CA FINAL – CORPORATE AND ECONOMIC LAWS

CHAPTER-5: COMPROMISES, ARRANGEMENTS AND AMALGAMATIONS

Chapter-XV of the Companies Act, 2013 And The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016

Sec. No	Marginal Notes	Effective Date
230	Power to Compromise or Make Arrangements with Creditors and Members	15/12/2016
231	Power of Tribunal to Enforce Compromise or Arrangement	15/12/2016
232	Merger and Amalgamation of Companies.	15/12/2016
233	Merger or Amalgamation of Certain Companies	15/12/2016
234	Merger or Amalgamation of Co with Foreign Company	13/04/2017
235	Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority	15/12/2016
236	Purchase of Minority Shareholding.	15/12/2016
237	Power of Central Government to Provide for Amalgamation of Companies in Public Interest.	15/12/2016
238	Registration of Offer of Schemes Involving Transfer of Shares	15/12/2016
239	Preservation of Books and Papers of Amalgamated Companies	15/12/2016
240	Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc.	15/12/2016

Important Aspects of Chapter-XV

1. **Detailed disclosures** to enhance transparency in corporate restructuring exercises with a view to enable the stakeholders to take informed decisions.
2. Additional facility of **Voting by Postal Ballot** to ensure larger participation.
3. Flexibility to dispense or **waive the creditors meeting**.

4. Prior **intimation to statutory authorities** about proposed corporate restructuring exercises, so as to obtain their views and suggestions.
5. **Prohibition** on maintenance of **treasury stock**.
6. **Exit option** to dissenting shareholders.
7. **Fast-track amalgamation** facility for certain companies.
8. Mergers and Amalgamations between Indian Companies and Foreign Companies **(International Mergers)**.
9. Amalgamation of companies in **public interest**.
10. **Option to minority shareholders** to surrender their shares to majority.
11. **Valuation report** from registered valuer, wherever necessary.
12. Auditor certification of **accounting treatment** for corporate restructuring.

SI.No	*Topic*
5.1	Compromises, Arrangements & Amalgamations (Sec.230 & 231)
5.2	Merger and Amalgamation of Companies (Sec.232)
5.3	Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority (Sec.235&238)
5.4	Purchase of Minority Shareholding (Sec.236)
5.5	Power of Central Government to Provide for Amalgamation of Companies in Public Interest - Sec.237
5.6	Preservation of books (Sec.239) & Liability of Officers (Sec.240)
5.7	Merger or Amalgamation of Certain Companies (Sec.233)
5.8	International Mergers – (Sec. 234) & Rule-25A

CH-5.1: COMPROMISES, ARRANGEMENTS & AMALGAMATIONS – Sec.230

5.1.1: Important Terms

A. Compromise:

- It arises when there is an **existing dispute**.
- It refers to **settlement** of disputes in a manner mutually agreed by parties to the dispute.
- It involves some element of giving up or **sacrifice** by both the parties.

ARRANGEMENT

- It arises when there is **no existing dispute**.
- It is used as a precautionary measure to avoid future disputes.
- It involves **modification of rights** of various stakeholders of the company viz., Members and Creditors

Explanation to Sec.230(1) provides that Arrangement includes a reorganization of the company's share capital:

→ By the **consolidation** of shares of different classes; or
→ By the **division** of shares into shares of different classes, or
→ By both

Following are some of the **examples** of "Arrangement"

a. Creditors extending time to the company.
b. Creditors waiving some portion of the amount due to them.
c. Members of the company agreeing to reduce the capital paid by them.
d. Transfer of an undertaking of the company.
e. Amalgamation

5.1.2: Parties to Compromise or Arrangement

Sec.230 can be used when a compromise or arrangement is entered between:

1. **Company** and the **All Creditors**;
2. **Company** and certain **Class of Creditors**;
3. **Company** and **All Members**;
4. **Company** and certain **Class of Members**.

5.1.3: Applicants to Tribunal (Sec.230(1))

Where above said compromise or arrangement is proposed then any of the following persons can make an application to the Tribunal **(In case of Government Company, the application shall be made to the CG, instead of Tribunal)**:

(i) Company;
(ii) Any Creditor;
(iii) Any member;
(iv) Liquidator appointed under CA, 2013, if the company is being wound up; or
(v) Liquidator appointed under Insolvency & Bankruptcy Coe, 2016, if the company is being wound up.

5.1.4: Disclosures in the Application

The company or any other person, who makes an application to the Tribunal shall **disclose by affidavit** to the Tribunal:

Matters to be disclosed	Additional Points
(a) All **material facts** relating to the Co	Such material facts include: » Latest financial position of the Co; » Latest auditor's report on the accounts of the company; and » Pendency of any investigation or proceedings against the company
(b) **Reduction of share capital**, if any.	
(c) Scheme of **Corporate Debt Restructuring**, if any, approved by not less than 75% of the Secured creditors in value.	Such scheme may include: i. Creditor's responsibility statement in Form.CAA-1; ii. Safeguards for the protection of other secured and unsecured creditors; iii. Report by the auditor that based on the estimates provided by the Board, the fund requirements of the Co after the CDR shall conform to the liquidity test; iv. A statement that Co proposes to adopt the CDR guidelines specified by RBI; and v. Valuation report, given by registered valuer, relating to shares, property and all assets of the company.

5.1.5: Tribunal order to conduct Meeting

On receipt of application from the persons specified u/s 230(1), the tribunal may order the **meeting for category of concerned applicant** (Sec.230(1)).

However, with respect to C/A pertaining to **creditors**, the Tribunal may dispense with calling of a meeting where creditors or class of creditors, having at least **90% value**, agree and confirm, to the scheme of compromise or arrangement, by way of affidavit **(Sec.230(9))**.

If the C/A involves:

(a) Reconstruction of a company (or) Merger or Amalgamation of companies; and

(b) Properties, Liabilities or undertakings of any company is required to be:

- » *Transferred from one company to another company; or*
- » *Divided between two or more companies,*

Then though the application is made u/s 230(1), but the tribunal will pass an order u/s 232(1)

5.1.6: Notice for the meeting

To Conduct a meeting in pursuance of order given by tribunal u/s 230(1) a notice shall be issued. Following are the provisions relating to notice:

Dissemination of Notice *(To whom the Notice shall be given and How)*	A. Notice shall be sent to Creditors, Members and Debenture Holders individually at the address registered with the Company. B. Notice and other documents shall be placed on the **website** of the Co C. Listed company shall send the notice and other documents to the **SEBI and the Stock exchanges** where its securities are listed. D. Listed company shall also advertise the notice in **newspapers** in Form.CAA.2. E. Advertisement pertaining to the notice shall indicate the time within which **copies of the compromise or arrangement** shall be made available to the concerned persons free of charge from the registered office of the company. F. Notice shall be sent to the CG, Income-tax authorities, RBI, the SEBI, the Registrar, Stock exchanges, Official Liquidator, Competition Commission of India and other sectoral regulators or authorities which are likely to be affected by the C/A. **Notice sent to the statutory authorities** shall state that: » Their representations, if any, shall be sent within **30 days** of receipt of notice.

	» If representations are not received within 30 days, the company shall presume that the authorities do not have any representations **(Sec.230(5))**.
Attachments to the Notice	The following documents shall be attached to the above notice: » A Statement disclosing the details of C/A » Copy of Valuation Report, if any. » Statement explaining the effect on creditors, KMP, promoters and non-promoter members, and the debenture-holders. » Effect of C/A on any material interests of the directors or the debenture trustees. » Such other matters as specified in Rule-6
Contents of Notice *(Method of Voting)*	The above notice shall provide that the persons to whom the notice is sent may vote: A. **In the meeting**: » Either themselves or » Through proxies or B. **By postal ballot** within 1 month from the receipt of such notice:

5.1.7: Agreeing to Compromise or Arrangement (Sec.230(6))

» **Majority of persons** **representing 3/4th in value** of the creditors, or class of creditors or members or class of members shall agree to C/A,

» At a meeting held as per Tribunal order Sec.230(1),

» By voting in person or by proxy or by postal ballot.

