LEXOLOGY
Getting The Deal Through

Public M&A

in India

Report generated on 06 July 2021

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India

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STRUCTURES AND APPLICABLE LAW

Types of transaction

How may publicly listed businesses combine?

The general forms of business combinations that are available to private companies are also available to publicly listed companies. These are: asset acquisitions, share acquisitions and court-approved schemes. Where the target is a publicly listed company, the business combination also becomes subject to Indian securities laws.

Asset acquisitions

With asset acquisitions, parties will have two key structuring alternatives. They may transfer either an entire running business or undertaking (also known as a 'slump sale') or only identified key assets (eg, material contracts and IP) while leaving other assets behind (eg, trade debts). Tax will also be a key driver for this choice of structure.

Owing to Indian exchange control restrictions on direct ownership by non-residents of certain categories of assets (eg, real estate), direct assets acquisitions by non-resident buyers are generally difficult to implement.

Share acquisitions

Unless there are concerns about historic liabilities, or a carve-out transaction is contemplated, buyers will be expected to undertake a share acquisition.

Acquisition structures involving convertible securities, or shares with superior voting rights, in publicly listed companies are also permitted, subject to conditions. Acquisition finance in India, however, involves certain challenges.

Cross-border share acquisitions will also be subject to the requirements of Indian exchange control regulations.

Court-approved schemes

Complex transactions are best implemented through court-approved schemes, which provide a great degree of structuring flexibility. The principal trade-off, however, is the relatively lengthy and public court approval process.

Law stated - 31 March 2021

Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

The principal legal and regulatory framework for business combinations and acquisitions of publicly listed companies in India comprises the following:

- the Companies Act 2013 and subordinate legislation (the Companies Act), which regulates, among others, non-pre-emptive issuances of shares, significant sales of 'material' undertakings, court-approved schemes and related party transactions. Together with the Indian Contract Act 1872, the Companies Act comprises the basic legal framework for business combinations;
- the Foreign Exchange Management Act 1999 and subordinate legislation, which regulates cross-border transactions involving Indian residents and non-residents; and

- the Competition Act 2002 and subordinate legislation, which sets out the merger control regime in India.

Unless the 'small target' (aggregate assets in India worth less than 3.5 billion rupees or aggregate turnover in India of less than 10 billion rupees, or both) exemption, or any other specified exemption, is available, transactions that would exceed the following thresholds must be notified to the Competition Commission of India:

- at the level of the buyer and target or the resultant entity:
  - 20 billion rupees of combined assets in India;
  - 60 billion rupees of combined turnover in India;
  - US$1 billion of combined assets worldwide (including 10 billion rupees of combined assets in India); or
  - US$3 billion of combined turnover worldwide (including 30 billion rupees of combined turnover in India); and
- at the level of the group (to which the target or resultant entity would belong):
  - 80 billion rupees of combined assets in India;
  - 240 billion rupees of combined turnover in India;
  - US$4 billion of combined assets worldwide (including 10 billion rupees of combined assets in India); or
  - US$12 billion of combined turnover worldwide (including 30 billion rupees of combined turnover in India).

The Securities and Exchange Board of India (SEBI) Act 1992 and subordinate regulations set out the insider trading, takeovers and disclosure regime in India.

The SEBI (Prohibition of Insider Trading) Regulations 2015 (the Insider Trading Regulations) govern the sharing or receipt of any 'unpublished price sensitive information', and prohibit trading in securities of publicly listed companies while in possession of such information. Further, any due diligence of publicly listed companies would need to comply with the processes and conditions set out in these regulations.

