

FinTax hour Tax and Regulatory pointers in M&A transactions

Fintax Hour – Tax and Regulatory pointers in Mergers and Acquisitions

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In the Financial Services Sector

SBI Associate banks merger with SBI – 1 April 2017 -will lead to increased capital base and availability of loan.

The mega consolidation, which took effect from April 1, 2020, saw 10 PSBs consolidate into four — Oriental Bank of Commerce and United Bank of India merged with Punjab National Bank; Syndicate Bank merged with Canara Bank; Andhra Bank and Corporation Bank merged with Union Bank; and Allahabad Bank with Indian Bank.- “The adoption of best practices across amalgamating entities would enable the banks improve their cost efficiency and risk management...” (PIB, 2019).

Prior to this mega consolidation, Vijaya Bank and Dena Bank had merged with Bank of Baroda with effect from April 1, 2019.

HDFC Limited merger with HDFC Bank announced on 4 April 2022 and effective from 1 July 2023.

Exide Life Insurance merger with HDFC Life

Bharti AXA General Insurance business acquisition by ICICI Lombard General Insurance

L&T General Insurance and Apollo Munich Health Insurance Company merger with HDFC Ergo.

Principle Mutual Fund with Sundaram Mutual Fund

L&T Mutual Fund with HSBC Mutual Funds

IDFC Mutual Funds with Bandhan MF

Mergers and Acquisitions

In the Financial Services Sector

Pre-webinar Polls

Which sector in India is likely to experience higher merger activities in 2024?

Pharma – 19%

Industrial – 14%

Financial services – 47%

Consumer and Retail – 21%

Total votes - 13445

Pre-webinar Polls

Will 2024 witness an increase in M&A activities compared to 2023 as the Indian economy improves?

Yes – 86%

No – 8%

Unlikely – 6%

Total votes - 2558

Mergers and Acquisitions

In the Financial Services Sector

OECD

- **Serial Acquisitions and Industry Roll-ups** - Background Note – 6 December 2023
(DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE)
- **Theories of Harm for digital mergers** – June 2023.

India Contribution to the Theories of Harm for Digital Mergers – 19 May 2023

Evaluated by CCI and approvals granted subject to modifications/ clarifications:

- Concerns Over Self-Preferencing - Hyundai & Kia / Ola and Walmart / ABFRL
- Concerns over Net Neutrality and Concerns arising from sharing of data leading to data backed market power – Google / Jio and Facebook/ Jio
- Multi-layered presence in ecosystem triggering complementary effects leading to creation of barriers to entry/expansion – PayU / Bill desk

The Parliamentary Standing Committee on Finance submitted its report on 'Anticompetitive Practices by Big Tech' in December 2022, need to enhance its competition law to address the needs of the digital market; on identifying and regulating Systemically Important Digital Intermediaries (SIDIs)

The Competition Act amended in 2023 for companies to notify CCI basis deal value test in addition to other test of turnover and asset size

Mergers and Acquisitions

In the Financial Services Sector



Few Judicial precedents on rejection of merger



NCLT Mumbai Bench order delivered on 05 September 2018 in the scheme of amalgamation and arrangement between Gabs Investments Private Limited and Ajanta Pharma Limited and their respective shareholders – CSP No. 995 of 2017 and CSP No. 996 of 2017 in CSA No. 791 and 792 of 2017 rejected the scheme on the basis of avoidance of taxes and benefiting only promoters and not in public interest.



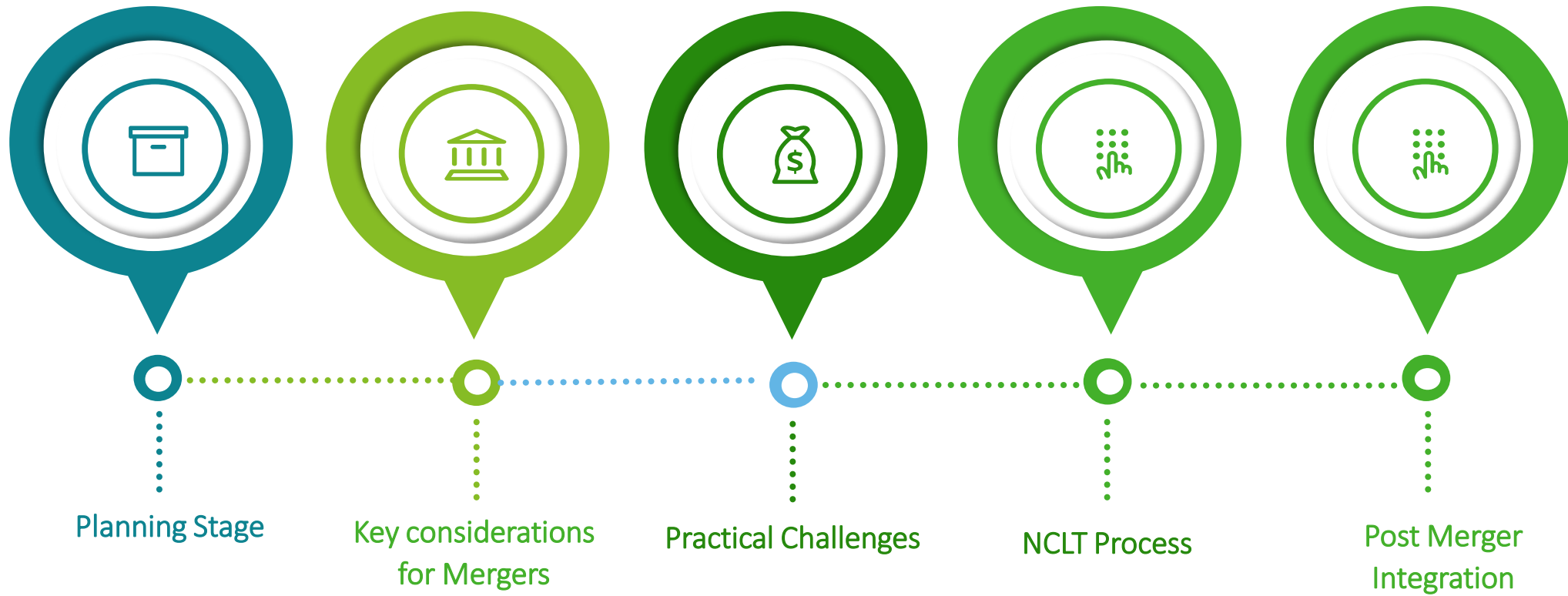
The NCLAT upheld the order of the NCLT In the case of ***Wiki Kids Limited v Aventel Ltd (AT No. 285 of 2017)***, rejecting a scheme of amalgamation, as it resulted in undue advantage and financial benefits to the common promoters even though the Transferor Company had no business and little net worth/value.



