside India by way of issue of any long term bond or rupee denominated bond which is listed only on a recognised stock exchange located in any IFSC, on or after 1 April 2020 but before 1 July 2023.
- Relaxations in certain conditions for relocation of eligible fund manager : The Government shall make a public notification of certain conditions that shall not apply, or apply with modifications, in case of an eligible investment fund and its eligible fund manager, if such fund manager is located in an IFSC and has commenced its operations on or before 31 March 2024.
- Exemption to investment division of offshore banking unit : An exemption shall be provided to specified funds in case of any income accrued, arising to, or received by the investment division of an offshore banking unit, to the extent attributable to it and computed in the prescribed manner.
- Exemption to non-resident on transfer of non-deliverable forward contracts and on royalty income by way of lease of an aircraft : An exemption shall be provided in the hands of non-residents on any income accrued, arising to, or received by a non-resident as a result of transfer of non-deliverable forward contracts entered into with an offshore banking unit of IFSC which commenced operations on or before the 31 March 2024 and fulfils prescribed conditions.

Subject to same date of commencement of operations as above, royalty/interest income by way of lease of an aircraft paid by a unit of an IFSC shall be exempt in the hands of non-residents. In this regard, both the nature of lease shall qualify operating as well as finance lease for the exemption (i.e. income in the form of royalty or interest). Further, an aircraft is defined as "an aircraft or a helicopter, or an engine of an aircraft or a helicopter, or any part thereof".

- Exemption of capital gains and carry forward and set off of losses, as a result of relocation of a fund : An exemption shall be provided to any income of the nature of capital gains, arising or received by a non-resident, which is as a result of relocation from the original fund to the resultant fund. This exemption shall be available to Category-III Alternative Investment Fund for only when qualifies as a specified fund, only to the extent of income attributable to units held by non-resident (not being a permanent establishment of a non-resident in India) in such specified fund.

In respect of the carry forward and set off of losses, Indian tax laws provide that benefit of carry forward and set off of loss will be available only if 51% or more of voting power is common in the year in which loss was incurred and the year in which set off is sought. The Finance Act, 2021 specified that this restriction pertaining to the carry forward and set off of losses will not apply wherein the change in shareholding pattern has taken place on account of relocation between original fund and resultant fund, which are defined as below:

For the meanings of original fund, relocation and resultant fund, please refer to Section 2.h.

- Extension of income based tax holiday for units located in an IFSC : It is proposed that income arising from transfer of an asset, being an aircraft or aircraft engine which was leased by any unit of the IFSC from its business for which it has been approved for setting up in such a Centre in a Special Economic Zone to a domestic company engaged in the business of operation of aircraft before such transfer shall also be eligible for 100% deduction subject to condition that the unit has commenced operation on or before 31 March 2024.
- Exemption extended to investment division of offshore banking unit : The exemption provisions have been extended to income attributable to the investment division of an Offshore Banking Unit ("OBU").
- Taxation of Income from Global Depository Receipts ("GDRs") issued by Overseas Depository Bank situated outside India or IFSC : Where an Indian company distributes dividends in respect of GDRs issued to its employees under an Employees' Stock Option Scheme, the dividend is taxable at a concessional tax rate of 10% in the hands of the employee, provided the employee is a resident in India and GDRs are purchased in foreign currency. The long term capital gains arising from transfer of such GDRs shall also be taxable at concessional rate of 10%. The Finance Act, 2021 has amended the definition of GDRs to provide that they can be created by the Overseas Depository Bank in an IFSC as well. Further, GDRs can also be issued against ordinary shares of issuing company, being a company incorporated outside India, if such depository receipt or certificate is listed and traded on any IFSC.

Further, the Finance Act, 2022 included the below amendments in respect of IFSC:

- Income accruing or arising to or received by a non-resident as a result of transfer of non-deliverable forward contracts entered into with an OBU of an IFSC is exempted from tax. Such exemption is not extended to income accrued or arisen to or received by a non-resident as a result of transfer of 'offshore derivative instruments' or 'over-the-counter derivatives' entered into with an OBU of an IFSC.
- Royalty and interest income of a non-resident on lease of an aircraft if it is paid by a unit in IFSC is exempt from tax. Such tax exemption is also extended to royalty and interest income of a non-resident on the lease of a "ship" if it is paid by a unit of IFSC. Further, a ship is defined to mean a ship or an ocean vessel, an engine of a ship or an ocean vessel, or any part thereof.

- Further, certain incomes of an IFSC Unit are allowed as a deduction for 10 years out of the 15 years. Such deduction is proposed to be extended to income arising from the transfer of an asset being a 'ship' which was leased by a unit of IFSC to any person.
- It is proposed to provide an exemption for income of a non-resident from a portfolio of securities or financial products or funds, managed or administered by any portfolio manager on behalf of such non-resident, in an account maintained with an OBU in an IFSC, to the extent that such income accrues or arises outside India and is not deemed to accrue or arise in India.
- Deemed gift rules shall not apply to excess share premium received by an Indian Company from a Category I or Category II Alternate Investment Fund regulated under the International Financial Services Centres Authority Act, 2019.
- Proposals for opening of an International Arbitration Centre in the GIFT City and providing state of art education facilities by allowing world-class foreign universities and institutions in the GIFT City to offer courses in Financial Management, FinTech, Science, Technology, Engineering and Mathematics free from domestic regulations.

i. Overseas listing

Presently, Indian companies are allowed to access overseas equity markets only through American depositary receipts ("ADR"), Global depositary receipts ("GDR"), foreign currency convertible bonds and masala bonds on foreign markets. Section 23 of CA 2013 allows listing of shares of companies in permitted stock exchanges. Ministry of Corporate Affairs and Securities Exchange Board of India ("SEBI") are yet to announce norms for overseas listing. Previously, the SEBI had suggested that only financially stable companies would be allowed to list in the overseas markets.

j. Carry forward and set-off losses of a public sector company

In respect of carry forward and set off of losses, the Indian tax laws provide that benefit of carry forward and set off of loss will be available only if 51% or more of voting power is common in the year in which loss was incurred and the year in which set off is sought. The Finance Act, 2022, provides for set off and carry forward of losses of a former public sector company ("PSU") if the ultimate holding company of such a company, immediately after the completion of strategic disinvestment, continues to hold either directly or through its subsidiary or subsidiaries, a minimum of 51% of the voting power in aggregate. This allows the buyer of loss making PSUs after its strategic disinvestment (by the Government) to carry forward and set-off of losses. Such proposal is brought to make disinvestment of loss-making PSUs deals (such as Air India, NINL, etc.) more attractive to the investors.

k. COVID-19 response

The Prime Minister of India announced an economic relief package of INR20 trillion with the moto of "Atmanirbhar Bharat". This covers a gamut of economic, financial and social measures with a vision of self-reliant India and development of Global Supply Chain originating in India. The finance minister also announced certain tax measures like extension of compliance timelines, reduction in the rates of withhold taxes on payments made to residents. Though such measures were introduced during the height of the Covid-19 pandemic and certain timelines have since expired, they should still be considered for the calculation of the limitation period in the context of M&A transactions when performing tax due diligence.

The Finance Act, 2022 included the following measures in light of COVID-19 scenario:

- Any sum paid by the employer in respect of any expenditure actually incurred by the employee on medical treatment of self or any family member in respect of any illness relating to COVID-19 subject to such conditions, as may be notified by the Central Government, shall not be liable to tax as income from salary.
- Any sum of money received by an individual, from any person, in respect of any expenditure actually incurred by such individual on medical treatment of self or any family member in respect of any illness relating to COVID-19, and subject to such conditions, as may be notified by the Central Government in this behalf, shall not be treated as the income for that person.
- Any sum of money received by a family member of a deceased person, from the employer of the deceased person (without limit), or from any other person or persons to the extent that such sum or aggregate of such sums does not exceed INR1 million, where the cause of death of such person is illness relating to COVID-19 and the payment is, received within 12 months from the date of death of such person, and subject to such other conditions as may be notified by the Central Government in this behalf, shall not be the treated as income for that person.
- The Emergency Credit Line Guarantee Scheme ("ECLGS") was introduced by the Government of India in May 2020 following the outbreak of the COVID-19 to provide relief to Micro Small and Medium Enterprises ("MSMEs"). As per the scheme, 100% guarantee coverage is to be provided by National Credit Guarantee Trustee Company in relation to additional facilities granted by Member Lending Institutions to eligible MSMEs and Business Enterprises. The Finance Minister has now proposed to extend ECLGS until March 2023 and further proposed to increase the cover of the scheme to INR5,000 billion which will now include additional INR500 billion for hospitality and related enterprises.

l. Aligning the purpose of entering into tax treaty with Multilateral Instruments ("MLI")

- On 14 March 2022, the CBDT released synthesised text for India-Iceland tax treaty, incorporating the changes made by the MLI on the basis of respective positions taken by both the countries.

m. Make in India

- Recent announcements by the Government of India towards 'Make in India' initiative amongst other things include Tariff rationalisations, coordinated regulations, infrastructure improvements, public procurements, grants, continued fiscal support, financing and dispute resolution. This is a booster for reviving the economy and is leading to consolidations and restructuring in the industry.