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) govern takeovers of publicly listed companies. Any direct or indirect (1) acquisition of an initial 25 per cent or more voting rights (at any time), (2) subsequent acquisition of more than 5 per cent voting rights (in an Indian financial year) or (3) acquisition of control in a publicly listed target in India will trigger a mandatory tender offer. This will require the buyer to offer to further acquire at least 26 per cent of the target's voting capital. Indirect acquisitions where the proportionate net asset value, sales turnover or market capitalisation of the publicly listed target company is more than 80 per cent of the consolidated net asset value, sales turnover or market capitalisation of the ultimate target or business are regarded as direct acquisitions. The SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations) prescribe regulatory approval, shareholder voting, disclosure and other requirements for court-approved schemes involving publicly listed companies. In addition, the Listing Regulations, together with the Takeover Regulations and the Insider Trading Regulations, contain certain disclosure requirements for business combinations involving publicly listed companies.

Law stated - 31 March 2021

Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Cross-border share acquisitions are subject to Indian exchange control and securities laws and may be structured through one of two routes: foreign direct investment (FDI), which comprises strategic investments into equity and convertible securities; and foreign portfolio investment, which comprises portfolio investments below 10 per cent in listed or to-be-listed equity and specific convertible securities as well as non-convertible corporate bonds.

FDI is also subject to fair valuation requirements, which require payment of a minimum price in case of acquisitions by non-residents and a maximum price in case of sales by residents, in each case, based on any internationally accepted valuation methodology. Deferred and contingent consideration structures are regulated and only 25 per cent of the purchase consideration can be paid subsequently, within an 18-month window.

In addition, outbound mergers (ie, the transferee or resultant entity outside India) are permitted only with specified foreign jurisdictions. Further, as a protectionist measure in view of the covid-19 pandemic, foreign investment from a country that shares a land border with India can only be undertaken with prior government approval.

Merger control and takeover and other securities laws will also impact cross-border transactions.

Law stated - 31 March 2021

Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Yes. Many sectors are subject to a sector-specific regulatory regime, in most cases, with a dedicated regulatory body. For example, there is a separate regulatory regime for banking and financial services administered by India's central bank, the Reserve Bank of India. Similarly, insurance has its own set of regulations, with the Insurance Regulatory and Development Authority of India acting as the regulatory body.

In addition, under the Indian exchange control regulations, although foreign investment is freely permitted in most sectors, in other sectors, it is either prohibited entirely (eg, atomic energy, lotteries and gambling), permitted up to a specified cap only (eg, 49 per cent in the pension sector) or permitted beyond specified caps but with prior governmental approval (eg, the telecoms sector, in which foreign investment beyond 49 per cent requires governmental approval). In addition, in certain sectors, there are also additional conditions and operating obligations (eg, single-brand retail trading).

Law stated - 31 March 2021

Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

Sale and purchase agreements are entered into for both asset deals and share deals. In asset deals, the transfer of immovable property will require a separate conveyance document and transfers of contracts and other liabilities are normally undertaken through separate novation agreements.

A mandatory tender offer is highly regulated and time bound in nature. The buyer needs to issue a public announcement, a detailed public statement and subsequently provide an offer letter to all shareholders setting out, among other things, details of the underlying transaction as well as the tender offer process. The shareholders are granted 10 working days to tender their shares (at their own discretion). The acquisition of shares envisaged in the underlying transaction may, subject to certain conditions, be completed prior to or post completion of the tender offer process.

The scheme document that is filed with the National Company Law Tribunal is the principal document in court-approved schemes. In strategic public M&A transactions structured under a scheme, there is an emerging trend for the parties to also enter into an implementation agreement.

Transaction agreements are typically governed by Indian law.

Law stated - 31 March 2021

FILINGS AND DISCLOSURE

Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

In mandatory tender offers, the public announcement, the detailed public statement and the letter of offer are all filed with the Securities and Exchange Board of India (SEBI), the relevant stock exchanges and the publicly listed company. Court schemes must be filed with the National Company Law Tribunal and also with the relevant stock exchanges.

Details of inbound foreign investments need to be reported to the Reserve Bank of India (RBI) within 30 days. Details of shares transferred on the stock exchanges and involving non-residents need to be reported to the RBI within 60 days.