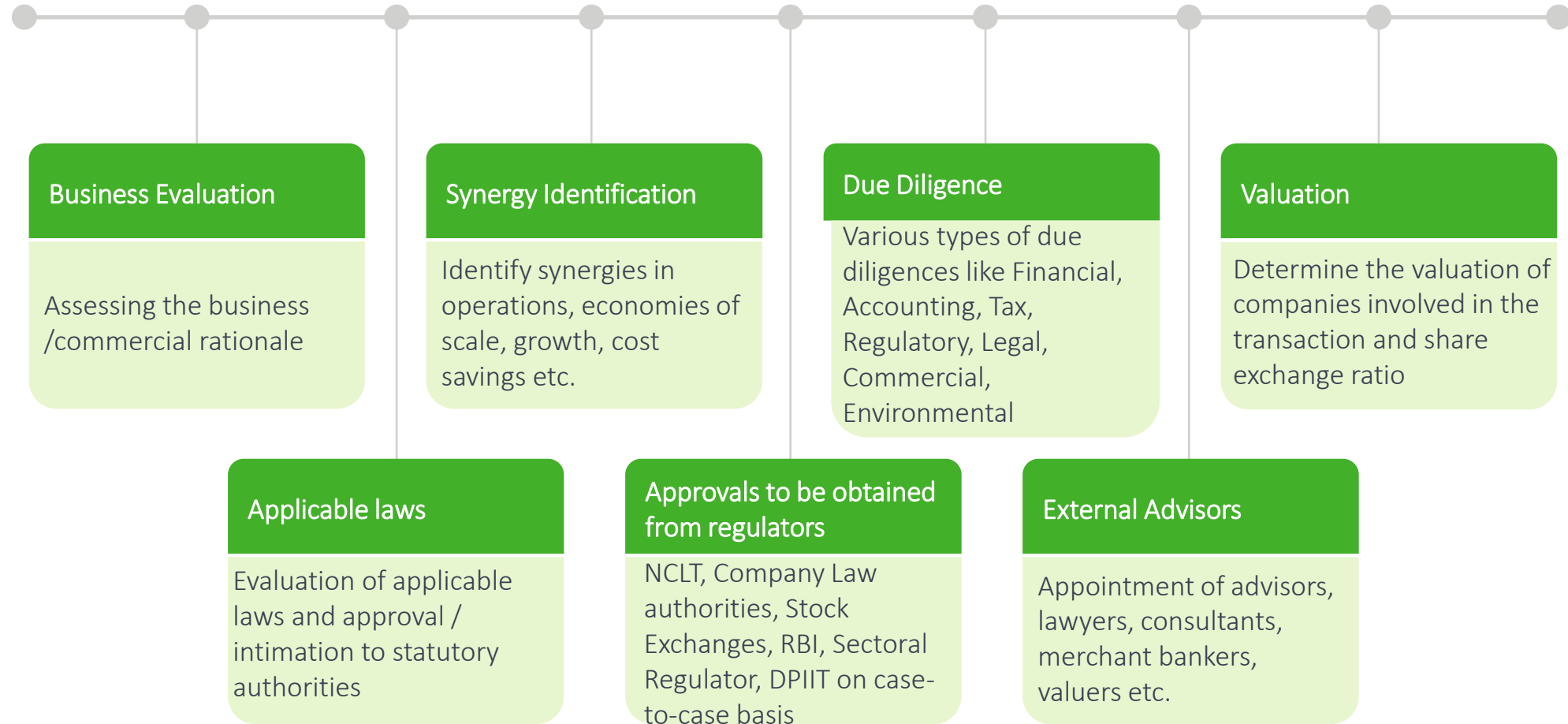
The NCLAT Chennai confirmed the order of the NCLT Kochi Bench in the case of Hotel City Plaza Private Ltd (transferor) v. Trivandrum Apollo Towers Private Ltd (transferee) dismissing scheme of merger on basis of objection raised by Regional Director, Ministry Of Corporate Affairs as the company had violated certain provisions of the Company law.