3. SHARE ACQUISITION

a. General Comments

One of the options to acquire a business is through the acquisition of shares. Share acquisition is probably the most conventional method of acquiring another business. The target company remains exactly the same, only its ownership changes. A share sale in which a capital gain arises results in taxation for the seller of the shares. Further, a deemed gift tax may also be triggered in the hands of the transferee in certain situations. A step up in the cost of the underlying business is not possible in the case of a share sale.

b. Tax attributes

The following are key considerations in connection with a share acquisition:

i Carry forward and set off of losses

Consideration should be given to the potential to set off and carry forward tax losses. In the case of closely held companies, losses are restricted from being carried forward and offset against future profits, unless on the last day of the year in which such losses are sought to be offset, the shares carrying not less than 51% of the voting powers are beneficially held by persons who beneficially held shares carrying at least 51% of the voting powers on the last day of the year in which such losses were incurred. However, carry forward of unabsorbed depreciation remains unaffected by such change in shareholding.

Eligible start-ups are allowed to carry forward their losses for the first seven years indefinitely subject to certain conditions, even if there is a change in more than 49% of their shareholding.

ii Valuation of shares

As discussed above, in the case of transfer of shares at a price lower than the fair market value (“FMV”), the FMV of such shares is deemed to be the full value of consideration for the transfer. Further, in an event where the shares are transferred at less than its FMV, the difference between the FMV of shares and the full value of consideration will be liable to tax in the hands of the transferee as income from other sources. In respect of the above, the FMV of shares is to be determined in a prescribed manner in the tax legislation. Lastly, where the transfer of shares is undertaken between two associated enterprise (“AE”), the transaction needs to be carried out at arm’s length price (“ALP”).

iii Tax clearance

A mechanism exists for obtaining a tax clearance certificate for transfer of assets/business subject to certain conditions. Such an application is typically made when any tax audit (proceeding) is pending against the transferor. In such cases the tax authorities have the power to claim any tax on account of completion of the audit from the transferee where the transfer is made for inadequate consideration.

iv Tax indemnities and warranties

In a share acquisition, the purchaser takes over the target company together with all its related liabilities, including contingent liabilities. Hence, the purchaser generally requires more widespread indemnities and warranties than in the case of an asset acquisition. When significant sums are involved, it is customary for the purchaser to initiate a due diligence exercise.

c. Tax Grouping

Group taxation is not permitted under the Indian tax law.

d. Tax free reorganisations

i Merger and amalgamation of Indian companies

Merging of one company into another company or merging of two or more companies to form a new company requires a National Company Law Tribunal ("NCLT") approval. In India, mergers are used extensively to achieve a tax neutral consolidation of legal entities in the course of corporate reorganisations since they enjoy favourable treatment under the Income Tax Act ("ITA") and other laws, subject to certain conditions. Indian tax law defines "amalgamation" as a merger of one or more companies into another company or a merger of two or more companies to form a new company such that:

- All the properties and liabilities of the amalgamating companies immediately before the amalgamation become the properties and liabilities of the amalgamated company; and
- Shareholders holding at least three-quarters of the shares in the amalgamating companies become shareholders of the amalgamated company (any shares already held by the amalgamated company or its nominees are excluded for purposes of this calculation).

To achieve tax neutrality for the amalgamating company (or companies) transferring the assets and the shareholders of such amalgamating companies, following additional conditions should be satisfied:

- The amalgamated company should be an Indian company; and
- The entire consideration should comprise of shares in the amalgamated company.

ii Demerger of Indian companies

The transfer of a business undertaking by a transferor company to a transferee company for consideration in the form of an issue of shares in the transferee company to the shareholders of the transferor company on a proportionate basis, is regarded as a demerger. A demerger of an undertaking also requires approval from the NCLT. Generally, a demerger is taxed as capital gains. However, if the following conditions are satisfied, then the demerger would be considered tax neutral and would be exempt from capital gains tax.

- All the properties and liabilities of the undertaking immediately before the demerger must become the property or liability of the resulting company by virtue of the demerger and such transfer should be at book value;
- In consideration of the demerger, the resulting company must issue its shares to the shareholders of the demerged company on a proportionate basis (except where the resulting company is itself a shareholder of the demerged company);
- Shareholders holding at least three-quarters of the value of shares in the demerged company become shareholders of the resulting company by virtue of the demerger. Shares in the demerged company already held by the resulting company or its nominee or subsidiary are not considered in calculating three-quarters of the value;
- The transfer of the undertaking must be on a going concern basis; and
- The demerger is subject to any additional conditions as notified by the Central Government.

e. Purchase Agreement

A share purchase agreement ("SPA") is a legal contract between a transferor and transferee of shares. The purchase agreement contains the details of the specific number of shares and the contract price for such transfer. This agreement serves as an evidence that the transfer of shares has taken place at mutually agreeable terms. This agreement also documents the various terms, conditions, representations and warranties agreed between the transferor and transferee. Tax representations, warranties and indemnities in Indian SPA's are typically in line with those accepted internationally.

f. Transfer taxes on share transfers (including mechanisms for disclosure and collection)

i Securities Transaction Tax ("STT")

Transfer of shares through a recognised stock exchange is liable to STT. It is imposed at the rate of 0.1% on both purchase and sale of certain listed instruments through a recognised stock exchange in India. STT is not applicable on transactions undertaken between entities off stock market or on a transfer of shares of unlisted companies.

ii Stamp duty

Generally, delivery based transfers of shares are subject to stamp duty at the rate of 0.015% of the market value of the shares.

iii Income tax on capital gains

Capital gains arising as a result of the transfer of equity shares held for more than a specified holding period (12 months in the case of listed shares and 24 months in the case of unlisted shares) would be taxed as long term capital gains. In all the other cases, capital gains would be treated as short term capital gains. The provisions of the ITA in respect of taxation of capital gains arising on transfer of shares can be summarised as:

Nature of capital gains	Category of capital asset	Tax rate for resident*	Tax rate for non-resident*
LTCG	STT paid on both acquisition and transfer	10% without indexation if the long-term capital gains exceed INR100,000	10% without the benefit of indexation and foreign exchange fluctuation, in case of transfer of securities of unlisted companies and shares of closely held companies. 20% in other cases
	In any other case	20% with indexation	
STCG	STT paid on both acquisition and transfer	15%	40%
	In any other case	Normal domestic tax rates as applicable to the taxpayer	

**Plus surcharge up to 15% and cess at 4%.*

iv Income tax in the hands of the transferee

Where the shares of a company are transferred at a value which is less than the FMV, the excess of the FMV over the sales consideration is liable to tax as income from other sources in the hands of the transferee. The rate of applicable tax would be 30%/25% (excluding surcharge and cess) in case of residents and 40% (excluding surcharge and cess) in the case of non-residents.

v Indirect tax

No implications arise under goods and services tax principles (“GST”) on the transfer of shares.

g. “Purchase Accounting” for share acquisitions

In India, purchase accounting is not applicable in the case of a direct or an indirect acquisition of shares.

h. Advantages of share purchases

The following are the advantages of a share purchases:

- Faster execution process, because no court approval is required (except where the open offer code is triggered, or government approval is required);
- Transferor to receive consideration directly in his hands. No tax leakage to repatriate surplus cash to the shareholders unlike business / assets transfer;
- Taxable at concessional rates when compared with the other modes of business reorganisation;
- Lower stamp duty cost and other cost of compliance; and
- GST is not applicable.

i. Disadvantages of share purchases

Following are the disadvantages of share purchases:

- In the case of a share acquisition, the value of intangibles and fair valuation of assets cannot be captured in the books of accounts and amortisation of goodwill is not available.
- Historical liability to move with the Company
- Carried forward tax loss of closely held company would lapse if acquisition result in change in shareholding by more than 49%.
- In the case of an acquisition of more than 25% of the shares of listed companies, compliance under SEBI Takeover Code is mandatory.

This would entail higher transaction cost and time.

- Capital gains tax for the seller.
- No benefit of amortisation in respect of the amount paid in excess of the book value of the underlying assets as opposed to the case of an asset acquisition. Hence, consideration paid for the acquisition of shares is locked in until such shares are sold;

Compliance and approvals may be required from the government and regulatory authorities especially for regulated entity like non-banking finance company, insurance company, etc.; and

- Regulatory Pricing guidelines may apply for valuation purposes in certain cases.

j. Other considerations

- Mode of discharge of consideration: Generally, consideration for share acquisitions has to be discharged in cash. Discharge of consideration in kind or through shares of transferred company, may be subject to certain restrictions under CA 2013 and exchange control regulations, which need specific evaluation.
- Exchange control regulations: The acquisition and transfer of shares of an Indian Company between a resident and a non-resident is governed by the Indian exchange control regulations. The regulations, inter alia, provide the permissible limit on investment, the manner of transfer of shares, the minimum/maximum price at which the shares can be transferred, etc.

