A DISCUSSION AND COMPARISON OF COMPANY LEGISLATION AND TAX LEGISLATION IN SOUTH AFRICA, IN RELATION TO AMALGAMATIONS AND MERGERS

Thesis submitted in partial fulfillment of the requirements for the degree

of

MASTERS OF COMMERCE (TAXATION)

of

RHODES UNIVERSITY

by

JUSTIN SLOANE

December 2013

ABSTRACT

In his 2012 Budget Review, the Minister of Finance, Pravin Gordhan acknowledged that the introduction of the "new" Companies Act had given rise to certain anomalies in relation to tax and subsequently announced that the South African government would undertake to review the nature of company mergers, acquisitions and other restructurings with the view of possibly amending the Income Tax Act and/or the "new" Companies Act, to bring the two legislations in line with one another. These anomalies give rise to the present research.

The literature reviewed in the present research revealed and identified the inconsistencies that exist between the "new" Companies Act, 71 of 2008 and the Income Tax Act, 58 of 1962, specifically the inconsistencies that exist in respect of the newly introduced amalgamation or merger provisions as set out in the "new" Companies Act. Moreover, this research was undertaken to identify the potential tax implications insofar as they relate to amalgamation transactions and, in particular, the potential tax implications where such transactions, because of the anomalies, fall outside the ambit section 44 of the Income Tax Act, which would in normal circumstances provide for tax "rollover relief". In this regard, the present research identified the possible income tax, capital gains tax, value-added tax, transfer duty tax and securities transfer tax affected by an amalgamation transaction, on the assumption that the "rollover relief" in section 44 of the Income Tax Act does not apply.

Key words: amalgamation, merger, "amalgamation or merger" transaction, fundamental transactions, tax "rollover relief", income tax, capital gains tax, value-added tax, transfer duty tax, securities transfer tax.

TABLE OF CONTENTS **PAGE**

CHAPTER 1: INTRODUCTION

1.1 CONTEXT **1**
1.2 GOAL OF THE RESEARCH **3**
1.3 METHODS, PROCEDURES AND TECHNIQUES **4**
1.4 OUTLINE OF THE CHAPTERS **5**

CHAPTER 2: FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

2.1 INTRODUCTION **7**
2.2 DESCRIPTION AND BACKGROUND **7**
2.3 AMALGAMATIONS OR MERGERS **9**
2.3.1 INTRODUCTION **9**
2.3.2 THE DEFINITION AND CONCEPT **13**
2.3.3 AMALGAMATION OR MERGER PROCEDURE **20**
2.3.3.1 MERGER AGREEMENT **21**
2.3.3.2 SOLVENCY AND LIQUIDITY TEST **22**
2.3.3.3 REQUISITE APPROVALS OF THE MERGER **28**
2.3.3.4 NOTICE TO CREDITORS **33**
2.3.3.5 IMPLEMENTATION OF THE MERGER **35**
2.3.4 THE EFFECT OF AN AMALGAMATION OR MERGER **39**
2.3.5 APPRAISAL RIGHTS FOR SHAREHOLDERS **44**
2.3.6 CONCLUDING REMARKS RELATING TO MERGERS AND AMALGAMATION TRANSACTIONS **49**
2.4 THE DISPOSAL OF ALL OR GREATER PART OF THE ASSETS OR THE UNDERTAKING OF A COMPANY **50**
2.4.1 THE REQUIREMENTS **50**
2.4.2 THE INTERPRETATION OF “DISPOSE OF ALL OR THE GREATER PART OF THE ASSETS OR UNDERTAKING” **53**
2.5 SCHEMES OF ARRANGEMENT **56**
2.5.1 THE REQUIREMENTS **57**

2.5.2 THE APPROVAL PROCESS **60**
2.6 CONCLUSION **62**

CHAPTER 3: CORPORATE RESTRUCTURING RULES - ROLLOVER RELIEF

3.1 INTRODUCTION **64**
3.2 BACKGROUND AND DEFINITIONS **65**
3.2.1 ASSET AND DISPOSAL **70**
3.2.2 TRADING STOCK **70**
3.2.3 EQUITY SHARES **72**
3.2.4 COMPANY AND GROUP OF COMPANIES **72**
3.3 AMALGAMATION TRANSACTIONS **74**
3.3.1 AMALGAMATION TRANSACTIONS: ROLLOVER RELIEF PROVIDED FOR AN AMALGAMATED COMPANY AND THE RESULTANT COMPANY **80**
3.3.1.1 CAPITAL ASSETS **83**
3.3.1.2 TRADING STOCK **84**
3.3.1.3 ALLOWANCE ASSET **84**
3.3.1.4 OTHER ALLOWANCES **87**
3.3.2 AMALGAMATION TRANSACTIONS: ROLLOVER RELIEF PROVIDED FOR THE AMALGAMATED COMPANY'S SHAREHOLDERS **88**
3.3.3 AMALGAMATION TRANSACTIONS: LIMITATION OF THE APPLICATION OF ROLLOVER RELIEF **92**
3.3.4 AMALGAMATION TRANSACTIONS: ANTI-AVOIDANCE PROVISIONS **95**
3.3.5 SECURITIES TRANSFER TAX, TRANSFER DUTY AND VALUE ADDED TAX **97**
3.4 CONCLUSION **99**

CHAPTER 4: POTENTIAL INCONSISTENCIES BETWEEN THE "NEW" COMPANIES ACT AND THE INCOME TAX ACT

4.1 INTRODUCTION **101**

4.2 A CRITICAL COMPARISON BETWEEN THE "NEW" COMPANIES ACT AND THE INCOME TAX ACT **101**

4.2.1 POTENTIAL INCONSISTENCIES **106**

4.2.1.1 DISSOLUTION, TERMINATION, LIQUIDATION, WINDING-UP OR DEREGISTRATION **109**

4.2.1.2 TRANSFER OF ASSETS AND LIABILITIES **111**

4.2.2 POTENTIAL TAX IMPLICATIONS IF NO "ROLLOVER RELIEF" APPLIES **114**

4.2.2.1 INCOME TAX IMPLICATIONS **116**

4.2.2.2 CAPITAL GAINS TAX IMPLICATIONS **121**

4.2.2.3 VALUE-ADDED TAX IMPLICATIONS **123**

4.2.2.4 TRANSFER DUTY IMPLICATIONS **127**

4.2.2.5 SECURITIES TRANSFER TAX **128**

4.2.3 THE TREATMENT OF INCONSISTENT PROVISIONS **130**

4.2.4 CONCLUSION **131**

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION **133**

5.2 REVIEW OF FINDINGS OF THE RESEARCH **134**

5.2.1 CHAPTER 2: FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS **134**

5.2.2 CHAPTER 3: CORPORATE RESTRUCTURING RULES - ROLLOVER RELIEF **138**

5.2.3 CHAPTER 4: POTENTIAL INCONSISTENCIES BETWEEN THE "NEW" COMPANIES ACT AND THE INCOME TAX ACT **142**

5.2.3.1 INCOME TAX IMPLICATIONS **144**

5.2.3.2 CAPITAL GAINS TAX IMPLICATIONS **146**

5.2.3.3 VALUE-ADDED TAX **147**
5.2.3.4 TRANSFER DUTY **147**
5.2.3.5 SECURITIES TRANSFER TAX **148**
5.3 CONCLUDING REMARKS **148**

BIBLIOGRAPHY **150**

CHAPTER 1: INTRODUCTION

1.1 CONTEXT

The Minister of Finance, in his 2012 Budget Review, acknowledged that the introduction of the "new" Companies Act 71 of 2008 (hereinafter referred to as "the "new" Companies Act"), having come into operation on 1 May 2011, effectively replaced and repealed the "old" Companies Act 61 of 1973 (hereinafter referred to as "the "old" Companies Act"), and this had given rise to certain anomalies in relation to tax.[1] Subsequently, the South African government announced it would review the nature of company mergers, acquisitions and other corporate restructurings with the view to possibly amending the Income Tax Act 58 of 1962 (hereinafter referred to as the Income Tax Act) and/or the "new" Companies Act over the next two years.[2] It is the aim of this thesis to identify the anomalies which exist by comparing the "new" Companies Act and the Income Tax Act.

For almost four decades the "old" Companies Act has governed company law in South Africa and, although it had been amended several times over the years, there was an urgent need to modernise and consolidate South Africa's company law comprehensively to bring it in line with global trends (such as the United States of Amercia, Canada, the United Kingdom and Australia).[3] This gave rise to the enactment of the "new" Companies Act which has introduced a number of new concepts and changes, whilst retaining much of the "old" Companies Act. Nevertheless, the "new" Companies Act marks the beginning of a new era for company law in South Africa and represents a significant liberalization of policy by the Legislature. It is common cause that the drafters of the "new" Companies Act have adopted concepts from other jurisdictions, including the United States of

---

[1] A Lewis "New amalgamation provisions not aligned with the Income Tax Act" (2011) *Tax Alert* http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2011/tax/downloads/Cliffe-Dekker-Hofmeyr-Tax-Alert-27-May-2011.pdf (accessed 25/06/2012) at 8; J Oppenheim and C Douglas "South Africa: Heating up" (2012) http://www.iflr.com/Article/3002918/South-Africa-Heating-up.html (accessed 20/07/2012) at 1.

[2] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8.

[3] E Davids, T Norwitz and D Yuill A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008 2010 *Acta Juridica* 337 at 338.

America, Canada, the United Kingdom and Australia, but have customised these concepts to South Africa's particular circumstances and climate.[4]

This research thesis seeks to analyse the "amalgamation or merger" provisions of the "new" Companies Act, which allow two or more companies to merge their respective assets and liabilities into one or more combined companies.[5] This mechanism has also been referred to as a "statutory merger".[6] Previously, the "old" Companies Act did not specifically facilitate a mechanism for an "amalgamation or merger" and only provided the traditional mechanisms of obtaining control of a company, namely:

- a sale of the whole or the greater part of its assets or undertaking (section 228);
- a scheme of arrangement involving a court application (section 311); or
- a so-called "squeeze out" or "takeover offer" (section 440K).[7]

Cassim *et al* state that the "new" Companies Act has effectively retained the three above-mentioned mechanisms in sections 112, 114 and 124 of the "new" Companies Act.[8] Thus, the "new" Companies Act has introduced the "amalgamation or merger" provision, section 113, over and above the traditional mechanisms of the "old" Companies Act. The introduction of this new regime was aimed at providing a simple, uncomplicated and effective framework within which two or more companies could merge by agreement, with the approval of the prescribed majority of

[4] DLA Cliffe Dekker Hofmeyr "Key aspects of the New Companies Act" (2012) *Everything Matters* http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/legal/sectors/downloads/Cliffe-Dekker-Hofmeyr-Key-Aspects-of-the-New-Companies-Act.pdf (accessed 16/07/2012) at 2.

[5] R Gad and J Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" (2012) http://www.ens.co.za/images/news/ENS%20-%2030%20March%202012.pdf (accessed 25/06/2012) at 1; Cassim *et al Contemporary Company Law* 2 ed (2009) at 676.

[6] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.

[7] R Gad and J Strauss "The impact of statutory mergers on current tax Legislation: Part 1" (2012) *ENSIGHT* http://www.ens.co.za/news/news_article.aspx?iID=584&iType=4 (accessed 25/06/2012) at 1; Davids *et al* 2010 *Acta Juridica* 337 at 338; D Druker "The Merits and Demerits of the Appraisal Remedy in the Context of Statutory Mergers and Amalgamations" (2011) 1 *JSR* at 1.

[8] Cassim *et al Contemporary Company Law* 2 ed (2009) at 676.

shareholders, and without the need of any court approval.[9] Moreover, instead of recourse to court, dissenting shareholders would have the right to exercise their appraisal rights, in terms of section 164 of the "new" Companies Act, and opt out by withdrawing the fair value of their shares in cash.[10]

Although there is no doubt that South African company law needed this overhaul, it is evident that this has come at a price, as there appear to be various inconsistencies between the "new" Companies Act and the Income Tax Act. From a comparison of section 44 of the Income Tax Act (which deals with "amalgamation transactions") and the corporate definition of "amalgamation or merger" under the "new" Companies Act, it is evident that these provisions are not fully aligned.[11] Gad and Strauss suggest that an "amalgamation transaction", which wholly or partly falls outside the ambit of the "rollover relief", may trigger unexpected tax implications (income tax, capital gains tax, value-added tax, transfer duty and securities transfer tax) for the parties concerned.[12]

1.2 GOAL OF THE RESEARCH

The goals of the research are, firstly to discuss the "new" Companies Act 71 of 2008 and the Income Tax Act 58 of 1962, with respect to the newly introduced "amalgamation and merger" provisions in the "new" Companies Act and to highlight the potential tax implications resulting from such corporate restructuring, and, secondly, to identify the inconsistencies that exist between the "new" Companies Act and the Income Tax Act , with respect to the newly introduced "amalgamation and merger" provisions. This thesis also identifies the potential income tax, capital gains

[9] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1; Cassim *et al Contemporary Company Law* 677.
[10] Cassim *et al Contemporary Company Law* 677.
[11] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8; L Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" (2011) *TaxTalk* http://www.thesait.org.za/news/96670/TaxTalk-Aligning-The-Income-Tax-Act-And-The-Companies-Act-For-Amalgama.htm (accessed 10/09/2012) at 15.
[12] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 3.8.

tax, value-added tax, transfer duty and securities transfer tax effects of a statutory merger on the assumption that the corporate "rollover relief" does not apply.[13]

1.3 METHODS, PROCEDURES AND TECHNIQUES

The method of research adopted in this thesis was interpretative research as it sought to understand and describe. The research methodology applied can also be described as a *doctrinal* research methodology. This methodology provides a systematic exposition of the rules governing a particular legal category (in the present case the legal rules relating to company law and tax), analyses the relationships between the rules, explains areas of difficulty and is based purely on documentary data.

The research methodology comprises of a critical analysis of the following documentary data in order to identify the inconsistencies between the "new" Companies Act 71 of 2008 and the Income Tax Act 58 of 1962, and to address the potential tax implications which may arise from "amalgamation or merger" transactions:

- the applicable South African legislation (Income Tax Act 58 of 1962; Companies Act 71 of 2008; Companies Act 61 of 1973); the Value-Added Tax Act 89 of 1997; Securities Transfer Tax Act 25 of 2007; and the Transfer Duty Act 40 of 1949)
- relevant foreign legislation;
- case law;
- commentary on the legislation by leading writers in the field; and
- various other articles, reports and interpreted findings by the South African courts in relation to the underlying tax principles.

[13] AP De Koker *Silke on South African Income Tax* (2012) Vol 2 at 13.32 - According to de Koker, the term "rollover relief" refers to appropriate relief which permits income or gains to be deferred for a period of time. In this regard, de Koker submits, that transactions that would ordinarily give rise to a disposition and would give rise to tax liability for normal tax, recoupments, dividends tax or capital gains tax may be deferred. As will be discussed more fully below, the corporate restructuring rules provided for in sections 41 to 47 of the Income Tax Act are aimed at providing tax relief by deferring normal tax and capital gains tax implications which would normally arise on the transfer or disposal of an asset.

The research is conducted in the form of an extended argument, which is supported by documentary evidence, with a focus on sections 113 to 116 of the “new” Companies Act in relation to section 44 of the Income Tax, which may or may not provide the relevant parties to the transaction with rollover relief, whereby they are able to defer the normal consequences of tax when a company’s existence is terminated after it disposes of all assets to another company. This research attempts to demonstrate that a statutory merger transaction may not necessarily qualify for the corporate rollover relief.

The validity and reliability of the research and the conclusions is ensured by:

- adhering to the statutory and common law rules for the interpretation of statutes;
- placing greater evidential weight on legislation, case law which creates precedent or which is of persuasive value (primary data) and the writings of acknowledged experts in the field;
- discussing opposing viewpoints and concluding thereon based on a preponderance of credible evidence; and
- the rigour of the arguments.

As all the data is in the public domain, no ethical considerations arise. Furthermore, interviews are not conducted; opinions are considered in their written form. The research does not seek to support or contest any existing theory or standpoint and therefore interpreter bias cannot arise.

1.4 OUTLINE OF THE CHAPTERS

Chapter 1 briefly describes the context and the background of this research thesis. It sets out the goals of the research and explains the research method and design applied to yield the anticipated results, including the scope of the research thesis.

Chapter 2 of this thesis presents a review of the “fundamental transactions” as provided for in Chapter 5 Part A of the “new” Companies Act, with the chapter focusing on the newly introduced “amalgamation or merger” provisions.