Regulatory Overview

Overview



Planning Stage



Key considerations involved in Mergers / Amalgamations



Determining the Appointed Date and Effective Date



Approvals / NOC from tax & regulatory authorities like IT, GST, CCI, SEBI, RBI, IRDAI, PFRDA, NCLT, Stock Exchange, RD, ROC, OL etc.



Tax Attributes



Litigation / dispute with customers, creditors, employees etc.



Regularising past non-compliance, if any



Valuation and consideration



Accounting treatment



Shift in registered office / common NCLT jurisdiction

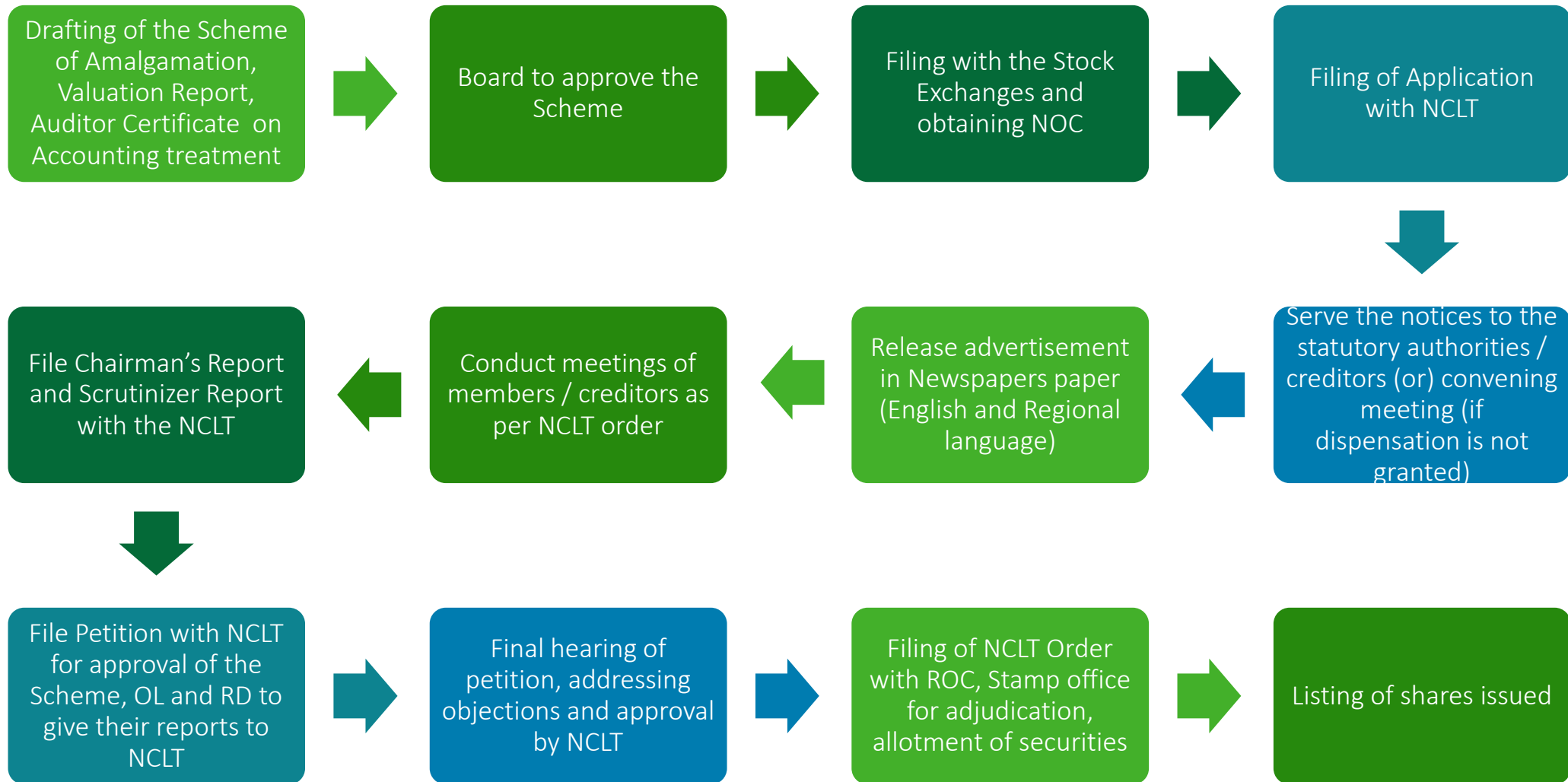


Stamp duty impact



Timeline for implementation

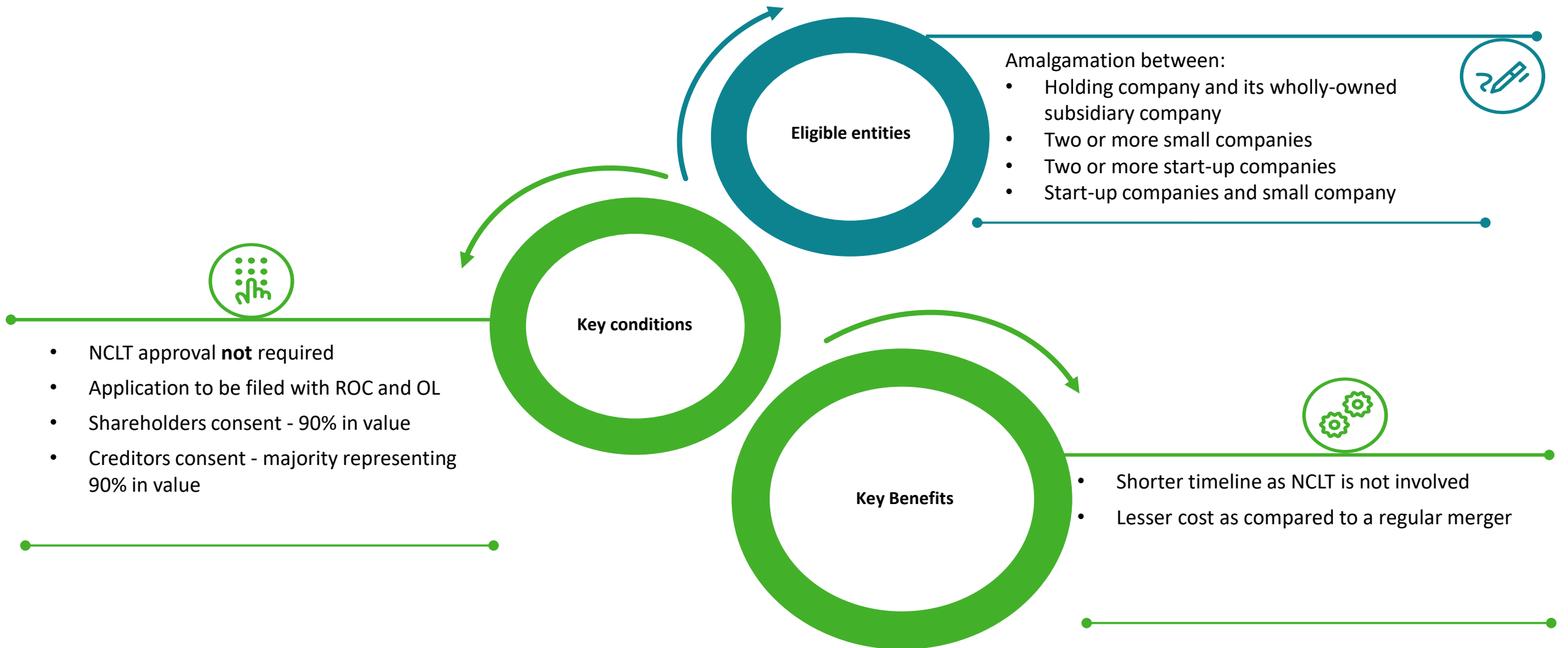
Merger process under Section 230-232 of the Companies Act, 2013



- **Note:** In case dispensation from members/creditors meeting is granted by NCLT, few steps like issuing notice for court convened meeting, convening meeting, scrutinisers report will not be required. Closely held companies generally submit NOC from shareholders at the application stage