Where merger control thresholds apply, the deal parties may have to make either a short-form filing in Form I or a long-form filing in Form II. The Form II filing is generally used where the combined market share is more than 15 per cent in any of the horizontal market or more than 25 per cent in any of the vertical market.

Business combinations will also involve secretarial filings to be made with the relevant registrar of companies under the Companies Act.

Stamp duty is chargeable on instruments, so the duties will vary depending on the transaction structure and the nature of instruments being executed. In addition, all share acquisitions (on a delivery basis) are chargeable to stamp duty at a uniform rate of 0.015 per cent.

Law stated - 31 March 2021

Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015 (the Listing Regulations) require public disclosure of basic information regarding business combinations. The disclosable information includes the size and turnover of the relevant transaction parties, the relevant business or industry, the transaction objective, the nature and amount of consideration and whether any related parties are involved. In share acquisitions, the disclosure obligation is also triggered upon execution of the transaction documentation.

Separately, acquisitions and disposals of shares beyond specified thresholds will trigger disclosure obligations under the SEBI (Prohibition of Insider Trading) Regulations 2015 and the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011.

Law stated - 31 March 2021

Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

Persons holding at least 25 per cent (including holdings of any concert parties) of the voting rights of a publicly listed company need to disclose their aggregate holdings and voting rights within seven working days of the financial year close (ie, 31 March).

Separately, any person holding at least 5 per cent (including holdings of any concert parties) of the shares or voting rights of a publicly listed company must disclose all acquisitions or sales of more than 2 per cent.

Publicly listed companies must also disclose details regarding their 'significant beneficial owners' on a quarterly basis. Significant beneficial owners are individuals who directly or indirectly hold at least 10 per cent of the shares, voting rights or rights to receive distributions, or otherwise exercise significant influence or control, over the listed company.

If the publicly listed company is party to a business combination, the disclosure obligations under the Listing Regulations will apply.

Law stated - 31 March 2021

DIRECTORS' AND SHAREHOLDERS' DUTIES AND RIGHTS

Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

Directors' duties

The principal duties of a director under Indian law are:

- to act in good faith to promote the objects of the company for the benefit of its members as a whole;
- to act with due and reasonable care, skill and diligence;
- to avoid any actual or potential conflict between his or her own and the company's interests; and
- not to achieve or attempt to achieve any undue gain or advantage to him or herself or his or her relatives or partners or associates.

The Companies Act further expands the scope of directors' duties by requiring them to act not only in the best interest of the company but also its employees, the shareholders, the community and for the protection of the environment.

With respect to business combinations, directors also have a statutory obligation to declare any direct or indirect interests in the business combination, first, in the board meeting at which the matter is first considered, and subsequently, at the first board meeting in each financial year and whenever there is any change to the earlier declaration. In these board meetings, with respect to matters in which directors are interested, the interested directors will not be considered for determining a quorum and may not vote on the matters.

Directors and specified connected persons (including relatives and holding, subsidiary and associate companies) are also considered related parties, so any arrangements between the company, on the one hand, and a director or his or her connected person, on the other hand, may require board or shareholder approval.

Shareholders' duties

Under Indian law, controlling shareholders are not subject to similar duties as directors. However, as in English law, controlling shareholders are obliged not to deal with the minority in an unfairly prejudicial or oppressive manner. Courts have wide-ranging powers in the case a claim of unfair prejudice is successfully made.

Law stated - 31 March 2021

Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Shareholder approval by special resolution (ie, 75 per cent of votes) is necessary where a public company proposes to dispose of a substantial part or the whole of an undertaking. In a merger or demerger, shareholder approval is necessary provided that a majority in number and three-quarters in value of the shareholders and creditors approve the transaction. Listed companies need shareholders' approval by special resolution in case of disposal of a material subsidiary (more than 10 per cent income or net worth on a consolidated basis) or sale or disposal of assets of a material subsidiary. Further, approval of majority of public shareholders is required in certain cases involving schemes of arrangement between a listed company and promoter or promoter group entities.