Chapter 3 presents a review of the corporate restructuring rules contained in sections 41 to 47 of the Income Tax Act, which provide for a deferral of tax where certain specified transactions are undertaken. The focus of this chapter is on section 44 of the Income Tax Act, which provides for “amalgamation transactions”.
Chapter 4 discusses the relationship between the “new” Companies Act and the Income Tax Act, focusing on the “amalgamation or merger” transactions and the “amalgamation transactions” respectively. This chapter considers the possible inconsistencies that exist between the two legislations and highlights the potential tax implications which may arise.

Chapter 5 concludes on the findings of this research thesis and aligns the findings with the goals of the research. It briefly concludes the discussion of the problems encountered due to the inconsistencies between the “new” Companies Act and the Income Tax Act, and how amendments to either the “new” Companies Act or the Income Tax Act, or both, may bring the two legislations in line with one another.

CHAPTER 2: FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

2.1 INTRODUCTION

The discussion in Chapter 2 is based on the business transactions (the so-called "fundamental transactions") which fall within the ambit of Chapter 5 Part A of the "new" Companies Act. Although Chapter 2 does briefly consider the traditional mechanisms of the "old" Companies Act, the focus falls on the newly introduced "amalgamation or merger" transaction, whereby two or more companies can merge their respective assets and liabilities into one or more combined companies. This chapter also sets out the definition of an "amalgamation or merger" transaction and describes the "merger or amalgamation" procedure, together with the necessary requirements that give effect to such transaction.

2.2 DESCRIPTION AND BACKGROUND

The "old" Companies Act was, in a number of instances, outdated and out of line with company law international trends. In this way, the "new" Companies Act has modernized the South African company law framework, overhauled the previous company regime, and has, among other things, introduced the concept "fundamental transaction", which is a generic term given to all business transactions or dealings falling within Chapter 5 Part A of the "new" Companies Act.[14] One of the highlights of the "new" Companies Act has been its innovation in the area of "fundamental transactions" and the fact that it regulates these business transactions more stringently than the "old" Companies Act.[15]

---

[14] Oppenheim and Douglas "South Africa: Heating up" at 1; C Douglas and C Green "South Africa: Modernising corporate law" (2010) *IFLR* http://www.iflr.com/Article/2594289/South-Africa-Modernising-corporate-law.html (accessed 20/11/2012) at 1; Davids *et al* 2010 *Acta Juridica* 337; L Phakeng "M&A regulations in the new Companies Act" (2009) 9 *Without Prejudice* at 28 – Chapter 5 in the 'new' Act deals with how company disposal of assets (s 112), amalgamation or merger (s 113), schemes of arrangement (s 114), acquisition or intention to acquire beneficial voting securities (s 122), acquisition of the remaining voting securities mandatory offer (s 123) and compulsory acquisitions (s 124), all of these transactions are defined as affected transactions. These transactions will only be regulated when they are undertaken by regulated companies as defined in Chapter 5.

[15] G Driver and H Goolam "Stringent regulation: company law" (2011) 11 *Without Prejudice* at 6.

Cassim *et al* aver that although the new company regime does not expressly define the phrase “fundamental transaction”, it does provide for three types of so-called fundamental transactions, namely:

(i) an amalgamation or merger;
(ii) a disposal of all or the greater part of the assets or the undertaking of a company; and
(iii) a scheme of arrangement.[16]

The preamble to the “new” Companies Act states that it seeks “*to provide for equitable and efficient amalgamations, mergers and takeovers of companies”.*[17] With these objectives in mind, the regulatory regime for fundamental transactions has been comprehensively reformed under the “new” Companies Act, which facilitates the creation of business combinations. One of the leading reforms of the “new” Companies Act has been the introduction of the “amalgamations or mergers” concept into South African company law.[18] According to Druker, before the promulgation of the “new” Companies Act, the “old” Companies Act did not provide any rules for the combination of two companies into one.[19] However, it did provide something analogous to a “merger” but this was only possible with court approval and the acquisition of shares by means of schemes of arrangement or through the sale of a business as a going concern.[20]

Markman and Atkinson suggest that under the “new” Companies Act there are three key matters that are applicable to all of the fundamental transactions, namely:

(i) shareholder approval in all circumstances;
(ii) court approval in limited circumstances; and

[16] Cassim *et al Contemporary Company Law* 674.
[17] Phakeng (2009) 9 *Without Prejudice* at 28.
[18] Cassim *et al Contemporary Company Law* 675.
[19] Druker (2011) 1 *JSR* at 1.
[20] *Ibid.*

(iii) the appraisal right in all circumstances.[21]

In addition to the aforementioned, sections 117 to 127 of the "new" Companies Act (as well as the Takeover Regulations) provide for takeover offers.[22] This has effectively replaced both the Securities Regulation Code on Takeovers and Mergers and the Rules of the Securities Regulation Panel.[23] The takeover procedure in the new dispensation is substantially the same as the "old" Companies Act, whereby acquirers are required to make a mandatory offer for all the shares of the target company once they have acquired a specified percentage of the target company's shares. In terms of section 124 of the "new" Companies Act, an acquirer can force out the minority, if 90 per cent or more of the shareholders (not related to the acquirer) accept its offer and the directors are not allowed to take any actions that may frustrate the offer. The old regime also failed to deal with the conduct of parties involved in mergers and takeovers. The "new" Companies Act specifically provides for such conduct under section 121, by creating an obligation for parties entering into affected transactions to report them.[24] For the purposes of this thesis, no further discussion on this procedure is required.

2.3 AMALGAMATIONS OR MERGERS

2.3.1 INTRODUCTION

The amalgamation or merger concept is a fundamental and radically new concept which has been incorporated into South African company law through the "new" Companies Act.[25] Although valid criticism may be levelled against aspects of the

---

[21] K Markman and C Atkinson "Scheme of arrangement under the new Companies Act: Better or worse?" (2010) *ENSIGHT* http://www.ens.co.za/news/news_article.aspx?iID=380&iType=4 (accessed 13/08/2012) at 1 - 2.

[22] Oppenheim and Douglas "South Africa: Heating up" at 1.

[23] *Ibid.*

[24] L Phakeng Making sure SA"s M&A regulations match the world"s best (2010) 10 *Without Prejudice* at 16.

[25] Cassim *et al Contemporary Company Law* 676; KPMG The Companies Act 71 of 2008 http://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Documents/Companies%20Act%20Brochure.pdf (accessed 15/10/2012*)* at 19 – The 'new' Companies Act has introduced the concept of amalgamation or merger into our company law. However the term amalgamation or merger is commonly used commercially and has also been referred to as such in the South African tax legislation.

"new" Companies Act, the introduction of amalgamations and mergers into corporate practice is a largely welcomed innovation, bringing South Africa in line with international best practice.[26] Traditionally South Africa has not provided for a merger in the true sense of the word whereby two or more corporate entities merge or amalgamate into a single entity.[27] Instead, business combinations have generally been effected through the acquisition by one company of the shares or assets of another, using one of the traditional mechanisms provided for in the "old" Companies Act.[28]

The adoption of an "amalgamation or merger" or the so-called "statutory merger"[29] procedure into the "new" Companies Act represents, in a broad sense, the pooling of assets and liabilities of two or more companies into a single company, which may either be achieved by combining companies or through a newly formed company.[30] This represents a significant departure from the previous regime and has aligned South African company law with a number of major jurisdictions worldwide, including the United States of America, France, Germany and Canada, all of whom have implemented or adopted some form of the "court-free" statutory merger procedure.[31]

Gad and Strauss opine that the introduction of the new statutory "amalgamation or merger" regime is a welcome approach and describe it as: *"a simple, uncomplicated and effective procedure by which companies may merge by agreement, with the approval of the prescribed majority of shareholders, and without the need of any*

[26] S Pretorius "Introducing a new instrument for mergers and amalgamations" (2010) 10 *Without Prejudice* at 28 – According to Pretorius, the provisions governing amalgamations and mergers have themselves been met with a fair amount of scepticism, and critics have noted that this newly introduced transaction may give rise to much uncertainty. However, the innovation is very much needed and the concept should be viewed as a major step forward in aligning South Africa corporate law with modern trends in other jurisdictions.

[27] *Ibid.*

[28] Davids *et al* 2010 *Acta Juridica* 337 at 338; Driver and Goolam (2011) 11 *Without Prejudice* at 6 – For the first time in South African law, company legislation enables companies to effect a merger *per se*, where a company may transfer its assets and liabilities to another company, without the consent of its creditors.

[29] N Bouwman "New road for M&As: Company Law" (2009) 9 *Without Prejudice* at 33 - The concept amalgamation or merger is commonly referred to as a statutory merger because the 'new' Companies Act will set out the rules governing and the procedure by which a corporate combination could be achieved.

[30] Cassim *et al Contemporary Company Law* 676.

[31] Cassim *et al Contemporary Company Law* 677; Davids *et al* 2010 *Acta Juridica* 337 at 340 – 341.

court procedure, which brings South Africa in line with international best practice."[32] Davids *et al* concur that this procedure is considerably quicker and possibly less expensive than would ordinarily be in a court-driven process, whereas the pre-existing scheme of arrangement procedure required judicial sanction, and was both a costly and lengthy procedure.[33]

As opposed to recourse to court, the "new" Companies Act provides that dissenting shareholders would have the right to opt out by withdrawing the fair value of their shares in cash.[34] The limited involvement by the courts may present increased prejudice for shareholders and other stakeholders, but this potential prejudice is rectified by the introduction of the appraisal remedy set out in section 164 of the "new" Companies Act.[35]

The statutory "amalgamation or merger" represents a significant shift or liberalization of policy on the part of the Legislature, addressing the conflicting objectives of facilitating the restructuring of businesses in the interests of economic growth and the interests of shareholders in retaining their investments in companies, together with the protection of minority shareholders from discrimination at the hands of the majority.[36] In hindsight, the "old" Companies Act placed considerable emphasis on the latter value whereas the "new" Companies Act marks a dramatic shift in policy towards the former.[37] This change of policy follows those implemented in the United States of America, and also adopted in Canada and New Zealand, who have all modernized their company law systems.[38]

The "new" Companies Act falls into line with foreign trends and the underpinning policy of harmonization of South African company law with other leading

[32] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 1.
[33] Davids *et al* 2010 *Acta Juridica* 337 at 343.
[34] Cassim *et al Contemporary Company Law* 677.
[35] Davids *et al* 2010 *Acta Juridica* 337 at 343.
[36] Cassim *et al Contemporary Company Law* 677; MF Cassim "The introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)" (2008) 20 *SA Merc LJ* at 1.
[37] Cassim *et al Contemporary Company Law* 677.
[38] Cassim (2008) 20 *SA Merc LJ* at 1; Cassim *Contemporary Company Law* 677.

jurisdictions. This shift in policy represents a radical departure from our traditional and historic adherence to English company law.[39] In this regard, neither English nor Australian law has adopted a court-free statutory merger procedure which, as a general rule, dispenses with the requirements of court approval.[40] Cassim notes that the court-free statutory merger procedure was in fact considered by the English legislature but was rejected on the basis that a statutory merger may infringe the rights of third parties to the respective merging agreement and that there appears to be a lack of creditor protection.[41]

In terms of the "amalgamation or merger" transactions, it would seem that the vesting of the property and obligations in the surviving company occurs automatically, by operation of law, which means that there is no need to comply with any of the legal formalities associated with transfer, save in terms of section 116(8) of the "new" Companies Act. This is one of the major advantages of this procedure, as no third party consent is necessary.[42] The obvious disadvantage would be successor liability as all existing liabilities or claims will be transferred to the newly amalgamated company or the company which survives the amalgamation or merger transactions.[43]

Gad and Strauss state that, arguably, the underlying *causa* of the transfer does not necessarily occur by operation of law.[44] They argue that the *causa* can be either:

> *"(i) the typical contractual causes for the transfer of assets and liabilities, (such as sale, cession, delegation, etc) in terms of the agreement between the parties. Therefore, the traditional contractual mechanisms used (i.e. the transfer of business arrangement) would govern the transaction. The tax implications of the transaction would be dictated by the type of agreement used and should be in line with the usual tax implications arising from such agreements, possibly also the tax rollover*

[39] Cassim *et al Contemporary Company Law* 677.
[40] *Ibid*.
[41] *Ibid*.
[42] KPMG "The new Companies Act 71 of 2008" at 20.
[43] *Ibid.*
[44] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 1.

relief, if applicable. In terms of this causa, the statutory merger provisions merely recognise, regulate and supplement the implementation of the contract between the parties and also enable parties to avoid third party consents;[45] *or*

(ii) the automatic operation of law, whereby the assets and liabilities pass ex lege and there would be no sale causa in terms of which the amalgamating or merging companies dispose of assets, in exchange for consideration and/or the assumption of liabilities, to the newly amalgamated or merged company. It is submitted that there are good legal arguments in favour of this interpretation and, should they be correct, the statutory merger provisions may have far-reaching tax implications."[46]

In terms of section 116(7)(b) of the "new" Companies Act, upon implementation of the merger agreement, the newly amalgamated or surviving merged company is "liable" for all the obligations of the amalgamating or merging companies subject, *inter alia*, *"to the requirements of section 113(1) of the "new" Companies Act, and any provision of the merger agreement or any other agreement."*[47] Thus, it would seem that such transfer has a contractual cause. This conclusion would only be justifiable if the phrase read *"subject to the provisions of the amalgamation or merger agreement."*[48] Therefore it remains unclear which of these interpretations regarding the *causa* is the correct interpretation.

2.3.2 THE DEFINITION AND CONCEPT

In terms of section 1 of the "new" Companies Act an "amalgamation or merger" means:

---

[45] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 1 – 2.
[46] *Ibid.*
[47] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 2.
[48] *Ibid.*

"a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in –

(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreements, and the dissolution of each of the amalgamating or merging companies; or

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by the amalgamating or merging companies immediately before the implementation of the agreement."[49]

Gad and Strauss believe the use of the word "*vesting*" in paragraph (b) is noteworthy.[50] Van der Merwe is of the opinion that, although the classification of legal rights as "*vested*" or otherwise is well known, it is not easy to provide a definitive statement of the meaning of the phrase. In part this is due to the inherent difficulty in the subject, but the main problem lies in the fact that the words *"vested"* and *"contingent"*, as applied to legal rights have different meanings according to their context.[51] The decision quoted most frequently, in respect of the meaning of the phrase *"vested rights"*, is *Jewish Colonial Trust Ltd v Estate Nathan*[52], where Watermeyer JA held:

Unfortunately the word "vest" bears different meanings according to its context. When it is said that a right is vested in a person, what is usually meant is that

[49] Section 1 of the Companies Act 71 of 2008; Cassim *et al Contemporary Company Law* 678; Davids *et al* 2010 *Acta Juridica* 337 at 341; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 2.
[50] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 3.
[51] BA Van der Merwe "The meaning and Relevance of the Phrase "Vested Right" in Income Tax Law" (2000) 12 *Merc LJ* 319.
[52] 1940 AD 163.

such person is the owner of that right - that he has all rights of ownership in such right including the right of enjoyment. But the word is also used in another sense, to draw a distinction between what is certain and what is conditional; a vested right as distinguished from a contingent or conditional right.[53]

The vesting of assets and liabilities in the surviving or newly merged company or companies propose that the surviving or merged company or companies must become the owners of the assets and liabilities held by the amalgamating or merging companies.[54] It is questionable whether a surviving company can become the owner of assets and liabilities already owned by it. Although it is presumed to be unintentional, it would appear that a transaction with only one amalgamating or merging company which is also a surviving company, could be prevented from ever falling within the description of paragraph (b). It would appear that the words "*with or without the formation of one or more new companies"* in paragraph (b) would then be redundant, which would be in conflict with the general presumption of law that the Legislature do not intend to use words in a sense that would make it redundant.[55]

Cassim *et al* believe that it is also important to define the meaning of "amalgamated or merged company" and "amalgamating or merging company". In terms of section 1 of the "new" Companies Act an "amalgamating or merging company" means "a company that is a party to an amalgamation or merger agreement*"*. An "amalgamated or merged" company means:

a company that either –

(a) was incorporated pursuant to an amalgamation or merger agreement; or

(b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement, and holds any part of the assets and liabilities that were held by any of the

---

[53] Van der Merwe (2000) 12 *Merc LJ* 319 at 320 – It is clear from this case that a vested right may nevertheless be vested even though in some instances enjoyment of the right may be postponed.
[54] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 3.
[55] *Ibid.*

amalgamating or merging companies immediately before the implementation of the agreement."[56]

Gad and Strauss suggest that a fair amount of uncertainty does exist as to how the definition of "amalgamation or merger" should be approached. Based on the plain wording of the definition, a plausible interpretation is that any transaction that results in the situations described in paragraph (a) and (b) of the definition would be considered an "amalgamation or merger".[57] This means that transactions that differ from what would classically be regarded as a "merger" or an "amalgamation" could be governed by the statutory merger provisions.[58]

Magubane opines, in terms of paragraph (a) and (b) of the "amalgamation or merger" definition, that there are two broad categories of transactions which qualify as an "amalgamation or merger".[59] The first category refers to two or more "amalgamating or merging" companies fusing into a new company, resulting in both the "amalgamating or merging" companies being dissolved in the process. It follows that the new company is incorporated pursuant to the amalgamation or merger agreement itself and holds all the assets and liabilities that were previously held by the "amalgamating or merging" companies.[60] The vesting of such assets and liabilities in the "amalgamated or merged" company takes place automatically by the operation of law upon the implementation of the merger, as provided for in section 116(7) of the "new" Companies Act (refer to Diagram 1).[61]

[56] Section 1 of the Companies Act 71 of 2008; Cassim *et al Contemporary Company Law* 678; Davids *et al* 2010 *Acta Juridica* 337 at 341; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 2.