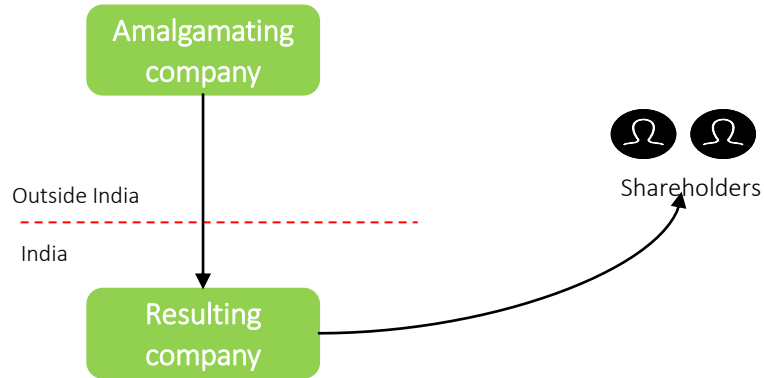
- **Timelines:** 6-9 months from the date of filing of Application with NCLT

Fast-track Merger



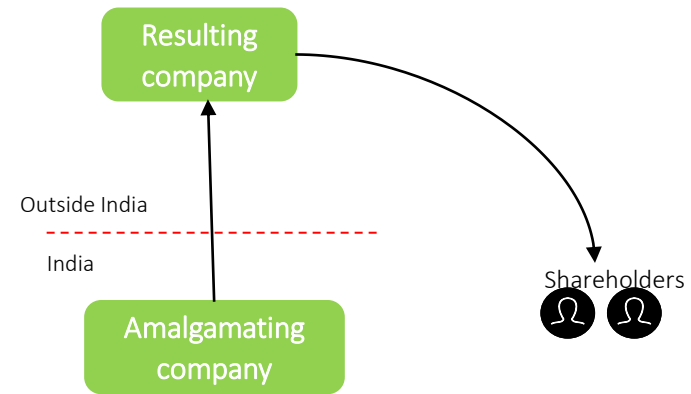
Cross Border Merger

Inbound Merger



- Compliance with pricing guidelines, entry routes, sectoral caps as per FDI regulations
- Foreign company's office is treated as Branch / Office outside India
- Any guarantee / borrowing of the foreign company from overseas sources shall conform to ECB norms within a period of 2 years
- Resulting company may maintain a bank account in foreign currency in the overseas jurisdiction for transactions incidental to cross border merger up to 2 years
- If the asset or security is not permitted to be acquired or held, the Resulting company need to dispose off within 2 years from the date of sanction of the Scheme and repatriate sale proceeds to India