Eligible Dissent (Proviso to Sec.230(4))

Any objection to the compromise or arrangement can be made only by persons:

→ Holding not less than **10% of the shareholding**; or

→ Having outstanding debt not less than **5% of the total outstanding debt**,

as per the latest audited financial statement.

5.1.8: Essentials for obtaining Tribunal's Sanction for C/A

Following shall be complied with to enable the tribunal to sanction the scheme of C/A:

a) A certificate by the company's auditor shall be filed with the Tribunal to the effect that the **accounting treatment**, if any, proposed in the scheme of C/A is in conformity with the AS prescribed u/s 133 **(Proviso to Sec.230(7))**;

b) If the C/A relates to **buy-back** of securities then the provisions of Sec.68 shall be complied with **(Sec.230(10))**.

5.1.9: Order Sanctioning of Compromise or Arrangement (Sec.230(7))

An order passed by the Tribunal u/s 230(6) sanctioning the scheme of C/A shall contain the following matters:

(a) Option to **preference shareholders** to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
(b) The **protection of any class of creditors**;
(c) A direction, to comply with Sec.48 for **variation of shareholders rights** which may be contemplated by the scheme of C/A;
(d) **Exit offer** to dissenting shareholders
(e) Such other matters as may be necessary to effectively implement the C/A.

If the Tribunal order provides for reduction of share capital, then Sec.66 shall not apply to such reduction of share capital effected as per Tribunal's order u/s 230 (Explanation to Sec.230)

Tribunal's power with respect to implementation of C/A (Sec.231)

While Sec.230 gives power to the tribunal to sanction a scheme of C/A, Sec.231 gives power to the tribunal to enforce the implementation of the sanctioned scheme. Following are the powers of the tribunal **(In case of Government Company, the following powers are vested with the CG, instead of Tribunal)** in this regard:

1. Tribunal has the power to supervise the implementation of C/A;
2. Tribunal may give necessary directions for the proper implementation of C/A;
3. Tribunal may make modifications to the C/A for its proper implementation.
   - ***Sec.231 does not empower the tribunal to rescind the order sanctioning the scheme of C/A.***
   - ***Modification necessary for proper implementation of the scheme can be made either at the time of sanctioning the scheme or after sanctioning the scheme.***
4. Tribunal may make an order for winding up of the company, if:
   a) The C/A cannot be implemented with or without modifications; and
   b) Company is unable to pay debts as per the scheme (Sec.231(2)).

It has to be noted that, Sec.231(2) (above point 4) does not permit a person to file an application for winding up of the Co. The power to order winding up can be exercised only suo motu by the Tribunal.

5.1.10. Binding of Compromise or Arrangement (Sec.230(6))

Compromise or Arrangement shall be binding on the following persons:

a. Company,
b. Creditors,
c. Class of Creditors,
d. Members,
e. Class of members
f. Liquidator Appointed under CA, 2013
g. Liquidator Appointed under IBC, 2016; and
h. Contributories,

if the scheme of C/A is:

» **Approved** by majority of persons representing 3/4th in value; and
» **Sanctioned** by the Tribunal by an order.

5.1.11. Filing of Tribunal's Order – The order of the Tribunal shall be filed with the Registrar within **30 days** of receipt of order **(Sec.230(8))**.

5.1.12. Take-over Offer

Unlisted Companies	Listed Companies
a) Any C/A relating to takeover offer shall be made in such manner as may be prescribed **(Sec.230(11))**. b) In the event of any grievances: » An aggrieved party may make an application to the Tribunal; and » The Tribunal may pass such order as it may deem fit **(Sec.230(12))**.	In case of listed companies, takeover offer shall be as per the regulations framed by the SEBI **(Proviso to Sec.230(11))**.

PQ-1: Internal Limited applied to the Tribunal for a scheme of arrangement between the company and its members under section 230 of the Companies Act, 2013. Accordingly, a meeting was ordered by the Tribunal to be conducted between the company and its members regarding the scheme of arrangement. Few of the members of the company to whom notice was sent have some objections to be made to the scheme of arrangement. State as to who can make objections to scheme of arrangement and period allowed for making such objections? (ICAI-SM)

Answer:

I. Who can make objections to the scheme of arrangement

Section 230(4) of the Companies Act 2013, provides that:

(i) A notice issued for conducting meeting in pursuance of tribunal order, shall specify that the persons voting for the adoption of C/A, may be done either:

A. At the meeting:

» Either themselves or

» Through proxies or

B. By postal ballot within 1 month from the receipt of such notice:

(ii) any objection to the C/A shall be made only by persons holding not less than:

» 10% of the shareholding or

» 5% of the total outstanding debt,

as per latest audited financial statements.

Therefore, the objections can be raised by the above-mentioned persons specified in Proviso to Sec.230(4).

II. Period allowed for making such objections

Objection can be raised at the meeting conducted for seeking approval of compromise or arrangement.

PQ-2: A meeting of members of ABC Limited was convened as per the orders of the Court to consider a scheme of compromise and arrangement. Notice of the meeting was sent to 1000 members holding in aggregate 500000 equity shares. The meeting was attended by 800 members holding 350000 shares. 450 members holding 240000 shares voted in favor of the scheme; 200 members holding 60000 shares voted against the scheme. The remaining 150 members abstained from voting. Explain with reference to the provisions of the Companies Act, 2013, whether the scheme is approved by the requisite majority (May-19 (New)).

Answer:

1. Sec.230(6) provides that a scheme of compromise or arrangement shall be approved by **majority of persons** representing **3/4th in value**.
2. In the case of Swift Formulations P Ltd, the Punjab and Haryana High court and in the case of Maharashtra Apex Corporation Ltd, the Karnataka High Court, it has been held that the dual criteria of Majority and 3/4th in value shall be considered only with reference to those who attended and validly voted and not with reference to total members or creditors.
3. In the given case:
   - The total number of members voted at the meeting is 650 (450-favor and 200 – against). Therefore, the majority of persons comes to 326 (more than 50% of 650);
   - Value voted at the meeting is 3,00,000 shares (2,40,000-favor and 60,000-against). Therefore, 3/4th in value comes to 2,25,000 shares.
   - Thus, the required approval is 326 members holding 2,25,000 shares.
   - The actual approval of 450 members holding 2,40,000 shares satisfied the required criteria.

Conclusion: The scheme is approved by requisite majority as specified in Sec.230(6)

Note: Judgement under above referred case laws are delivered with reference to the provisions of Companies Act, 1956. Therefore, readers are hereby cautioned to read the judgements, if any, delivered under Companies Act, 2013, before relying on the above views.

PQ-3: A meeting of members of DEF Limited was convened under the orders of the Court for the purpose of considering a scheme of compromise and arrangement. The meeting was attended by 300 members holding 10,00,000 shares. 120 members holding 7,00,000 shares in the aggregate voted for the scheme. 140 members holding 2,00,000 shares in aggregate voted against the scheme. 40 members holding 1,00,000 shares abstained from voting. Examine with reference to the relevant provisions of the CA, 2013 whether the scheme was approved by the requisite majority? (RTP-2017)

Answer:

1. Sec.230(6) provides that a scheme of compromise or arrangement shall be approved by **majority of persons** representing **3/4th in value**.
2. In the case of Swift Formulations P Ltd, the Punjab and Haryana High court and in the case of Maharashtra Apex Corporation Ltd, the Karnataka High Court, it has been held that the dual criteria of Majority and 3/4th in value shall be considered only with reference to those who attended and validly voted and not with reference to total members or creditors.
3. In the given case:
   - » The total number of members voted at the meeting is 260 (120-favor and 140 – against). Therefore, the majority of persons comes to 131 (more than 50% of 260);
   - » Value voted at the meeting is 9,00,000 shares (7,00,000-favor and 2,0,000-against). Therefore, 3/4th in value comes to 6,75,000 shares.
   - » Thus, the required approval is 131 members holding 6,75,000 shares.
   - » The actual approval of 120 members holding 7,00,000 shares not satisfied the required criteria. This is because, though the value criteria have been satisfied, but the number criteria have not been satisfied. The number and value criteria are cumulative but not alternative.