[57] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 2.

[58] *Ibid.*

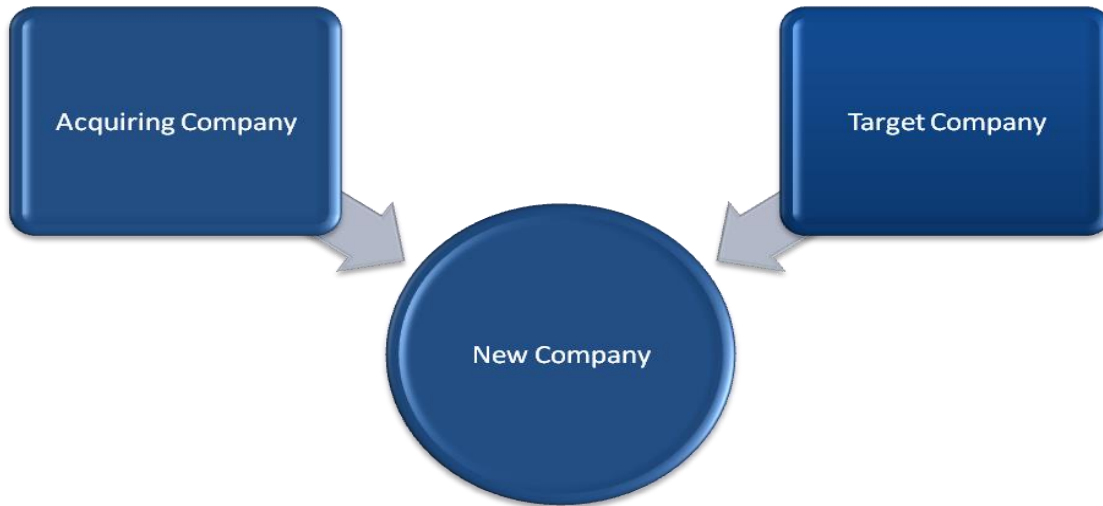
[59] V Magubane "A practical guide to the implication of the new Companies Act (7) – fundamental transactions" (2010) *De Rebus* at 45.

[60] Magubane "A practical guide to the implication of the new Companies Act (7) – fundamental transactions" at 45.

[61] *Ibid* - The first structure refers to where two or more "amalgamating or merging" companies fuse into a new company, with the result that both the "amalgamating or merging" companies are dissolved in the process. It follows that the new company is incorporated pursuant to the amalgamation or merger agreement itself and holds all the assets and liabilities that were previously held by the "amalgamating or merging" companies. The vesting of such assets and liabilities in the "amalgamated or merged" company takes place automatically, by the operation of law, upon the implementation of the merger, as provided for in section 116(7) of the 'new' Companies Act.

DIAGRAM 1

New Company Merger Structure[62]



The second category provides that one of the "amalgamating or merging" companies fuses into the other, resulting in the survival or continuing existence of the latter company, the surviving company.[63] The surviving company holds all the assets and liabilities that were previously held by the "amalgamating or merging" companies. The first "amalgamating or merging" company, termed the disappearing company, disappears in the process (refer to Diagram 2).[64]

---

[62] Cassim *et al Contemporary Company Law* 679.
[63] *Ibid.*
[64] Cassim *et al Contemporary Company Law* 679 – The second structure provides, for the survival of at least one of the merging or amalgamation companies and the assets and liabilities of the non-surviving merging companies, which are subsequently dissolved by the operation of law, are transferred to the surviving company or companies and, if applicable, a newly formed company or companies

DIAGRAM 2

Surviving Company Merger Structure[65]

Against this backdrop, Gad and Strauss provide that transactions satisfying the following requirements will fall within paragraph (a) of the "amalgamation or merger" definition:

(i) at least one new acquiring company must be incorporated;

(ii) every target company must be dissolved; and

(iii) together all of the acquiring companies must hold all of the assets and liabilities that were previously held by the target companies.[66]

Similarly, transactions satisfying the following requirements will fall within paragraph (b) of the "amalgamation or merger" definition, regardless of whether or not a new acquiring company has been incorporated:

(i) at least one of the target companies must survive; and

(ii) together all of the assets and liabilities of the target companies must vest in all of the acquiring companies.[67]

---

[65] Cassim *et al Contemporary Company Law* 679.

[66] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 3.

[67] *Ibid.*

In a draft version of the "new" Companies Act, a transaction described in paragraph (a) of the "amalgamation or merger" definition was defined as an "amalgamation" and paragraph (b) as a "merger", which in essence was in line with American jurisdictions.[68] The "new" Companies Act curiously defines an "amalgamation or merger" together and does not deal with amalgamations and mergers separately; therefore there is no real distinction between an amalgamation and a merger, so that the concept is treated as one, in contrast to the position in most other jurisdictions. Davids *et al* opine that failure to do so is regrettable, as it remains unclear whether these terms are simply interchangeable or reflect different transactions. [69]

Cassim *et al* suggest that the terms "amalgamation or mergers" appear to be regarded as synonymous and interchangeable in terms of the "new" Companies Act.[70] However, there appear to be technical differences between paragraphs (a) and (b) of the "amalgamation or merger" definition.[71]

In terms of paragraph (a) of the definition, where an acquiring company and a target company wish to merge, both the acquiring and the target companies are dissolved and a new company is formed or established. This is compared to paragraph (b) of the definition, where the acquiring company would survive and continue in existence whilst the target company would be the disappearing company, and would be dissolved or deregistered.[72]

The aforementioned reflects a simplification of the possible transaction, as the "new" Companies Act envisages transactions between two or more companies and creates scope for the survival of more than one company or the formation of more than one new company. The introduction of the new company regime makes it possible for a combination of paragraphs (a) and (b) of the definition, whereby the "amalgamation or merger" results in at least one surviving company as well as the formation of one or more new companies.[73]

[68] Davids *et al* 2010 *Acta Juridica* 337 at 342.
[69] *Ibid.*
[70] Cassim *et al Contemporary Company Law* 678.
[71] *Ibid.*
[72] Cassim *et al Contemporary Company Law* 678; Davids *et al* 2010 *Acta Juridica* 337 at 342.
[73] Cassim *et al Contemporary Company Law* 680.

In practice, the choice between the two structures of an "amalgamation or merger" would be determined by a number of factors, such as:

(i) *the desire to portray the transaction as a true merger of equals. In this case the first structure, which results in the formation of a new company, may be preferred;*

(ii) *the need to preserve the goodwill or identity of one of the constituent companies. This may necessitate the use of a merger into the relevant company, which would be the surviving company;*

(iii) *the material provisions of the Memorandum of Incorporation of the constituent companies. This may determine whether the relevant company must survive or must disappear under the transaction; and*

(iv) *the change of control provisions in material contracts between a constituent company and third parties.*[74]

Apart from the technical differences presented by the two structures, they are substantially similar in all other respects. Moreover, it is submitted that the amalgamation or merger provisions provided in the "new" Companies Act, have a far wider application and scope compared to the draft Companies Bill, 2007.

2.3.3 AMALGAMATION OR MERGER PROCEDURE

David's *et al* aver that there are three stages of the new merger procedure, which can be identified as the merger agreement, the shareholder approval process and the implementation of the merger.[75] Oppenheim and Douglas on the other hand, state that the requirements of an amalgamation or merger are as follows:

(i) *the parties to the proposed amalgamation or merger must enter into a written agreement setting out certain statutory information concerning the proposed amalgamation or merger;*

---

[74] Cassim *et al Contemporary Company Law* 680 – 681.
[75] Davids *et al* 2010 *Acta Juridica* 337 at 343.

(ii) the amalgamation or merger must be approved by the shareholders of each amalgamating or merging company; and

(iii) before the amalgamation or merger can be implemented, the board of directors of each company involved in the amalgamation or merger, must be satisfied that the solvency and liquidity test will be met.[76]

For the purposes of this thesis, the merger procedure will illustrate as follows: (i) merger agreement; (ii) solvency and liquidity test; (iii) requisite approvals of the merger; (iv) notice to creditors; and (v) implementation of the merger.[77]

2.3.3.1 MERGER AGREEMENT

The first step in the statutory merger procedure is that where two or more companies are proposing to "amalgamate or merge" they must enter into a written agreement setting out the terms and means of effecting the merger, as set out in terms of section 113(2) of the "new" Companies Act.[78] Magubane explains that this provision prescribes certain terms which are required to be included in the merger agreement, *inter alia*:

(i) the proposed Memorandum of Incorporation of any new company to be formed by the amalgamation or merger;

(ii) the name and identity number of each proposed director of any proposed amalgamated or merged company;

(iii) the manner in which the securities of each amalgamating or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property;

(iv) if any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company;

---

[76] Oppenheim and Douglas "South Africa: Heating up" at 1.

[77] Cassim *et al Contemporary Company Law* 684; Davids *et al* 2010 *Acta Juridica* 337 at 343.

[78] *Ibid.*

(v) the manner of payment of any consideration, where fractional securities are not being issued and where a juristic person is receiving payment, how the securities are to be paid or in what form they are to be received in the amalgamation or merger;

(vi) details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies, among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;

(vii) details of any arrangement or strategy necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies; and

(viii) the estimated cost of the proposed amalgamation or merger.[79]

Magubane opines that although what should be included in the merger agreement may be prescriptive in nature, the "new" Companies Act places very little limitation on the substance of the agreement, and companies have considerable latitude to structure the agreement in a manner that best meets their desired commercial objectives.[80]

2.3.3.2 SOLVENCY AND LIQUIDITY TEST

Once the merger agreement is concluded, the boards of directors of each of the merging companies are required to submit the transaction to their respective shareholders for approval in terms of section 115 of the "new" Companies Act. However, the boards of directors must be satisfied that, upon implementation of the

---

[79] Section 113(2) of the 'new' Companies Act; Cassim *et al Contemporary Company Law* 684; Davids *et al* 2010 *Acta Juridica* 337 at 343– Upon closer consideration of the above-mentioned items, it would appear that some of these items would be less significant than others and are not required in all jurisdictions which recognize the merger form.

[80] Magubane 2010 *De Rebus* at 45; Davids *et al* 2010 *Acta Juridica* 337 at 344; PA Delport *Henochsberg on the Companies Act, 71 of 2008* (2011) Durban: LexisNexis at 408 - The actual merger procedure is consensual, notwithstanding various restrictions. Companies proposing to amalgamate or merge can enter into a written contract, with at least the terms set out above, in section 113(2). These terms are based on the principles that the assets and liabilities of the various companies are allocated and that the shares of the amalgamated and merged companies are reorganized and the consideration payable to the shareholders of the different companies.

merger agreement, each merged entity will satisfy the solvency and liquidity test, as provided for in section 113(1) of the "new" Companies Act.[81] Section 113(1), (4) and (5) of the "new" Companies Act provides that:

> (1) *Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.*[82]
>
> . . .
>
> (4) *Subject to subsection (6), the board of each amalgamating or merging company-*
>
> > (a) *must consider whether, upon implementation, each proposed amalgamated or merged company must satisfy the solvency and liquidity test; and*
> >
> > (b) *if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a shareholders meeting of that amalgamating or merging company, in accordance with section 115.*
>
> . . .
>
> (5) *Subject to subsection (6), a notice of a shareholders meeting contemplated in subsection (4)(b) must be delivered to each shareholder of each respective amalgamating or merging company, and must include or be accompanied by a copy or summary of –*

---

[81] Cassim *et al Contemporary Company Law* 688; Davids *et al* 2010 *Acta Juridica* 337 at 345 - 346*;* Davis *et al* (2012) *Companies and other Business Structures in South Africa* 2 ed (2012) at156; Horwath "The Solvency & Liquidity Test in terms of the Companies Act 2008" (2012) Vol 27 *Talking Companies* http://www.crowehorwath.net/uploadedFiles/ZA/insights/Talking_Companies/Talking%20Companies%20-%20Volume%2027%20-%20The%20Solvency%20and%20Liquidity%20Test.pdf (accessed 19/11/2012) at 1.

[82] Delport *Henochsberg on the Companies Act, 71 of 2008* at 406 – The board of each of the amalgamated or merged company must consider if each of the companies will satisfy the solvency and liquidity test, and if the board reasonably believe that it will, it may submit the agreement for consideration at a shareholders" meeting of those companies.

> (a) *the amalgamation or merger agreement; and*
>
> (b) *the provisions of section 115 and 164 in a manner that satisfies prescribed standards.*[83]

In terms of the "new" Companies Act, companies may merge only if the merged entity or entities satisfy the solvency and liquidity test. Therefore, the companies would be prohibited from amalgamating or merging should either of the merging companies fail to satisfy the solvency or liquidity test, in terms of section 113(1) of the "new" Companies Act.[84]

The solvency and liquidity test is not foreign to South Africa, albeit in different contexts, such as a company providing financial assistance in connection with the acquisition of its shares (section 38 of the "old" Companies Act) or for share buy-backs (section 85 of the "old" Companies Act), and is also one of the underlying tenets of the new statutory regime moving away from the previous capital maintenance regime.[85] Pretorius *et al* support this submission stating that one of the fundamental shifts in our corporate law regime, since the enactment of the "new" Companies Act, is the departure from a capital maintenance regime to a solvency and liquidity environment.[86]

Compliance with the solvency and liquidity test is an essential prerequisite for a merger transaction and section 4 of the "new" Companies Act provides the following:[87]

> (1) *For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time -*

---

[83] Delport *Henochsberg on the Companies Act, 71 of 2008* at 406 – 407.

[84] Horwath "The Solvency & Liquidity Test in terms of the Companies Act 2008" at 1; S Evan "The Liquidity and Solvency Test under the new Companies Act 2008" (2011) *Dingley Attorneys* http://www.dingley.co.za/the-solvency-and-liquidity-test-under-the-new-companies-act-2008/ (accessed 19/11/2012) at 1.

[85] Davids *et al* 2010 *Acta Juridica* 337 at 346. – It is noteworthy that the United States has a similar requirement for the payment of dividends and distributions to shareholders, and that the new English Companies Act has also adopted a similar approach set out in section 829 to 853.

[86] Evan "The Liquidity and Solvency Test under the new Companies Act 2008" at 1.

[87] Cassim *et al Contemporary Company Law* 688.

(a) the assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company, as fairly valued, equal or exceed the liabilities of the company or, if the company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued; and

(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of –

(i) 12 months after the date on which the test is considered; or

(ii) in the case of a distribution contemplated in paragraph (a) of the definition of distribution in section 1, 12 months following that distribution. . .[88]

The solvency and liquidity test will be satisfied by a company if, considering all reasonably foreseeable financial circumstances of the company at the particular time:

(i) the company's assets exceed its liabilities; and

(ii) it appears that the company will be able to pay its debts, as they become due, in the ordinary course of business, for a period of twelve months after the date on which the test is considered.[89]

Clearly the test comprises of a solvency[90] and a liquidity[91] element, set out in paragraph (a) and (b) respectively, both of which must be satisfied.[92] Solvency, depicts a scenario where assets exceed liabilities, is often referred to as solvency in the bankruptcy sense and is determined through the application of a balance sheet

---

[88] Section 4 of the 'new' Companies Act; Horwath "The Solvency & Liquidity Test in terms of the Companies Act 2008" at 1 – The board of directors or any other person applying the solvency and liquidity test to a company: (i) must consider the fair value of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities.

[89] Horwath "The Solvency & Liquidity Test in terms of the Companies Act 2008" at 1.

[90] Section 4(1)(a) of the 'new' Companies Act.

[91] Section 4(1)(b) of the 'new' Companies Act.