Outbound Merger



- Compliance with FEMA Overseas Investment regulations and LRS regulations (in case of individual acquirers) for acquiring shares pursuant to Cross Border Merger
- Indian company's office is treated as Branch Office in India
- Guarantees or outstanding borrowings shall be repaid as per the sanctioned Scheme
- Resulting company may acquire, hold and transfer any asset in India which a foreign company is permitted to acquire. Where the asset or security is not permitted to be acquired, the resultant company shall sell/ dispose off within 2 years from the date of sanction of Scheme and repatriate sale proceeds outside India
- Resulting company may open SNRR Account for the purpose of putting through transactions and keep it open up to 2 years

Deemed RBI approval, Valuation norms, earlier contravention / non-compliance to be set right prior to merger, certificate from the key managerial personnel to be filed with NCLT

Stamp duty on merger / demerger

Order of NCLT is treated as an instrument of Conveyance and is liable to stamp duty



States with a specific entry for conveyance on merger / demerger



- Maharashtra
- Gujarat
- Karnataka
- Madhya Pradesh
- West Bengal
- Andhra Pradesh
- Rajasthan
- Tamil Nadu

States with no specific entries, but HC has ordered for payment of stamp duty



- Delhi (Delhi Tower Limited)
- Uttar Pradesh (Hero Motors and other Applicants)

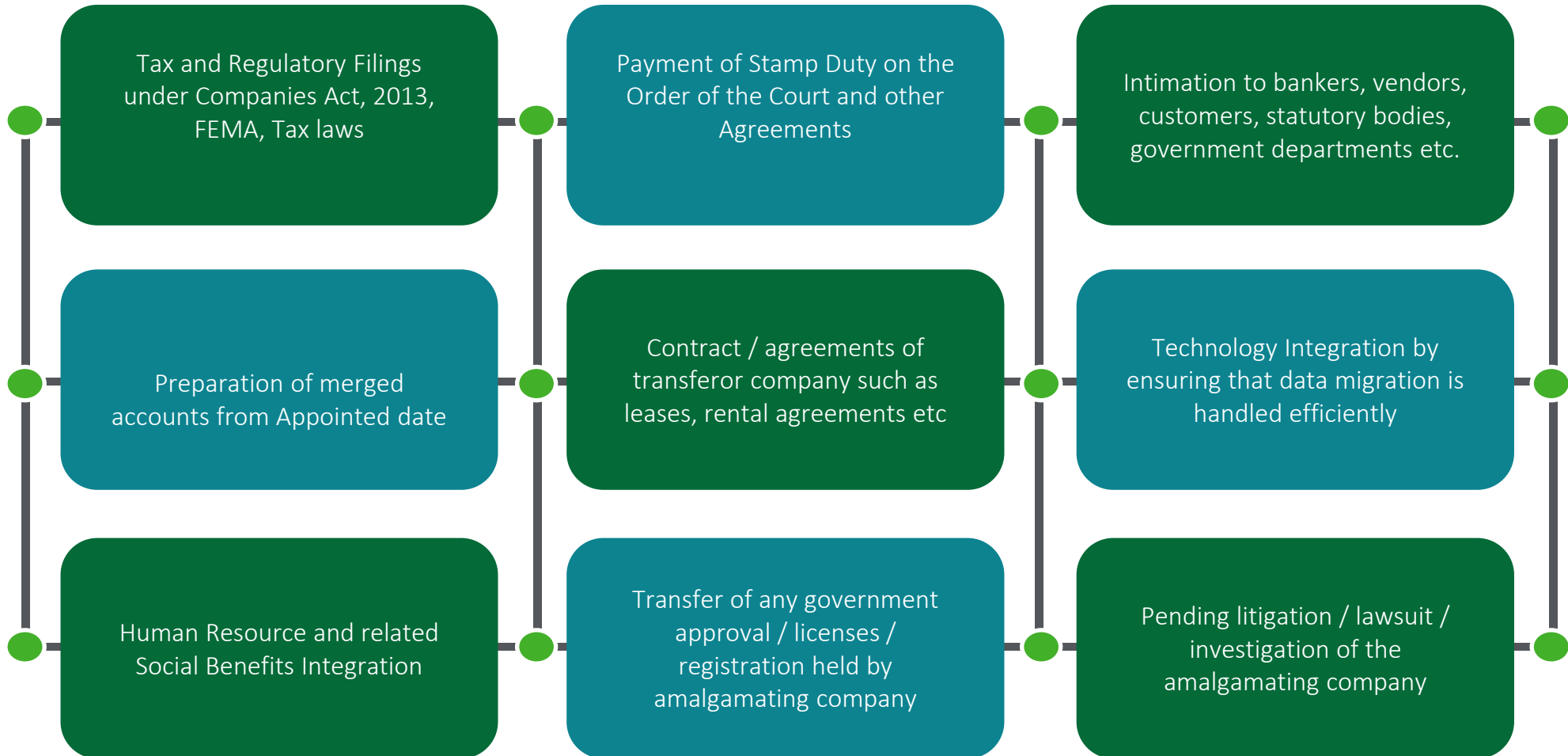
States with no specific entry for conveyance on merger / demerger