Listed Indian companies tend to be closely held by an individual or a family. Therefore, deal protection can be achieved by ensuring that the controlling shareholders are committed to the proposed transaction.

Law stated - 31 March 2021

COMPLETING THE TRANSACTION

Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Historically, unsolicited transactions in the case of publicly listed entities have been scarce in India owing to the concentration of controlling interests in a few individuals or families. Most public deals involve a degree of due diligence by the acquirer and fairly robust representations and warranties package backed by the seller. Accordingly, public takeovers closely resemble private M&A transactions, with the exception of the acquirer having to complete a tender offer process in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011 (the Takeover Regulations) and make mandatory disclosure under the Takeover Regulations and the SEBI (Prohibition of Insider Trading) Regulations 2015 (the Insider Trading Regulations).

The Takeover Regulations provide for hostile takeovers of listed Indian companies and set out conditions upon satisfaction of which, an acquirer can make a voluntary offer to acquire shares of an Indian listed company. These conditions include, inter alia, the following:

- a voluntary offer can be made only by a person who holds at least 25 per cent shares or voting rights in a company, but not more than 75 per cent (taking account of the maximum permissible non-public shareholding);
- the offer size must be for at least an additional 10 per cent of the voting rights the target company;
- a voluntary offer can be made only by a person who has not acquired any shares in the target company in the preceding 52 weeks prior to the offer;
- during the offer period, the acquirer cannot acquire shares other than through the voluntary offer; and

- once the voluntary offer is completed, the acquirer shall not acquire further shares in the target company for six months after completion of the offer. However, this excludes acquisitions by making a competing offer.

As the Insider Trading Regulations make communication of unpublished price-sensitive information an offence, the approach towards due diligence of a listed target and the related public disclosure of the findings requires careful planning, as well as execution of appropriate confidentiality and standstill agreements between the target and the acquirer.

Law stated - 31 March 2021

Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

Although much more common in relation to private deals (especially where financial investors are involved or in the case of termination owing to non-satisfaction of a condition), deal protection devices such as break fees (payable by the target or promoters to the bidder) and reverse break fees (payable by the bidder to the target or promoters) are extremely rare in connection with public deals in India. It is not clear whether the Securities and Exchange Board of India (SEBI) would approve an offer letter involving such payments, especially if these arrangements cast a potential payment obligation on the target company. Separately, the payment of break-fees to non-residents may require the prior approval of the Reserve Bank of India (RBI).

Under the Companies Act, it is unlawful for any public company to give financial assistance in connection with the acquisition of shares. Further, the consequences of a breach are stringent and liability of the company is subject to a fine of a maximum of 2.5 million rupees, and every officer of the company who is in default is liable to imprisonment for a term that may extend to three years and with fine of a maximum of 2.5 million rupees.

Law stated - 31 March 2021

Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

Yes. If there is a perceived risk to national security, the government can influence or restrict the completion of a business combination. For instance, under the exchange control policy, foreign investments requiring government approval in the defence, railway infrastructure, broadcasting or telecoms sectors are scrutinised from a security standpoint. On account of the covid-19 pandemic, and as protectionist measures against 'opportunistic acquisitions and takeovers', foreign investment by non-resident entities from, or entities whose beneficial owners belong to, countries sharing land borders with India can be undertaken only with prior government approval.

Law stated - 31 March 2021

Conditional offers

What conditions to a tender offer, exchange offer, merger, plan or scheme of arrangement or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Most forms of business combinations will be subject to conditions, in particular, on obtaining governmental and regulatory consent.

In the case of tender offers under the Takeover Regulations, however, there are funding requirements and the only conditionality that can be provided is with respect to minimum acceptance levels (provided that the higher of 100 per cent of minimum acceptance level consideration and 50 per cent of total consideration has been deposited, in cash, in escrow). Although, the Takeover Regulations permit withdrawal of a tender offer in the event 'any condition stipulated in the agreement for acquisition attracting the obligation to make the tender offer is not met for any reasons outside the reasonable control of the acquirer', the SEBI may resist attempts to expand the remit of conditional offers.