[92] K Van der Linde "The solvency and liquidity approach in the Companies Act 2008" (2009) *TSAR at* 225.

test. This is distinguished from equity solvency or the ability to satisfy one's debts as they become due, which refers to description provided for in paragraph (b) above.[93] This test requires not only that the company is liquid, that it is able to pay its debts as they become due in the ordinary course of business, but also that the company be solvent.[94]

The solvency element will be satisfied *"at a particular time* if, *considering all reasonably foreseeable financial circumstances of the company at the time"* the fair value of the company's assets equals or exceeds its fairly valued liabilities.[95] The solvency or balance sheet test determines the net assets or liabilities at a specific moment in time, whereas the requirement regarding the consideration of all reasonably foreseeable financial circumstances, involves a measure of prediction and uncertainty.[96]

The liquidity element will be satisfied if, considering all reasonably foreseeable financial circumstances of the company at the time, it appears that the company will be able to pay its debts as they become due in the course of business for a period of twelve months.[97] If the distribution is in the form of a transfer of money or property, the period ends twelve months after the date on which the distribution is made. If the distribution is made in any other form, the twelve month period ends after the date on which the solvency and liquidity test is considered. In contrast to the solvency element, which makes provision for the financial position of a group of companies, the liquidity element does not apply to the group context but is restricted to individual companies. Where a company satisfies the solvency and liquidity test at the relevant time in question, that company's assets, fairly valued, are equal to or exceed its liabilities and the company is able to pay its debts as they fall due in the ordinary course of business.[98]

---

[93] Van der Linde 2009 *TSAR* at 225.
[94] Evan "The Liquidity and Solvency Test under the new Companies Act 2008" at 1.
[95] Van der Linde 2009 *TSAR* at 226 – 227.
[96] Van der Linde 2009 *TSAR* at 226 – 227 - This form of prediction, in conjunction with the liquidity test, is not appropriate for the solvency test.
[97] Davis *et al Companies and other Business Structures in South Africa* 155.
[98] Davis *et al Companies and other Business Structures in South Africa* 155.

In applying the test, the directors will be required to consider *"all reasonably foreseeable financial circumstances of the company at that time".* This implies a predictive element, requiring directors to consider matters which may not be reflected in the accounting records and financial statements of the company, but rather based on elements such as how the economy or political circumstances may impact on the financial state of the company in the future.[99]

Pretorius *et al* suggest that any financial information concerning the relevant company and which is to be considered by the directors, "must" be based on the accounting records and financial statements that satisfy the requirements in the "new" Companies Act.[100] In addition, the board, or any person applying the test, must consider a fair valuation of the company's assets and liabilities including any reasonably foreseeable contingent assets and liabilities, and may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances.[101]

Objectively, the solvency and liquidity test does not require that the company be solvent and liquid, but rather that the directors must be "satisfied" that the company would satisfy the solvency and liquidity test.[102] It must reasonably appear that the company will satisfy the solvency and liquidity test and the board of the company must acknowledge, by resolution, that it has "applied" the solvency and liquidity test and "reasonably concluded" that the company will satisfy the test.[103]

If the boards of directors of the merging companies *"reasonably believe"* that each proposed entity will satisfy the solvency and liquidity test, they can then call a shareholders" meeting for the purpose of considering the transaction in terms of

---

[99] Davis *et al Companies and other Business Structures in South Africa* 155.
[100] K Pretorius and T De Wit "The solvency and liquidity test: where did we come from? Where do we go from here?" (2010) *ENSIGHT* http://www.ens.co.za/newsletter/briefs/corpCommNov10printAll.html (accessed 21/11/2012) at 2.
[101] *Ibid.*
[102] Pretorius and De Wit "The solvency and liquidity test: where did we come from? Where do we go from here?" at 2.
[103] Pretorius and De Wit "The solvency and liquidity test: where did we come from? Where do we go from here?" at 2.

section 113(2) read with section 115 of the "new" Companies Act.[104] The inclusion of an objective "reasonableness" standard for the board's determination, as opposed to a subjective "good faith" standard, may increase the risk of challenges by creditors. The "new" Companies Act has gone to some length to protect creditors and if the need arises the courts will fashion appropriate limits.[105]

Once the board of directors "*reasonably believe"* that the solvency and liquidity requirements have been met, notice of a shareholders" meeting must be delivered to each of the shareholders of each respective amalgamating or merging company, and must include, or be accompanied by, a copy or summary of the merger agreement and the provisions of section 115 and section 164 of the "new" Companies Act, which relates to the required approvals for the transaction and the appraisal rights of dissenting shareholders.[106] This is important, because shareholders may be unaware of their appraisal rights and the procedure for their exercise or of the provisions regarding court approval.[107]

2.3.3.3 REQUISITE APPROVALS OF THE MERGER

The third step in the merger procedure is that the merger must be approved in accordance with section 115 of the "new" Companies Act, failing which the "amalgamation or merger" transaction may not be implemented at all.[108] Shareholder requirements set out in section 115 of the "new" Companies Act apply, not only to the merger procedure, but also to disposals of all or the greater part of the assets or

[104] Delport *The New Companies Act Manual* (2009) 84.
[105] Davids *et al* 2010 *Acta Juridica* 337 at 346.
[106] Bouwman (2009) 9 *Without Prejudice* at 34.
[107] Cassim *et al Contemporary Company Law* 689.
[108] Cassim *et al Contemporary Company Law* 689; Horwath "Procedural Requirements for Fundamental Transactions in terms of the Companies Act 2008" (2010) Vol 26 *Talking Company* http://www.crowehorwath.net/uploadedFiles/ZA/insights/Talking_Companies/Talking%20Companies%20-%20Volume%2026%20%20Procedural%20Requirements%20for%20Fundamental%20Transactions.pdf (accessed 19/11/2012) at 1; Delport *Henochsberg on the Companies Act, 71 of 2008* at 416 – A company may only implement a resolution to dispose of all or the greater part of its assets or undertaking, implement an amalgamation or merger, or implement a scheme of arrangement, it is approved in terms of section 115, and if applicable, approved by court, or it is in terms of a business rescue plan.

undertaking of a company and to the implementation of schemes of arrangement.[109] Section 115(1) of the "new" Companies Act provides that:

> (1) *Despite section 65, any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or holders of securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of arrangements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless –*
>
> (a) *the disposal, amalgamation or merger, or scheme of arrangement*
>
> (i) *has been approved in terms of this section; or*
>
> (ii) *is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6 . . .*[110]

The shareholder approval requirements, the exceptional requirement of court approval and the appraisal rights of dissenting shareholders, are largely similar, yet not entirely so, for all three types of fundamental transactions set out in the "new" Companies Act.[111]

In terms of section 115(2) of the "new" Companies Act:

> *A proposed transaction contemplated in subsection (1) must be approved –*

---

[109] Cassim *et al Contemporary Company Law* 689; Davids *et al* 2010 *Acta Juridica* 337 at 346 – 347; Horwath "Procedural Requirements for Fundamental Transactions in terms of the Companies Act 2008" at 1; Magubane (2012) *De Rebus* at 45 – All three categories of fundamental transactions, in addition to their specific regulatory requirements, are subject to certain generic regulatory provisions set out in section 115 of the 'new' Companies Act.

[110] Section 115(1) of the Companies Act 71 of 2008; Delport *Henochsberg on the Companies Act, 71 of 2008* at 88 – 89 – Irrespective of any action under section 65 (resolutions by shareholders), any provision of a company's Memorandum of Incorporation, or any resolution adopted by its Board or the holders of securities to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements implement an amalgamation or a merger, , unless the transaction has been approved in terms of section 115 or is pursuant to or contemplated in an approved business rescue plan for the company.

[111] Cassim *et al Contemporary Company Law* 689.

> (a) *by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25 per cent of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64(2). . .*[112]

A merger or amalgamation must be approved by a special resolution of shareholders of each company at a meeting specifically called for the purpose. A quorum of shareholders entitled to exercise 25 per cent of the voting rights exercisable in respect of the relevant matter is required, and, as mentioned, a special resolution is needed to approve the transaction.[113] Typically, a resolution may only be adopted with the support of at least 75 per cent of the voting rights that are actually exercised on the resolution.[114] Both the quorum and the prescribed shareholder approval requirements relate to the percentage of voting rights, which in terms of section 1 of the "new" Companies Act means the rights of any holder of the company's securities to vote in connection with that manner, as opposed to the percentage of shareholders or shares.[115]

By definition, a "special resolution" is adopted with the support of at least 75 per cent of the voting rights exercised on the resolution or a different percentage as

[112] Section 115(2) of the Companies Act 71 of 2008; Delport *Henochsberg on the Companies Act, 71 of 2008* at 416 – The minimum quorum required is 25 per cent of voting rights entitled to vote on the resolution unless the Memorandum of Incorporation requires a higher quorum. The special resolution percentage is determined in terms of section 65, and can be higher or lower than 75 per cent.

[113] Davids *et al* 2010 *Acta Juridica* 337 at 347; Cassim *et al Contemporary Company Law* 690 - Cassim *et al* note that, the quorum for the meeting may be increased in a particular company's Memorandum of Incorporation, but may not be decreased, according to section 115(2)(a) read with section 64(2) of the Companies Act 71 of 2008.

[114] Despite section 115(2) of the 'new' Companies Act requiring 75 per cent of the shareholders present at the meeting would need to approve the transaction, section 65 provides a proviso that, shareholder approval may be reduced to as low as 60 per cent plus one vote. However, the company's Memorandum of Incorporation must make provision for this.

[115] Davids *et al* 2010 *Acta Juridica* 337 at 347.

contemplated in section 65(10) of the "new" Companies Act.[116] Section 65(10) of the "new" Companies Act states that:

> *A company's Memorandum of Incorporation may permit a different percentage of voting rights to approve a special resolution, provided that there must at all times be a margin of at least ten percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter.*[117]

However, there appears to be some confusion as to the applicability of this provision, therefore the question remains whether a company's Memorandum of Incorporation may legitimately alter the required percentage of voting rights, to approve a special resolution in respect of a fundamental transaction. One of the significant changes to the previous position is that a company Memorandum of Incorporation may stipulate that a higher percentage of voting rights will be required to approve an ordinary resolution.[118] Similarly, a company's Memorandum of Incorporation may also permit a lower percentage of voting rights to approve a special resolution.[119] The "new" Companies Act requires that a margin of at least 10 per cent always be kept between the requirements for approval of ordinary and special resolutions concerning different specific matters.[120]

Clause 119(1) under the draft Companies Bill, 2007 explicitly precluded such alteration, whereas under the "new" Companies Act it is less clear. Cassim *et al* argue that since section 115 of the "new" Companies Act applies "despite section 65, and any provision of a Company's Memorandum of Incorporation*",* this would effectively mean that a company is prohibited from relying on section 65(10) of the "new" Companies Act, to alter the requisite 75 per cent support for a fundamental

[116] Section 1 of the 'new' Companies Act.
[117] Cassim *et al Contemporary Company Law* 690.
[118] N Bouwman "Quorums and Resolutions" (2010) 10 *Without Prejudice* at 19.
[119] Bouwman (2010) 10 *Without Prejudice* at 19.
[120] Bouwman (2010) 10 *Without Prejudice* at 19 – The 'new' Companies Act only permits a company's Memorandum of Incorporation to adjust the percentage ordinary resolution to a higher percentage and the percentage of a special resolution to a lower percentage, subject to always maintaining a 10 percent difference between the percentages allowed for special and ordinary resolutions.

transaction to be approved. Therefore, on strict application of section 115 of the "new" Companies Act, the 75 per cent threshold is fixed and may not be altered.[121]

Despite this threshold, shareholders who feel that they need greater protection in the event of a proposed merger or any other fundamental transaction, may have respite in the company's Memorandum of Incorporation, whereby the quorum for the meeting is simply increased.[122] Therefore, a merger could only proceed if it has obtained the approval or support of a greater percentage of the total voting rights of the company. Bouwman submits that although the "new" Companies Act has introduced some interesting changes to the provisions regulating quorum and resolutions, these changes afford companies some flexibility in adjusting resolution requirements and also save companies the administrative burden of registering all special resolutions.[123]

Where shareholders holding at least 15% (fifteen per cent) or more of the voting rights vote against the proposed amalgamation or merger (where there was an 85 per cent majority in support of the resolution), any dissenting shareholder may require the company to seek court approval for the transactions.[124] The company, must then apply to the court for such approval and bear the subsequent costs of the application, or treat the resolution as a nullity, in terms of section 115(5) of the "new" Companies Act.[125]

If there is a 75 per cent majority vote in support of the resolution, any shareholder who voted against the resolution also has the right to apply to court for review of the resolution, in terms of section 115(3)(b) of the "new" Companies Act. The court may therefore grant leave to apply for review, if it is satisfied that the shareholders are acting in good faith and it appears that the dissenting shareholders are prepared to sustain the proceedings and the alleged facts support a finding as contemplated in

---

[121] Cassim *et al Contemporary Company Law* 691.
[122] *Ibid.*
[123] Bouwman (2010) 10 *Without Prejudice* at 19.
[124] Bouwman (2010) 10 *Without Prejudice* at 19; PA Delport *The New Companies Act Manual* (2009) 89.
[125] Delport *The New Companies Act* 89.

section 115(7) of the "new" Companies Act.[126] In essence, where the majority is between 75 and 85 per cent, any dissenting shareholder may seek respite by requiring the company to seek court approval, which emphasizes the increased minority shareholder protection afforded by the "new" Companies Act.[127] Although court approval is only required in certain circumstances, as contemplated in subsection (3), the discretion of the court in these circumstances is very wide.

In terms of section 115(3) of the "new" Companies Act, the resolution (the proposed transaction) may not be implemented until the requisite approval has been obtained, and therefore a strict application of the "new" Companies Act must be followed. This safeguard is generally not provided for in other jurisdictions that have merger statutes and therefore this protection is unique to South African company law.[128]

2.3.3.4 NOTICE TO CREDITORS

Once the requisite shareholder approval of each of the merging entities is obtained, the fourth step of the merger procedure is to notify every known creditor, in the prescribed manner and form, as provided for in section 116(1)(a) of the "new" Companies Act.[129] Section 116 of the "new" Companies Act provides as follows:

> *Subject to subsection (2), after the resolution approving an amalgamation or merger has been adopted by each company that is party to the agreement –*
>
> *(a) each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to every known creditor of that company;*

---

[126] Section 115(7) of the 'new' Companies Act states – On reviewing a resolution that is subject of an application in terms of subsection (5)(a), or after granting leave in terms of subsection (6), the court may set aside the resolution only if –

> (a) the resolution is manifestly unfair to any class of holders of the company's securities; or
> (b) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.

[127] Delport *The New Companies Act* 89.

[128] Davids *et al* 2010 *Acta Juridica* 337 at 347 - 348.

[129] Bouwman (2009) 9 *Without Prejudice* at 34; Delport *Henochsberg on the Companies Act, 71 of 2008* at 421 – Notification as contemplated in section 113 of an amalgamation or merger must be sent to all the creditors of the relevant companies who are not in business rescue in the prescribed form. The notice must be published to the known creditors and delivered to them in accordance with reg 7.

(b) within 15 (fifteen) business days after delivery of a notice required by paragraph (a), a creditor may seek leave to apply to court for a review of the amalgamation or merger only on the grounds that the creditor will be materially prejudiced by the amalgamation or merger; and

(c) a court may grant leave contemplated in paragraph (a) only if it is satisfied that –

(i) the applicant for leave is acting in good faith;

(ii) if implemented, the amalgamation or merger would materially prejudice the creditor; and

(iii) there are no other remedies available to the creditor.[130]

The "new" Companies Act explicitly provides respite for objecting creditors, whereby a creditor may seek leave to apply to court for a review of the amalgamation or merger on the grounds that the creditor will be materially prejudiced by the transaction.[131] Subsequently, the creditor has 15 (fifteen) business days to apply to court to review the amalgamation or merger transactions. In terms of section 116(1)(b) and (c) of the "new" Companies Act, a court may grant leave to a creditor to apply for review of the merger, only if the court is satisfied that (i) the applicant is acting in good faith; (ii) that the merger, if implemented, would materially prejudice the creditor; (ii) and that there are no other remedies available to the creditor.[132]

Cassim *et al* state that remedies are inherent protective measures for the creditors of the merging companies.[133] This protection is important because once the merger has taken effect, the creditors would be in competition with one another, especially where the proportion of the claims of a creditor of the one merging company in relation to the value of that merging company's assets, is more favorable than the proportion of the creditor's claim in relation to the value of the assets of the merged company.[134] Creditor's interests are protected by the following mechanisms:

---

[130] Section 116(2) of the Companies Act 71 of 2008.
[131] Cassim *et al Contemporary Company Law* 689.
[132] *Ibid.*
[133] Cassim *et al Contemporary Company Law* 701.
[134] Cassim *et al Contemporary Company Law* 701.

