# AMALGAMATION
# FUNDAMENTAL PROCEDURES


## SUMMARY:-

Amalgamation is the merger of one or more companies with another company or the merger of two or more companies to form one company.

The Companies Act, 1956, does not defines the term “amalgamation”. The procedures relating to an amalgamation contains critical processes. The law requires involvement of the Courts in the process of an amalgamation. An amalgamation process can not be completed within few days. It may require few months or more than one year to complete.

The Court procedures, relating to an amalgamation, are different in different States. However, the basic-fundamental procedures followed by the Courts in all States are same. In this paper, the fundamental procedures, relating to an amalgamation, is discussed.


## Introduction :

The term “amalgamation” is not defined by the Companies Act, 1956. But section 2(1B) of the Income-tax Act, 1961, defines the term “amalgamation” for the purposes of the income tax law.

Amalgamation is the merger of one or more companies with another company or the merger of two or more companies to form one company.

In views of the Companies Act, 1956, the terms, “amalgamation” and “merger”, has the same meaning. Amalgamation is not a process that can be completed within few days. It is a lengthy process. It has its own procedures which contains critical processes. It may take one year period or more to complete. The period that may be required to complete an amalgamation process is depends upon the cases of the companies involved therein.

Amalgamation is not a mere contract that can be executed by the companies themselves. The law requires involvement of the Courts in the cases of amalgamation. (In this paper, “the Court” means the Court dealing with the case of amalgamation. The Companies Act, 1956, empowers the High Courts to deal with the cases relating to the amalgamation).

The provisions contained in sections 390 to 396A (both inclusive) of the Companies Act, 1956, (hereinafter “the Act”) are dealing with the amalgamations and the mergers. The procedures for carrying out an amalgamation and forms relating thereto are provided under the Companies (Court) Rules, 1959.

(Hereinafter, all the sections specified in this article are of the Companies Act, 1956).

## Purposes of an Amalgamation:

There may be any purpose for an amalgamation. Among other purposes the following are the main purposes for which an amalgamation may be preferred-

1. To expand the business or operations of the company;
2. To carry on the business of the company more economically or more efficiently;
3. To attain economic, business and other goals of the company in efficient manner;
4. To eliminate competition between the companies;
5. To use economic, financial, technical and other sources efficiently;
6. In the public interest (by the Central Government in exercise of the powers conferred by section 396).

A company having vulnerable financial/economic position may prefer an amalgamation with another company so as to secure itself. And the companies may adopt the concept laid down by the proverb, ‘union is strength’, the result of which may be an amalgamation.

## Procedures for an Amalgamation:

The Court procedures, relating to an amalgamation, are different in different States. However the basic procedures followed by the Courts in all States are same. The Act requires involvement of the Courts to carry out the amalgamations effectively. The Act empowers the Courts to make orders providing for such incidental, consequential and supplemental matters as are necessary to secure and to carry out the amalgamations properly (Sections 392 and 394(1) (vi)). The basic and important procedure to carry out an amalgamation is discussed below in brief.

(To discuss about the procedures for an amalgamation, it is assumed that A Ltd. and BLtd. are getting amalgamated with NLtd.).

1. The Board meeting of individual companies, ALtd. and BLtd. should propose for the amalgamation with NLtd.
2. The proposal for the amalgamation should be forwarded to NLtd. by ALtd. and BLtd.
3. The Board meeting of NLtd. should consider the proposal and to effect for the amalgamation, the Board should approve the proposal of ALtd. and BLtd.
4. Subsequently, NLtd. should inform the fact that it has accepted the proposal to ALtd. and BLtd.
5. After consulting ALtd. and BLtd. NLtd. should appoint the valuers and the solicitors. (Advocates, who can handle the company law related cases, may be appointed as the solicitors).
6. The valuers will determine the fair share exchange ratios of the companies. After their valuation work, the valuers will submit their Valuation Report of shares of ALtd. BLtd. and NLtd.
7. Draft documents of-
   i. the application under section 391(1);
   ii. the statement, (in this article, for short, "explanatory statement"), under section 393; and
   iii. the scheme for the amalgamation,

   should be prepared with the assistance of the solicitors.

8. The requirements of sub-section (1) (a) and sub-section (2) of section 393 in respect of statement (i.e. explanatory statement) must be satisfied while preparing that statement.

9. The scheme for the amalgamation, the Valuation Report and the share exchange ratios specified therein should be approved by the Boards of ALtd., BLtd. and NLtd.

10. The solicitors should move an application under section 391(1) in the Court praying an order so as to call, hold and conduct a meeting under that section. A scheme for the amalgamation should be enclosed with the said application.

11. The Court will make an order under section 391(1), on the application made to it.

12. The order of the Court-

i. will provide for the date, time and venue of the meeting;
ii. will provide for the appointment of the chairperson of the meeting;
iii. will provide for the time limit within which the chairperson of the meeting should submit his report to the Court;
iv. may provide for the advertisement of the notice of the meeting; and
v. may give such directions as the Court thinks expedient in relation to the calling, holding and conducting of the meeting.

13. On receipt of the order of the Court, with the assistance of the solicitors, notice of the meeting is to be drawn up.