Duty may be payable as per SC judgment in Hindustan Levers Limited at Stamp Duty rates applicable for Conveyance

Stamp duty is attracted in the State where the registered office is located and where the properties of the amalgamating company is situated

Post Transaction Integration



Practical Challenges

Compliance with Significant Beneficial Ownership provisions

Compliance with accounting treatment, payment of fees for increase in authorised capital, if any

Interest of creditors are protected

Compliance with related party transactions entered in the past

Compliance with the qualifications and reservations made by the statutory auditors

Pending disputes / litigations

Compliance with FEMA Guidelines

Whether any complaints / show cause notice / compounding application is pending in ROC

Safeguard interest of employees

Polling question - 1



If the amalgamating company (the transferor company) and amalgamated company (transferee / resulting company) are in two different states, should NCLT order be obtained from both States?

- Yes
- No, should be obtained only from the state in which the amalgamating company is situated
- Not sure



Income-tax overview

Applicable sections under the Income-tax Act, 1961 (“the Act”)

One of the important aspects which is required to be considered in deciding about amalgamation of two companies, is the effect of such amalgamation to the amalgamating company and the resulting company under the various provisions of the Income-tax Act

- Section 2(1B) - defines “amalgamation”.
Prescribes certain conditions to be satisfied to qualify as amalgamation
- Section 47(vi)/(via) – Gains on transfer of assets pursuant to compliant amalgamations not taxable for the amalgamating company.
- Section 43C - computation of cost of acquisition of certain assets
- Section 32 – proportional depreciation to be allowed to amalgamating and resulting
- Section 43(1) – actual cost for the successor = WDV of the block of the amalgamating co. less depreciation
- Section 72A / 72AA – Specified resulting companies permitted to carry forward and set-off of loss of amalgamating company subject to conditions

Admissibility of certain expenses/allowances incurred by the amalgamated company -

- Section 32A - Investment allowance
- Section 33A(1) - Development Allowance
- Section 35 - Expenditure on scientific research
- Section 35AB - expenditure on know how
- Section 35ABB - Expenditure for obtaining license to operate telecommunication
- Section 35D - Amortisation of certain preliminary expenses
- Section 35DD - Amortisation of expenditure in case of amalgamation
- Section 10AA – tax holiday to units in Special economic zone

- Section 170(2A) – assessment / reassessment of amalgamating co. during pendency of amalgamation, deemed to be made on the resulting co.
- Section 170A - allows filing of modified return of income by the successor within 6 months.
- Taxation of Investors in the amalgamating Company:
 - Section 47(vii) – gains on transfer of securities pursuant to compliant amalgamations not taxable
 - Section 49(1)/(2) and 2(42A) – cost of asset and period of holding of the previous owner considered as “cost of acquisition” in computing capital gains

Pre-merger Planning to post-merger integration for tax matters

The income tax compliances related to mergers involve several aspects, and the return of income filing is a crucial component. Here is an overview of the key considerations for income tax compliances in the context of amalgamation

Per-merger due diligence

1. A thorough due diligence process.
2. Reviewing the tax positions of both the entities..
3. Evaluating TDS / MAT credit availability
4. Evaluating refund / demand position
5. Timing differences in expenses claimed / recoverable
6. Retiral and other funds of employee benefits

Suitable clauses to be inserted in the merger Scheme to provide the benefit to the merged / amalgamated company

During the intervening period (between appointed and effective date)

If due date for filing statutory forms and the Income-tax return falls between the appointed date and the effective date,

- to obtain statutory forms and file return of income of the amalgamated and amalgamating company.

Evaluate TDS filings and mismatches and other TDS related compliances

Post-merger integration

- Obtain final / revised statutory reports based on final consolidated financials
- File return / modified return of income
- List down activities that impact the stakeholders for tax purposes and prepare a workplan under project management principles for a timely integration and adequate documentation.

Practical Challenges

-
1. If NCLT order is received just few days before the due date of filing return of income and there is no readiness of the consolidated financials, whether to file return considering standalone financials followed by modified return or to file belated return considering final consolidated financials or to file return considering draft consolidated financials within due date followed by modified return
 2. Claim for expenses by the successor for amounts disallowed by the predecessor for non-deduction of tax at source
-
4. Claim for expenses by the successor for amounts disallowed by the predecessor which remained unpaid.
 5. MAT credit whether allowable for carry forward and set off?
 6. Brought forward loss of the predecessor entity whether to be carried forward in case of other than those covered under 72A and 72AA?
 7. Treatment of unabsorbed depreciations of the predecessor ?
 8. Whether reversals / recovery of expenses / provisions / bad / doubtful debts, etc. or cessation of trading liability of the predecessor entity taxable in the hands of the successor entity?
-
9. Treatment of write off of debts of the predecessor entity as “bad debts”
 10. Amalgamation expenses incurred by the merging entities before the year of merger, whether to be allowed from the year of merger or from the year of incurring of expenses?

Polling question 2.