(i) *where a merger takes effect, all the liabilities of the merging companies automatically, by operation of law, become the liabilities of the resultant company, therefore, the creditors never lose their claims;*

(ii) *a merger may only be effected if all the merging companies would, upon implementation of the merger, satisfy the solvency and liquidity test;*

(iii) *written notice of the merger has to be given to all known creditors of the merging companies, as this ensures that all creditors are made aware of the proposed merger; and*

(iv) *objecting creditors are now provided with a remedy under the "new" Companies Act.*[135]

If creditors fail to object to the transaction within the requisite period, the parties may then proceed with the implementation of the merger.[136] Only once the court has disposed all of the proceedings involving the creditors may the parties proceed with the implementation stage.

2.3.3.5 IMPLEMENTATION OF THE MERGER

The fifth and final step in this analysis of the merger procedure is the implementation of the merger. As mentioned above, the parties to the agreement may only proceed with the implementation of the merger once the transaction has satisfied all the applicable approval requirements as set out in section 115 of the "new" Companies Act, and only if no objecting creditors apply to court within the prescribed period.[137] Where a creditor does seek leave to apply to court for a review of the merger, the companies concerned may only implement the merger once the court has disposed of the creditor's application, and subject to the order of the court.[138] Section 116(3) of the "new" Companies Act provides that:

---

[135] Cassim *et al Contemporary Company Law* 702.
[136] Cassim *et al Contemporary Company Law* 694; Davids *et al* 2010 *Acta Juridica* 337 at 347.
[137] *Ibid.*
[138] Cassim *et al Contemporary Company Law* 695.

A notice of amalgamation or merger must be filed after the transaction has satisfied applicable requirements set out in section 115, and –

(a) after the time contemplated in section (1)(b), if no application has been made to the court in terms of that subsection; or

(b) in any other case –

(i) after the court has disposed of any proceedings arising in terms of subsection (1)(b) and (c); and

(ii) subject to the order of the court.[139]

Moreover, to implement the merger, subject to any court order, or if there is no action by the creditor, a notice of amalgamation or merger containing the information as required in subsection (4), must be filed with the Companies Commission.[140] Section 116(4) and (5) of the "new" Companies Act provide that:

(4) A notice of amalgamation or merger must include –

(a) confirmation that the amalgamation or merger –

(i) has satisfied the requirements of section 113 and 115;

(ii) has been approved in terms of the Competition Act, if so required by that Act;

(iii) has been granted the consent of the Minister of Finance in terms of section 54 of the Banks Act, if so required by that Act; and

(iv) is not subject to –

(aa) further approval by any regulatory authority; or

(bb) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority; and

(b) the Memorandum of Incorporation of any company newly incorporated in terms of the agreement.

. . .

[139] Section 116(3) of the 'new' Companies Act.

[140] Cassim *et al Contemporary Company Law* 695; Delport *Henochsberg on the Companies Act, 71 of 2008* at 420 – 422: It would appear that the single filing of the CoR 89, along with the prescribed filing fee, is all that is required for an amalgamation or merger. However, it is less clear as to which party bears the onus to file this notice, and who will be the authorized signatory. It would only make sense that all the amalgamated or merged companies would need to give such authority, preferably in written agreement as provided for in section 113(2) of the 'new' Companies Act.

(5) After receiving a notice of amalgamation or merger, the Commission must –

(a) issue a registration certificate for each company, if any, that has been newly incorporated in terms of the amalgamation or merger agreement; and

(b) deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger.

With regard to subsection (5), upon receipt of a notice of an amalgamation or merger, the Companies Commission will then proceed to issue a registration certificate for each new company that is to be incorporated, and then also deregister each of the merging companies which are not intended to survive the transaction, as provided for under the amalgamation or merger agreement.[141] This happens without the need for any formal winding-up.[142]

In terms of subsection (6), the merger may then take effect in accordance with, and subject to, any conditions set out in the merger agreement. Section 116(6) of the "new" Companies Act provides:

(6) An amalgamation or merger –

(a) takes effect in accordance with, and subject to any conditions set out in the amalgamation or merger agreement;

(b) does not affect any –

(i) existing liability of a party to the agreement, or of a director of any of the amalgamating or merging companies, to be prosecuted in terms of any applicable law;

(ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may continue to be prosecuted by or against any amalgamated or merged company; or

[141] Davids *et al* 2010 *Acta Juridica* 337 at 349.
[142] Cassim *et al Contemporary Company Law* 695.

> (iii) *conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merging company, and any such ruling, order or judgment may be enforced by or against any amalgamated or merged company.*[143]

Section 116 (6)(b) of the "new" Companies Act provides that the merger will not affect, *inter alia*, any existing liability of any merging party or its directors to be prosecuted under the law, and provides that any legal proceedings against the merging companies may be continued against the merged company or companies, and any court order or judgment against the merging companies may be enforced against the merged company or companies.[144]

In respect of the existing liabilities, the above submission reflects the juridical nature and effect of a statutory merger as envisaged in the matter of *R v Black & Decker Manufacturing Co*[145] where the court held:

> *The purpose is economic: to build, to consolidate, perhaps to diversify, existing businesses; so that through union there will be enhanced strength. It is a joining of forces and resources in order to perform better in the economic field. If that be so, it would surely be paradoxical if that process were to involve death by suicide or the mysterious disappearance of those who sought security, strength and above all, survival in that union. . .The end result is a coalesce to create a homogenous whole. The analogies of a river formed by the confluence of two streams, or the creation of a single rope through the intertwining of strands have been suggested by others.*[146]

The aforementioned envisages the intended juridical nature of an amalgamation or merger, whereby two or more companies can amalgamate or merge their respective assets and liabilities into one or more combined companies. Gad and Strauss suggest that this process is meant to be *"a simple, uncomplicated and effective*

---

[143] Section 116(6) of the 'new' Companies Act.
[144] Davids *et al* 2010 *Acta Juridica* 337 at 349.
[145] [1975] 1 SCR 441 (SCC) at 420-422.
[146] Cassim (2008) 20 *SA Merc LJ* at 4.

procedure by which companies may merge by agreement, with the approval of the prescribed majority of shareholders, and without the need of any court procedure, which brings South Africa in line with international best practice."[147] Therefore, in harmony with the juridical nature of an amalgamation or merger, neither a merger nor an amalgamation affects the existing liability of any of the amalgamating or merging companies for criminal prosecution.

2.3.4 THE EFFECT OF AN AMALGAMATION OR MERGER

Prior to the introduction of the "amalgamation or merger" provisions, the transfer of assets and liabilities was normally effected by the registration of immovable property, the delivery of movable things and the delegation or assignment of liabilities.[148] With the introduction of the "amalgamation or merger" provisions it would seem that, in terms of section 116(7) of the "new" Companies Act, all the assets and liabilities of the amalgamating companies would vest in the amalgamated company, by operation of law.[149]

Upon the implementation of an amalgamation or merger agreement, such an agreement would have the following effect in terms of section 116(7) and (8) of the "new" Companies Act:

> *(7) When an amalgamation or merger agreement has been implemented –*
>
> *(a) the property of each amalgamating or merging company becomes the property of the newly amalgamated, or surviving merged, company or companies; and*
>
> *(b) each newly amalgamated, or surviving merged company is liable for all of the obligations of every amalgamating or merged company, in accordance with the provisions of the amalgamation or merger*

[147] Gad and Strauss Company mergers and tax: The implications of separate legislation that is not fully aligned at 1; Gad and Strauss The impact of statutory mergers on current tax Legislation: Part 1 at 1.

[148] Bouwman (2009) 9 *Without Prejudice* at 34.

[149] Bouwman (2009) 9 *Without Prejudice* at 34; Davids *et al* 2010 *Acta Juridica* 337 at 349.

agreement, <u>or any other relevant agreement</u>, but in any case subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test, subject to subsection (8), if it is applicable.[150][Emphasis added]

(8) If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be transferred from an amalgamating or merging company to an amalgamated or merged company, a copy of the amalgamation or merger agreement, together with a copy of the filed notice of amalgamation or merger, constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property.[151]

One of the key advantages of the merger procedure is that all of the assets and liabilities of the merging companies will vest automatically in the amalgamated company or companies, by operation of law.[152] This means that companies avoid costs and legal formalities normally associated with the transfer of a business from one entity to another, as well as the time it takes to transfer things such as immovable and intellectual property.[153] Bouwman reiterates that, under the new statutory merger provisions, there will be no need for compliance with any of the legal formalities associated with transfer, save for registration of the transfer of immovable property, and there should be no need for a court order to effect transfer therefore providing simplicity and efficiency.[154]

In terms of section 116(7) of the "new" Companies Act, when a merger agreement has been implemented, the "property" of each amalgamating or merging company becomes the property of the newly amalgamated, or surviving merged company or companies, whatever the case may be. Gad and Strauss suggest that, an amalgamation or merger agreement will not affect the existing liabilities of the

---

150 Section 116(7) of the 'new' Companies Act.
151 Section 116(8) of the 'new' Companies Act.
152 *Ibid.*
153 *Ibid.*
154 Bouwman (2009) 9 *Without Prejudice* at 34.

amalgamating or merging companies, and the property and obligations of the amalgamating or merging companies will become those of the newly amalgamated or surviving company.[155] Although the term "property" is not specifically defined, it would presumably, in this context, be interpreted in the wide sense to include all property, rights, powers and privileges.[156] This would therefore be extended to include both corporeal and incorporeal property.[157]

Upon implementation of the merger agreement, in terms of section 116(7)(b) of the "new" Companies Act, the newly amalgamated or surviving merged company *"is liable"* for all of the obligations of the amalgamating or merging companies subject, however, *inter alia*, *"to the requirements of section 113(1) of the "new" Companies Act, and any provision of the merger agreement, or any other agreement."*[158]

Davids *et al* argue that the qualification of the general rule that all liabilities of the merging companies are assumed by the company surviving the merger, subject to *"any other agreement*", is unfortunate and potentially confusing.[159] In the absence of this qualification, the transfer of contracts, to which the merging companies were party to, would be a matter of interpreting the specific contracts implicated. Generally, contractual rights and obligations of the disappearing company would vest in the surviving company automatically, by operation of law, but where a contractual clause specifically provides that a contract will not survive a statutory merger, such a clause would be effective to prevent the vesting of the contract in the surviving merged company.[160]

---

[155] Gad and Strauss Company mergers and tax: The implications of separate legislation that is not fully aligned at 1.

[156] Cassim *et al Contemporary Company Law* 681; Cassim (2008) 20 *SA Merc LJ* at 5 – "Property" in the context of section 120(5)(a) of the 'new' Companies Act, would presumably be interpreted in its broad sense to include all property, rights, powers and privileges. In this regard the term "property" in the equivalent section 186(b) of the Canada Business Corporations Act 1985, has been held to mean all rights, powers, privileges and franchises. Similarly, section 225 of the New Zealand Companies Act 1993, refers to "property, rights and privileges, and then section 259 of the Delaware General Corporation Law 2001, refers to "rights, powers, privileges and franchises, and all property real, personal and mixed". It is suggested that these corresponding sections may well influence the interpretation of the term "property".

[157] Davids *et al* 2010 *Acta Juridica* 337 at 349.

[158] Bouwman (2009) 9 *Without Prejudice* at 34; Davids *et al* 2010 *Acta Juridica* 337 at 349.

[159] Davids *et al* 2010 *Acta Juridica* 337 at 350.

[160] Cassim *et al Contemporary Company Law* 682.

As the assumption of the assets and liabilities would take place by the operation of law and not by assignment, a provision prohibiting the assignment without consent of the third parties would prevent the merged companies assuming rights and obligations under the contracts.[161] Parties to the contract are open to agree the inclusion of a right of termination, or other remedies, in the event that the contract is taken over by another party as a result of a merger or in the event of a change of control.[162]

The assumption of obligations in terms of section 116(7) of the "new" Companies Act, subject to the requirements of *"any other agreement*", raises some doubt as to what liabilities may be assumed in the merger by the operation of law.[163] This qualification means that the merger transaction does not render other contracts entered into previously, less effective. Where *"other agreements*" provide for the termination of such contracts in the event of a merger transaction, such contract will be terminated and the obligations contained in it will not be assumed by the merged company.[164]

David's *et al* believe that this provision is not intended to allow parties, as a matter of law, to contract out of the legal consequences of a merger, including the automatic assumption by the merged company of all the rights and obligations of the merging companies.[165] If a company is party to a contract that provides that specified rights or obligations terminate if it engages in a merger, and it subsequently enters into a merger, the consequences of termination of the rights or obligations are provided for as a matter of contract, and the statute need not specify that the assumption of merging parties' obligations in a merger is *"subject to any other agreement."*[166] The wording of section 116(7) of the "new" Companies Act is unfortunately ambiguous. The Legislature could have provided further clarification as to what is meant by "making the assumption of obligations subject to any other agreement".[167]

---

[161] Davids *et al* 2010 *Acta Juridica* 337 at 366.
[162] *Ibid.*
[163] *Ibid.*
[164] *Ibid.*
[165] *Ibid.*
[166] *Ibid.*
[167] *Ibid.*

The "new" Companies Act explicitly states that the merged company or companies assume the obligations of the merging companies, but fails to expressly mention that the merged company or companies will automatically *"step into the shoes"* of the merging companies, which is presumably the intention.

The fact that the transfer of obligations under section 116(7)(b) of the "new" Companies Act is subject to certain qualifications to which the transfer of property under section 116(7)(a) is not, it may have been preferable to deal with the transfer of contracts. Typically, this would have included both rights and obligations as a separate provision, and specifically confirm that the merged company or companies would replace the merging companies as parties to whatever agreements the merging companies were party to by operation of law, and assume both the rights and obligations of the merging parties under those agreements.[168]

There are undoubtedly a number of other issues which will arise in relation to the implementation of mergers, which will need to be regulated for, or dealt with in practice, and consequential amendments to a variety of different legislation will be required. In particular, tax legislation will need to be amended to deal with the tax implications of such mergers, and indeed the tax treatment of mergers is likely to play a significant role in the extent to which the merger procedure is utilised in practice.

In terms of section 115(9) of the "new" Companies Act, if a fundamental transaction has been approved by the shareholders, any person to whom assets are transferred may (if necessary), *inter alia*, apply to court to give effect to the transaction.[169] This

---

[168] Davids *et al* 2010 *Acta Juridica* 337 at 367.

[169] Cassim *et al Contemporary Company Law* 695; In terms of section 115(9) of the 'new' Companies Act – *If a transaction contemplated in this Part has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to a court for an order to effect –*

> *(a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;*
> *(b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;*
> *(c) the transfer of shares from one person to another;*
> *(d) the dissolution, without winding-up, of a company, as contemplated in the transaction;*
> *(e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or*

mechanism allows a party to a transaction to enforce it if the other party refuses, for whatever reason, to give effect to the merger agreement after shareholder approval has been obtained.[170] According to David's *et al,* such an order by the court would effect:

> *(i) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;*
> *(ii) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;*
> *(iii) the transfer of shares from one person to another;*
> *(iv) the dissolution, without winding-up, of a company, contemplated in the transaction;*
> *(v) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or*
> *(vi) any other relief that may be necessary or appropriate to give effect to, and properly implement, the amalgamation or merger*.[171]

2.3.5 APPRAISAL RIGHTS FOR SHAREHOLDERS

Generally, in company law, the business of a company, apart from business management decisions, is conducted on the basis of votes of the majority of shareholders in that particular company.[172] Naturally, in some instances, the conduct of the majority may be to the detriment of minority and dissenting shareholders in that company.[173] The obvious solution for these shareholders would be to sell their shares. However, there is not always a ready market and there may be instances where the right to transfer shares may be subject to certain restrictions, as in the

---

(f) *any other relief that may be necessary or appropriate to give effect to, and properly implement, the amalgamation or merger.*

[170] Davids *et al* 2010 *Acta Juridica* 337 at 352.

[171] Section 115(9) of the 'new' Companies Act; Davids *et al* 2010 *Acta Juridica* 337 at 352.

[172] HGL Beukes "An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies" (2008) 20 *SA Merc LJ* 479 at 480; AT Adebanjo *Remedies for Dissenting Shareholders: A comparison of the current option of personal action and the proposed appraisal remedy under the Companies Bill of 2008* (Masters Degree Thesis Unpublished, University of South Africa, 2008) 6.