Conclusion: The scheme was not approved by requisite majority as specified in Sec.230(6)

PQ-4: At the meeting of the members of M/s QRS Limited, a scheme of compromise and arrangement was approved by requisite majority. The National Company Law Tribunal (NCLT) after complying the provisions, issued an Order, approving the scheme of compromise and arrangement. List out the matters to be provided in the Order issued by NCLT under Section 230(7) of the Companies Act, 2013.
When shall the Order be filed with ROC? (Nov-19 (N))

Answer:

I. Matters to be provided in NCLT order – Refer Sec.230(7) as discussed in 5.1.9 above
II. Time limit to file the NCLT order with RoC - Refer Sec.230(8) as discussed in 5.1.11 above

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PQ-5: RMP Limited was facing acute financial difficulties as operations were continuously disrupted and the Company was facing the brunt of:
(i) Non-Availability of Raw Materials,
(ii) Loss of demand for the Company's products,
(iii) Frequent lockdown due to workmen's unrest.
On the verge of liquidation, the Management proposed one last arrangement between creditors and the Company, whereby, the creditors will have to forego 50%, of their dues to the Company. This has evoked strong protest from some of the creditors who may block the arrangement.

Examine the arrangement in the light of the Companies Act, 2013 and advice the course of action/procedure to be adopted by the company to implement the arrangement (Nov-2020 (New))

Answer:

- Sec.230 of the CA, 2013 provides the procedure for compromise or arrangement.
- An "Arrangement" refers to adjustment of rights of the parties with a view to avoid possible disputes.
- In the given case, the Management proposes to seek creditors to forego 50% of their dues. Effectively, it amounts to adjustment of rights and as such it can be termed as arrangement.
- Company is advised to follow the below mentioned procedure to implement the proposed arrangement:
    1. Prepare a draft scheme of arrangement.
    2. File an application to the jurisdictional tribunal in Form.NCLT-1 along with a copy of the draft scheme.
    3. Obtain direction from the tribunal to conduct meeting of concerned creditors.
    4. Issue notice of meeting to creditors, statutory authorities and to the SEBI and Stock Exchange (if applicable).
    5. Conduct a meeting of the creditors.
    6. Obtain approval of majority of the creditors representing 3/4th in value.
    7. Obtain a certificate from the auditor to the effect that proposed accounting treatment for the arrangement is in line with the AS prescribed u/s 133.
    8. Chairperson of the meeting shall submit a report of the meeting to the tribunal.
    9. A petition shall be presented to the tribunal for sanction of approved C/A.
    10. Obtain an order from the tribunal sanctioning the C/A in Form.CAA-6.
    11. File a certified copy of the order with the Registrar within 30 days of receipt of such of copy of the order.

5.2. Merger and Amalgamation of Companies (Sec.232)

5.2.0 Important Terms.

1. Merger by Absorption	A. It involves transfer of undertaking, properties, or liabilities: » Of **one or more** companies (*transferor companies)*; » To another existing company (*transferee company)* B. The above transfer is done by virtue of a scheme involving merger. C. The undertaking, properties or liabilities transferred may be that of a company in respect of which C/A is proposed and also that of any other company.
2. Merger by Formation	A. It involves transfer of undertaking, properties, or liabilities: » Of **two or more** companies (*transferor companies)*; » To a new company (*new company)* B. The undertaking, properties or liabilities transferred may be that of a company in respect of which C/A is proposed and also that of any other company. C. The new company may be public company or private company.
3. Division (Demerger)	It involves of division of undertaking, properties or liabilities: » Of a company **(Demerged company)** in respect of which C/A is proposed; and » To two or more companies (existing or new) **(Resulting company)**
4. Amalgamation	» Amalgamation means an amalgamation pursuant to the provisions of: a) The Companies Act, 2013 or b) Any other statute which may be applicable to companies. » Amalgamation includes "Merger" » Transferor Company means the company which is amalgamated into another company. » Transferee Company means the company into which a transferor company is amalgamated.

	» Amalgamation involves blending of two or more companies. » The shareholders of each blending company become substantially the shareholders of amalgamated company. » Amalgamated company carries on the business of blending companies. » Amalgamated company may be new company or may be an existing company. » There are two types of amalgamations: a) Amalgamation in the nature of Merger; b) Amalgamation in the nature of Purchase.
5. Amalgamation in the nature of Merger	Amalgamation in the nature of merger is an amalgamation which satisfies all the following conditions: (i) All the **assets and liabilities** of the transferor company become, after amalgamation, the assets and liabilities of the transferee company. (ii) **No adjustment** is intended to be made **to the book values** of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies. (iii) **Shareholders holding not less than 90%** of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) shall become equity shareholders of the transferee company by virtue of the amalgamation. (iv) The **consideration** for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares. (v) The **business** of the transferor company is intended to be carried on, after the amalgamation, by the transferee co. Amalgamations in the nature of merger are accounted for using

	pooling of interest's method
6. Amalgamation in the nature of purchase	» Amalgamation in the nature of purchase is an amalgamation which does not satisfy any one or more of the conditions specified above. » Amalgamations in the nature of purchase are accounted for using **Purchase Method**.

5.2.1 Tribunal order for meeting (Sec.232 (1)).

When an application is made to the Tribunal u/s 230 **(In case of Government Company, the application shall be made to the CG, instead of Tribunal)** for the sanctioning of a C/A and it is shown to the Tribunal that the:

(a) C/A involves **reconstruction** of a Company (or) **Merger or Amalgamation** of two or more companies; and

(b) Undertaking, property or liabilities are required to be:
- » Transferred from one company to another company; or
- » **Divided** between two or more companies;

then, the Tribunal may order the meeting of Members/Creditors.

When the tribunal passes an order u/s 232(1) to conduct the meeting, then the provisions of Sec.230 (3) to (6) shall apply to such meeting:

- » Sec.230(3) – Sending of notice to members, creditors, debentures holders SEBI etc.
- » Sec.230(4) – Method of voting and Criteria for dissenting;
- » Sec.230(5) – Sending of Notice to Statutory Authorities;
- » Sec.230(6) – Approval of scheme by parties and Sanction of scheme by Tribunal.

5.2.2 Circulation of Information relating to Merger or Division of Companies (Sec.232(2))

In case of C/A involving Reconstruction, Merger or Demergers, in addition to the attachment specified u/s 230(3) for other C/A, the following documents specified in Sec.232(2) shall also be circulated

a. **Draft scheme** adopted by the directors of the merging Companies;
b. A statement confirming that a copy of the draft has been **filed with the RoC**;
c. A report adopted by the directors of the merging companies explaining the **effect of compromise** on:
   - » Each class of shareholders,
   - » Key managerial personnel,
   - » Promoters; and

» Non-promoter shareholders

The above explanation shall specify the:

→ Share exchange ratio and
→ Any special difficulties faced in valuation;

d. A **valuation report** from expert;
e. A **supplementary accounting statements**. This is required only if the last annual accounts of any of the merging Co relate to a FY ending more than 6 months before the first meeting conducted for approving the scheme.

5.2.3 Pre-requisites for Sanctioning the Scheme (Sec.232(3))

The Tribunal may sanction the compromise or arrangement if:

a. The **procedure** specified in Sec.232(1) & (2) *(i.e., dissemination of notice and approval of scheme by members and creditors)* has been complied with; and

b. A **certificate** by the company's auditor has been filed with the Tribunal to the effect that the **accounting treatment** proposed in the scheme of compromise or arrangement is in conformity with the applicable accounting standards;

5.2.4 Tribunal's Order Sanctioning the Scheme (Sec.232(3))

The Tribunal's order sanctioning the scheme of compromise or arrangement may provide for the following matters:

Matter	Additional Points
(a) Transfer of undertaking, **property and liabilities** of transferor company *Properties and Liabilities will be transferred by virtue of tribunal order. No other conveyance deeds are required. Further, the order may provide that the transferred property be freed from any charge* **(Sec.232(4))**	Usually parties to the C/A shall have the freedom to determine the date from which the above transfer becomes effective. However, Sec.232(3) bestows the power to the tribunal to fix the effective date. But before exercising such power, the tribunal shall record the reasons why it wants to fix the effective date.
(b) **Allotment of shares** or debentures by the transferee company.	A. If the transferee company already holds shares in the transferor company and in lieu of such shares in transferor company, if the transferee company receives its own shares, then the transferee company is not allowed to hold such shares of it in its own name and such shares (known as treasury stock) shall be cancelled.