4. ASSET ACQUISITION

a. General Comments

A purchase of assets can be achieved either through the purchase of a business on a going concern basis or via the purchase of individual assets. A business could be acquired in either of the following ways:

- • Slump sale: Slump sale refers to the transfer of one or more undertakings as a result of sale for a lump sum consideration without assignment of values to the individual assets and liabilities. In the case of a slump sale, the entire business is transferred as a going concern. Up to March 2021, a slump sale necessarily entailed transfer of an undertaking on a going concern basis for monetary consideration. However, recently, the scope of slump sale has been expanded to include such transfer of undertaking for other than monetary consideration. A slump sale includes within its scope all types of transfers, such as sale, exchange, relinquishment of assets etc. thus proposing to tax slump exchange of an undertaking as Slump Sale. This increased the scope for the levy of tax on slump sale by any means. It also provided that the fair market value ("FMV") of the capital assets (being an undertaking or division transferred by way of slump sale) as on the date of transfer should be calculated in a prescribed manner. FMV is deemed to be the full value of the consideration received or accruing as a result of transfer of the business undertaking. Further, the value of goodwill, which has not been purchased shall be taken as nil for computation of FMV of capital assets.
- Itemised sale : An itemised sale typically occurs either where only specific assets are transferred or where the buyer has an option to choose to purchase individual assets.

b. Purchase Price Allocation

The actual cost of the asset is regarded as its cost for tax purposes. However, this general rule may be subject to some modifications depending on the nature of asset and the transaction.

- Slump sale : While a slump sale entails transfer of undertaking without consideration being assigned to individual assets, generally, the buyer carries out a purchase price allocation post acquisition. Allocation of the purchase price by the buyer in case of acquisition through a slump sale is critical from a tax perspective because the entire business undertaking is transferred as a going concern for a lump sum consideration. The tax authorities normally accept the allocation of the purchase price on a fair value or other reasonable commercial basis. Generally, reports from independent valuation providers are also acceptable.
- Itemised sale : The cost paid by the acquirer as agreed upfront may be accepted as the acquisition cost, subject to certain conditions.

c. Tax Attributes

The following are key tax attributes of an asset acquisition:

- Tax losses : In an asset acquisition, tax losses are retained by the seller and are not transferred to the acquirer.
- Undertaking specific tax deductions : Certain tax benefits/deductions available to an undertaking may be available to the acquirer on transfer of whole undertaking on a going concern basis as a result of a slump sale.
- Succession : The transferee may be liable to pay any claim raised by the tax authorities for any tax on account of completion of the pending proceeding where the transfer is made for inadequate consideration and without prior clearance from the tax authorities.

d. Purchase Agreement

An asset purchase agreement ("APA") is an agreement between a buyer and a seller that finalises terms and conditions related to the purchase and sale of a company's assets. It is important to note that in an APA transaction, it is not necessary for the buyer to purchase all the assets of the company. In fact, it is common for a buyer to exclude certain assets in an APA. The provisions of an APA may include the payment of purchase price, monthly instalments, liens and encumbrances on the assets, conditions precedent for the closing, etc. Defining and controlling behaviour is a major objective of the APA. The buyer must represent its authority to purchase the asset. The seller must represent its authority to sell the asset.

e. Depreciation and Amortisation

- Goodwill : In the case of a slump sale, when the consideration paid is higher than the total FMV/cost of the assets acquired, goodwill arises. Such goodwill, being the excess of consideration over the value of the assets, arises because of the underlying value of intangible assets. However, no depreciation is allowed for tax purposes on such goodwill acquired. Such acquired goodwill would still be recorded in books as a non-depreciable asset, the cost of which will be available as a deduction in computing capital gains on any subsequent sale of business.
- Depreciation : Book Depreciation is ignored for tax purposes and tax laws allow depreciation on a "block of assets" basis. All assets of a similar nature are classified under a single block and any additions/deletions are made directly in the block. Depreciation under the Income Taxes Act ("ITA") is generally computed on reducing balance basis on the entire block. However, companies engaged in the business of generation and/or distribution of power have the option to claim depreciation on a straight line basis. Goodwill is excluded from the meaning of "block of assets".

Finance Act, 2022 amended the special provision for computation of capital gains in the case of depreciable assets by clarifying that reduction of the amount of goodwill of a business or profession, from the "block of assets" shall be deemed to be transfer of such goodwill. This could lead to capital gain tax under certain circumstances viz. there are no assets left in the block, or the value of block becomes nil on reduction of goodwill.

Further, when the assets are used for more than 180 days in the first year, the entire eligible tax depreciation for that year is allowed. However, in case where the assets are used for less than 180 days, only 50% of the eligible tax depreciation would be allowed. Capital allowances are available for certain types of asset, such as assets used in scientific research or other specified businesses, subject to certain conditions.

The tax laws provide for specific depreciation rates for the tangible assets (buildings, machinery, plant or furniture), depending on the nature of asset used in the business. Additional depreciation of 20%/35% is available for new plant and machinery used in manufacturing or production, provided prescribed conditions are met. Depreciation on eligible intangible assets (such as know-how, patents, copyrights, trademarks, licenses and franchises or any similar business or commercial rights) is allowed at 25%.

f. Transfer Tax, VAT

i Stamp duty

Transfer of assets by way of a slump sale would be subjected to stamp duty based on the amount of consideration received for the transfer or the market value of the property transferred (whichever is higher). Rates of stamp duty are state specific. Generally, rates of stamp duty applicable to immovable property range between 5-10% and for movable property range between 3-5%.

ii Income tax/Corporate Income Tax

The income tax implications under asset sale are as under:

- Slump sale : The excess of sales consideration over the net worth of the transferred undertaking shall be treated as capital gains in the hands of the transferor. Net worth is the aggregate value of the total assets of the undertaking as reduced by the value of liabilities as per the accounts. In this regard, the manner of computation of the aggregate value of total assets is prescribed. If the undertaking has been held for more than 36 months, the capital gains shall be considered as long term capital gains (“LTCG”), liable to tax at 20% (plus surcharge and cess). If not held for more than 36 months then capital gains would be treated as short term capital gains (“STCG”) liable to tax at normal tax rates applicable to the transferor. Further, a slump exchange is also classified as a slump sale.

In accordance with taxing a slump exchange, the CBDT issued valuation rules for computing capital gains arising from a slump sale. For the purposes of computing capital gains from a slump sale, the net worth of the undertaking is deemed to be the cost of acquisition.

- Itemised sale : In case of depreciable assets, capital gains shall be computed on a block of asset basis. The excess of full value of consideration over and above the aggregate of the written down value of the block of assets and expenditure incurred in relation to the transfer will be treated as STCG. In other cases, capital gains tax payable by the seller will depend on the period for which the seller has held each of the assets that are transferred.

iii Indirect taxes

Goods and Service Tax (“GST”) has been applicable in India from 1 July 2017. Under the GST regime, services by way of transfer of a going concern, as a whole or an independent part thereof, are exempt from levy of GST. However, in case the transaction does not qualify as a “transfer of going concern” (i.e. qualifies as an itemised sale), GST will be applicable on the rates applicable on the transferred goods.

g. Advantages of Asset Purchases

The following are the advantages of an asset purchase:

- Unlike a share acquisition, there is no need to make an open offer for acquisition (applicable for listed companies) of business/asset ;
- Selective acquisition and assumption of assets and liabilities is possible;
- Recognition of value of brand and other intangibles and claims of depreciation thereon may be possible;
- No court approval is required and thus, the execution process is faster compared to a merger/ demerger;
- Values of the assets can be stepped-up by the acquirer for accounting and tax purposes subject to certain conditions; and
- Unlike a share purchase, tax and other commercial liabilities of the whole entity/company are not necessarily transferred upon acquisition.

h. Disadvantages of Asset Purchases

The following are the disadvantages of an asset purchase:

- Applicable stamp duty on an asset purchase is higher than other modes of acquisition;
- Levy of GST may apply in an itemised sale of assets. Also, certain amount of input tax credit ("ITC") may require reversal.
- The transaction may not be tax neutral, unlike certain other modes of acquisition like demerger, amalgamation, etc.
- The process may get delayed due to requirements of approvals from the financial institutions, inter alia, for transfer assets or undertakings; and
- Continuity of incentives, concessions and unabsorbed losses under direct or indirect tax laws may be jeopardised.

5. ACQUISITION VEHICLES

a. General Comments

There are a number of options of possible acquisition vehicles available in India to a foreign purchaser. Implications under the tax and regulatory framework influences the choice of acquisition vehicles of purchasers.

b. Domestic Acquisition Vehicle

The following are the options of domestic vehicles available for acquisition:

- Local holding company : FDI guidelines for downstream investments governs the acquisitions made through an Indian holding company. Generally, indirect foreign investments through Indian companies are not construed as foreign investments where the intermediate Indian holding company is owned and/or controlled by residents of India. Ownership and control of an Indian company is determined on the basis of ownership of more than 50% of the shares along with control of the governing board.

c. Foreign Acquisition Vehicle

- Foreign parent company : Subject to FDI guidelines, foreign investors can invest in India directly through a foreign parent company.
- Non-resident intermediate holding company : To minimise tax leakage in India and avail favourable treaty benefits, an intermediate holding company resident in another territory could be used for investment into India. However, proof of substance in the intermediate holding company's jurisdiction may be required to avoid any application of the GAAR.

d. Partnerships and joint ventures

- LLPs and partnerships : Generally, Indian LLPs and partnerships may not be permitted to act as an acquisition vehicle for Indian investments. However, seeking specific approval from RBI in this regard, may be evaluated.
- Joint venture : Joint ventures ("JVs") are normally used where specific sectoral caps are applicable under the foreign investment guidelines. In such scenarios, a JV with an Indian partner is set up that will later acquire the Indian target. In planning a JV, the current guidelines for calculating indirect foreign investments should be considered. Additionally, JVs are also set up to create synergies between the intellectual properties/skills of the JV's partners.