[173] Adebanjo *Remedies for Dissenting Shareholders: A comparison of the current option of personal action and the proposed appraisal remedy under the Companies Bill of 2008* at 6.

case of private companies. Therefore the Legislature needed to recognize and anticipate such circumstances, and give respite to these dissenting shareholders.[174] The "new" Companies Act has introduced a new concept into our law, namely *"dissenting shareholder appraisal rights."*[175] However, it has been a feature of American corporate law for over a century now and has more recently been adopted by Canada and New Zealand.[176]

In terms of section 164 of the "new" Companies Act, the appraisal right gives minority shareholders the right to have their shares bought out by the company in cash at a price reflecting the fair value of shares, which value may be determined judicially, if they disagree with resolutions approving certain fundamental transactions.[177] Simply stated, the appraisal remedy creates a mechanism through which a dissenting shareholder can demand that the company purchase their shares held in the company, either at mutually satisfactory or a judicially set fair price, upon the occurrence of certain events.[178] Therefore, the appraisal right is not a general right, but is triggered only in certain specified circumstances.

Broadly speaking, in terms of section 164(2) of the "new" Companies Act, the appraisal rights mechanism is triggered by way of a notice to shareholders of a meeting to consider adopting a resolution to:

(a) *amend its Memorandum of Incorporation by altering the preference, rights, limitation or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares; or*

(b) *enter into a fundamental transaction, as contemplated in section 112, 113 or 114 of the "new" Companies Act.*[179]

---

[174] Adebanjo *Remedies for Dissenting Shareholders: A comparison of the current option of personal action and the proposed appraisal remedy under the Companies Bill of 2008* at 6.

[175] Cassim (2008) 20 *SA Merc LJ* at 19.

[176] Cassim (2008) 20 *SA Merc LJ* at 19; Cassim *et al Contemporary Company Law* 796.

[177] *Ibid.*

[178] Cassim (2008) 20 *SA Merc LJ* at 19.

[179] Section 164(2)(a) and (b) of the 'new' Companies Act; Beukes (2008) 20 *SA Merc LJ* 479 at 480; Druker (2011) 1 *JSR* at 6.

The underlying factor in these instances is that a major decision is about to be taken, or has been taken, in respect of the company's business and/or a member's shareholding which may substantially affect the shareholder's interest.[180] It would appear that the appraisal rights are extended to all the fundamental transactions. For the purposes of this thesis, the focus will be on the appraisal right as it relates to a company having concluded an "amalgamation or merger" agreement.

The formal recognition of the appraisal right of dissenting shareholders in a merger, impliedly acknowledges that a merger does have significant and far-reaching consequences for the shareholders of both the merging companies.[181] This is due to the changing nature of the investments of both the company and the shareholders, whilst their rights as shareholders could also potentially change.[182]

Importantly, the merger procedure is not restricted to transactions whereby both sets of shareholders of the merging companies continue to participate as shareholders in the surviving or merged company.[183] Instead, the consideration offered to such shareholders may consist of other securities, property or cash.[184] This suggests that shareholders of the merging companies will no longer have the right to insist on remaining shareholders in the surviving company, but may be disinvested of their whole interest in the company, and only left with a cash consideration.[185] It is because of such consequences that shareholders are afforded protection by way of the appraisal right, whereby they disapprove the proposed merger.

There are a number of procedural steps that shareholders who wish to exercise their appraisal rights must follow, as provided for in section 164 of the "new" Companies Act. Firstly, when a company gives notice to shareholders of a meeting to consider adopting a resolution to give effect to one of the triggering events, a dissatisfied or dissenting shareholder must send a written notice of objection to the resolution proposing the merger at any time prior to the shareholders' meeting, where the

---

[180] Druker (2011) 1 *JSR* at 6.
[181] Cassim (2008) 20 *SA Merc LJ* at 19.
[182] *Ibid.*
[183] *Ibid.*
[184] *Ibid.*
[185] *Ibid.*

resolution will be voted on.[186] This notice of objection is one of the essential prerequisites for the exercise of an appraisal right.[187] Where shareholders fail to submit a written notice of objection, it is possible that they lose the appraisal right. Therefore, as soon as one of the triggering events is proposed for approval by the general meeting, the shareholder should take immediate action to make the objection by sending a written notice of objection before the resolution is actually put to the vote.[188]

To give effect to the merger or amalgamation transaction the resolution must be voted against, in terms of section 164(5)(c) of the "new" Companies Act. If the resolution is adopted the company must, within ten business days, advise the dissenting shareholders accordingly.[189] Notices need to be sent to each of the dissenting shareholders who had originally lodged a written notice of objection against the proposed resolution, and not withdrawn the objection or voted in support of the resolution.[190]

Should dissenting shareholders wish to opt out and be paid the fair value for their shares, they have twenty days in which to make this demand, but only if all of the following requirements have been satisfied:

(i) the shareholder must have sent a notice of objection;
(ii) the resolution must have been adopted by the company;
(iii) the shareholder must have voted against the resolution (abstention from voting will not suffice);
(iv) the shareholder must have complied with all the procedural requirements as provided by section 164 of the "new" Companies Act; and
(v) in the case of an amendment to the company's Memorandum of Incorporation to alter class rights, the shareholder must hold shares of a class that is materially and adversely affected by the amendment.[191]

[186] Section 163(3) of the 'new' Companies Act; Cassim *et al Contemporary Company Law* 800.
[187] Cassim *et al Contemporary Company Law* 800; Druker (2011) 1 *JSR* at 10.
[188] *Ibid.*
[189] Cassim *et al Contemporary* at 801.
[190] Beukes (2008) 20 *SA Merc LJ* 479 at 481.
[191] Cassim *et al Contemporary* at 801.

Once such demand has been made, the shareholder "perfects" the appraisal right, and the shareholder has no further right in respect of its shares other than its right to receive the fair value for the shares. Thus, the shareholder forfeits all its rights in respect of those shares and would lose its rights to future dividends and voting rights.[192] The company is then required to make an offer to the dissenting shareholders to acquire their shares, at a value that the board deems is fair, and provide a statement to the shareholders showing how the value was determined.[193]

The "new" Companies Act fails to provide an exact method of valuation and this lack of certainty is bound to create a fruitful ground for dispute between companies and shareholders.[194] Whilst this lack of clarity may potentially lead to increased litigation it may be argued that had the "new" Companies Act provided a method of calculation, this in itself might have been considered a shortcoming because the determination of value is more than a mere accounting exercise and varies according to various factors, such as the type of business, the prevailing economic climate, and others.[195]

Where a dispute does arise as to the fair valuation of the shares, the affected shareholders are entitled to apply to court to have the fair value determined judicially.[196] Section 164(15)(c) of the "new" Companies Act provides a mechanism for the court to obtain the expertise necessary to make a determination by providing the court with discretion to appoint an appraiser.[197] In terms of section 164(16) of the "new" Companies Act, the fair value must be determined at the date of, and the time immediately preceding, the adoption of the resolution which has given rise to appraisal.[198] The court will then decide the matter and make an order as to what it constitutes fair value for the shares.

[192] Druker (2011) 1 *JSR* at 10.
[193] *Ibid.*
[194] Druker (2011) 1 *JSR* at 10 – 11.
[195] Druker (2011) 1 *JSR* at 11.
[196] Cassim *et al Contemporary* at 801.
[197] Cassim *et al Contemporary* at 801 – 802.
[198] *Ibid.*

Druker states that although the determination of fair value in these circumstances may be criticized, despite this, the appraisal remedy is a welcome mechanism for minority and dissenting shareholder protection. Notably, although the other shareholder protections are not discussed in this thesis, it is evident that this mechanism is significantly different to all the existing shareholder remedies, in that dissenting shareholders now have respite and may opt out of, instead of being forced to go along with the decision of the majority which they oppose.[199] Whilst there are some difficulties associated with the exercise of this remedy, it is submitted that these difficulties do not undermine the benefits created by the statutory merger, and are not likely to hinder merger activity.[200]

2.3.6 CONCLUDING REMARKS RELATING TO MERGERS AND AMALAGAMATION TRANSACTIONS

The introduction of the "amalgamation or merger" transaction into South African company law is largely welcomed, and parties to the transaction may now decide for themselves as to the terms and procedures for the implementation of the "amalgamation or merger" transaction. However, as with any innovative concept, there are potential pitfalls which need to be avoided, namely the uncertainty surrounding the tax treatment of such transaction, the possibility of having this new transaction being challenged by disgruntled shareholders exercising their appraisal rights, and the fact that there is uncertainty as to how this unprecedented transaction in South Africa will be viewed by the courts.

Mergers and amalgamations are well established in other countries, namely, and therefore some cognizance may be taken as to how they deal with them. Pretorius cautions that although these transactions may have been practiced with a fair degree of success abroad there is no guarantee that the same level of effectiveness will be achieved in South Africa.[201] Thus, lawyers and other advisors will be tasked to give the prospective clients to the transactions opinions and point out the implications and

[199] Cassim *et al Contemporary* at 801 – 802.
[200] Druker (2011) 1 *JSR* at 21.
[201] Pretorius (2010) 10 *Without Prejudice* at 29.

risks associated with the proposed transactions, taking into account both the Companies Act and the Income Tax Act.

2.4 THE DISPOSAL OF ALL OR GREATER PART OF THE ASSETS OR THE UNDERTAKING OF A COMPANY

Section 112 of the "new" Companies Act also makes provision for the disposal of all or the greater part of the assets or undertaking of the company. This paragraph deals with such a transaction.

2.4.1 THE REQUIREMENTS

Disposals of all or greater part of the assets or the undertaking of a company, as provided for in section 112 of the "new" Companies Act, are subject to very similar approval requirements as those set out in amalgamation or merger transactions.[202] The quorum and shareholder approval requirements are the same as those for an amalgamation or merger, as is the court review process and appraisal rights procedure.[203] A company may only dispose of all or greater part of the assets or undertaking once the transaction has been approved by a special resolution of the shareholders in accordance with section 115 of the "new" Companies Act, and has satisfied all other requirements set out in that provision.[204] Creditors would also need to be given constructive notice of the transaction in accordance with section 34 of the Insolvency Act.[205]

Generally, a sale of business is not a favoured method of implementing a transaction involving the acquisition of an entire company or business, primarily because of the costs, legal formalities and time that is normally involved in transferring of a business from one entity to another.[206] The merger procedure has a significant advantage over a normal sale of a business, in that it provides for the automatic assumption by

---

[202] Cassim *et al Contemporary Company Law* 715 – 716.
[203] Davids *et al* 2010 *Acta Juridica* 337 at 368.
[204] *Ibid.*
[205] *Ibid.*
[206] *Ibid.*

the newly amalgamated or merged company of the property and obligations of the amalgamating or merging companies, as well as the dissolution by operation of law of the disappearing company, without needing to go through formal liquidation proceedings.[207] Although the formalities involved in section 112 disposals are similar to those set out in the amalgamation or merger procedure, only the shareholders of the disposing company are required to approve the transaction. Where the acquirer's shareholders are hesitant to grant the necessary approval, a section 112 transaction might be favoured because only the approval shareholders of the disposing company are required.[208]

The general rule under the new company regime is that no company may dispose of all or the greater part of its assets or undertaking unless –

(i) the disposal has been approved by a special resolution of shareholders in accordance with section 115 of the "new" Companies Act; and
(ii) the company has satisfied a number of other (largely procedural) requirements, which are also set out in section 115 of the "new" Companies Act.[209]

In practice, asset disposals must be approved by shareholders of the disposing company who together hold at least 75 per cent of the voting rights exercised on the resolution at a meeting at which sufficient persons are present to exercise, in aggregate, at least 25 per cent of the voting rights that are entitled to be exercised on the matter.[210] The exceptional requirement of court approval and the appraisal rights of dissenting shareholders are largely harmonised for all three fundamental

[207] Davids *et al* 2010 *Acta Juridica* 337 at 368.
[208] *Ibid.*
[209] Boardman 2010 *Acta Juridica* at 307; N Bouwman "Disposing of a company's undertaking or assets: Company Law" (2008) 11 *Without Prejudice* at 15 – The directors of a company cannot dispose of the whole or the greater part of the company or the whole or greater part of the assets of the company unless they obtain the approval of the general meeting by way of a special resolution by the members. Previously, under section 228 of the "old" Companies Act directors had the freedom in disposals provided they obtained the approval of the general meeting, whereas, the introduction of section 112 of the 'new' Companies Act, has effectively provided that disposals can only take effect once the necessary approval is obtained by way of special resolution.
[210] Boardman 2010 *Acta Juridica* at 307.

transactions: an amalgamation or merger, a disposal of all or the greater part of the assets or the undertaking of a company, and a scheme of arrangement.[211]

Although the new company regime has introduced significant changes to South African company law, it has retained many of the basic concepts and structures of the pre-existing Companies Act. Section 112 disposals are largely similar to its predecessor, section 228 of the "old" Companies Act, in the requirement of a special resolution by the disposal company authorising the transaction.[212]

Prior to the implementation of the Corporate Laws Amendment Act 24 of 2006, the "old" Companies Act provided that business disposals had to be approved by a simple majority, as opposed to the favoured special resolution of the disposing company's shareholders.[213]

The procedure under section 112 of the "new" Companies Act now incorporates additional safeguards for dissenting shareholders who are dissatisfied with the transaction.[214] These safeguards include court approval of the transaction in specified circumstances, and the appraisal rights of dissenting shareholders. Additionally, where a party is simultaneously the acquiring party as well as a shareholder in the disposing company, such a party, in view of the potential conflict of interest, is precluded by the new company regime from voting on the special resolution of the disposing company in respect of the proposed transaction.[215]

[211] Cassim *et al Contemporary Company Law* 674 – It is noteworthy that before the introduction of these protective measures very little protection was afforded to minority shareholders under the "old" Companies Act.
[212] As amended by the Corporate Laws Amendment Act 24 of 2006; Cassim *et al Contemporary Company Law* 716.
[213] Section 21 of the Corporate Laws Amendment Act, effectively, introduced the special resolution requirement into the "old" Companies Act.
[214] Cassim *et al Contemporary Company Law* 716.
[215] Cassim *et al Contemporary Company Law* 716 – As provided for in section 115(4) of the 'new' Companies Act.

2.4.2 THE INTERPRETATION OF "DISPOSE OF ALL OR THE GREATER PART OF THE ASSETS OR UNDERTAKING"

As the reading of section 112 of the "new" Companies Act suggests, procedures discussed above are only triggered where a company proposes to *"dispose of all or the greater part of its assets or undertaking."*[216] Thus, as Cassim *et al* suggest, the interpretation of this phrase is of utmost importance.[217] For clarity, the meanings of "dispose" and "the greater part" will be discussed.

A thorough reading of the "new" Companies Act will show, similarly to section 228 of the "old" Companies Act, that the statute uses the word *"dispose"* without defining the range or scope of transactions that fall within the ambit of a "disposal".[218] Considering the similarities between section 112 of the "new" Companies and section of the "old" Companies Act, in addressing the meaning of the term "dispose", it may be useful to look to judicial decisions under previous regimes.

In *Standard Bank of South Africa Ltd v Hunky-dory Investments 188 (Pty) Ltd*[219], Rodgers AJ had to decide whether the registration of a mortgage bond over a company's main assets constituted an act whereby the company "disposes of" the whole or the greater part of its assets within the meaning of section 228(1) of the "old" Companies Act.[220] Section 228(1) of the "old" Companies Act states that –

> *Notwithstanding anything contained in its memorandum and articles, the directors of a company shall not have the power, save by special resolution of its members, to dispose of –*
>
> *(a) the whole or the greater part of the undertaking of the company; or*

---

216 Cassim *et al Contemporary Company Law* 716.
217 Cassim *et al Contemporary Company Law* 716.
218 *Ibid.*
219 (15427/08) [2009] ZAWCHC 81.
220 W Mennem "Court's interpretation of "disposal" is hunky-dory" *DLA Cliffe Dekker Hofmeyr* (2009) http://www.cliffedekkerhofmeyr.com/en/news/press-releases/2009/court-interpretation.html (accessed 21/11/2012) at 1.

(b) the whole or the greater part of the assets of the company.

The court held that the term *"dispose"* or *"disposal"* was not defined under the "old" Companies Act.[221] The ordinary meaning of the phrase *"dispose of*" is *"to make over or part with by way of sale or bargain, sell*, *to transfer into new hands or to the control of someone else (as by selling or bargaining away)*."[222] While the *Hunky-dory* case deals only with the registration of mortgage bonds over a company's assets, there is no reason not to extend the *dictum* of the case to other transactions where money is borrowed or the lender acquires security, such as cessions and pledges in *securitatem debiti.*[223]

Cassim submits that the intended meaning of the word *dispose* is a transaction that would have the effect of permanently depriving the company of its rights to ownership of the assets involved. Moreover, in the *Hunky-dory* case the court held that *"dispose"* in this context means a disposal in the form of a transfer of ownership.[224]

In terms of the *Hunky-dory* judgment the term *"dispose"* in the context of section 112 of the "new" Companies Act means a permanent transfer of the ownership of the assets.[225] Notwithstanding the fact that this case was decided under the "old" Companies Act, section 112 of the "new" Companies Act provides for similar restrictions, and as such the above case still finds relevance in the interpretation of the "new" Companies Act. Considering the "new" Companies Act fails to define the term *"dispose"* it is likely that the reasoning of the *Hunky-dory* case would apply.

