

## ARTICLE

## TAKEOVER OF A PRIVATE LIMITED COMPANY

- C. S. Kelkar

In the present context takeover of any business Entity is a popular made for entering into that particular or other business. Takeover takes place in variety of ways. Such as :

- Purchase of proprietary business,
- Entering into partnership
- Change in the management of the Company
- Purchase of shares of the Company etc.

In this article we are restricting our discussion only about the 'takeover of private limited Company.'

**WHY TAKEOVER ?**

- Some wants to retire from the business because of age or second generation does not want to continue the business.
- Some wants to change the line by selling existing one.
- Some wants to expand by acquiring other similar or different lines of business.
- Some wants to transfer the locality / shift the unit at some other place and sell the existing one and get better rewards.
- Some companies are in the middle of the debt & being taken over.
- Some Companies become sick. Creditor wants to get realised his finance, the unit is disposed off. Company is transferred or only assets are sold.

**ADVANTAGES**

There are certain advantages in Company takeover from the point of view of seller as well as purchaser. Those are:

- Transfer of shares and change in managements are the only events involved. Hence easy to implement.
- The company remains same. Capital gains are avoided. No taxes or Less taxes.
- No transfer of land & Building. Immovable assets remain in the name of the Company. No stamp duty involved.
- From the point of view of seller - payment could be adjusted to match the payment in respect of capital gains.
- From the point of view of purchaser - cash flow could be adjusted.
- Important registration Nos. / octroi benefits could be obtained or continued in the name of the Company.
- Investment blocked in fixed assets could be realised & part of that could be invested somewhere else where again special incentives / tax holidays are available for the seller.
- Take over enhances competitive deal as compare to setting up a new one.
- Saving in time / energy for setting infrastructure.

**HOW ?**

There are different ways of takeover. Some are:

- Acquiring or purchasing more than 50% of shares / voting in the Company, but less than 75%. Purchaser can control/appoint of Board of Directors.
- Purchase of 75% or more shares thus absolute majority.
- Purchase of 100% shares thus complete takeover.
- Acquiring only assets like land & Building, Plant & Machinery and not the Company.

**LAWS INVOLVED**

Various laws are involved while taking over. Some of them are:

- Company law
- Stamp Act
- Income Tax Act
- Registration Act
- Labour Laws like - ESI, PF, Gratuity, Workmen's compensation
- WMDC rules & regulations
- Package incentive scheme, covenants.
- MIDC Rules & regulations
- Banks / Financial Institutions documentations / sanctions.
- Sales Tax, Professional Tax

Under these laws also again we have to consider some specific issues.

**a) Company Law :**

- Memorandum and Articles of Association copy
- Inspection of 'D' file at Registrar of companies and taking certified copies of company's shareholding pattern.
- Charges registered
- Directors position
- Statutory Register of the Company
- Title of the Shares
- Provisions regarding transfer of shares & appointment of Directors, meetings etc. in the Articles.
- Whether objects cover the activity transferee is thinking of.
- Company Law Audit - filing etc. : Statutory Audit, Minutes, deciding liabilities, penalty : Updatons
- Clearing papers at ROC from pending file
- Pending suits / claims / Notice - ST / Excise

**b) Labour Laws / Industrial Laws**

- ESI Position / Notice
- PF Position

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- Gratuity - Policy Taken / Provided in the Balance Sheet
- Labour position - Want/do not want settlement, full & final
- Pending legal matters in respect of labour.
- Whether because of other Industrial undertaking unit will loose SSI status / filing IEM.

## c) MIDC / WMDC / Package Incentive Scheme

- dues paid upto what date
- lease rentals.
- Titles are properly with the company any nothing is pending.
- Any NOCs Taken ? Details about the same
- MSEB dues paid.
- Water tax paid
- Telephone charges paid
- Any covenant in the agreement / Leasedeed
- Change in ownership through shareholding Directorship
- Activity
- Item is registered with DIC/ otherwise noting on certificate new item.

## d) Stamp Act / Registration Act

- MOU on Stamp paper
- Indemnity on stamp paper
- Power of Attorneys. On stamp paper for disposing off the shares.
- Notarisation / Registration.

## e) Bank &amp; Financial Institutions

- Documents executed.
- Any covenants regarding Non disposal of Shareholding
- Change in management
- Issue of new shares
- Charges Registered for facilities and position regarding security.

## f) Income Tax

- Pending assessments
- Advance Tax paid provision
- Carry forward of losses whether allowed.

## DOCUMENTS INVOLVED

- Memorandum of Understanding
- Balance Sheet as on cut off date
- List of Contingent liabilities
- Indemnity Bond
- Final agreement
- Transfer forms
- Discharge receipts
- No objects for transfers according to articles of Association
- Minutes of the Board Meeting
- Letters to the Bankers / financial Institution for no object for change in Management & shareholding pattern.

- NOC from WMDC / DIC Change in Management / Shareholding for Package incentives.

## STEPS INVOLVED :

While taking over following steps have to be followed:

- Deciding about the takeover
- Negotiations regarding price & finalisation of the same
- Decide about mode which fits into accounting policies and procedures and could be transacted through balance sheet.
- Action plan for transfer of shares
- Preparation of memorandum of understanding
- Signing
- Holding BM for Change in Directorship
- Filing with ROC resignation / Appt., shifting of Regd. Office
- Transfer of Shares
- Change in signatories
- Cooling period is necessary
- Indemnity Bond from Transferor and transferee.
- Balance Sheet as on the date of takeover supported by an affidavit from retiring directors.
- If entire shares are not being transferred taking irrevocable power of Attorney from the transferor
- Intimating change of Management/ control to various statutory authorities at appropriate time.
- Substitution of personal Guarantees for Bank facilities.
- Physical stock taking / legal Audit
- Change in Auditors, if required.
- Resolution regarding keeping Books of Accounts

While taking over of a loss making Company Section 79 of I T Act, 1961 has to be kept in mind. It reads - Notwithstanding anything contained in this Chapter, where a change in shareholding has taken place in a previous year in the case of a Company, not being a company in which the public are substantially interested, no loss incurred in any year prior to the previous year shall be carried forward and set off against the income of the previous year unless --

a. on the last day of the previous year the shares of the company carrying not less than fifty-one per cent of the voting power were beneficial held by persons who beneficial held shares of the company carrying not less than fifty one per cent of the voting power on the last day of the year or years in which the loss was incurred.

Provided that nothing contained in this section shall apply to case where change in the said voting power takes place in a previous year consequent upon the death of a shareholder or on account of transfer of by way of gift to any relative of the shareholder making such gift.