Law stated - 31 March 2021

Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Pure leverage cross-border deals are not common in India (owing to restrictions on domestic banks in India providing acquisition financing). Where a transaction is debt-financed outside India, an offshore security package is normally put in place by the acquirer, as taking security over Indian assets needs prior approval from the RBI. In this scenario, funds are normally drawn down and available at the time of signing the acquisition documents and making the public announcement to satisfy the merchant banker that necessary financing is available. Even in purely domestic deals, financing conditions are rarely sought for, or accepted.

Law stated - 31 March 2021

Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Indian securities laws require that public (or non-controlling) shareholders must hold at least 25 per cent of publicly listed companies. Coupled with SEBI's mandate to safeguard the interests of minority shareholders, implementing a squeeze out of minority shareholders of a publicly listed company therefore becomes challenging, unless the company is delisted first.

Voluntary delistings require approval by at least two-thirds of public shareholders and also the stock exchanges. The exit price is determined through a reverse book-building methodology. The statutory time frame for a voluntary delisting is approximately two to three months, but the actual time frame may vary by a few weeks.

Post-delisting, to squeeze out any remaining minority shareholders, buyers traditionally relied upon court-approved schemes, selective reductions of capital and share consolidations (to cause the minority to end up holding fractional shares).

Section 236 of the Companies Act was enacted to provide an express squeeze-out procedure without the involvement of the courts. In this procedure, the buyout price is to be determined on the basis of an independent valuation with reference to the final offer price of the delisting and the fair value of the target (as determined by conventional valuation methodologies). The section 236 procedure, however, can still involve judicial challenge and remains untested and unreliable as there is no clear right to acquire the minority's shareholding after price determination has taken place.

Law stated - 31 March 2021

Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

In sensitive or highly regulated sectors (eg, atomic energy, lotteries, telecoms), foreign investment approvals are directly handled by the relevant government department. Investment approvals are required to be given within eight to 10 weeks, but that time frame may be extended when security clearance is needed.

Separately, in regulated sectors (eg, insurance), business combinations also require the approval of the relevant regulatory authority in certain cases. In these circumstances, no fixed time frame is provided by the authorities, and business combinations are approved on a case-by-case basis.

Law stated - 31 March 2021

OTHER CONSIDERATIONS

Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

The following position of law is as of 1 April 2021 (as amended by Finance Act 2021).

Share sales

Under the Income Tax Act 1961 and subordinate legislation (the IT Act), the seller's capital gains tax liability will depend on the period of holding and the seller's residency status (including the investment route under exchange control regulations). The applicable tax rates are as follows.

Particulars	Long-term capital gains (period of holding exceeds 12 months)	Short-term capital gains (period of holding is 12 months or less)		
	Resident	Non-resident	Resident	Non-resident

Where securities (equity shares and units of equity oriented mutual fund) are listed on a recognised stock exchange in India and the transaction of sale takes place on the stock exchange such that the transaction is subject to securities transaction tax (STT)	10%	10%	15%	15%
Equity shares sold in an offer for sale to the public included in the initial public offer and where these securities are subsequently listed on a recognised stock exchange	10%	10%	15%	15%
Where securities (other than bonds or debentures) are listed on a recognised stock exchange in India and the transaction of sale does not take place on the stock exchange and is therefore not subject to STT	10% (without indexation) or 20% (with indexation)	10% (without indexation)	30%/corporate tax rate elected	40%

The above-mentioned rates will be further increased by applicable surcharge and cess.

The concessional tax regime for foreign portfolio investment (FPI) is as follows.