It would appear that section 112 read with section 115 of the "new" Companies Act goes further than section 228 of the "old" Companies Act and does not just provide that the directors have no power to act, but expressly provides that the company

---

[221] Mennem "Court's interpretation of "disposal" is hunky-dory" at 1.
[222] See *Kinloch NO v Kinloch* 1982 (1) SA 697 (A) at 697H – 698C.
[223] Mennem "Court's interpretation of "disposal" is hunky-dory" at 1.
[224] Cassim *et al Contemporary Company Law* 717 – The court in the *Hunky-dory* case held that the passing of mortgage bonds over assets is not an absolute disposal for these purposes because, like a pledge, it is not an absolute disposal of ownership.
[225] Cassim *et al Contemporary Company Law* 718.

may not dispose of all or the greater part of its assets or undertaking unless the requirements of section 112 and 115 are complied with. Therefore, this more stringent formulation could well result in another court taking a different view when considering the same issue but in relation to the "new" Companies Act.

All or the greater part of the assets or undertaking of a company is defined in section 1 of the "new" Companies Act as meaning –

> *(i)* *in the case of the company's assets, more than 50% (fifty per cent) of its gross assets fairly valued, irrespective of its liabilities; or*
>
> *(ii)* *in the case of the company's undertaking, more than 50% (fifty per cent) of the value of its entire undertaking fairly valued.*[226]

Boardman states that although the "new" Companies Act does not define the phrase *"greater part"*, it nonetheless implies assets representing over half of the company.[227] Presumably, the construction is likely to be a matter of fact for each particular case, and will include important considerations of the qualitative attributes and strategic importance of the assets involved, as well as their value and revenue generating potential. It is therefore likely that if the assets of the company comprise of more than 50% (fifty per cent) of the market value of the company's assets, or are responsible for more than 50% (fifty per cent) of the profits generated by the company, section 112 of the "new" Companies Act will apply.[228]

It follows that any company subject to the new company regime, whether public or private, listed or unlisted, intending to dispose of more than 50% (fifty per cent) of its assets or business must obtain the necessary approval of a special resolution of its shareholders.[229] This provision explicitly protects shareholders" interests by preventing a company's directors from unilaterally deciding to dissipate all or the greater part of that company's assets.

[226] Cassim *et al Contemporary Company Law* 718.
[227] N Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" (2010) *Acta Juridica* at 308.
[228] Boardman 2010 *Acta Juridica* at 308.
[229] *Ibid.*

The fact that a special resolution is required by the shareholders, as opposed to a simple majority, protects minority shareholders by ensuring that a significant minority can oppose large unwarranted disposals.[230] This protection is allowed despite a disposal being approved by the majority shareholders, therefore preventing minority shareholders from being discriminated against because of their status.

According to Cassim *et al*, in determining whether *"the greater part"* of the assets or undertaking of a company is being disposed of, a calculation of the value of the specific assets or undertaking in relation to the value of all the assets or the entire undertaking of the company is required.[231]

Section 112(4) of the "new" Companies Act, which is similar to section 228(4) of the "old" Companies Act, provides that any part of the undertaking or assets of a company to be disposed of, as contemplated in section 112, must be fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner.[232] The intention is, presumably, to calculate the fair value of the assets or undertakings. This method of calculation, which is based on a mathematical calculation, may be contrasted to the calculation used in American law and Canadian law, which combines a combination of a qualitative and quantitative approach.[233]

2.5 SCHEMES OF ARRANGEMENT

As discussed in the introduction to Chapter 2, Part A of Chapter 5 of the "new" Companies Act provides for business transactions or dealings, which are commonly referred to as *"fundamental transactions"*. Although the new company regime does not expressly define the phrase *"fundamental transaction"*, it does provide that a

---

[230] Boardman 2010 *Acta Juridica* at 308.
[231] *Ibid.*
[232] Cassim *et al Contemporary Company Law* 718.
[233] *Ibid.*

scheme of arrangement falls squarely within the ambit of section 114 of the "new" Companies Act.[234]

2.5.1 THE REQUIREMENTS

It is common cause that all fundamental transactions must comply with the requirements set out in section 115 of the "new" Companies Act. Over and above the section 115 requirements, a scheme of arrangement must also meet certain requirements that are peculiar to this specific transaction.[235] Generally, this includes detailed requirements in relation to the retention of an independent expert by the company, as well as the preparation and circulation of a report by that expert.[236] The report must, among other things, identify the categories of shareholders affected by the proposed arrangement, describe the material effects and evaluate any material adverse effects, as provided for in terms of section 114(3) of the "new" Companies Act.[237]

The regulatory regime for fundamental transactions has been comprehensively reformed under the new company regime and Davids *et al* suggest that although the scheme of arrangement has been the preferred method of implementing a friendly takeover in South Africa, one of the drawbacks of the procedure has been the requirement for judicial sanction of the scheme, which made it both costly and time consuming.[238] The removal of the court approval requirement constitutes a

[234] Cassim *et al Contemporary Company Law* 674 - 675.
[235] Cassim *et al Contemporary Company Law* 725.
[236] *Ibid.*
[237] Boardman 2010 *Acta Juridica* at 314; Delport *The New Companies Act* 87 – 88: The person to be retained must be qualified, and have the experience necessary to understand the type of arrangement proposed, evaluate its consequences and assess the impact of the arrangement on the value of securities and its effect on the rights and interests of a holder of securities or creditor of the company, and be able to express opinions, exercise judgements and make decisions impartially. Furthermore, in terms of section 114(2) of the 2008 Companies Act, the person retained will be excluded if he or she has any relationship with the company or proponent of the arrangement that would lead a reasonable and third party to conclude that the integrity, impartiality or objectivity of that person is compromised by the relationship. Such a person may not be a full-time employee of the company or have been an full-time employee within the past two years; the company's current auditor; currently or within a year have been a legal, professional or other advisor of the company; or be related to any of the above mentioned persons.
[238] Davids *et al* 2010 *Acta Juridica* 337 at 369.

fundamental departure from the procedure previously prescribed under the "old" Companies Act.[239]

Under the "new" Companies Act the company is required to provide an independent expert report on the transaction to its shareholders, who must then approve the scheme by special resolution, in the same manner as for an amalgamation or merger. Largely similar to the amalgamation or merger procedure, dissatisfied shareholders are entitled to apply, in certain circumstances, for a court review of the process and are able to exercise appraisal rights.[240]

Generally, the procedure for a scheme of arrangement under the new company regime seems to be significantly more user-friendly. Although, it does have the additional requirement of an independent expert report, the formalities required for a scheme of arrangement appear to be fewer than those required for an amalgamation or merger procedure, given that no creditor notification is necessary and only the approval of the amalgamating company shareholders is required.[241]

Section 311 of the "old" Companies Act required, *inter alia*, the following:

(i) *an application to the court for leave to convene a scheme meeting to be summoned in such manner as the court directed;*

(ii) *a majority representing 75 per cent of the votes exercisable by the members or class of members present and voting at the scheme meeting to agree to the arrangement;*

(iii) *a second application to court to sanction the results of the scheme meeting; and*

(iv) *the lodgement of the court order with the Registrar and the registration thereof in order to make it effective.*[242]

---

[239] Cassim *et al Contemporary Company Law* 726; Boardman 2010 *Acta Juridica* at 315.
[240] Davids *et al* 2010 *Acta Juridica* 337 at 369.
[241] *Ibid.*
[242] Cassim *et al Contemporary Company Law* 726 - In terms of the "old" Companies Act all schemes of arrangements are required to be sanctioned by the courts, as provided for in section 311. It is noteworthy that the application of such is limited in certain circumstances and may therefore not

In contrast, section 114 of the "new" Companies Act provides that a company's board of directors may propose and implement a scheme of arrangement between the company and the holders of any class of its securities.[243] However, the board of directors would be prohibited from doing so if the company is in liquidation or has entered into business rescue proceedings, as provided for in Chapter 6 of the Act. An arrangement may be implemented provided that the required approvals contained in Chapter 5 of the "new" Companies Act have been obtained.[244] Broadly speaking, an arrangement can be about anything on which the company and its members can properly agree, including share-for-share exchange or share repurchase. [245]

According to Magubane, a comparison between section 114, read with section 115 of the "new" Companies Act, and section 311 of the "old" Companies Act, reflects key differences between the two company regimes. These differences include, *inter alia,* the following:

- *(i)* *the new scheme of arrangement procedure does not apply to companies in the process of liquidation or business rescue proceedings;*
- *(ii)* *under the previous company regime the scheme of arrangement had to be approved by a majority of at least 75 per cent of the votes exercisable by the members present and voting at the scheme meeting – therefore the new quorum requirement abolishes one of the most significant and distinctive advantages of the previous scheme of arrangement procedure;*
- *(iii)* *under the previous company regime the scheme of arrangement required the approval of two courts, one to convene the scheme of arrangement meeting and the second to sanction the scheme, whereas under the "new" Companies Act, court involvement has been removed in its entirety; and*
- *(iv)* *the new company regime now requires an independent expert report and sets out the requirements for both the independent expert and the*

---

require judicial sanction. Moreover, it is important to recognize that these limited circumstances have since been removed by the 'new' Companies Act.

[243] Cassim *et al Contemporary Company Law* 725; Boardman 2010 *Acta Juridica* at 314.

[244] Cassim *et al Contemporary Company Law* 725.

[245] Boardman 2010 *Acta Juridica* at 314.

contents of his or her report. This report needs to be prepared for the board of directors and needs to be distributed to all the company's security holders.[246]

A scheme of arrangement in the "new" Companies Act allows greater flexibility in the manner in which schemes can be affected between a company and its shareholders. The company would need to comply with the requirements for approval of a *"fundamental transaction"*, as provided for in section 115 of the "new" Companies Act. Therefore an application to court as required under the previous section 311 of the "old" Companies Act would not automatically be required, other than in certain exceptional circumstances.[247]

In practice, a company can bring about almost any kind of takeover, merger, demerger or internal reorganisation through the use of a scheme, provided that the requisite approvals are obtained. This means that this procedure is a considerably more flexible means of affecting a takeover, compared to any other business acquisition or standard takeover offer.[248]

2.5.2 THE APPROVAL PROCESS

Essentially, section 114 of the "new" Companies Act is the successor to and has the same effect as section 311 of the "old" Companies Act. The approval procedure for a scheme of arrangement is now equivalent to the procedures for other fundamental transactions.[249] Therefore, a scheme of arrangement cannot simply be implemented unless and until it has been approved in terms of section 115 of the "new" Companies Act. This means that a scheme of arrangement must be approved by a

---

[246] Magubane (2012) *De Rebus* at 46; Markman and Atkinson "Schemes of arrangement under the new Companies Act: better of worse?" at 1.

[247] KPMG "The new Companies Act 71 of 2008" at 20.

[248] Boardman 2010 *Acta Juridica* at 314; Driver and Goolam (2011) 11 *Without Prejudice* at 8 – A scheme of arrangement may include a reorganisation of the share capital of the company which can be effected in a variety of ways, namely (i) a consolidation of securities of different classes; (ii) a division of securities into different classes; (iii) an expropriation of securities from the holder; (iv) exchanging any of its securities for other securities; (v) a reacquisition by the company of its securities; or (vi) a combination of the above methods.

[249] Cassim *et al Contemporary Company Law* 725.

special resolution at a meeting called for that purpose.[250] A proposed arrangement must be authorised, passed and ratified by the shareholders of the company.

In terms of the quorum, the presence of persons sufficient to exercise at least 25 per cent of the voting rights entitled to be exercised on that matter, is required. A special resolution is a resolution passed by the shareholders of the company holding at least 75 per cent of the voting rights exercised on that resolution in order to be adopted.[251]

A scheme of arrangement may also require court approval in exceptional circumstances.[252] Similarly to business disposals, where a special resolution is opposed by at least 15% (fifteen per cent) of the exercised voting rights, any person who opposes the resolution may require the company to seek court approval for the arrangement.[253] If court approval is not sought or obtained, the resolution will be treated as a nullity in terms of section 115(3) of the “new” Companies Act. Moreover, as with business disposals, a person who has opposed the resolution, regardless of the number of shareholders who opposed the resolution, may apply to court for leave to have the transaction set aside.[254] However, leave may only be granted if the court is satisfied that the applicant is acting in good faith, appears prepared and is able to sustain proceedings, and has a *prima facie* case.[255]

In terms of section 115(7) of the “new” Companies Act, a court may only set aside the resolution if it is manifestly unfair to any class holders of the company’s securities, or the vote was materially tainted by significant and material procedural irregularities, such as failing to comply with the “new” Companies Act. If the

[250] Cassim *et al Contemporary Company Law* 725.
[251] *Ibid.*
[252] Boardman 2010 *Acta Juridica* at 315; Cassim *et al* Contemporary Company Law 728 -729: It is noteworthy that the approval of the court is not a general or automatic requirement for a scheme of arrangement, but is instead restricted to certain specified circumstances, as provided for in section 115(3) to (6) of the Companies Act 71 of 2008. Moreover, it is suggested that this is consistent with the new company regime, as it attempts to avoid excessive formalities in company regulation and so increase the efficiency of South Africa company law.
[253] Boardman 2010 *Acta Juridica* at 315.
[254] Section 115(3)(b) of the Companies Act 71 of 2008.
[255] Boardman 2010 *Acta Juridica* at 315.

resolution is not set aside in the way described above, the scheme of arrangement will be binding on all of the shareholders of the company.[256]

Once a scheme of arrangement (or any other fundamental transaction for that matter) has been approved, any person to whom assets are or an undertaking is to be transferred may, if necessary in the circumstances, apply to a court for an order to give effect to the transaction. In terms of section 115(9) of the "new" Companies Act, this may include, *inter alia:*

(i) an order to effect the transfer of the relevant undertaking, assets and liabilities;
(ii) the allotment and appropriation of any relevant shares or similar interests;
(iii) the transfer of shares from one person to another;
(iv) the dissolution without winding-up of a company, as contemplated in the specific transaction;
(v) any other relief necessary or appropriate to give effect to and properly implement an amalgamation or merger; or
(vi) any incidental, consequential and supplemental matters that are necessary to effect and complete the transaction.[257]

Parties to the section 112 disposal transaction need to comply with all the relevant legal formalities needed to effectively transfer assets or undertakings. This is comparable to that of a statutory merger, where the transfers of such assets or undertakings are automatically transferred by operation of law.[258]

2.6 CONCLUSION

The purpose of this Chapter was to briefly outline the so-called *"fundamental transactions"* as provided for in Chapter 5 Part A of the "new" Companies Act, with a particular focus on the newly introduced concept of the "amalgamation or merger" transaction which provides the main theme of this Chapter. In this regard, this

[256] Boardman 2010 *Acta Juridica* at 315.
[257] Cassim *et al* Contemporary Company Law 731.
[258] *Ibid.*

Chapter sets out application of the "amalgamation or merger" transaction from a South African company law perspective.

Further, this Chapter identifies the significance of the "amalgamation or merger" concept by considering the opinions of various leading academics on the subject. In this respect, these academics have not been at consensus as to the ramifications and implications this concept poses. It is evident that some academics have opined that, in the traditional sense, South Africa did provide for a merger in the true sense of the word (whereby two or more corporate entities merge or amalgamate into a single entity). In this instance, the adoption of the "amalgamation or merger" concept, represents a significant departure from the "old" Companies Act and has attempted to align South African company law with the leading jurisdictions such as the United States of America, France, Germany and Canada, who have all progressed to implement or adopt some form of court free statutory merger procedure.[259]

On the other hand, academics such Druker argue the converse, that the "old" Companies Act did not fail completely, as it did provide something analogous to a "merger" but was only possible through the traditional mechanisms, namely the acquisition of shares by means of schemes of arrangement or through the sale of a business as a going concern, with court approval.[260]

The importance of this Chapter lies in the fact that it is abundantly clear that the introduction of the "amalgamation or merger" concept, has led to the identification of certain anomalies which co-exist with the introduction of the "new" Companies Act. Moreover, this Chapter initiates the discussion in Chapter 3 relating to the corporate restructuring rules as provided for in sections 41 to 47 of the Income Tax Act.

---

[259] Cassim *et al Contemporary Company Law* 676 - 677; Davids *et al* 2010 *Acta Juridca* 337 at 340 – 341.