<table>
<tr><td></td><td>B. To the existing non-resident shareholders of transferor company, the shares in the transferee company shall be allotted in a manner specified in the order.</td></tr>
<tr><td colspan="2">(c) Any legal proceedings initiated by the transferor company may be continued by the transferee company. Similarly, any legal proceedings initiated by any person against the transferor company may be continued against transferee company.</td></tr>
<tr><td colspan="2">(d) Dissolution of transferor company without going through winding up process</td></tr>
<tr><td colspan="2">(e) Provision for the persons who dissented from the C/A. To claim this benefit, the said persons shall dissent within the time prescribed by tribunal.</td></tr>
<tr><td colspan="2">(f) Employees of the transferor company are allowed to join the transferee company</td></tr>
<tr><td>(g) If the transferee company is an unlisted company before merger, it continues to be unlisted after merger, even though the transferor company is a listed company</td><td>A. If any shareholder(s) of the listed transferor company does not want join an unlisted transferee company, then they may decide to opt out of the transfer and in such a case compensation shall be paid to them.
B. Such compensation shall not be less than that specified in any of the SEBI regulations.
C. A Tribunal shall make arrangements for payment of such compensation.</td></tr>
<tr><td colspan="2">(h) If the transferor company is dissolved, then any fee paid by the transferor company on its authorized capital, can be used by the transferee company to set off against any fee payable by the transferee company to increase its authorized capital subsequent to amalgamation.</td></tr>
<tr><td colspan="2">(i) Any other matters necessary to effectively implement the merger or amalgamation.</td></tr>
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Prohibition on Treasury Stock

As a result of C/A, the transferee company shall not hold any shares in its name or in the name of any trust, subsidiary company or associate company, on its behalf.

Any such shares held shall be cancelled or extinguished.

5.2.5 Effective date of Scheme (Sec.232(6))

» The scheme shall clearly indicate an **appointed date** from which it shall be effective.

» The scheme shall be deemed to be effective from such appointed date and not at a date subsequent to that.

5.2.6 Filing with Registrar

a) **Tribunal's order** - Every company in relation to which the order is made shall cause a **certified copy** of the order to be filed with the RoC for registration within **30 days** of the receipt of certified copy of the order **(Sec.232(5))**.

If the company fails to do the above filing:
- The co and every officer in default shall be liable to a penalty of ₹ 20,000;
- If the default is continuing, then a further penalty of ₹ 1,000 per day subject a maximum of ₹ 3,00,000 **(Sec.232(8))**

b) Status of Scheme Implementation (Sec.232(7)):

» Every company, in relation to which an order is passed by tribunal u/s 230, shall file a statement with RoC until the scheme is fully implemented.

» Such statement shall indicate whether the scheme is being complied with in accordance with the orders of the Tribunal or not.

» Such statement shall be certified by a practicing CA/CS/CMA indicating

» Such statement shall be filed within 210 days from the end of each FY.

PQ-1: Ram Company Limited, a company incorporated under the Companies Act, 2013 has paid up equity share capital of ₹ 1,00,00,000 of face value of ₹ 10 each divided into 10,00,000 shares. The company's financial position is gradually deteriorating since last 3 years. Rajan Company Limited, which is in the same line of business as of Ram, has paid up equity share capital of ₹ 5,00,00,000 of ₹ 1 each divided into 5,00,00,000 has proposed to take over Ram Company Limited. What minimum numbers of shareholders are required to become the shareholders of Rajan Company limited to complete the amalgamation in the nature of merger? (ICAI-SM)

Answer:

- One of the conditions for the amalgamation to be in the nature of merger is Shareholders holding not less than 90% of the face value of the equity shares of the transferor company become equity shareholders of the transferee company by virtue of the amalgamation.
- For the purpose of counting 90%, the equity shares already by the transferee company in the transferor company shall not be counted.
- Shares are held by nominees of or subsidiaries of the transferee company shall also be excluded from counting the said 90%.
- Therefore, Shareholders holding not less than 90% of the face value of equity shares of Ram Company Limited, are required to become the shareholders of Rajan company limited to complete the amalgamation in the nature of merger.
- For counting the said 90%, the shares already held by Rajan company in Ram Company either directly, or through nominees or subsidiaries, shall be excluded.

PQ-2: Long Lasting Ltd applied to the Tribunal for the approval of proposed merger scheme. State the process to be complied with for the approval of the proposed merger scheme drawn by the directors of long lasting ltd under the CA, 2013 (MTP,2018)

Answer:

Following process to be adopted for merger of companies:

1. Memorandum to be checked to ensure that the objects clause authorizes Merger, if not a special resolution to be passed and Memorandum to be altered thereby authorizing the company to merge.
2. Draft scheme of merger to be prepared and adopted by Board of directors.
3. An application shall be filed with the tribunal seeking direction to convene meeting.

4. Draft scheme of merger shall be filed with the registrar.
5. Notice and other annexures shall be disseminated to shareholders, creditors and statutory authorities.
6. Meeting to be conducted.
7. Scheme of Compromise or Arrangement to be approved by majority of persons representing $3/4^{th}$ in value.
8. Obtain a certificate from the auditor to the effect that proposed accounting treatment for the arrangement is in line with the AS prescribed u/s 133.
9. Chairperson of the meeting shall submit a report of the meeting to the tribunal.
10. A petition shall be presented to the tribunal for sanction of approved C/A.
11. Obtain an order from the tribunal sanctioning the C/A in Form.CAA-6.
12. File a certified copy of the order with the Registrar within 30 days of receipt of such of copy of the order.
13. Transferee company to increase authorized capital, if necessary.
14. Undertaking, property or liabilities of the transferor company to be transferred to the transferee company.
15. Transferee company to allot securities to the shareholders of transferor company.

PQ-3: Hi-tech engineering limited engaged in the business of engineering construction and cement manufacturing, decided to concentrate on its core business of engineering construction and hive off (demerger) its cement business inf favor of premier cement limited. State the steps to be taken by Hi-tech engineering limited to give effect to the proposed demerger under the provisions of CA, 2013 (May, 2013)

Answer:

The concept of demerger is covered u/s 232(1)(b). Therefore, the procedure for demerger would be same as that of procedure for merger discussed in the above practical question.

PQ-4: Pioneer Textiles Limited desired to amalgamate its enterprise with Latex Textiles Limited. A scheme of amalgamation for this purpose was approved by an overwhelming majority of shareholders and all creditors of both companies at meetings held under the provisions of Section 232 of the CA, 2013. Thereupon it was presented to the Company Law Tribunal for its sanction. While the scheme was pending in the Tribunal, some of the dissentient shareholders of Pioneer Textiles Limited requisitioned an extraordinary general meeting to negotiate with Latex Textiles Limited as according to the requisitionists the exchange ratio was not fair and reasonable. Examine whether the directors may refuse to call the extraordinary general meeting. Also discuss the powers of the Tribunal in this respect. (May,2019)

Answer:

I. Director's refusal to call the EGM

1. Sec.232(3)(e) enables tribunal to make a provision, in its order sanctioning the C/A, for those who dissent from C/A within the time and in a manner directed by tribunal.
2. Proviso to Sec.230(4) specifies that any objection to the compromise or arrangement can be made only persons holding not less than 10% of the shareholding. By virtue of Sec.232(1), the provisions of Sec.230(3) to (6) shall apply to scheme of amalgamation covered u/s 232 also.
3. In the given case, the scheme was still pending in the tribunal. Therefore, the dissenting shareholders cannot request the board to conduct EGM as the scheme has already been approved by requisite majority u/s 232.

Conclusion: Directors may refuse to call the EGM.