6. ACQUISITION FINANCING

a. General Comments

An acquisition can be financed in various forms including debt, equity and hybrid instruments that combine the characteristics of both. The principles underlying these approaches are discussed below.

b. Equity

Equity shares are ordinary shares in the share capital of a company and are entitled to voting rights and dividend rights. Companies in India, as in other jurisdictions, pay their shareholders dividends on their equity shares, usually a percentage of the nominal or face value of the share. For a foreign investor holding an equity interest, payment of dividend on equity shares is a straightforward way of extracting earnings. Dividends received by equity shareholders are taxable in India and the domestic distributing companies are required to withhold tax on dividends. Non-resident shareholders may be eligible to claim foreign tax credit for taxes paid in India subject to tax laws in their home jurisdictions.

c. Debt

Debentures are debt securities issued by a company representing a loan taken by the company with a predetermined rate of interest. Debentures may either be secured or unsecured. Debentures issued to non-residents are also required to be compulsorily convertible to equity shares. For the purposes of FDI, fully and compulsorily convertible preference shares and debentures are treated on a par with equity and do not need to comply with the guidelines governing external commercial borrowings ("ECB Guidelines"). The ECB Guidelines place a negative list for which the ECB proceeds cannot be utilised. Indian companies and LLPs are permitted to benefit from ECB, which limits up to USD750 million per company/LLP per year under the automatic route depending on the sectors in which the companies are doing business. Further, there remain restrictions on the minimum average maturity period. The benchmark rate in case of foreign currency ECB and trade credit has changed from six months Libor to any widely accepted interbank rate or alternative reference rate ("ARR") of six-month tenor, applicable to the currency of borrowing.

Thin Capitalisation provisions have been introduced in India wherein the interest expenditure on certain specified debt is restricted to 30% of the EBIDTA. The balance interest expenditure (which is not allowed as a tax deduction) is allowed to be carried forward for eight years and claimed against taxable profits, if any, subsequently.

The debt in respect of which the thin capitalisation provisions apply include any borrowings from an AE or any third party to which the AE has provided an implicit or explicit guarantee. Also, the aforesaid provisions cover in their ambit, loans, finance lease or funds raised through any other means. These provisions are not applicable if the interest expenditure in respect of these debts does not exceed INR10 million. Interest paid on other debts (third-party debts, not covered above) shall be allowed as tax deductible expenditure. Further, a debt pushdown structure needs evaluation on a case by case basis.

d. Hybrid Instruments

Preference capital is used in some transaction structuring models. Preference capital has preference over equity shares for dividends and repayment of capital, although it does not carry voting rights. An Indian company cannot issue perpetual (non-redeemable) preference shares. The maximum redemption period for preference shares is 20 years. Preference dividends can be only declared out of profits. Dividends on preference shares are not a tax deductible cost. Preference dividends on fully convertible preference shares can be freely repatriated under the current exchange control regulations. The preference

shares may be converted into equity shares, subject to the terms of the issue of the preference shares. On the regulatory front, a foreign investment made through fully compulsorily convertible preference shares is treated the same as equity share capital. Accordingly, all regulatory norms applicable for equity apply to such securities. Other types of preference shares (non-convertible, optionally convertible or partially convertible) are considered as debt and must be issued in conformity with the ECB guidelines discussed above in all respects. Certain hybrid instruments are proposed to be covered by specific hybrid instruments regulations to be announced. Because of the ECB restrictions, such non-convertible and optionally convertible instruments are not often used for funding acquisitions.

e. Other Instruments

Call/put options are some of the other investment instruments used for acquisition financing. SEBI permits contracts consisting of pre-emption rights, such as options, right of first refusal, and tag along/drag along rights, in shareholder or incorporation agreements. Further, the RBI has notified taxpayers that the use of options is subject to certain pricing guidelines that principally do not provide the investor an assured exit price and conditions as to the lock-in period. FDI regulations permit issue of non-convertible/redeemable bonus preference shares or debentures (bonus instrument) to non-resident shareholders under the automatic route. Another possibility is the issuance of convertible debt instruments. Interest on convertible debentures normally is allowed as a deduction for tax purposes. However, like preference shares, all compulsorily convertible debentures are treated the same as equity.

f. Earn-outs

Earn-out is a consideration contingent upon the happening of certain events or the achieving of pre-set targets such as meeting a post-transaction earnings goal. Earn-out arrangements are particularly helpful when the target company is an early stage or high growth company where value would be better represented by future performance as against historical performance. Business and valuation models containing an earn out arrangement are prevalent in M&A practice, with investors seeking recourse to the same in cases where promoter involvement is sought to be retained throughout the transition period or to motivate the seller to keep customers and increase productivity even after the acquisition.

As per the provisions of the Income Taxes Act, ("ITA"), income arising on transfer of a capital asset is taxable as capital gains in the year in which such transfer takes place, irrespective of the year of receipt of consideration. In the case of earn-outs, the transfer of an asset takes place in a particular year whereas the consideration for such transfer is crystalised in subsequent years. This poses a peculiar challenge in computing the capital gains in the year of transfer. A possible view being adopted is that the entire sale consideration (i.e. maximum amount receivable by the taxpayer) would be subject to capital gains tax in the year of transfer. However, certain judicial rulings have upheld a contrary position that the capital gains arising in case of earn outs should be taxed in the year of receipt of the sale consideration. The issue however remains extremely litigious.

7. DIVESTITURES

a. Tax Free

Merger and amalgamation of Indian companies

The merger of one company into another company or merging of two or more companies to form a new company requires an NCLT approval. Amalgamations enjoy favourable treatment under CITA/ITA and other laws, subject to certain conditions. The important provisions under Indian laws relating to amalgamation are discussed below.

i Income tax

Indian tax law defines "amalgamation" as a merger of one or more companies into another company or a merger of two or more companies to form a new company such that:

- All the properties and liabilities of the amalgamating companies immediately before the amalgamation become the properties and liabilities of the amalgamated company; and
- Shareholders holding at least three-quarters of the shares in the amalgamating companies become shareholders of the amalgamated company (any shares already held by the amalgamated company or its nominees are excluded for purposes of this calculation).

To achieve tax neutrality for the amalgamating company (or companies) transferring the assets and the shareholders of such amalgamating companies, following additional conditions should be satisfied:

- The amalgamated company should be an Indian company; and
- The entire consideration should comprise of shares in the amalgamated company.

ii Carry forward and offset of accumulated losses and unabsorbed depreciation

Unabsorbed tax losses, including depreciation, of the amalgamating company (or companies) are deemed to be those of the amalgamated company in the year of amalgamation. In effect, the business losses get a fresh lease of life as they may be carried forward for up to eight years from the year of amalgamation.

However, the carry forward is available only where:

- The amalgamating company owns a ship or hotel or is an industrial undertaking (manufacturing or processing of goods, manufacturing of computer software, electricity generation and distribution, telecommunications, mining or construction of ships, aircraft or rail systems); or
- The amalgamating companies are banking companies.

Further, the carry forward of losses on amalgamation is subject to additional conditions under the ITA.

iii Other implications

Other implications of amalgamation include the following:

- In the case where a company claiming certain specified business unit/undertaking linked tax deductions is amalgamated, the amalgamated company may not be entitled to such unit/undertaking linked tax benefits where specifically restricted under the tax law. However, in other cases, unamortised instalments of certain deductions eligible to the amalgamating company (or companies) are allowable for the amalgamated company.
- No step up in the value of assets acquired on amalgamation is possible for tax purposes. The total depreciation on assets transferred to the amalgamated company in that financial year is apportioned between the amalgamating and amalgamated company in the ratio of the number of days for which the assets were used by each entity during the year.
- In respect of goodwill acquired on business acquisitions, Accounting Standard 14 allows for amortisation of goodwill over a period not exceeding five years unless a longer period can be justified. Ind AS 103 requires amortisation of goodwill over its useful life if the same is finite. But if the useful life of the goodwill is determined as indefinite, then there shall be no amortisation. The CITA/ITA does not specifically provide whether depreciation shall be allowed on acquired goodwill for tax purposes. However, the Supreme Court has held that goodwill acquired on amalgamation (being difference between cost of assets and consideration paid) is a capital right falling under the category of "any other business or commercial right of a similar nature" in the definition of intangible assets and hence, eligible for depreciation. However, the Finance Act, 2021 specifically excluded goodwill from the definition of "block of assets", not allowing any depreciation on such goodwill.
- Amalgamation expenses can be amortised in five equal annual instalments, starting in the year of amalgamation.

iv Indirect tax

There are no GST implications. Input Tax Credit ("ITC") can be transferred to the transferee company case of sale, merger, demerger, amalgamation, lease or transfer of a business.

v Stamp duty

Stamp duty is levied on the NCLT order effecting amalgamation at the applicable rate. The rate of stamp duty is dependent upon the state where the registered offices of the companies are situated.

b. Taxable

Demerger of Indian companies

The transfer of a business undertaking by a transferor company to a transferee company for consideration in the form of an issue of shares in the transferee company to the shareholders of the transferor company on a proportionate basis, is regarded as demerger. A demerger of an undertaking requires approval from the NCLT. Specific provisions of law with respect to demerger are as follows:

i Income tax/Corporate Income Tax

Generally, a demerger is taxed as capital gains. However, if the following conditions are satisfied, then the demerger would be considered tax neutral and should be exempt from capital gains tax.

