A Critical Analysis of Merger and Acquisition under Indian Accounting Standard-103 and the Companies Act, 2013

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ABSTRACT

Since last decades, India is extensively demanding to converge Accounting Standards (AS) with International Financial Reporting Standards (IFRS). For that it is essential also as to maintain uniformity in disclosing the accounting treatments especially for the multi-national and global company. In this course, the Institute of Chartered Accountant of India engages in formulating Indian Accounting Standards (Ind AS) with this regards. The implementation of Ind AS has already begun in the country with Phase I and Phase II companies and many of the Ind AS has been already implemented. In this regards, The Ministry of Corporate Affairs (MCA) also provided The Companies Rules, 2015(Indian Accounting Standards) on vide Notification dated February 16, 2015 and till date many of the amendments are been finalising too. The Ministry also notified the provisions on Compromises, Arrangements and Amalgamations under Sections 230- 240 in Chapter XV of the Companies Act, 2013. By this paper, the efforts have been made to explore the modified concepts of Ind AS 103 - Business Combinations and all those provisions of the Companies Act, 2013 that relate to mergers and acquisitions. This paper emphasis mainly on two aspects i.e. A comparison between the provisions of old companies act, 1956 & new companies act, 2013 and comparison between the provisions of AS-14 & Ind AS-103.

***Keywords*:** Merger and Acquisition, Business Combination, Arrangements, Amalgamations, Ind AS- 103.

I INTRODUCTION

In today's modest world, most of the companies want fast and easy mode for the growth and development of their business. For that sometimes business expansion strategy is used by the company and they opt an option to purchase or unite with ready business rather than opt for IPOs to save the time, efforts and cost. The concept of merger and acquisition is very much popular in today's world, especially after economic reforms of Liberalisation, Privatisation, and Globalisation (LPG) of the year 1991. The breezes of economic reforms increased competition in the Indian economy. Indian firms also switch towards mergers and acquisition to void unhealthy competition and to face international and multinational companies globally.

As far as India is concerned, the legal and regulatory framework has been framed by the Government to control over the activity of merger and acquisition. Institute of Chartered Accountants of India and Ministry of Corporate Affairs has also framed Accounting Standard to maintain uniformity in preparing accounting for M&A. Moreover in new Companies Act, 2013, Ministry of Corporate affairs provides more logical and practical approach regarding merger and acquisition compared to old Companies Act, 1956 with the object of conversation with the global standards. Before going into the detail, we must understand the basic concept of merger and acquisition.

II MERGER

According to the Oxford Dictionary "Merger" means "combining of two companies into one".

The term 'Merger' is not stated anywhere in sections 390 to 394 of old companies Act, 1956. The Income Tax Act, 196 has also overlooked it . The term of 'Merger' is mentioned only in accounting standard 14 given by ICAI and that is 'Amalgamation in nature of Merger'

But the new Companies Act, 2013 explains the concept of merger without specific definition. The act mentions following points about merger:

(a) A combination of two or more entities into one.
(b) The desired effect being not just the accumulation of assets and liabilities of the distinct entities but organisation of such entity into one business
(c) Generally, in merger, the merging entities would cease to be in existence and would merge into a single surviving entity.
(d) Merger or amalgamation
(e) Merger by absorption
(f) Merger by formation of a new company.

III ACQUISITION

A Fundamental characteristic of merger (either through absorption or consolidation is that the acquiring or amalgamated company (existing or new) takes over the ownership of other company and combines its operations with its own operations.

An acquisition may be either Friendly or Hostile Acquisition,

(a) Friendly Acquisition
(b) Hostile Acquisition

IV REVIEW OF LITERATURES

(a) 2018 September, A Research Article has been published by Jain D, Mergers and Acquisitions under the Companies Act, 2013. In this paper, the author wrote about new provisions in the companies act, 2013 with regards to merger and acquisition and she also compared all those provisions with companies act, 1956.

(b) 2014, December 6th, NRS Advisors pvt ltd published an article on changes in provisions related to Mergers and Amalgamations in Companies Act, 2013 where explanations have been given about changes in the process of mergers and acquisitions, new types of mergers with respect to small companies or between a holding company and its wholly owned subsidiary and of an Indian Company with a foreign company.

(c) 2016, December, Anup Koushik Karavadi, published an article on titled, Changing contours of mergers and acquisitions under companies act, 2013. In this article author tried to explain the about what are the topics that remains unexplained and what are the topics that remains unchanged.

(d) 2016, September 7, Nimisha Srivastva, student of Gujarat National Law University, Gandhinagar, discusses mergers under the Companies Act, 2013. The author explained about merging of listed co. with unlisted co., fast track mergers, cross border merger, minority shareholders etc.