Whether the extant tax reliefs are sufficient enablers for the amalgamation activity

- Yes
- No, because certain benefits of carry forward of losses is restricted to specified business undertakings
- Maybe

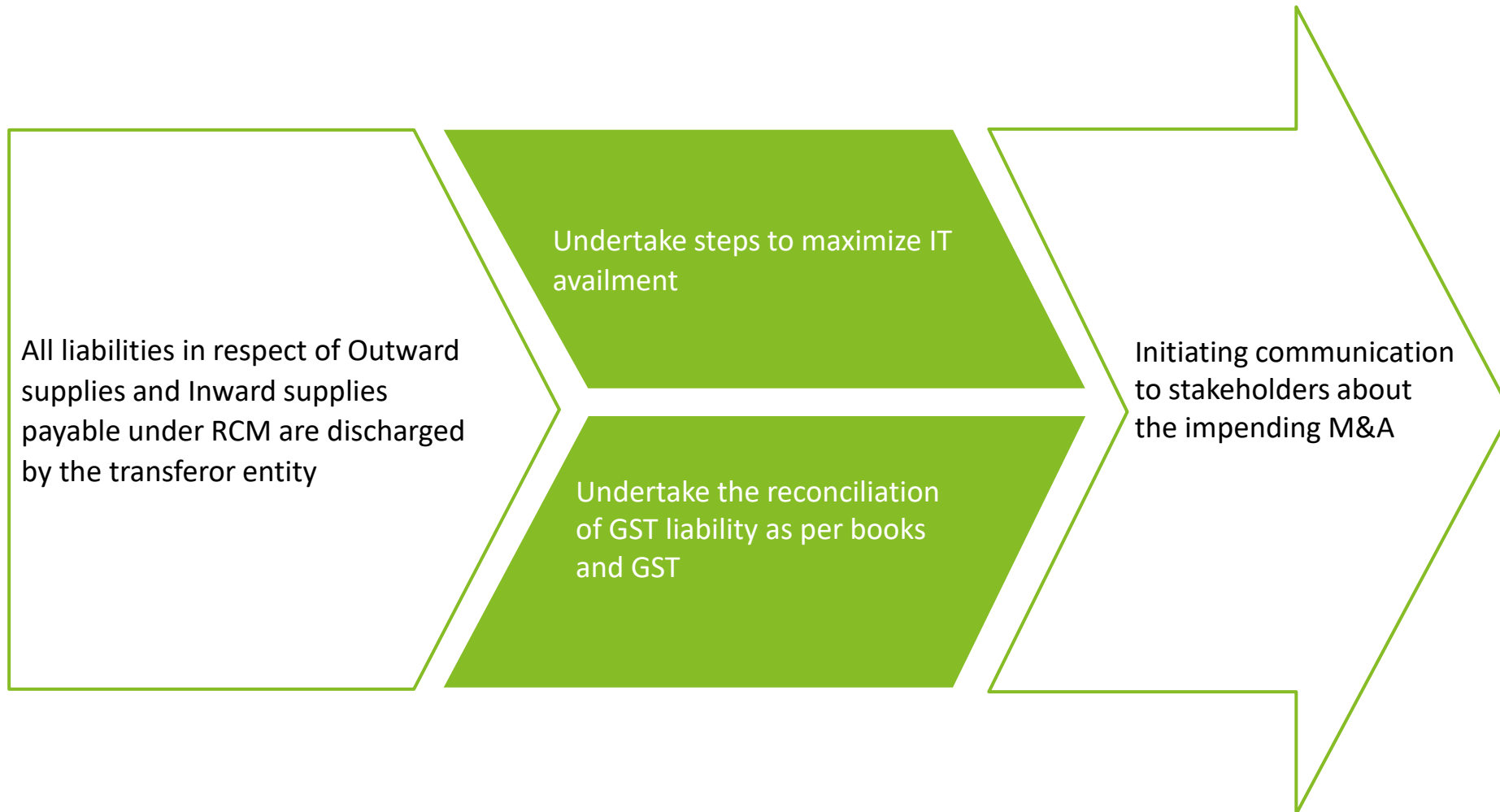


Indirect tax overview

Key aspects

Key aspects

Pre-merger steps



Key aspects

Post merger steps – Transferor entity

1

Undertake the periodic compliances till cancellation of GST registration

2

Utilizing/Obtaining refund of balance in Electronic Cash Ledger

3

Intimation about amalgamation to jurisdiction authority and authorities of on-going notices/adjudications

4

Filing of ITC-02 for transfer of unutilized ITC balance lying in Electronic Credit Ledger. Circular No 133/03/2020 - GST dated 23rd March 2020 provides for formula for computation of ITC to be transferred

5

Filing for cancellation of GST registration within 30 days of occurrence of event followed by filing of Final Return within 3 month of date of cancellation or date of order of cancellation, whichever is later

Key aspects

Post merger steps – Transferee entity (Under GST)

- 1 Obtain fresh registration/add premises of transferor entity in GST registration certificate of transferee entity
- 2 Obtain the custody of all past records of transferor entity
- 3 Alignment of tax positions of transferor entity with transferee entity
- 4 Continuation of transactions of transferor entity by transferee company
- 5 Undertake the applicable compliances of transferor entity

Transition procedures

Post merger steps – Transferee entity (Under Customs / FTP)

1

Re-organization of SEZ units / Developer maybe undertaken with prior approval of the Board of Approval. This is subject to continuation of SEZ as a going concern.

2

Transferee entity to obtain new IEC against new PAN, if not already existing.