- All the properties and liabilities of the undertaking immediately before the demerger must become the property or liability of the resulting company by virtue of the demerger and such transfer should be at book value;
- In consideration of the demerger, the resulting company must issue its shares to the shareholders of the demerged company on a proportionate basis (except where the resulting company itself is a shareholder of the demerged company);
- Shareholders holding at least three quarters in value of shares in the demerged company become shareholders of the resulting company by virtue of the demerger. Shares in the demerged company already held by the resulting company or its nominee or subsidiary are not considered in calculating three quarters in value;
- The transfer of the undertaking must be on a going concern basis; and
- The demerger is subject to any additional conditions as notified by the Central Government.

Any divestment by the Central/State Government which results in reduction of its holding in a public sector company (“PSC”) to below 51% shall be regarded as tax neutral demerger and proposes to enable set off and carry forward of loss and allowance of depreciation, subject to certain conditions.

ii Other implications

Other implications of demerger include the following:

- Accumulated losses and unabsorbed depreciation relating to the transferred business undertaking can be carried forward by the resulting company for the balance period.
- If the undertaking of the demerged company was entitled to tax incentive, then the resulting company may claim such incentives for the balance period after demerger.
- Step up in the value of assets is not permissible in books of accounts or for tax purposes.
- The total depreciation on assets transferred to the resulting company in that financial year is apportioned between the demerged company and the resulting company in the ratio of the number of days for which the assets were used by each entity during the year. Thus, depreciation up to the effective date of transfer is available to the demerged company and depreciation after that date is available to the resulting company.
- Expenses incurred on account of demerger can be amortised in five equal annual instalments, starting in the year of demerger.

iii Indirect tax

There are no GST implications if the entity is transferred as a going concern; ITC can be transferred to the transferee company case of sale, merger, demerger, amalgamation, lease or transfer of a business.

iv Stamp duty

Stamp duty is levied on the NCLT order effecting demerger at the applicable rate. The rate of stamp duty is dependent upon the state where the registered offices of the companies are situated.

c. Cross Border

i Cross border mergers

Recently, the CA 2013 has notified provisions for cross border merger. The following cross border mergers are permitted:

- Inbound merger : Foreign company can merge into an Indian company.
- Outbound merger : An Indian company can merge into a foreign company in a permitted jurisdiction,

However, it is pertinent to note that prior approval of the RBI is mandatory and only after receiving RBI's approval, an application can be made by the Indian company with the jurisdictional NCLT in respect of the cross border merger. Outbound mergers are not tax neutral. Also, a cross border merger entails a detailed analysis in respect of other tax and regulatory aspects.

ii Amalgamation of foreign companies involving direct/ indirect transfer of shares of Indian company

Amalgamation of two foreign companies involving the transfer of shares of an Indian company or shares of a foreign company deriving its value substantially from shares of an Indian company, is normally tax exempt provided that:

- The amalgamation satisfies the criteria for an amalgamation set out above;
- At least 25% of the shareholders of the amalgamating company remain shareholders in the amalgamated company; and
- Such transfer does not attract capital gains tax in the country in which the amalgamating company is incorporated.

iii Demerger of foreign company involving direct/ indirect transfer of shares of Indian company

A demerger involving the transfer of shares of an Indian company or shares of a foreign company deriving its value substantially from shares of an Indian company, is also tax exempt provided that:

- The shareholders holding not less than three quarters of the shares in the demerged foreign company remain shareholders in the resulting company; and
- Such transfer does not attract capital gains in the country in which the demerged foreign company is located.

8. FOREIGN OPERATIONS OF A DOMESTIC TARGET

a. Worldwide or territorial tax system

Foreign Investments by an Indian company are regulated by the RBI guidelines. Broadly, an Indian entity can invest up to 400% of its net worth (as per audited accounts) in joint ventures or wholly owned subsidiaries overseas, although investments exceeding USD5 million may be subject to certain pricing guidelines.

Tax on foreign operations of domestic target in India

In India, whether a person is subject to tax is determined based on residential status of the person. In the case of tax residents of India, the worldwide income is liable to tax in India, irrespective of the source of income.

i Residential Status of a Company

A foreign company will be regarded as a tax resident of India, if:

- It is incorporated in India; or
- Its Place of Effective Management (“POEM”) in that year is in India.

In this regard, POEM been defined to mean “a place where key management and commercial decisions that are necessary for the conduct of the business of an entity as a whole are, in substance made”. Determination of POEM is dependent on facts and circumstances and a holistic analysis of the principles laid out. CBDT’s guidelines issued vide circular no. 6 of 2017 serves as a guidance for determination of POEM in India. As per Circular no. 8 of 2017, the provisions of POEM will not be applicable to a Company having turnover of INR500 million or less in a financial year.

ii Foreign tax credit

The domestic target entities can benefit from a foreign tax credit (“FTC”) in respect of taxes paid by them outside India under the tax treaty or income tax payable under the applicable law of that country. Such FTC can be utilised by the domestic target against their tax liability in respect of tax, surcharge, cess, minimum alternate tax (“MAT”) which is chargeable on companies and alternate minimum tax which is chargeable for Partnerships and LLPs are payable in India. FTC is available to the taxpayer in the year in which the income corresponding to such foreign tax has been offered to tax in India. The total available FTC is the aggregate of FTC computed separately for each source of income arising from a particular country as per prescribed rules. The taxpayer is required to furnish certain prescribed documents on or before the due date of filing of return of income to avail such FTC.

b. CFC Regime

Currently, there are no CFC regulations in India.

c. Foreign branches and partnerships

The income of foreign branches is taxable in India as part of the Indian company’s worldwide taxable income. Similarly, the losses of all foreign branches are deductible in computing the worldwide taxable income. In computing the income or loss of a foreign branch, a deduction is generally allowed for all expenses incurred wholly and exclusively for the purpose of the business that are not of a capital or personal nature. Income is taxed whether or not repatriated. If such foreign branch incurs tax in the foreign country, credit is available in India to the extent of the lesser of the foreign tax paid or the Indian tax on the foreign income, either unilaterally or under treaty.

Further, taxability of foreign partnerships in India would be dependent on its tax residential status in India. A partnership firm would be treated as a tax resident in India if control and management of its affairs is not wholly situated outside India.

d. Cash repatriation

Dividends received from foreign company are taxable in the hands of the domestic company at applicable tax rates.

9. OTHER GENERAL INTERNATIONAL TAX CONSIDERATIONS

a. Special Rules for Real Property, including Shares of “Real Property-Rich” Corporations

GAAR

In certain circumstances, the tax authorities are empowered to invoke GAAR and treat an “arrangement” to be an impermissible avoidance agreement (“IAA”), resulting in denial of the tax benefit under the provisions of the domestic tax law or a tax treaty. An arrangement would be treated as IAA if the main purpose of the arrangement is to avail treaty benefit and such arrangement contains one of the following tainted elements:

- The transaction is not at arms’ length price;
- The motive of the transaction is to abuse the tax provisions;
- The transaction lacks commercial substance and is not undertaken for bona fide purpose.

GAAR is not applicable to the following transactions:

- Foreign Institutional Investors (“FIIs”) who do not avail themselves of the benefit of tax treaties;
- Non-resident who have invested in such FIIs;
- Transactions where the aggregate tax benefit from an arrangement in relevant financial year does not exceed INR30 million.

If GAAR provisions are invoked, the following consequences apply:

- Overriding effect of tax treaty benefits availed by the assessee;
- Disregarding or re-characterising any step in, or a part of or the whole arrangement;
- Disregarding any accommodating party or treating the parties to the arrangement as one and the same person;
- Re-characterising the place of residence or situs of an asset or transaction, reallocating the accrual, receipt or expenditure amongst the parties to the arrangement; and
- Ignoring corporate structure applied by the assessee.

With the advent of the GAAR, structuring of transactions is expected to require additional consideration. Moreover, the CBDT has clarified that GAAR will not apply to an arrangement where the NCLT has “explicitly and adequately” considered its tax implication. As a result, GAAR may have to be considered in all future Schemes proposed to be presented to the NCLT before they are submitted. In view of this, all future structuring options should be examined from the perspective of GAAR and it should be ensured that they have strong commercial rationale supporting the transaction. The taxpayers could also approach the Board for Advance Rulings for achieving certainty and clarity. The Authority for Advance Rulings has recently been changed to the Board for Advance Rulings. As the Board for Advance Rulings has recently been set up, the time for applications to be processed is currently unclear.

CBDT vide letter dated 7 April 2021 has notified the composition of the Approving Panel for making references under GAAR. Further CBDT, vide letter dated 11 February 2022 has notified that GAAR Secretariat has been set up in Delhi and all the references need to be sent directly to the GAAR Secretariat. GAAR reference can be made to the Approving panel, in case where a taxpayer objects to notice issued for declaring an arrangement as an impermissible avoidance arrangement and determining the consequences thereof and where taxpayer's explanation is found unsatisfactory.