14. With the notice of the meeting -

i. a copy of the scheme of amalgamation;
ii. an explanatory statement prepared under section 393; and
iii. where proxies are allowed under the rules made under section 643(section 391(2)), proxy form,

must be sent to all the persons who are entitled to present and to vote at the meeting under section 391(2).

15. Advertisement of the notice of the meeting is to be given according to the order of the Court. When giving the advertisement, the requirements of clause (b) of sub-section (1) and sub-section (3) of section 393 must be satisfied.

16. The meeting should be presided over by the person who was appointed by the Court as the chairperson of the meeting (or by the person who was appointed as the chairperson in accordance with the provision of the order of the Court).

17. At the meeting, the scrutineers should be appointed. And, after taking a poll for the resolution approving the scheme for the amalgamation, the results will be announced by the chairperson of the meeting.

18. The chairperson of the meeting will submit his report, on the decision taken at the meeting on the scheme of amalgamation, to the Court.

19. An application should be made to the Court praying an order under section 391(2) sanctioning the scheme of amalgamation.

20. To consider the application, the Court will order to send notice of hearing to the persons/companies who/which are concerned with the scheme of amalgamation.

21. According to section 394A the Court will give notice to the Central Government of which representations, if any, will be taken into consideration before passing any order under section 391(or 394).

22. The Court may make an order to publish the notice of hearing in the newspapers and to send its copy to the Registrar of Companies.

23. After-

i. hearing all the persons/companies concerned with and interested in the scheme of amalgamation;

ii. considering the representations, if any, made by the Central Government;

iii. satisfying the requirements of the proviso to section 391(2); and

iv. considering such other matters relating to the scheme of amalgamation,

the Court will make an order under section 391(2) sanctioning the scheme of amalgamation.

24. When the scheme of amalgamation is sanctioned by the Court it will be binding on all the parties specified in section 391(2).

25. The order made under section 391(2) must be filed with the Registrar. If the order is not filed so, it will have no effect (Section 391(3)).

26. A copy of every such order must be annexed to every copy of the memorandum, or the instrument constituting or defining the constitution of the company, issued after the certified copy of the order has been filed as aforesaid (Section 391(4)).

27. Where an application is made to the Court under section 391 for the sanctioning of the scheme of amalgamation and after considering the matters specified in section 394(1) (a) and (b), the Court may either by the order sanctioning the scheme of amalgamation or by a subsequent order, make provision for all or any of the matters specified in clauses (i) to (vi) of section 394(1) to facilitate for the amalgamation (Section 394(1)).

28. Before making an order under section 394(1) (iv) for the dissolution of ALtd. and BLtd., the transferor companies, without winding up, the Court will appoint the Official Liquidator who, on scrutiny of the books and papers of ALtd. and BLtd., the transferor companies, will make a report to the Court that the affairs of the companies have not been conducted in a manner prejudicial to the interests of their members or to the public interest (Second proviso to section 394(1)).

29. After considering the report made by the Official Liquidator and such other matters, the Court will make an order under section 394(1) (iv) for the dissolution of ALtd. and BLtd. the transferor companies, without winding up.

30. Every order made under section 394 must be filed with the Registrar within thirty days after making that order (Section 394(3)).

## **Other Points:**

Some other points relating to the amalgamation process and relevant to the companies involved therein is discussed below:-

### A. Official Liquidator:-

Before making a report to the Court, the Official Liquidator may appoint such persons like Chartered Accountants to examine the books and papers of the transferor companies, ALtd. and BLtd. The persons so appointed will make their report to the Official Liquidator who will, subsequently, submit his report to the Court.

## B. Forms:-

The Companies (Court) Rules, 1959, prescribes forms to use in the amalgamation process. The forms used in the amalgamation process should be in accordance with the said Rules and forms prescribed there under.

## C. Intimations /Notices to the Stock Exchanges:-

At the several stages of the amalgamation process, the companies involved therein are required to send intimations/notices to the stock exchanges concerned.

For instance-

i. when the Board meeting decides for the amalgamation, the fact thereof;

ii. after a meeting is called, held and conducted under section 391(1), the minutes thereof;

iii. when the Court by an order sanctioned the scheme of amalgamation, the fact thereof;

iv. When the Court made an order for dissolution of ALtd. and BLtd. (the transferor companies) without winding up, the fact thereof,

should be intimated/sent to the stock exchanges concerned by the respective companies involved in the amalgamation.

## D. The Central Government's Power:-

The Central Government has power to provide for the amalgamation of the companies in the public interest, notwithstanding anything contained in sections 394 and 395 but subject to the provisions of section 396 (Section 396(1)).

## E. Preservation of Books and Papers:-

The books and papers of ALtd. and BLtd. the transferor companies, must not be disposed of without the prior permission of the Central Government (Section 396A).

## F. Issue of Shares:

The transferee company (NLtd.) may issue shares to the transferor companies (ALtd. and BLtd.). In such cases the requirements of law and rules, regulations, guidelines, etc., made there under, regarding the issue of shares, must be complied with.

## **Conclusion:**

The procedures for the amalgamation discussed above are not exhaustive. However, these are fundamental procedures to be followed to carry out an amalgamation. These procedures are subject to the company law and rules, regulations etc., if any, prescribed there under. And the procedures, discussed above, should be suitably modified according to the orders/directions of the Court dealing with the case.

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Reference: "Amalgamation" by Somabruta Dutta. (The Chartered Accountant, December, 2001).

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