II. Powers of the Tribunal

1. The appropriate action to the dissenting shareholders, if they are holding 10% of shares, is to apply to the tribunal, within the time and in a manner directed by the tribunal.
2. As specified in Sec.232(3)(e) tribunal has the power to make a provision for dissenting shareholders.

CH-5.3. Power to Acquire Shares of Shareholders Dissenting from Scheme or Contract Approved by Majority – Sec.235 & 238

Dissenting Shareholders includes:

→ Shareholders who have ***not assented*** to the transfer of shares;

→ Shareholders who failed or ***refused to transfer*** their shares.

5.3.1. Notice by Transferee Company to Dissenting Shareholders (Sec.235(1))

1. Transferee company **prepared scheme** requiring transfer of all or any class of shares of the transferor company to the transferee company.
2. Transferee company **made an offer**[1] in this regard to the concerned shareholders of the transferor company.
3. Within ***4 months*** of offer, 90% of the concerned shareholders[2], **approved the offer**.
4. Within ***2 months*** from the expiry of the 4 months, the transferee company may give **notice to any dissenting shareholders**.

   Such notice expresses the desire of the transferee to acquire the shares held by such dissenting shareholders.

5.3.2. Binding nature of Offer / Obligation to Acquire shares (Sec.235(2))

A. Where a notice is given u/s 235(2), the transferee company is **entitled to and bound to** acquire the shares of dissenting shareholders.

Such acquisition shall be on the **same terms** at which it acquired the shares of consenting shareholders.

B. **Exception:** **The transferee company is not entitled to acquire** if,

» The dissenting shareholders made an **application to the tribunal** within 1 month of receipt of notice from the Transferee Company.; and

» The tribunal thinks fit to pass an **order restraining** the transferee company from acquiring the shares of dissenting shareholders.

[1] Before making offer to the shareholders of the transferor company, the transferee company shall file the concerned circular relating to offer, with the Registrar. (Refer Sec.238 discussed in Sec.5.3.5)

[2] For the purpose of counting 90%, the shares already (before the scheme) held by transferee company (whether directly by itself or through nominees or through its subsidiaries) in the transferor company shall be excluded.

5.3.3. Notice by Transferee company to Transferor Company (Sec.235(3))

» Transferee company shall send a **notice (*Notice-2)* to the transferor company**.

» Such notice shall be given after expiry of **1 month** from the notice given u/s 235(1) (*Notice-1)*[3]

» Along with such notice, an **instrument of transfer** shall also be sent.

» Such instrument of transfer:
a) Should have been **executed** (*signed)* by transferee company; and
b) **To be executed**, by any person, appointed by the transferee company. Such execution is on behalf of the dissenting shareholders.

» The transferee company shall also pay **money** to the transferor company along with the instrument of transfer.
Such money represents the consideration payable by the transferee company to the dissenting shareholders.

5.3.4. Duties of transferor company after receiving notice from transferee company (Sec.235(3) and (4))

» After receiving notice from the transferee company, the transferor company shall **register the shares** of dissenting shareholders in the name of transferee.

» Transferor company shall **send an intimation** to the dissenting shareholders that the shares hitherto registered in the name of such dissenting shares has now been registered in the name of transferee company.
Such intimation shall be given within ***1 month*** of receipt of notice from transferee company

» Transferor company shall **deposit** such amount into a separate bank account

» Transferor company shall **disburse** such amount to the dissenting shareholders within ***60 days***.

[3] Such notice by the transferee company to the transferor company shall not be given, if within the said 1 month time, the Dissenting shareholders made an application to the tribunal and:
a) Such application is still pending in the tribunal; or
b) The application is closed and the tribunal passed an order preventing the transferee company from acquisition;

5.3.5. Registration of Offer of Schemes Involving Transfer of Shares (Sec.238).

A. Contents of Circular containing offer (Sec.238(1) (a) and (b))

Circular issued by transferee company pertaining to offer made by it to the shareholders of transferor company. Shall contain the following:

→ **Information** as specified in Forn.No.CAA-15.

→ **Recommendation**, by the directors of the transferor company, to the members of the transferor company, advising to accept the offer made by transferee company.

→ Statement by the transferee company assuring the **steps taken by it to make available the necessary cash** payable to the shareholders of transferor company.

B. Registration of Circular (Sec.238(1)(c))

a) Every such circular shall be presented to the Registrar for registration.
b) Such circular shall not be issued until it is registered.
c) If it is issued without registration, the concerned director shall be liable to a penalty up to ₹ 1 Lakh **(Sec.238(3))**.

C. Refusal to Register and Appeal

a) Registrar may refuse to register such circular, if:
   - » Such circular does not give information specified u/s 238(1)(a); or
   - » Such circular gives such information but, in a manner, likely to give false impression.

b) Registrar shall record the reasons for such refusal.
c) Registrar shall communicate such refusal to the parties within **30 days** of filing of application **(Proviso to Sec.238(1))**.
d) The concerned parties shall have a right to file an appeal to the tribunal against such refusal order of Registrar **(Sec.238(2))**.

PQ-1: Special Company Limited, a company incorporated under the Companies Act, 2013 have applied to the Tribunal for a scheme of arrangement under section 230 of the Companies Act, 2013. The Tribunal by way of an order approves the scheme of arrangement involving amalgamation with Flip Company Limited under section 232 of the Act. Accordingly, the required numbers of shareholders have given the approval to become the shareholders of Flip Company Limited under section 235 of the Act. However, few shareholders have not consented to become the shareholder of Flip Company Limited. You are required to state the legal procedure to be followed by dissenting shareholders? (Note: Flip Company Limited has given a notice to dissenting shareholders that it desires to acquire his shares). (ICAI-SM)

Answer:

1. Sec.235(3) of the companies provides that the transferee company shall send a notice (along with the instrument of transfer and consideration) to the transferor company, after expiry of 1 month of sending notice to dissenting shareholders.

   But the transferee company cannot send such notice, if during the said 1 month:
   - An application is made, by the dissenting shareholders, to the tribunal and such application is pending with the tribunal; or
   - Such application is closed and the tribunal has passed an order preventing the transferee company from acquisition of shares

2. Therefore, the way to prevent the transferee company is for the dissenting shareholders to make an application to the tribunal within the said 1 month time given by transferee company.

PQ-2: A Ltd. (transferee) decides to acquire B Ltd. (transferor) by acquiring its shares via a process of takeover u/s 235 of the Companies Act, 2013. A Ltd. prepared a scheme by which an offer was made to the shareholders of B Ltd. The offer was made on 1st August, 2019. The offer remained open for 4 months. Such offer was approved by shareholders having 92% value of the shares. Subsequently A Ltd. gave a notice to the remaining shareholders that it desires to acquire their shares. Such notice was given on 5th January, 2019. Certain dissenting shareholders made an application to the tribunal that acquisition of their shares should not be permitted. Such application was dismissed by the tribunal. Hence A Ltd. acquired shares of 5% of the dissenting shareholders (out of balance 8%). The shareholding of balance 3% shareholders continued to remain with them. Comment on the validity of such a takeover by A Ltd. (ICAI-SM)

Answer:

The basic requirements as to acquisition of shares mentioned in Sec 235 of the Companies Act, 2013 are as follows: -

1. The scheme or contract involving the transfer of shares in a company (transferor company) to another company (transferee company) has been approved by the holders of not less than 9/10th(90%) in value of the shares whose transfer is involved.

2. The approval of 9/10th shareholders in value shall be received within 4 months after making of an offer in that behalf by the transferee company.

3. The transferee company shall express his desire to acquire the remaining shares of dissenting shareholder in 2 months after the expiry of the said 4 months.

4. The transferee company shall be entitled as well as ***bound to acquire*** the shares of the dissenting shareholders where:

- » No application is made by any dissenting shareholders to the tribunal in 1 month of receipt of notice of acquisition of shares or
- » An application is made by any dissenting shareholder but such application is dismissed by the tribunal.

In the given case since application made by the dissenting shareholders has been dismissed by the tribunal hence A Ltd is entitled and bound to acquire all the shares of the dissenting shareholders i.e. entire 8% shareholding.

Comment: Since A Ltd only acquired 5% shareholding of the dissenting shareholders hence this is in contravention of Sec 235 of the Companies Act, 2013. Hence the takeover is invalid.