Indirect transfer

In the backdrop of the Supreme Court's decision in the case of Vodafone Holdings and with an intention of protecting the Indian tax base from highly abusive tax planning structures, in 2012, the provisions for taxation of indirect transfer were introduced in the ITA with retrospective applicability from 1 April 1962. As per the said provisions, any income accruing or arising from transfer of the share of, or interest in, a company or entity located outside India that derives directly or indirectly, its value substantially from assets located in India shall be treated as indirect transfer and shall be taxable in India. In this regard, share or interest shall be deemed to derive its value substantially from the assets located in India, if value of assets on the specified date:

- Exceeds INR1 million; and
- Represents at least 50% of the total value of assets owned by the company or entity, as the case may be in India.

For the purpose of valuation of assets, the ITA considers the FMV of assets on the specified date without reduction of liabilities. The specified date shall be either the immediately preceding accounting period ending prior to the transfer or the date of transfer. The date of transfer shall be considered as the specified date only where the book value of the assets of the foreign company on the date of transfer exceeds the book value of the assets as at the end of the immediately preceding accounting period by more than 15%. The method for determining the value of assets is prescribed under the Income-tax Rules, 1962. Payments for such transfer of shares are liable to withholding tax. The Indian entity and the transferor entity are required to report the information in respect of indirect transfer in prescribed forms.

b. CbC and Other Reporting Regimes

If the total consolidated group revenue of the international group is INR55 billion or more in the preceding accounting year, then the resident parent entity or the alternative reporting entity is required to file a CbC report ("CbCr"). Such filing is to be done within a period of 12 months from the end of the reporting accounting year.

Where the Indian entity is a constituent entity ("CE") being a part of international group, whose parent is a non-resident, in such a case, an Indian entity is required to notify the reporting entity to the tax authorities. The due date for such notification is two months before the due date of filing of return in India.

If more than one CE of either of the following international group are resident in India, then one of the entities has to be designated by the international group as the designated entity to furnish CbCr:

- Where the parent is "not obligated" to file CbCr in its home country;
- Where India does not have an agreement for exchange of CbCr with the jurisdiction in which the ultimate parent company or alternate reporting entity is resident;
- Where there has been a systemic failure in a country, and this is intimated by the prescribed authority to the CE.

In the absence of a CbCr exchange agreement between India and certain jurisdictions, inbound CEs with their ultimate parent company or alternate reporting entity in such jurisdictions would need to electronically file the CbCr in India within 12 months from the end of a reporting accounting year. In the event of a systemic failure, the timeline is six months from the end of the month in which intimation is given of this systemic failure.

Master File

Any CE of an international group has to file Part A of the master file. Further, the CE has to file Part B of master file if the following are satisfied:

- Consolidated revenue of such international group as reflected in consolidated financial statements for the accounting year exceeds INR5 billion; and
- The aggregate value of international transaction of CE:
  - During the accounting year exceeds INR500 million; or
  - In respect of purchase, sale, transfer, lease or use of intangible property during the accounting year exceeds INR100 million.

The due date of filing master file is date of filing of return of income i.e. 30 November.

10. TRANSFER PRICING

International transaction

As per the provisions of the CITA/ITA, the definition of international transaction includes a transaction of business restructuring or reorganisation, entered into by an enterprise with an Associated Enterprise ("AE"), irrespective of the fact that it has bearing on the profit, income, losses or assets of such enterprises at the time of the transaction or at any future date. Thus, any international restructuring transaction should be at arm's length price ("ALP") and should be reported.

Further, where there is an increase in the book profit of the income of a year due income of past year(s) on account of secondary adjustment or APA entered by the taxpayer, the Assessing Officer shall recompute the book profit and tax payable of the past years in the prescribed manner.

Deemed international transaction

The domestic transfer pricing provisions have been recently amended to widen the scope of international transactions. Accordingly, a transaction with a person other than an AE is also deemed to be an international transaction if there exists a prior agreement in relation to the relevant transaction between such other person and the AE, or the terms of the relevant transaction are determined in substance between such other person and the AE.

Post-acquisition

All intercompany transactions (international and certain domestic), including interest on loans, are subject to transfer pricing regulations.

11. POST-ACQUISITION INTEGRATION CONSIDERATIONS

a. Use of hybrid entities

Acquisition entities may have hybrid features which makes their classification difficult. Divergence in approach of classifying such entities may create issue of classification in cross border scenarios. Thus, use of hybrid entities involve issues like entity classification which can have a bearing on the following:

- Determination of residency;
- Eligibility for treaty benefits;
- Nature of income derived by entity/members and tax treatment thereof; and
- Application of provisions of CITA/ITA which are entity specific.

b. Use of hybrid instruments

Some of the hybrid funding options currently under consideration are compulsory convertible preference shares, compulsory convertible debenture ("CCD") and convertible notes. Hybrid instruments that are fully and mandatorily convertible into equity within a specified period are regarded as equity under the FDI policy and hence are eligible to be issued to persons residing outside India. Any hybrid instrument that is not mandatorily convertible into equity is considered debt and governed by external commercial borrowing rules. Use of hybrid entities may have post-integration issues like treatment of the existing CCDs issued by the entities, validity of terms of existing CCDs issued by the former entities after the reorganisation, etc

c. Principal/Limited Risk Distribution or Similar Structures

A limited risk distributor ("LRD") is the distributor in the country of residence which performs limited functions and undertakes limited risks while performing a sales and marketing function. Post-acquisition, a functions, assets and risk ("FAR") analysis needs to be undertaken to review the status of existing LRDs.

d. Intellectual property (licensing, transfers, etc.)

The following are some of the issues with respect to intellectual property ("IP"):

- Aligning IP protection to business objectives like expanding existing coverage through strategic filing programmes and contracting coverage where needed;
- Implementing arrangements for appropriate ownership, control, and use of brands to avoid invalidity and tax concerns;
- Managing patent and trademark portfolios to meet objectives (including global maintenance and enforcement strategies);
- Depending upon the scope of the business activities, making a decision as to whether to obtain the record title to IP assets received in a merger or acquisition or to sell its newly acquired IP to a third party and receive a licence to use such IPs;
- Further, the parties need to decide as to who will bear the future expenses, like expenses of filing, registration, renewals and maintenance of patents, trademarks, etc;
- Entities which create or acquire IP assets have the ability to claim a tax deduction for their costs.

e. Special tax regimes

India has an alternate levy in the form of minimum alternative tax ("MAT") at 15% (plus surcharge and cess) for companies and LLPs. Generally, the credit of MAT is allowed to be carried forward and set off against the future income tax liabilities of the companies and LLPs. However, in case of amalgamation, availability of such MAT credit by way of carry forward and set off, is litigious.

12. OECD BEPS CONSIDERATIONS

Removal of digital taxes

As per the Multilateral Convention, all jurisdictions are required to remove all Digital Services Taxes and other relevant similar measures and provide commitment to refrain from introducing such measures in the future. In view of this, no newly enacted Digital Services Taxes or other relevant similar measures will be imposed on any company from 8 October 2021 and until the earlier of 31 December 2023, or the coming into force of the MLC.

On 8 October 2021, India and the US joined 134 other members of the OECD/G20 Inclusive Framework (including Austria, France, Italy, Spain, and the UK) in reaching agreement on the Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy. India and the US have agreed that the same terms that apply under the October 2021 Joint Statement shall apply between the US and India with respect to India's charge of 2% equalisation levy on ecommerce supply of services and the US's trade action regarding the said Equalisation Levy. However, the interim period that will be applicable will be from 1 April 2022 till implementation of Pillar One or 31 March 2024, whichever is earlier. The final terms of the Agreement will be finalised in 2022.

BEPS and India:

Some of the BEPS recommendations would immediately be applicable, while some require changes that can be implemented via tax treaties, including the multilateral instruments. Some other require domestic law changes. Tabulated below are the amendments made in Indian tax laws to align it with BEPS.