(e) 2017, January, Purohit, Jaydutt and Trivedi Sunil published research paper on titled, Road Map to Ind AS in International Journal of scientific research in engineering in Vol. 1 where business combination is explained under extant Indian GAAP and Ind AS 103.

V OBJECTIVES OF THE STUDY

(a) To explore the concepts and provisions of the Indian Accounting Standard 103 as well as of section 230-240 of the Companies Act, 2013.

(b) To comprehend the provisions of section 230-240 of the Companies Act, 2013.

(c) To understand the needs of convergence of AS 14 into Ind As of 103.

(d) To study the modification made by the ministry of corporate affairs and Institute of Chartered Accountants of India with regards to merger and acquisition.

(e) To compare the old provisions and new provisions of Accounting Standards and Companies Acts.

VI SIGNIFICANCE OF THE STUDY

(a) Acquirer companies may aware about the new provisions of companies act 2013 as well as in Ind AS -103 with respect to merger and acquisition

(b) They can differentiate the old provision and new provision with this research study.

(c) Shareholders may also be able to understand that the company has taken the right decision or not.

(d) The study will help the regulatory authority to regulate the mergers and acquisitions deals for stakeholders' benefit like RBI and SEBI.

(e) Research will help the consultancy or advisory firms that in which aspect they should pay more attention to earn more consultancy fee.

VII NEW PROVISIONS IN IND AS 103 - BUSINESS COMBINATIONS

A business consists of inputs and processes applied to those inputs that have the ability to create outputs.

Business is an integrated set of activities and assets that is capable of being conducted and managed for the purpose of providing a return in the form of dividends, lower costs or other economic benefits directly to investors or other owners, members or participants.

A business combination is a transaction or other event in which an acquirer obtains control of one or more businesses. Transactions sometimes referred to as 'true mergers' or 'mergers of equals' are also business combinations as that term is used in this Ind AS.

(a) Intangible assets: while doing business combination, all the intangible assets are recognised at their fair value, if they are separately identifiable. Only goodwill is recognised as a separate asset.

(b) Acquisition-related costs: while having a business combination, acquisition-related costs (including stamp duty) are considered as an expense in the period in which such costs are incurred and are not included as part of the consideration transferred.

(c) Deferred taxes are recorded on provisional basis of differences of assets acquired (other than goodwill) and liabilities taken over presumed in a business combination.

If the fair value of an assets acquired and liabilities taken over surpasses the fair value of the consideration transferred (plus the amount of non-controlling interest and the fair value of the acquirer's previously held equity interests in the acquire), It's a gain for the acquirer in other comprehensive income and accumulated in capital reserve.

(d) Contingent liabilities: It is assumed that if contingent liabilities represent by current obligation that arises from past events and its fair value can be measured reliably with subsequent changes to profit and loss.

(e) New Provisions under the Companies Act, 2013:Under the Companies act, 2013, the notice of scheme and documents to be circulated to regulators (Income Tax, Reserve Bank of India, SEBI, Competition Commission of India (if necessary)) and the regulators shall respond within 30 days from the date of receipt of notice [Section 230(5)]

(f) Fast Track Mergers: There is no such provision provided before the new companies act. Under the 1956 Act, all mergers and amalgamations required approval of court. The 2013 Act provides that mergers and amalgamations between two or more small companies or between holding companies and its wholly-owned subsidiary (or between such companies as may be prescribed) do not require court approval. (Section 233)

(g) Squeeze-out Provisions: As per the new law, the provision for voluntary squeeze-out is retained but it also provides for mandatory minority squeeze out, subject to appropriate shareholders resolutions. (Section 236)
   - The merger of a listed company into an unlisted company will not ipso facto make the unlisted company listed. It will continue to be unlisted until the applicable listing regulations and SEBI guidelines in relation to allotment of shares to public shareholders are complied with.
   - In case the shareholders of the listed company decide to exit, the unlisted company would facilitate the exit with a pre-determined price formula which shall be within the price specified by SEBI regulations.
   - **Set off of authorized capital –** It has been specifically provided in CA 2013 that where the transferor company is dissolved, the fee paid by the transferor company on its authorized capital shall be set off against any fees payable by the transferee company on its authorized capital subsequent to the merger.
   - **Filing of report till completion of scheme** – Every company in relation to which an order has been made by the Tribunal, shall until the completion of the scheme, file a statement, every year, with the Registrar, certified by a CA or a CS, indicating whether the scheme is being complied with in accordance with the orders of the Tribunal.
   - **Penalty –** The penalties for non-compliance with the provisions of CA 2013 has been increased substantially. The fine for the company shall be a between the range of Rs 1,00,000 to Rs 25,00,000. Every officer in default shall be punishable with a fine between the range of Rs 1,00,000 to 3,00,000 or with imprisonment upto 1 year or both.