PQ-3: Premier technologies limited proposes to takeover Modern solutions limited, an unlisted company, by making an offer to the members of Modern Solutions Limited to purchase all their shares. At present, Premier Technologies Limited are not holding any shares in Modern Solutions Limited. Explain briefly the steps to be taken under the CA, 2013 to give effect to the proposed takeover. (Nov-13)

Answer:

Takeover of companies by making an offer to the shareholders of target company is covered u/s 235 of the Companies Act, 2013. Procedure for such takeover is as follows:

- » A scheme for transfer of shares has to be prepared by Premier Technologies Ltd.
- » An offer shall be given to the shareholders of Modern Solutions Limited.
- » Such offer shall be accepted by such shareholders within 4 months.
- » A notice may be given by Premier Technologies to dissenting shareholders within 2 months from the expiry of the said 4 months.

- An intimation and consideration shall be sent by Premier technologies to Modern Solutions.
- Modern Solutions shall register the shares of dissenting shareholders in the name of Premier Technologies Ltd.
- Modern Solutions shall intimate such dissenting shareholders within 1 month of above registration.
- Modern Solutions shall pay the consideration to such dissenting shareholders within 60 days.

CH-5.4. Purchase of Minority Shareholding – Sec.236

5.4.1. Acquirer's Obligation to notify the company (Sec.236(1))

a) If the Acquirer or a Person Acting in Concert (PAC)[1] with such acquirer becomes registered holder of **90% or more** of the issued equity share capital of a Co; or

b) If Any person or group of persons:
   - → Becoming 90% majority or
   - → Holding 90% of the issued equity share capital of a Co,

by virtue of an amalgamation, share exchange, conversion of securities,

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Then such (a) Acquirer or (b) Person or Group of persons, shall **notify** the company of their intention to buy the remaining equity shares.

5.4.2. Majority offer to Minority (Sec.236(2))

» The acquirer, person or group of persons specified u/s 236(1) shall give an **offer** to the minority shareholders of the company.

» Such offer is to purchase the equity shares held by such minority shareholders.

» Such offer should be at a price determined on the basis of **valuation by a registered valuer**.

5.4.3. Minority offer to Majority (Sec.236(3))

The minority shareholders may offer to the majority shareholders to purchase their shareholding at a price determined in accordance with Rule-27 of the CAA Rules, 2016.

5.4.4. Depositing of Consideration (Sec.236(4))

a) The majority shareholders shall deposit an amount equal to the value of shares to be acquired by them in to a **separate bank Account**.

b) Such account shall be **operated by the company** whose shares are being transferred.

c) The co shall **disburse** the amount to the entitled shareholders within 60 days.

d) Such Account shall **remain open** for at least 1 year.

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[1] The words "Acquirer" and "Persons acting in concert" shall have same meaning as specified in Regulation-2(1)(b) and (e) of SEBI ((Substantial Acquisition of Shares and Takeovers) Regulations, 1997).

e) Shareholders, who for any reason failed to claim payment within the above period of 60 days, they **can claim payment for a period of 1 year** and the company shall continue to disburse within the said 1 year.

5.4.5. Transfer Agent (Sec.236(5))

The company whose shares are being transferred shall act as a transfer agent for:

» Receiving the consideration from acquirer;
» Paying such consideration to minority shareholders;
» Taking shares from minority shareholders; and
» Delivering such shares to the acquirer.

5.4.6. Failed to deliver, Cancellation and New Issue (Sec.236(6))

If the minority shareholders fail to deliver their share certificates within the time specified by the company, the Co shall:

→ **Cancel** such certificates;
→ **Issue new** shares in lieu of cancelled shares;
→ Complete the transfer of shares to Acquirer; and
→ **Dispatch the purchase price** to the minority.

5.4.7. Extended time to sell shareholding of deceased (Sec.236(7))

» Majority shareholders wants to purchase full shares of minority.
» Majority shareholders deposited money with the company.
» Shares of some shareholders who have died have not been transmitted.
» The legal shall have a right, to sell their minority shareholding, for a period of 3 years from the date of acquisition by majority shareholders.

5.4.8. Sharing of Additional Compensation (Sec.236(8))

- Shareholders holding ***75%*** or more ***minority*** equity shareholding negotiated with majority acquirers, for a higher price.
- Such negotiation is done prior to the transfer pursuant to acquisition.
- Such 75% minority not disclosed the likelihood of transfer on the basis of such negotiation.
- Such additional compensation shall be shared with other minority shareholders on a pro rata basis.

Example: The issued equity share capital of ABC Limited is INR 50 crore and 90% of such issued capital has been acquired by the XYZ Limited as a part of Amalgamation. In remaining minority shareholding of INR 5 crore, INR 4 crore has been held by Person "A". Hence, if he negotiates with the company with price higher than the decided under the scheme. The extra amount / compensation received by person "A" shall be allocated to all minority shareholders on pro rata basis.

5.4.9. Acquirer default and Right of Residual Minority (Sec.236(9))

If the majority shareholder fails to acquire full minority shareholding, then the rights of **residual minority** (*Who shares has not yet been acquired by majority*) shall continue even though:

(a) The shares of the company had been delisted; and

(b) The period of 1 year or the period specified in the regulations made by the SEBI had elapsed.

PQ-1: In a scheme of reconstruction by a multinational company listed in India, the company wanted the minority shareholders to get out of the company by selling their shares back to the promoters at the price determined by the promoters. The minority shareholders were not given a choice whether they wanted to tender their shares or not. In the meeting, there were 6 non-promoter shareholders who voted against the scheme, but the chairman declared that the motion was carried with an overwhelming majority of more than 90% shareholding. However, minority shareholders contended that they had a right to reject the offer. Will they succeed? (Nov-19(O) – 4 Marks)

Answer:

» Sec.236 provides that, if an acquirer or person becoming acting in concert becomes the registered shareholders of 90% of the issued share capital of a company, then they shall give an offer to the minority shareholders to buy the equity shares held by such shareholders.

» Unlike Sec.235, Sec.236 does not entitle the acquirer to purchase the shares by compulsion.

» Sec.236 provides that the acquirer shall give an offer to minority and the minority has the choice whether to accept the offer or not.

» Further, Sec.236(2) provides that the price quoted in the offer should be determined by registered valuer.

» In the given case:
  a) No choice (offer) is given to minority shareholders; and
  b) Valuation is not done by registered valuer but determined by promoters.

Conclusion: Members will succeed as their contention, that they have a right to reject the offer, is valid.

CH-5.5. Power of Central Government to Provide for Amalgamation of Companies in Public Interest - Sec.237

5.5.1. CG order for amalgamation of Companies (Sec.237(1))

- CG may order for amalgamation of 2 or more companies into a single company.
- CG shall exercise such power, if it essential in the public interest.
- Such order for amalgamation shall be **notified in the official gazette**.
- Such order may provide for the constitution, property, liabilities, rights and duties of an amalgamated company.

Procedure prior to passing an order (Sec.237(5))

1) A copy of the proposed order shall be sent in draft to each of the Co's concerned.
2) CG shall give **not less than 2 months'** time to such Co's to make suggestions or objections.
3) The CG shall consider the **objections and suggestions** made by the companies
4) CG may make **modifications** to the draft order in the light of such suggestions.
5) (a) The time for preferring an **appeal** for assessment of compensation has been expired **or** (b) The appeal has been preferred but disposed off.

Procedure after passing an order (Sec.237(6))

The copies of every order made u/s 237 shall, as soon as may be after it has been made, be laid before each House of Parliament.

5.5.2. Continuation of pending legal Proceedings (Sec.237(2))

The amalgamation order passed by the CG u/s 237(1) may, provide that the legal proceedings pending by or against the transferor company may

Continue by or against the transferee company.

5.5.3. Maintenance of Pre-Amalgamation Interest or Compensation for deficit in the interest (Sec.237(3))

- Every member, creditor or debenture Holder shall have **same interest** in the transferee company as they had in the transferor companies.
- If their interest in the transferee Co is **less than their interest** in the transferor Co, they shall be entitled for **compensation**.