Action Plan	Particulars	Amendment made / Action taken	Effective from
Action Plan 1	Tax challenges arising from Digitalisation	In order to address the challenges arising on taxation of digital transactions, India via Finance Act, 2016 introduced 'Equalisation levy' at 6% on the amount of consideration for specified services received or receivable by a non-resident not having PE in India, from a: Resident in India who carries out business or profession; or Non-resident having PE in India As mentioned above, the said EL is extended (at the rate of 2%) to online supply of goods and services by ecommerce operators.	1 June 2016
		The concept of "significant economic presence test" to determine business connection / territorial nexus was introduced under the Indian tax laws	1 April 2018
Action Plan 4	Limitation on interest deductions	Interest limitation rules were introduced in India vide Finance Act, 2017. A new section 94B was introduced in the Act, to provide that interest expense paid by an entity to its AE or on a debt implicitly or explicitly guaranteed by the AE shall be restricted to 30% of its EBIDTA or interest paid/payable to AE, whichever is less.	1 April 2017

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Action Plan	Particulars	Amendment made / Action taken	Effective from
Action Plan 5	Harmful tax practices	The Finance Act, 2016 introduced Section 115BBF providing a concessional tax regime and 10% for royalty income from patents to promote in-house research and development and making India a hub for R&D. Such provisions are in line with the nexus approach recommended by BEPS Action 5. For the purpose of this section at least 75% of R&D expenditure for development of patent should be incurred in India by the eligible assessee for any invention in respect of which patent is granted under Patents Act, 1970.	1 April 2016
Action Plan 6	Prevention of tax treaty abuse	GAAR provisions are introduced in the domestic tax laws.	1 April 2017
		India is actively negotiating its existing tax treaties to counter treaty abuse.	Not Applicable
Action Plan 7	Permanent establishment status	The definition of business connection/permanent establishment under the Indian tax laws was aligned with modified DAPE rules as per Action Plan 7.	1 April 2018
Action Plan 13	Country by Country reporting	The requirement of filing a Country-by-Country Report, a Master file and a Local file has been introduced in India broadly in line with BEPS Action Plan 13.	1 April 2016
Action Plan 15	Multilateral Instrument	India has ratified MLI on 7 June 2017 and deposited the instrument of ratification on 25 June 2019.	Come into force 1 October 2019 (Effective from FY 2020-21)

13. ACCOUNTING CONSIDERATIONS

Accounting norms for companies are governed by the Accounting Standards issued under the CA 2013. Normally, for amalgamations, demergers and restructurings, the Accounting Standards specify the accounting treatment to be adopted for the transaction. The standard prescribes two methods of accounting: merger accounting and acquisition accounting.

- In merger accounting, all the assets and liabilities of the transferor are consolidated at their existing book values.
- Under acquisition accounting, the consideration is allocated among the assets and liabilities acquired (on a fair value basis).

The government of India has recently notified International Financial Reporting Standards ("IFRS"), converged Indian Accounting Standards (Ind AS). Under the new Ind AS on amalgamation, all assets and liabilities of the transferor are recorded at their respective fair values. Further, goodwill arising on merger is not amortised; instead it is tested for impairment. The accounting treatment of mergers within a group are separately dealt with under the new Ind AS, which requires all assets and liabilities of the transferor to be recognised at their existing book values only. The new Ind AS are to be implemented in a phased manner. It became applicable to all listed companies and companies with net worth of INR5 billion or more from 1 April 2016, and to companies with net worth of INR2.5 billion or more from 1 April 2017. Other companies will continue to apply existing accounting standards.

14. OTHER TAX CONSIDERATIONS

a. Application of Regional Rules

Buy back

Amongst the other options available for a company to provide an exit to the shareholders, is the buy back of shares. A buy back of shares provides an investor the ability to extract earnings as capital gains and consequently take advantage of tax treaty benefits. However, buy backs in India have certain restrictions and thus need to be strategically planned. For instance, a company may not, except with a special resolution, buy back more than 25% of its outstanding equity shares in a year. Further, a buy back may be effected only from certain permitted sources.

In terms of being subject to tax, any domestic company proposing to buy back its shares from shareholders is required to pay a buy back tax. Any amount of "distributed income" by a domestic company on buy back of unlisted shares from shareholder is chargeable to additional income tax at 20% (plus 12% surcharge and 4% cess). The term "distributed income" has been defined to mean the consideration paid by the company on buy back of shares as reduced by the amount received by it for issue of such shares, to be determined in the prescribed manner. The amount received on issue of shares has to be determined as per the IT Rules. Some of the methodologies relevant for determining amount received on issue of shares are as follows:

- Shares issued by way of subscription
- The amount actually received in respect of such share, including any amount actually received as securities premium.
- Where any amount, out of amount received on issue of shares, has been returned to shareholders prior to buy back.
- The amount received in respect of shares less sum so returned. However, no such deduction is allowed in respect of Dividend Distribution Tax ("DDT").

b. Tax Rulings and Clearances

In case where any transfer is made for inadequate consideration and any proceedings are pending against the transferor, the tax authorities have the power to claim any tax on account of completion of the proceeding by treating the said transfer as void. The CITA/ITA provides mechanism for obtaining a tax clearance certificate for transfer of assets/ business subject to certain conditions. The timeline depends on the facts of each case.

15. MAJOR NON-TAX CONSIDERATIONS

a. Competition Commission of India ("CCI") regulations

If any acquisition exceeds certain financial thresholds and is not within a common group, then such acquisition shall require a prior approval of the CCI. While evaluating an acquisition, CCI would mainly examine if the acquisition would lead to a dominant market position, resulting in an adverse effect on competition in the concerned sector. Under CCI regulations, a business combination that causes or is likely to cause a considerable hostile effect on competition within the relevant market in India shall be void. Any acquisition of control, shares, voting rights or assets, acquisition of control over an enterprise, or merger or amalgamation is regarded as a combination if it meets certain threshold requirements and accordingly requires approval.

b. CA 2013

The acquisition of shares is permissible with prior approval of the audit committee and board of directors. Share sales between related parties may also require prior shareholders' approval. Pursuant to Sections 230 to Section 240 of the CA 2013, schemes of arrangement require approval of the NCLT. Procedurally, any scheme is first approved by the audit committee, the board of directors, stock exchanges (if shares are listed) and then by the shareholders/creditors of the company with a requisite majority (i.e. majority in number and 75% in value of shareholders/creditors voting in person, by proxy or by postal ballot). NCLT will give its final approval to the scheme after considering the observations of the Regional Director, Registrar of Companies, Official Liquidator, income tax authorities, other regulatory authorities like RBI, stock exchanges, SEBI, CCI, etc. and any other objections filed by any other stakeholder interested in or affected by the scheme.

c. Securities laws

Any acquisition of 25% shares of a listed company by an acquirer would trigger an open offer to the public shareholders. However, under the Takeover Code, a merger or demerger of a listed company usually does not trigger an open offer to the public shareholders. Any merger or demerger involving a listed company would require prior approval of the stock exchanges and SEBI before approaching NCLT.

d. Foreign exchange regulations

Transfer of equity shares are permissible transactions subject to RBI pricing guidelines and permissible sectoral caps. Merger/demerger transaction involving any issuance of shares to a non-resident shareholder of the transferor company does not require prior RBI/government approval, provided that the transferee company does not exceed the foreign exchange sectoral caps and the merger/demerger is approved by the NCLT. Issuance of any instrument other than equity shares/ compulsorily convertible preference shares/compulsorily convertible debentures to the non-resident would require prior RBI approval as they are considered as debt.

16. APPENDIX I - TAX TREATY RATES

Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
Albania	10	10	10	[A] [B] [C] [D] [E]
Armenia	10	10	10	[A] [B] [C] [D] [E]
Australia	15	15	10 / 15	[A] [B] [C] [D] [E] [J]
Austria	10	10	10	[A] [B] [C] [D] [E]
Bangladesh	10 / 15	10	10	[A] [B] [C] [D] [E]
Belarus	10 / 15	10	15	[A] [B] [C] [D] [E]
Belgium	15	10 / 15	10	[A] [B] [C] [D] [E] [F] [G]
Bhutan	10	10	10	[A] [B] [C] [D] [E]
Botswana	7.5 / 10	10	10	[A] [B] [C] [D] [E]
Brazil	15	15	25 / 15	[A] [B] [C] [D] [E] [H]
Bulgaria	15	15	15 / 20	[A] [B] [C] [D] [E]
Canada	15 / 25	15	10 / 15	[A] [B] [C] [D] [E] [J]
China (People's Republic of China)	10	10	10	[A] [B] [C] [D] [E]
Chinese Taipei (Taiwan)	12.50	10	10	[A] [B] [C] [D] [E]
Colombia	5	10	10	[A] [B] [C] [D] [E]
Croatia	5 / 15	10	10	[A] [B] [C] [D] [E]
Cyprus	10	10	10	[A] [B] [C] [D] [E]
Czech Republic	10	10	10	[A] [B] [C] [D] [E]
Denmark	15 / 25	10 / 15	20	[A] [B] [C] [D] [E]
Estonia	10	10	10	[A] [B] [C] [D] [E]
Ethiopia	7.50	10	10	[A] [B] [C] [D] [E]
Fiji	5	10	10	[A] [B] [C] [D] [E]
Finland	10	10	10	[A] [B] [C] [D] [E] [G]
France	10	10 / 15	20	[A] [B] [C] [D] [E] [F] [G]
Georgia	10	10	10	[A] [B] [C] [D] [E]
Germany	10	10	10	[A] [B] [C] [D] [E]
Hong Kong	5	10	10	[A] [B] [C] [D] [E]