	Long-term capital gains (period of holding exceeds 12 months)	Short-term capital gains (period of holding is 12 months or less)
Where securities are listed on recognised stock exchange and transaction of sales takes place on the stock exchange by FPI	10%	15%
Other securities	10%	30%
The above-mentioned rates will be further increased by applicable surcharge and cess. FPI is also accorded a concessional rate of withholding on interest payments at 5 per cent (plus applicable surcharge and cess) on certain debt instruments such as listed non-convertible debentures (NCDs) and long-term infrastructure bonds provided the rate of interest on the NCDs does not exceed 500 basis points over the SBI base rate and are issued before 1 July 2023. If the conditions mentioned under the IT Act are not met, withholding on interest payments would be at the rate of 20 per cent (plus applicable surcharge and cess) or the applicable rate under the tax treaty (contingent upon furnishing a tax residency certificate), whichever is lower.		

In addition, unless specifically exempt under safe-harbour provisions, transfers of shares or interests in foreign companies are also taxable under the IT Act if the substantial value test is met, namely at least 50 per cent of value is derived from India and the value of Indian assets exceeds 100 million rupees (as determined in the prescribed manner).

In cross-border transactions, non-resident buyers have withholding obligations in relation to the seller's capital gains tax and need to obtain basic tax registrations in India. In this respect, parties often resort to tax indemnities, escrows and other risk adjustment mechanisms.

The taxability of deferred or contingent consideration is not fully clear, as there have been conflicting judicial decisions. In a helpful 2016 ruling, however, it was held that the deferred component would be taxable in the year of accrual as against the year of transfer, provided certain conditions were satisfied.

Asset transfers

In slump sales, the business is sold as a going concern for a lump sum consideration. The seller will be subject to capital gains tax on the sale of the business undertaking. Where the undertaking has been in existence for more than three years, a reduced rate of capital gains tax (ie, 20 per cent plus surcharge and cess) would apply. Otherwise, the rate of tax would be as per the general rates of corporate tax applicable to the seller. Recently, slump sales have been made subject to pricing requirements where fair market value (FMV) would be deemed to be the minimum consideration for computing taxes in the hands of the seller. However, the manner in which the deemed FMV is to be calculated has not yet been prescribed. The cost basis of the acquired assets, for the buyer, is determined in accordance with specific rules and needs to be supported by an independent valuation report. Generally, a judicial view has been taken that the sale of a business as a whole is not subject to goods and services tax (GST) and most of the states have also exempted sale as a going concern from GST.

An itemised asset transfer would also result in capital gains liability for the seller. The rate of tax would depend on the period for which the relevant asset is held and whether depreciation has been claimed. In addition, GST will be levied on sale of movable assets (including intangibles assets) as per the prescribed rates. If any consideration is paid for a non-compete obligation, GST will be payable on the consideration. For IT Act purposes, the non-compete fee could either be characterised as business income or capital gains.

In both slump sales and itemised asset transfers, accumulated business losses and unabsorbed depreciation are not allowed to be brought forward.

Court-approved schemes

Amalgamations and demergers involve significantly different tax considerations. Subject to the satisfaction of certain conditions, amalgamations and demergers are tax-neutral and no capital gains tax is applicable. In addition, accumulated business losses and unabsorbed depreciation may be utilised by the resulting (or demerged) entity or amalgamated entity, subject to the conditions provided in the IT Act. However, in demergers, the assets are transferred at book value or Ind AS value and there is no step-up in the cost basis of those assets. Further, any goodwill arising on amalgamation or demergers in the hands of the amalgamated or resulting company (as the case may be) would not be eligible for depreciation.

Other key tax considerations

Buyers are generally advised to require sellers to procure a tax clearance certificate, to avoid the risk of Indian tax authorities declaring one or more asset transfers as void (owing to the seller's pending tax liabilities). In an acquisition of business, the IT Act provides that the buyer as a successor can be held liable for the past tax dues of the seller, in certain circumstances. Alternatives include tax indemnities and certificates from reputed chartered accountants.