- Such compensation shall be assessed by the **prescribed authority**.
- Such assessed compensation shall be published in the official Gazette.
- Such assessed compensation shall be paid to the concerned person.

5.5.4. Appeal against Compensation (Sec.237(4))

- Any person aggrieved by any assessment of compensation made by the prescribed authority u/s 237(3) may, prefer an appeal to tribunal.
- Such appeal shall be filed within **30 days** from the date of publication of such assessment in the official gazette.
- Thereafter, the assessment of the compensation shall be made by the Tribunal.

PQ-1: Cotton on Yarn Ltd and Country Cotton Blossom Ltd are 2 listed companies engaged in the Business of Textiles. The Companies are not making profits and as such their share's market price have gone down. A substantial portion of their share capital is held by CG as well as some Public Financial Corporations. In order to increase the share value, the CG wants to amalgamate the aforesaid two companies into a single company. Examine the powers of CG to amalgamate the 2 companies in public interest as per the provisions of the Companies Act, 2013. (RTP-Nov 18)

Answer:

Sec.237 gives power to the CG to order for amalgamation of two companies in public interest. Provisions of Sec.237 are discussed below:

» CG shall send a copy of proposed order to the concerned companies.
» CG shall consider the objections and suggestions raised by such companies.
» CG may modify the order in light of above objections and suggestions.
» In the event that interest of any person in amalgamated company is less than his interest in amalgamating company, the compensation to be assessed by the prescribed authority.
» Such assessment of compensation shall be published in the official gazette.
» CG may pass an order for amalgamation of the companies, if time for preferring an appeal has expired or appeal is preferred and disposed off.
» CG has power to define the constitution, rights, powers and liabilities of the amalgamated company.
» Such order shall be published in the official Gazette.
» Copies of such order shall be laid before each house of parliament.

PQ-2: The Central Government in public interest ordered for the amalgamation of ABC Limited and DEF Limited into a single company named KPN Limited through a notification in the Official Gazette. In this connection the prescribed authority ordered that the equity shareholders of ABC Limited were to be provided with a cash compensation of ₹ 2,000 and two equity shares in KPN Limited for every equity share held in ABC Limited.

Mr.Ganesh, an equity shareholder of ABC Limited was dissatisfied not only with the amalgamation but also with the compensation offered by the prescribed authority.

Advise him whether he can challenge the above amalgamation order of the CG. Also advise him within how many days and before which authority he can prefer an appeal against the order of the prescribed authority (Nov-16, 6 Marks)

Answer:

I. Challenging the amalgamation order

» Sec.237(3) provides that if the interest of any person in the amalgamated company is less than his interest in the amalgamating company, he is entitled for compensation and such compensation shall be assessed by the prescribed authority.

» Sec.237(4) provides that if any person is aggrieved by the assessment of compensation, he may prefer an appeal to the tribunal.

» Therefore, it is clear that Sec.237 provides for challenging the assessment of compensation done by the prescribed authority u/s 237(3), but it does not allow for challenging the amalgamation order passed by CG u/s 237(1).

Conclusion: Ganesh cannot challenge the amalgamation order of CG

II. Appeal against the order of prescribed authority

» Appeal against the assessment of compensation made by prescribed authority shall be filed within 30 days from the date of publication of such assessment in the official gazette.

» Such appeal shall be filed with the tribunal.

PQ-3: CPR Ltd. and TJC Ltd. are wholly owned by Government of Tamil Nadu. As a policy matter, the Government issued administrative orders for merging TJC Ltd. with CPR Ltd. in the public interest. State the authority with whom the application for merger is required to be filed under the provisions of the Companies Act" 2013. Also state the provisions governing the preservation of Books and Records of TJC Ltd. after merger under the said Act. (May-18, 3 Marks)

Answer:

I. Authority to whom the application for merger is to be made

According to Sec.237 of the Companies Act, 2013, where the Central Government is satisfied that it is essential in the public interest, it may pass an order for amalgamation of two or more companies into a single company.

Thus, in the given situation of merger between two wholly owned Government companies in public interest, there is no specific authority with whom the application for merger is to be filed.

The Central Government may by notification in the Official Gazette, will provide for the amalgamation of the two said companies into a single company. Concerned companies may request the CG to consider the matter.

II. Preservation of books and records after merger

Refer Sec.239 discussed in portion 5.6.

5.6. Preservation of books (Sec.239) & Liability of Officers (Sec.240)

5.6.1. Preservation of Books and Papers of Amalgamated Co's (Sec.239).

A. Applicability

- Books and papers of Amalgamating company;
- Books and papers of acquired company (transferor company).

B. Procedure

- Appointment of a person by the CG.
- Examination of books and papers.
- Ascertaining whether any offence has been committed in connection with the formation or management of the amalgamating company or transferor company
- Granting permission by CG.
- Disposal of books and papers. of without the prior permission of the CG.

5.6.2. Liability of Officers in Respect of Offences Committed Prior to Merger, Amalgamation, etc (Sec.240).

The liability in respect of:

- offences committed under this Act
- by the officers in default of the transferor company
- prior to its merger, amalgamation or acquisition

shall continue after such merger, amalgamation or acquisition, irrespective of anything contained in any other law

5.7. Merger or Amalgamation of Certain Companies – Sec.233

5.7.1. Applicability (Sec.233(1) and Rule-25(1A) of CAA Rules,2016)

Sec.233 can be used

By **(Which companies can use Sec.233)**	**For** **(For which transactions Sec.233 can be used)**
a. 2 or more Small Companies; or b. A holding company and its wholly-owned subsidiary company; c. Two or more start-up companies; or d. One or more start-up company with one or more small company.	Aforesaid companies can use Sec.233 for: (i) Compromise or Arrangement specified u/s 230; (ii) Merger or Amalgamation specified u/s 232(1)(a); (iii) Division or transfer of a company specified u/s 232(1)(b); **(Sec.233(12))**

5.7.2. Notice to Registrar and Official Liquidator (Sec.233(1)(a))

» Notice of the proposed scheme shall be given to the Registrar and Official Liquidator.

» The objective of such notice is to invite *(to receive)* objections or suggestions from Registrar and Official Liquidator.

» Such notice is shall be given to those registrars and official liquidators who has the jurisdiction over the place where:
  a) Registered office of the respective companies (transferor companies and transferee company) is situated; and
  b) Persons affected by the scheme are located.

» Such Registrars & official liquidators shall give their objections or suggestions **within 30 days** of issue of such notice.

5.7.3. Consideration of Objections and Approval of scheme

» Objections and suggestions received from Registrars and Official Liquidators shall be considered by the respective companies (transferor companies and transferee company) in their respective general meetings.

» Scheme of amalgamation shall be approved by:
  a) Members or class of members holding ***90% of the total number*** of shares **(Sec.233(1)(b))**.
  b) ***Majority*** representing ***90% in value*** of the creditors or class of creditors of respective companies.

Approval of creditors can be obtained:
→ Either at a meeting convened by giving 21 days of notice; or
→ Otherwise in writing **(Sec.233(1)(d))**

» Each of the companies involved in the merger shall file a **declaration of solvency** with their concerned Registrars **(Sec.233(1)(c))**.

5.7.4. Filing and Registration of scheme

» The transferee company shall file a copy of the approved scheme with Regional Director, Registrar and OL **(Sec.233(2))**.

» If the Registrar or the Official Liquidator has no objections or suggestions to the scheme, the Regional Director shall register the scheme and issue a confirmation thereof to the companies **(Sec.233(3))**.

5.7.5. Objections or Suggestions by Registrar & Official Liquidator

» If the Registrar or Official Liquidator has any objections or suggestions, they may communicate the same to the Regional Director within a period of **30 days**.

If such communication is not made, it shall be presumed that they have no objection to the scheme **(Sec.233(4))**.

» Regional Director may file an ***application to the tribunal***[1], if he is of the opinion that the scheme of amalgamation is not in the interest of public or creditors.

» RD may form such opinion:
a) After receiving the objections or suggestions from Registrar or Official Liquidator; or
b) For any other reason

» Such application shall be filed within ***60 days*** of receipt of scheme u/s 233(2).