VIII AS-14 VIS-À-VIS AS-103: A COMPARISON

Existing AS 14 on Accounting for Amalgamations	Ind AS 103 on Business Combinations[i]
The Standard deals only with amalgamation	Ind AS 103 defines business combination which has a wider scope
There are two methods of accounting for amalgamation. The pooling of interest method and the purchase method.	Ind AS 103 prescribes only the acquisition method for each business combination.
An acquired assets and liabilities are recognised at their existing book values or at fair values under the purchase method.	Ind AS 103 requires the acquired identifiable assets liabilities and non-controlling interest to be recognised at fair value under acquisition method.
AS 14 states that the minority interest is the amount of equity attributable to minorities at the date on which investment in a subsidiary is made and it is shown outside shareholders' equity.	Ind AS 103 requires that for each business combination, the acquirer shall measure any non-controlling interest in the acquirer either at fair value or at the non-controlling interest's proportionate share of the acquireree's identifiable net assets.
AS 14 requires that the goodwill arising on amalgamation in the nature of purchase is amortised over a period not exceeding five years.	Under Ind AS 103, the goodwill is not amortised but tested for impairment on annual basis in accordance with Ind AS 36.
AS 14 does not provide specific guidance on the consideration.	Ind AS 103, the consideration the acquirer transfers in exchange for the acquirer includes any asset or liability resulting from a contingent consideration arrangement.
An existing AS 14 does not deal with the reverse acquisitions.	Ind AS 103 deals with reverse acquisitions

(a) Companies Act, 1956 vis-à-vis Companies Act, 2013: A Comparison

Let us analyse the impact of new provisions of the Companies Act, 2013 relating to the mergers and acquisitions. We will first analyse the concepts that have been modified under the new Act and compare those with similar provisions under the old Act. Then, we will also analyse certain new concepts related to mergers and acquisitions introduced under the new Act.

Reverse Mergers have been largely used by private companies as a method to become public instead of opting for the traditional Initial Public Offering (IPO) method. The term 'Reverse Merger' has not been statutorily defined either under the old Act or the 2013 Act.

Under the Companies Act, 1956 there were no specific threshold limits to object to a scheme of compromise or arrangement. Companies Act, 2013 specifies certain threshold requirements to object to a scheme.3 Proviso to Section 230(4) of the 2013 Act stipulates the minimum criteria to raise any objections.

(b) Cross-Border Mergers: MCA notified Section234 of the Companies Act, 2013 which permits cross border mergers. Also, Rule 25A of the Companies (Compromises, Arrangements and Amalgamations) Amendment Rules, 2017 deals with the Merger or amalgamation of a foreign company with a Company and vice versa. Under the Companies Act, 1956, the merging a foreign company with an Indian company was allowed while the merging of an Indian Company with a foreign company was not possible since the definition of the transferee company under Section394(4)(b) of the 1956 Act was defined to mean only 'company incorporated under the Act.

Another key change introduced under the 2013 Act is the abolition of treasury stock. Section 77 of the Companies Act, 1956 specifically restricted a company from issuing shares to itself or through its own holding company

(c) Comparison of Ind AS – 103 with IFRS 3:

Ind AS 103 requires the bargain purchase gain arising on business combination to be recognised in other comprehensive income and accumulated in equity as capital reserve, unless there is no clear evidence for the underlying reason for classification of the business combination as a bargain purchase, in which case, it shall be recognised directly in equity as capital reserve while IFRS-3 requires the same to be recognised in profit or loss.

Ind AS -103 gives the guidance under the common control for business combinations of entities while IFRS 3 does not.

IX CONCLUSION

This research paper is specially made to analyse the aspects of merger and acquisition with regards to old companies act with new companies act and old accounting standard with new accounting standard, However there are some other laws also affects to merger and acquisition moreover of theses. Like the Income Tax Act, 1961 [Section 2(1A)] also defines an amalgamation, All the mergers are statutory mergers, since all mergers occur as specific formal transactions in accordance with the laws, or statutes of the states where the companies are incorporated.

The new Companies Act, 2013 has sought to streamline and make M&A more smooth and transparent. It appears that the New Act can help to deal with the challenges and complexities that the current procedures faces in relation to procedures that were contemplated under the old Act. The New Act has incorporated various provisions to tackles the problems actually faced during the process of mergers, by taking into consideration the practical aspects of the process the new notified sections are going to bring a paradigm shift in the way corporate restructuring is done in India. The new provisions seek to streamline the process and make it more transparent. Further, the jurisdiction of NCLT over these matters will speed up the entire process and also provide uniformity. The 2013 Act has provided statutory force to many of the corporate restructuring practices that were in practice earlier through judicial approval

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