In cross-border situations, the availability of tax relief under India's tax treaties with the relevant foreign jurisdiction must be considered.

Indian tax authorities may invoke anti-abuse provisions if a transaction lacks commercial purpose and is aimed principally at obtaining a tax benefit. Re-characterisations of transactions can include disregarding specific entities in a structure, reallocation of income and expenditure, alteration of a party's tax residency and the legal situs of an asset, treatment of debt as equity or vice versa, and even denial of tax treaty benefits.

Indian transfer pricing regulations will apply if the buyer and seller are related enterprises.

The IT Act prescribes specific fair market valuation rules (tax FMV) for transfers of shares and other capital assets. Transfers that do not take place at tax FMV can result in additional tax incidences for the buyer or seller, or both.

Law stated - 31 March 2021

Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

For the transfer of employment of employees categorised as 'workmen' (generally, someone not engaged in an administrative or a managerial capacity or, if employed in a supervisory capacity, earning a maximum monthly wage of 10,000 rupees), the Industrial Disputes Act 1947 (the ID Act) requires buyers to offer full and uninterrupted continuity of service with no less favourable terms. This involves:

- carrying forward accrued benefits and providing credit of past service;
- ensuring that their employment remains uninterrupted and that material employment terms and benefits are not varied; and
- periods of continuous service (with the seller) being credited and taken into account for all employment benefits.

If this requirement is not met, the workmen would become entitled to retrenchment compensation under the ID Act, in addition to other applicable statutory and contractual severance payments.

The above requirements of the ID Act will not apply, however, in share acquisitions where there is no transfer of employment.

In addition, even in respect of the transfer of employment of 'non-workmen' employees, uninterrupted continuity of service (on no-less favourable terms) may be offered, as a contractual matter, to help the buyer retain those employees.

Note that the aforesaid position is the law as of 31 March 2021. However, in September 2020, the President of India granted his assent to the Industrial Relations Code 2020 (IR Code), which will replace the ID Act when it is brought into force and implemented by the Indian government. The government proposes to implement the new IR Code in the next few months, although the exact date of implementation is awaited. However, as far as the above-mentioned provisions are concerned, the upcoming IR Code does not envisage any change other than increasing the wage threshold from the current 10,000 rupees per month to 18,000 rupees per month for the exclusion of supervisory-level employees from the ambit of workmen.

Law stated - 31 March 2021

Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Corporate insolvency is regulated under the Insolvency and Bankruptcy Code 2016 (IBC), which follows a creditor in possession model and requires insolvency resolution plans to be implemented within a statutory time frame of 180 days (extendable up to 330 days). Once a company enters the corporate insolvency resolution process (CIRP), the board of directors loses its powers, which get vested in a court-appointed resolution professional, and a committee of creditors (generally comprising financial creditors) is responsible for approving fundamental matters, including the insolvency resolution plan submitted by an eligible bidder.

The IBC does not permit UK-style pre-packs or US-style 363 asset sales.

For bidders, one of the preliminary considerations will be satisfying the fairly broad eligibility criteria under section 29A of the IBC, which applies not only to the bidder but also its connected persons. Section 29A eligibility has been the subject of judicial challenge in the past and can be a contentious issue, particularly in large deals involving several bidders.

An IBC sale is on an 'as is where is' basis, so proper diligence is critical, but given the limited availability of adequate information as well as strict time frames, bidders need to focus their diligence on pre-identified key risk areas and also ensure that the various aspects of diligence (ie, legal, financial and operational) are closely and efficiently coordinated. Key areas for legal diligence will include third-party consent requirements, late and contingent claims, security interests given by third parties for the target's indebtedness, licences and leases and onerous or long-term contracts.