» Such application shall state the objections of Regional Director and request the tribunal to consider the scheme u/s 232.

5.7.6. Tribunal's Order (Sec.233(6) & (7))

A. After receiving the application from ***Regional Director or from any person***, the Tribunal may either:
→ Direct that the procedure laid down in Sec.232 shall be followed; or
→ Pass an order confirming the proposed scheme u/s 233 **(Sec.233(6))**.

B. Tribunal's confirmation order shall be communicated to:

[1] If the Regional director does not file any application to tribunal, it shall be deemed that it has no objection to the scheme **(Proviso to Sec.233(6))**

- » Registrar of transferee company; and
- » Concerned persons.

C. Registrar of transferee company shall register the scheme and issue a confirmation.
D. Such confirmation shall be filed with the registrars of transferor companies.

5.7.7. Dissolution of transferor company (Sec.233(8))

- » Registration of scheme by Regional director u/s 233(3); or
- » Registration of scheme by Registrar of transferee company u/s 233(7),

shall be deemed to have the effect of dissolution of the transferor company without process of winding-up.

5.7.8. Effect of Registration of Scheme (Sec.233(9))

Registration of Scheme shall have the following effects:

a. Transfer of **property and liabilities** of transferor Co to the transferee company;

b. The **charges** on the property of the transferor Co shall be applicable and enforceable as if the charges were on the property of the transferee company;

c. **Legal proceedings** by or against the transferor company pending before any court of law shall be continued by or against the transferee company.

d. Where the scheme provides for purchase of shares held by the dissenting shareholders or settlement of **debt due to dissenting creditors**, such amount, to the extent it is unpaid, shall become the liability of the transferee company.

5.7.9. Restriction on Treasury Stock (Sec.233(10))

A. Upon Merger of Amalgamation, the Transferee Co shall not hold any shares:
   - » In its own name or
   - » In the name of any trust either on its behalf or on behalf of any of its subsidiary or associate company.

B. All such shares shall be cancelled or extinguished on the merger/ amalgamation.

5.7.10. Revision of Authorized Capital (Sec.233(11))

- » The transferee company shall file an application with the Registrar along with the scheme registered.
- » Such application shall indicate the revised authorized capital.
- » The fee paid by the transferor company on its authorized capital shall be set-off against the fees payable by the transferee company on its authorized capital enhanced by the merger or amalgamation.

5.7.11. Sec.230-to-232 vs Sec.233

- Companies specified u/s 233(1) read with Rule-25(1A), if they choose to follow the fast-track procedure given u/s 233, they need not comply with regular procedure specified in Sec.230 and Sec.232 **(Sec.233(1))**
- However, such companies may at their discretion use the regular procedure specified u/s 232 also instead of fast-track procedure specified u/s 233 **(Sec.233(14))**
- Abovementioned companies can use Sec.230-to-232 at their choice and such choice can also be availed when the condition u/s 233(1)(d) (i.e., creditors consent) has not been met **(Rule-25(8))**.

PQ-1: ABC Limited is a wholly owned subsidiary company of XYZ Limited. The Company wants to make application for merger of Holding and Subsidiary Companies under Section 232. The Company Secretary of the XYZ Limited is of the opinion that company cannot apply for merger as per section 232. The company shall have to apply for merger as per section 233 i.e., Fast Track Merger. Is the contention of Company Secretary being valid as per law?

Answer:

- Sec.233 deals with fast-track merger between holding company and its wholly-owned subsidiary company.
- The provisions given for fast-track merger in the section 233 are optional in nature and not a compulsion to the company.
- Sec.233 is only an enabling provision. It is not a mandatory provision.
- Accordingly, the merger between holding company and its wholly-owned subsidiary company can be done either through regular mode u/s 232 or through fast-track mode u/s 233.
- Furthermore, Sec.233(14) specifically provides that a company covered u/s 233 may use the provisions of Sec.232 for the approval of any scheme for merger or amalgamation.

Conclusion: Contention of Company Secretary is not valid.

5.8. International Mergers – SEC.234 & Rule-25A

Foreign Company - Company or body corporate incorporated outside India whether having a place of business in India or not

Company - A company as defined in Sec.2(20) of Companies Act, 2013

Merger of Foreign Company with Indian Company *(Amalgamating Co – Foreign Company Amalgamated Co – Indian Company)*	**Merger of Company with Foreign Company** *(Amalgamating Co – Indian Company Amalgamated Co – Foreign Company in specified jurisdictions)*
1. Prior approval of RBI to be obtained 2. Sec.230 to Sec.232 shall be complied. 3. CAA rules to be complied. 4. An application shall be filed to the tribunal as per Sec.230 to 232, after obtaining approval from RBI 5. Consideration to the shareholders of the merging company may be paid either: a) Cash; or b) Depository receipts; c) Partly both.	1. Transferee co shall obtain valuation from a ***member of recognized professional body***. Such valuation should be done in accordance with ***internationally accepted principles on accounting and valuation***. 2. A declaration regarding valuation shall be attached to the application filed with RBI. 3. Approval to be obtained from RBI. 4. Sec.230 to Sec.232 shall be complied. 5. CAA rules to be complied. 6. An application shall be filed to the tribunal as per Sec.230 to 232, after obtaining approval from RBI 6. Consideration to the shareholders of the merging company may be paid either: a) Cash; or b) Depository receipts; c) Partly both.
Provisions of Chapter-XV shall be subject to the provisions of any other law. In other words, in case of any conflict between the provisions of other laws (e.g., FEMA) and the Companies Act, 2013, then the provisions of such other laws shall prevail.	

PQ-1: M/s Unicorn Rubber sheets limited was incorporated and registered in the United Kingdom. M/s Artha Rubber sheets manufacturing and Trading Limited is an Indian Company incorporated and registered under the provisions of Companies Act, 2013. A scheme of compromise between the two companies provided for an amalgamation of the English Company with the Indian Company. The CFO of the Indian Company is of the opinion that the companies being amalgamated must be companies registered in India and therefore an amalgamation with a company registered outside India is not possible. Explaining the relevant provisions of Companies Act, 2013 examine the correctness or otherwise of the following with reference to a scheme of amalgamation of Companies:

- **(i) Whether the contention of the CFO is correct that the companies being amalgamated must be companies registered in India?**
- **(ii) What is the majority required for approving the scheme of amalgamation in a meeting of members of a company called as per the directions of the Tribunal? Is the scheme required to be approved by preference shareholders? (May 2019 (O) – 4 Marks)**

Answer:

I. Contention of CFO

- » Sec.234(2) provides that a foreign company may merge into registered in India. Provided prior approval of RBI to be obtained and the provisions of any other law for the time being in force (*E.g., FEMA)* shall be complied with.
- » Therefore, the amalgamation may occur between Foreign Company and Indian Company or vice-versa.
- » Accordingly, the contention of the CFO is not correct

II. Approval for the scheme of Amalgamation

According to Sec.230(6) of the Companies Act, 2013, where a meeting is called as per tribunal order u/s 230(1), a scheme of amalgamation has to be approved by majority of persons representing 9/10th in value of members

II. Approval of Preference Shareholders

- » Sec.230(6) requires the approval of members.
- » Sec.2(55)(ii) provides that every person who agreed to become a member and whose name is entered in the register of members is a "Member".
- » Sec.88(1) provides that register of members shall indicate equity and preference shares.
- » Therefore, combined reading of Sec.2(55)(ii) and Sec.88(1) provides that the term "Member" shall include both Equity and Preference shareholders.
- » Therefore, the scheme of amalgamation has to be approved by preference shareholders also.

PQ-2: Global Limited a foreign company proposed to Desi Limited, an Indian Company for merger of companies. State the requirements of merger as per companies Act,2013. (ICAI-MTP 2018)

Answer:

- Sec.230 to Sec.232 to be complied with.
- CAA Rules to be complied with.
- Provisions of other applicable laws to be complied with.
- Valuation to be obtained from a member of recognized professional body.
- Approval to be obtained from RBI.
- Approval to be obtained from members.
- Sanction to be obtained from Tribunal.