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Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
Hungary	10	10	10	[A] [B] [C] [D] [E] [F]
Iceland	10	10	10	[A] [B] [C] [D] [E]
Indonesia	10	10	10	[A] [B] [C] [D] [E]
Ireland	10	10	10	[A] [B] [C] [D] [E]
Israel	10	10	10	[A] [B] [C] [D] [E]
Italy	15 / 25	15	20	[A] [B] [C] [D] [E]
Japan	10	10	10	[A] [B] [C] [D] [E]
Jordan	10	10	20	[A] [B] [C] [D] [E]
Kazakhstan	10	10	10	[A] [B] [C] [D] [E] [F]
Kenya	10	10	10	[A] [B] [C] [D] [E]
Korea	15	10	10	[A] [B] [C] [D] [E]
Kuwait	10	10	10	[A] [B] [C] [D] [E]
Kyrgyz Republic	10	10	15	[A] [B] [C] [D] [E]
Latvia	10	10	10	[A] [B] [C] [D] [E]
Lithuania	5 / 15	10	10	[A] [B] [C] [D] [E]
Luxembourg	10	10	10	[A] [B] [C] [D] [E]
Macedonia	10	10	10	[A] [B] [C] [D] [E]
Malaysia	5	10	10	[A] [B] [C] [D] [E]
Malta	10	10	10	[A] [B] [C] [D] [E]
Mauritius	5 / 15	7.5	15	[A] [B] [C] [D] [E] [I]
Mexico	10	10	10	[A] [B] [C] [D] [E]
Mongolia	15	15	15	[A] [B] [C] [D] [E]
Montenegro	5 / 15	10	10	[A] [B] [C] [D] [E]
Morocco	10	10	10	[A] [B] [C] [D] [E]
Mozambique	7.50	10	10	[A] [B] [C] [D] [E]
Myanmar	5	10	10	[A] [B] [C] [D] [E]
Namibia	10	10	10	[A] [B] [C] [D] [E]
Nepal	5 / 10	10	15	[A] [B] [C] [D] [E] [F]
Netherlands	10	10	10	[A] [B] [C] [D] [E] [F] [G]

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Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
New Zealand	15	10	10	[A] [B] [C] [D] [E]
Norway	10	10	10	[A] [B] [C] [D] [E]
Oman	10 / 12.5	10	15	[A] [B] [C] [D] [E]
Philippines	15 / 20	10 / 15	15	[A] [B] [C] [D] [E]
Poland	10	10	15	[A] [B] [C] [D] [E]
Portugal	10 / 15	10	10	[A] [B] [C] [D] [E]
Qatar	5 / 10	10	10	[A] [B] [C] [D] [E]
Romania	10	10	10	[A] [B] [C] [D] [E]
Russian Federation	10	10	10	[A] [B] [C] [D] [E]
Saudi Arabia	5	10	10	[A] [B] [C] [D] [E]
Serbia	5 / 15	10	10	[A] [B] [C] [D] [E]
Singapore	10 / 15	10 / 15	10	[A] [B] [C] [D] [E]
Slovenia	5 / 15	10	10	[A] [B] [C] [D] [E]
South Africa	10	10	10	[A] [B] [C] [D] [E]
Spain	15	15	10 / 20	[A] [B] [C] [D] [E] [F]
Sri Lanka	7.50	10	10	[A] [B] [C] [D] [E]
Sudan	10	10	10	[A] [B] [C] [D] [E]
Sweden	10	10	10	[A] [B] [C] [D] [E] [F]
Switzerland	10	10	10	[A] [B] [C] [D] [E] [F]
Syria	5 / 10	10	10	[A] [B] [C] [D] [E]
Tajikistan	5 / 10	10	10	[A] [B] [C] [D] [E]
Tanzania	5 / 10	10	10	[A] [B] [C] [D] [E]
Thailand	10	15	10	[A] [B] [C] [D] [E]
Trinidad & Tobago	10	10	10	[A] [B] [C] [D] [E]
Turkey	15	10 / 15	15	[A] [B] [C] [D] [E]
Turkmenistan	10	10	10	[A] [B] [C] [D] [E]
Uganda	10	10	10	[A] [B] [C] [D] [E]
Ukraine	10 / 15	10	10	[A] [B] [C] [D] [E]
United Arab Emirates	10	5 / 12.5	10	[A] [B] [C] [D] [E]

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Jurisdiction	Dividends %	Interest %	Royalties %	Footnote Reference
UK	10 / 15	10 / 15	10 / 15	[A] [B] [C] [D] [E] [J]
US	15 / 25	10 / 15	10 / 15	[A] [B] [C] [D] [E] [J]
Uruguay	5	10	10	[A] [B] [C] [D] [E]
Uzbekistan	10	10	10	[A] [B] [C] [D] [E]
Vietnam	10	10	10	[A] [B] [C] [D] [E]
Zambia	5 / 15	10	10	[A] [B] [C] [D] [E]

Footnotes:	
[A]	Dividend - Finance Act, 2020 abolished dividend distribution tax. Dividends are now liable to tax in the hands of the shareholders and non-resident shareholders are eligible to pay tax at beneficial tax rate under the tax treaty and also avail foreign tax credit subject to domestic laws in their home jurisdiction.
[B]	Interest - If the relevant tax treaty provides for unlimited taxation rights for the source country on interest income, then the rate of tax is considered as 20%. Under the Indian tax laws, withholding tax rate of 20% (applicable surcharge and cess) applies with respect to interest on monies borrowed or debts incurred in foreign currency by an Indian concern or the government. Reduced rate of 5% (applicable surcharge and cess) applies where the interest paid by business trusts. In case of Kenya, withholding tax rate of 10% is applicable on interest. In other cases, depending on whether the recipient is a corporate entity, a tax rate of 30%/ 40% (plus applicable surcharge and cess) applies.
[C]	Interest - Reduced rate of 0% to 10% generally applies under a tax treaty if interest payments are made to local authorities, political subdivisions, the government, banks, financial institutions or similar organisations or the lender holds a certain threshold of capital in the borrower. Specific clause of the treat needs to be evaluated in this regard.
[D]	Royalty - Under the Indian tax laws, if the relevant tax treaty provides for unlimited taxation rights for the source country on royalty income and if the payment is made by the government of India or an Indian concern, then the rate of tax is considered as 10% (plus surcharge and cess). In case of Kenya, withholding tax rate of 10% is applicable on royalties. In other cases, depending on whether the recipient is a corporate entity, a tax rate of 30%/40% (plus applicable surcharge and cess) applies.
[E]	Royalty - The above rates on royalties are applicable to royalties other than those effectively connected with a PE in India. Further, in some of the tax treaties like UK, US, Spain, Canada and Australia, a separate rate of 10% is specified for equipment royalties. Similarly, in case of Bulgaria, rate of 15% is applicable to copyright royalties other than cinematographic films or films and tapes used for radio or television broadcasting.
[F]	MFN clause - The scope of the definition of royalties/interest may be restricted and/or a reduced rate of tax may be available under the MFN clause.
[G]	MFN clause - In case of notification issued by the government of India giving effect to the MFN clauses in these tax treaties, reduced rate applies.
[H]	Royalties - In case of trademark royalties, rate of tax is 25%.
[I]	Interest - The protocol provides for a withholding tax rate of 7.5% on interest and 15% on royalties.
[J]	Royalty - In the first five years in which this treaty is in effect, if the payer of royalties is the government of the contracting state, a political subdivision or a public sector company, the rate of tax is 15% and in case of other payers, tax rate is 20%. For subsequent years, a 15% rate applies in all cases.

17. APPENDIX II - GENERAL CORPORATE ENTITY TAX DUE DILIGENCE REQUESTS

Nº.	Category	Sub-Category	Description of Request
1	Tax Due Diligence	General	Copy of the Annual Report or the Balance Sheet along with the notes to accounts and audited financial statements for last three years.
2	Tax Due Diligence	General	Management financial statements for current year and the detailed trial balance associated with the financial statements.
3	Tax Due Diligence	General	Copies of major service agreements, loan agreements, if any.
4	Tax Due Diligence	Direct tax	Copy of income tax returns for last three years including revised returns, computation of total income along with notes to computation and form 26AS.
5	Tax Due Diligence	Direct tax	Computation of deferred tax liability and other enclosures except for the TDS certificates and provisional tax computation for current year.
6	Tax Due Diligence	Direct tax	Tax audit reports along with annexures for last three years.
7	Tax Due Diligence	Direct tax	CbCr, Master file, transfer pricing accountant's reports along with the transfer pricing documentation for last three years.
8	Tax Due Diligence	Direct tax	Screenshot of e-proceedings and demand section of traces and income tax e-filing portal.
9	Tax Due Diligence	Direct tax	Copies of the assessment orders/ transfer pricing orders for the latest three years along with the notice for demand, notices for initiation of penalty proceedings.
10	Tax Due Diligence	Direct tax	Details of historical tax positions taken by the company.
11	Tax Due Diligence	Direct tax	Details of any Income tax incentives (Section 10AA, 80IA, etc.)/concessions/exemptions, if any, availed by the Company from Central and State governments.
12	Tax Due Diligence	Direct tax	Analysis of past losses and the impact of change in shareholding on such losses.
14	Tax Due Diligence	Direct tax	Analysis of loans advanced to shareholders and allied entities and possibility of deemed dividend.
18	Tax Due Diligence	Direct tax	Details of underreported tax liabilities, if any.
19	Tax Due Diligence	Direct tax	Representation made by the seller at the time of pre-deal negotiation.
20	Tax Due Diligence	Direct tax	Sample checks of withholding tax compliances help in identifying inconsistencies in withholding tax filings/ compliances of the target company.
21	Tax Due Diligence	Direct tax	Recoverability of tax refunds/credits like MAT credit, etc.
22	Tax Due Diligence	GST	Details with respect to GST and other historical indirect tax regime like service tax, value added tax, excise duty, custom duty, etc.

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