Anticipating the motivations of the creditor committee and appropriately structuring the bid will be fundamental. For example, Indian public sector banks, which constitute a majority on the creditor committee and are driven by their provisioning and capital adequacy requirements, are likely to favour plans with a higher upfront payment. Other key factors for the bid will include:

- the bidder's experience in turnaround situations and familiarity with the target's sector;
- the extent of the conditionality of the resolution plan;
- the resolution plan's compliance with the IBC and other applicable laws, including how the plan addresses the interests of all stakeholders and not only the creditor committee; and
- payments to non-committee creditors.

Tax liabilities arising from write-offs of existing debt are often substantial and adjustments for past losses and unabsorbed depreciation may be inadequate sometimes. In these cases, specific risk mitigation strategies (eg, debt-to-equity conversions and reverse merger acquisitions) may need to be implemented.

To achieve complete control of the target, bidders also need to design a plan that achieves a clean and efficient exit of incumbent promoters and minority shareholders. This may involve a debt-to-equity conversion and buyout, issuance of new equity or a capital reduction. Publicly listed targets will also need to be delisted and certain exemptions from the general delisting procedure under Indian securities laws have been made available to delistings pursuant to a CIRP.

It should be noted that the IBC is a relatively new piece of legislation and is still evolving. Issues that remain unsettled, or new untested strategies, may become contentious and require judicial or legislative intervention, or pose other challenges. Flexibility, foresight, swiftness of action and detailed meticulous advice should therefore underpin any successful acquisition strategy.

Law stated - 31 March 2021

Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

The offence of bribery under the Prevention of Corruption Act 1988 (POCA) involves an undue advantage offered to, or accepted by, a public servant and is punishable with up to seven years' imprisonment. An undue advantage can include a non-monetary bribe and Indian courts have interpreted 'public servant' quite broadly (even senior bank officials have been covered). Both the bribe taker and the bribe giver can be prosecuted under POCA and it is immaterial whether the bribe was offered or paid directly or through an intermediary.

Most importantly, commercial organisations can also be prosecuted for bribery offences committed by their associated persons and officers of commercial organisations can face personal liability for offences committed with their consent or connivance. A defence of having adequate procedures in place may be raised by corporate organisations.

Buyers also need to be wary of the public company's state of compliance with anti-money laundering laws (including legislation on 'black money'), legislation restricting Benami transactions (ie, transactions for purchase of property in an ostensible owner's name) and tax laws. Consequences of non-compliance in these cases can involve not only fines and imprisonment but also attachment of tainted property. In addition, in case of public companies dealing with the government, there is the risk of being blacklisted from future tenders.

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UPDATE AND TRENDS

Key developments

What are the current trends in public mergers and acquisitions in your jurisdiction? What can we expect in the near future? Are there current proposals to change the regulatory or statutory framework governing M&A or the financial sector in a way that could affect business combinations with, or acquisitions of, a public company?

Despite the ongoing global pandemic, public M&A has been exceptionally active over the past year, and its bull run appears far from over. Volatile markets have presented investors and promoters an excellent opportunity to acquire or further consolidate holdings in publicly listed companies. The Securities and Exchange Board of India has recently approved various measures in support of investment activity and to render greater regulatory clarity to the listed space, including changes to the delisting and promoter reclassification regimes. In addition, much like last year, continued monetary and fiscal support measures and temporary relaxations under the existing legal framework for businesses is expected to play a key role in driving M&A activity in 2021.

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Coronavirus

What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

During the previous financial year (2020–2021), the government and regulators granted certain relaxations to publicly listed companies and their promoters, including, among other things, the extension of timelines for various regulatory compliances, process relaxations in relation to tender offers, convening board and shareholder meetings, increased limits for promoter consolidation (increase to a 10 per cent stake from the earlier limit of 5 per cent) without triggering a tender offer and greater flexibility in launching a voluntary tender offer. These relaxations were granted only for a temporary period and have currently not been extended, and are therefore not available today. However, given that India finds itself in the grip of a second (and more severe) covid-19 wave, it is expected that the government and regulators may extend or reintroduce certain relaxations.

Law stated - 31 March 2021