3

Application for linking obligations under IEC of transferor maybe submitted online by transferee. Once linkage is sanctioned, IEC shall be treated as surrendered.

4

The SVB valuation report of transferor entity may be required to be re-evaluated by transferee entity

Provisions of GST law – Other areas

Provisions of GST law – Other areas



Section 85 of Central GST Act, 2017

The transferor as well as transferee shall, jointly and severally, be liable to pay the amount due from the transferor upto the time of such transfer



Section 87 of Central GST Act, 2017

Where the amalgamation takes effect from a date earlier to date of order of Tribunal, the supply / receipt between those companies in the interim shall be included in turnover / receipt of respective companies. Such companies shall be treated as distinct companies for period upto date of Order.



Entry 4(c) of Schedule II to the Central GST Act, 2017

Transfer of business as a going concern is to be considered as a supply of services

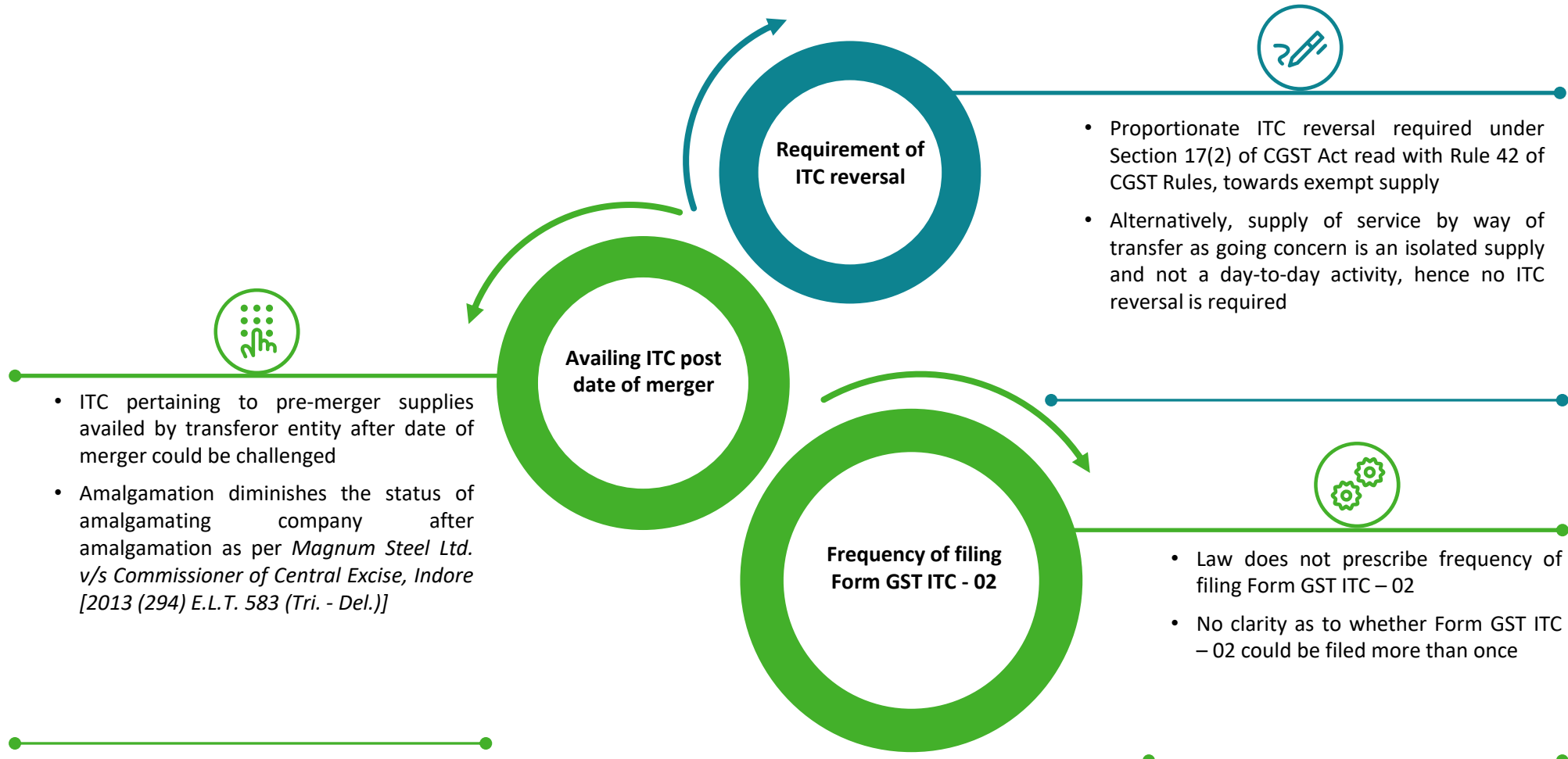


Entry No. 2 of Notification No. 12/2017-CT(R) dated 28 June 2017

Services by way of transfer of a going concern, as a whole or an independent part thereof is an exempt supply

Practical challenges

Practical challenges



Polling question -3



Whether input tax credit is allowable to the amalgamated company (transferee company) for premerger supplies received by the amalgamating company (transferor company)

- Yes, as the transferor company has succeeded the transferee company
- No, both companies are different and so ITC should lapse
- Maybe



Thank you!

Kindly spare a minute to help us with your feedback for today's session...

For any queries, please feel free to write to us at intax@deloitte.com



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