[260] Druker (2011) 1 *JSR* at 1.

CHAPTER 3: CORPORATE RESTRUCTURING RULES - ROLLOVER RELIEF

3.1 INTRODUCTION

Chapter 3 discusses the corporate restructuring rules, as set out in sections 41 to 47 of the Income Tax Act and which provide special rules for corporate rollover relief. Part III of the Income Tax Act extends relief in certain circumstances which allow for tax deferrals. Accordingly, these provisions are designed to remove the tax obstacles, if any, but at the same time are interwoven with anti-tax avoidance rules.[261]

Further, it is noteworthy that the Taxation Laws Amendment Act, 22 of 2012[262] (hereinafter referred to as the Taxation Laws Amendment Act, 2012) was promulgated on 1 February 2013 and has introduced a substitutive-share-for-share transaction under section 43, as an additional corporate restructuring provision. However, in line with Chapter 2, this Chapter focuses on section 44 of the Income Tax Act dealing with "amalgamation transactions" and shows that where the specific requirements are satisfied, such transactions may be undertaken with no immediate income or capital gains tax implications for the parties involved.[263]

The analysis of section 44 is important in that it clearly demonstrates that in order to obtain the maximum tax benefits upon entering corporate restructuring transactions, such as "amalgamation transactions" envisaged in section 44, compliance with the specific corporate rules as set out in the Income Tax Act is absolutely necessary.

Moreover, this Chapter will show that compliance with the corporate rules differs in many ways to the requirements presented by the statutory merger provisions in the "new" Companies Act.[264] In this regard, it will be shown that there is a general misconception amongst academics and practitioners that a statutory merger

---

[261] De Koker *Silke on South African Income Tax* at 13.32.
[262] Act 22 of 2012.
[263] De Koker *Silke on South African Income Tax* at 13.32.
[264] D Van der Berg "Companies Act v Tax Law: Guidelines" (2012) Moneywebtax http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page265?oid=71603&sn=Detail (accessed 29/10/2012) at 1.

transaction automatically qualifies as an "amalgamation transaction", as envisaged in terms of section 44 of the Income Tax Act, which would ordinarily qualify for tax rollover relief.[265]

3.2 BACKGROUND AND DEFINITIONS

Chapter 2, in Part III of the Income Tax Act, provides special rules relating to corporate restructuring transactions, set out in sections 41 to 47 of the Income Tax Act.[266] According to De Koker, corporate restructuring transactions which provide for the transfer or disposal of assets would, technically, be taxable *prima facie,* but the special rules set out in Chapter 2, in Part III of the Income Tax Act, allow for tax deferrals in these circumstances.[267] These deferrals are commonly referred to as "rollover" or "holdover" reliefs, as they are designed to remove the tax consequences, if any, but at the same time take cognisance of the anti-avoidance rules, which add considerable complexity to the substantive provisions.[268] Beukes submits that these corporate restructuring rules are aimed at providing tax relief when companies undergo different forms of restructuring, and by entering into such transactions, tax relief may be achieved by deferring normal tax and capital gains tax implications which would normally arise on the transfer or disposal of an asset.[269]

Gad and Strauss submit that the corporate restructuring rules contained in sections 41 to 47, provide for a deferral of tax where specified transactions are undertaken within groups of companies, with the exception of section 42.[270] However, South Africa, unlike certain foreign jurisdictions, does not allow for taxation on a group or consolidation basis.[271] In terms of the Income Tax Act, certain transactions undertaken within groups of companies may be implemented in such a way that the

---

[265] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.
[266] *Ibid.*
[267] *Ibid.*
[268] *Ibid.*
[269] C Beukes "Amalgamations: Possible BEE concessions" (2012) 25 *Tax Planning* at 94.
[270] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" para 3.1.
[271] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3.2; Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.
[271] P Haupt *Notes on South African Income Tax* 31 ed (2012) 348.

tax consequences, which would have ordinarily, have resulted from the transactions, are "deferred" or "rolled-over" until a later event.[272]

According to Haupt, these *"corporate restructurings may involve one or more of the following:*

(i) a reorganisation of the ownership of a company;
(ii) a reallocation of assets, businesses, or functions within a group of companies;
(iii) a reorganisation of the ownership of companies within a group;
(iv) the reorganisation of debt within a group; and
(v) a financial restructuring."[273]

It is evident that, in most instances, restructuring often follows an acquisition or a change of control within a group of companies.[274]

The corporate restructuring provisions contained in sections 41 to 47 of the Income Tax Act, deal with the following transactions:

(i) **Asset-for-share transactions**, which deal with the exchange of assets for equity shares in a company (section 42);[275]
(ii) **Substitutive share-for-share transactions** which have only recently been introduced by way of section 75 of the Taxation Laws Amendment Act, 2012[276] and which allow the disposal of equity shares and non-equity shares between a person and a company.[277] It has been suggested that

[272] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3; Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.
[273] Haupt *Notes on South African Income Tax* 31 ed (2012) 348.
[274] *Ibid.*
[275] Section 42 of the Income Tax Act applies where a company disposes of assets in exchange for equity shares another resident company and holds a "qualifying interest" in that other resident company after the disposal.
[276] Act 22 of 2012.
[277] The Taxation Laws Amendment Act 2012 has introduced section 43, which applies to transactions concluded on or after 1 January 2013. In essence this section seeks to give rollover relief where shares in a company are exchanged for different shares in that same company, and the new shares

the insertion of this section may well have been a response to the "new" Companies Act (inserted as section 43 of the Income Tax Act);

(iii) **Amalgamation transactions**, which provide for the disposal of assets by one company to another (section 44);

(iv) **Intra-group transactions**, which deal with the rationalization of a group through the transfer of assets between two companies in that group (section 45);[278]

(v) **Unbundling transactions**, which provide for the unbundling of a company's assets by means of a distribution *in specie* (section 46);[279] and

(vi) **Liquidation, winding-up and deregistration**, which essentially deals with the distribution of capital assets by a liquidating company in terms of a liquidation distribution to its holding company (section 47).[280]

Traditionally, tax rollover relief was only available for transactions entered into between members of a South African group of companies. As from 1 January 2012 the asset-for-share, amalgamation, unbundling and liquidation rules have all been extended to include the restructuring of off-shore companies that fall under the control of South African multinational groups.[281] The rollover provisions provided for in sections 42, 45 and 47 of the Income Tax Act apply in respect of the relevant transaction, unless all parties involved in the transaction agree in writing that the relevant section does not apply.[282] For section 44 and 46 transactions, all parties (the person disposing of shares in the amalgamated company in return for shares in

are trading stock where the shares disposed of are trading stock, or the new shares are acquired either as capital assets or trading stock where the shares disposed of were capital assets.

[278] Section 45 of the Income Tax Act, essentially entails a company disposing of an asset to another resident company, where both companies form part of the same group of companies after the transaction.

[279] Section 46 of the Income Tax Act, provides that all the equity shares of a company, the unbundled company, that are held by a company, the unbundling company, are distributed to the shareholders of the unbundling company to the extent that those shares are so distributed to a shareholder which forms part of the same group of companies as the unbundled company.

[280] D Clegg and R Stretch *Income Tax in South Africa* (2012) Vol 1A at 24.9; De Koker *Silke on South African Income Tax* at 13.32; Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.

[281] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.

[282] Stiglingh *et al SILKE: South Africa Income Tax* (2012) 496 – The relevant sections are section 42(8A), section 45(6)(g) and section 47(6)(b) of the Income Tax Act.

the resultant company, the amalgamated company and the resultant company) must jointly elect that the relevant section does not apply.[283]

Van der Berg emphasises that compliance with the Income Tax Act restructuring provisions is necessary in order to obtain maximum tax benefits.[284] Essentially, tax rollover relief is subject to a transaction meeting the specific requirements of a rollover relief provision, and in many instances these requirements differ from the statutory merger provisions provided for in the "new" Companies Act.[285] Gad and Strauss are of the belief that there is a general misconception that a statutory merger automatically qualifies as an "amalgamation transaction" as envisaged under section 44 of the Income Tax Act, but as mentioned above, it is necessary for a particular transaction to satisfy the particular requirements of the rollover provisions.[286]

Provided the requirements of the applicable sections are met, transactions governed by the corporate rules can be undertaken with no immediate capital gains or income tax implications for either party.[287] In addition, there are other taxing statutes such as the Transfer Duty Act, 40 of 1949 and the Securities Transfer Tax Act, 25 of 2007 which provide for similar deferred tax treatment where the treatment provided for in corporate rules applies or could have applied, even where the parties elect that the provisions of the relevant sections in the Income Tax Act will not apply.[288] Moreover, although the Value-Added Tax Act, 89 of 1991, does not specifically provide for these transactions the *"going concern"* disposal rules have a similar effect.

Section 41(2) of the Income Tax Act provides that the corporate rules override the normal rules in the Income Tax Act, except for those provisions specifically

---

[283] Stiglingh *SILKE* 496 – The relevant sections are section 44(1) and section 46(8) of the Income Tax Act.

[284] D Van der Berg "Companies Act v Tax Law: Guidelines" (2012) Moneywebtax http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page265?oid=71603&sn=Detail (accessed 29/10/2012) at 1.

[285] *Ibid.*

[286] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.

[287] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3.2.

[288] *Ibid.*

mentioned in these sections.[289] According to De Koker, the provisions in Part III of the Income Tax Act apply:

> *Notwithstanding any provision to the contrary contained in the Income Tax Act, with exception of section 24B(2) and (3) which provides that no expenditure is incurred when a company issues a share in exchange for the acquisition of a share, the new anti-avoidance provisions in sections 80A to 80L, section 103 which provides for the general anti-avoidance rules in respect of assessed losses, and transactions which involve the transfer of an asset to the untaxed policyholder fund of a life assurer as defined in section 29A of the Income Tax Act.*[290]

The Taxation Laws Amendment Act, 2012[291] has amended section 41(2) of the Income Tax Act to extend the application of this provision to a "substitutive share-for-share transaction" and includes an insertion of section 24BA in addition to section 24B(2) and (3).[292] It is noteworthy that, the Taxation Laws Amendment Bill, 2013 deletes section 24B which invariably and consequently amends section 24BA. In this regard, the amendment makes room to accommodate a new exception in that the deemed market rules of paragraph 38 of the Eight Schedule take precedence over the new anti-avoidance rules (which are discussed more fully below).[293]

When considering any of the above-mentioned qualifying transactions, section 41 of the Income Tax Act would always be a starting point, as it sets out the defined terms which are relevant to all corporate rule provisions.[294] Haupt opines that when analysing the application of section 44, the definitions set out in section 41 need to

---

[289] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3.2.

[290] Clegg and Stretch *Income Tax in South Africa* at 24.9; De Koker *Silke on South African Income Tax* at 13.32.

[291] The Taxation Laws Amendment Act 22 of 2012

[292] *Ibid.*

[293] National Treasury, Republic of South Africa "Explanatory Memorandum on the Taxation Laws Amendment Bill, 2013" (2013) http://www.sars.gov.za/AllDocs/LegalDoclib/ExplMemo/LAPD-LPrep-EM-2013-02%20-%20Explanatory%20Memorandum%20Taxation%20Laws%20Amendment%20Bill%202013.pdf (accessed 10/11/2013) at 114.

[294] De Koker *Silke on South African Income Tax* at 13.32.

be taken into consideration.[295] For the purposes of this thesis it is not necessary to consider all the defined terms provided for in section 41 or all the qualifying transactions in Chapter 2 Part III of the Income Tax Act, instead the focus shall fall on section 44 of the Income Tax Act and the relevant terms under that provision.

3.2.1 ASSET AND DISPOSAL

The term "asset", for the purposes of Part III, is defined in section 41(1) of the Income Tax Act, as an asset as defined in paragraph 1 of the Eighth Schedule, and therefore includes property of whatever nature, whether movable or immovable, corporeal or incorporeal, excluding any currency, but including any coin made mainly from gold or platinum, and a right or interest of whatever nature to or in such property. The term "capital asset" refers to much the same as an asset as set out in paragraph 1 of the Eighth Schedule but does not extend to "trading stock".[296]

3.2.2 TRADING STOCK

"Trading stock" is defined in section 1 of the Income Tax Act and includes –

(i) *anything produced, manufactured, constructed, assembled, purchased or in any other manner acquired by a taxpayer for the purposes of manufacture, sale or exchange by the taxpayer or on behalf of the taxpayer;*

(ii) *anything the proceeds from the disposal of which forms or will form part of the taxpayer's gross income, otherwise than –*

(aa) *in terms of paragraph (j) or (m) of the definition of "gross income";*

(bb) *in terms of paragraph 14(1) of the First Schedule; or*

[295] Haupt *Notes on South African Income Tax* 349.

[296] Clegg and Stretch *Income Tax in South Africa* at 24.9 – The term "disposal" refers to the same definition as provided in the Eighth Schedule, whereby a "disposal" is defined as an event, act, forbearance or operation of law as envisages in paragraph 11 or an event, act or forbearance or operation of law, which in terms of the eighth Schedule is treated as the disposal of an asset, and therefore the term "dispose" must be construed accordingly.

(cc) *as a recovery or recoupment contemplated in section 8(4) which is included in gross income in terms of paragraph (n) of the definition of "gross income"; or*

(iii) any consumable stores and spare parts acquired by the taxpayer to be used or consumed in the course of the taxpayer's trade; but

(a) does not include-

(i) a foreign currency option contract; or

(ii) a forward exchange contract, as defined in section 24I(1).[297]

In this regard, De Koker explains that when an amalgamated company disposes of trading stock to a resultant company, which acquires it, the amalgamated company is deemed to have disposed of it for an amount equal to its cost or trading stock value.[298] Moreover, in the determination of taxable income derived by the resultant company from a trade carried on by it, the amalgamated company and the resultant company would be deemed to be one of the same in respect of the date of acquisition of the trading stock by the amalgamating company, as well as the amount and date of incurral of any costs or expenditure incurred as contemplated in section 11(a) or section 22(1) or (2).[299] Ultimately, this deems the cost or trading stock value in the hands of the amalgamated company to be the cost or trading stock value as held by the resultant company.[300]

On the other hand, the rollover relief referred to above can be compared to the normal circumstances, where expenses incurred to acquire trading stock will be allowed as a deduction under section 11(a), provided that all the requirements of that provision have been satisfied.[301] On the other hand, under normal circumstances the proceeds from the sale of trading stock would fall within the gross income definition and would therefore ordinarily be included in taxable income.[302]

[297] Section 1 of the Income Tax Act.
[298] De Koker *Silke on South African Income Tax* at 13.34.
[299] *Ibid.*
[300] *Ibid.*
[301] Stiglingh *SILKE* 694.
[302] *Ibid.*

Importantly, section 22(4) of the Income Tax Act provides that the cost price of trading stock for a taxpayer who acquires it for no consideration or for a consideration that is not measurable in terms of money would be deemed to be its current market price on the date on which it was acquired.[303]

3.2.3 EQUITY SHARES

According to de Koker, previously the Income Tax Act defined the term "equity share capital", however, effective from 1 January 2011, this definition has been replaced by the definition of "equity share" which, in relation to a company, means any share or similar interest in a company, excluding any share or similar interest that does not carry any right to participate beyond a specified amount in a distribution.[304] The word "capital", in the phrase "*equity share capital",* has been deleted to bring the definition into line with the "new" Companies Act, which does not refer to "share capital".[305] For the purpose of asset-for-share transactions (section 42) and amalgamation transactions (section 44), the term "equity share", as defined in section 41 of the Income Tax Act, specifically includes a participatory interest in a portfolio of a collective investment scheme in securities.[306]

3.2.4 COMPANY AND GROUP OF COMPANIES

Section 41 of the Income Tax Act states that a "company" does not include a headquarter company and includes any portfolio of collective investment scheme in securities, for the purposes of section 42 and 44 of the Income Tax Act.[307] On the other hand, a "group of companies" means a group of companies as defined in section 1 of the Income Tax Act, and therefore refers to two or more companies in which one company, the "controlling group company" directly or indirectly holds shares in at least one other company, the "controlled group company", to the extent that:

---

[303] Stiglingh *SILKE* 698.
[304] De Koker *Silke on South African Income Tax* at 13.32.
[305] *Ibid.*
[306] Stiglingh *SILKE* 497.
[307] De Koker *Silke on South African Income Tax* at 13.32.

(i) at least 70 per cent of the equity shares of each controlled group company are directly held by the controlling group company, one or more other controlled group company or companies, or any combination thereof; and

(ii) the controlling group company directly holds at least 70 per cent of the equity shares in at least one controlled group company.[308]

Section 41 of the Income Tax Act amends the definition of *"group of companies"* to mean:

> *a group of companies as defined in section 1: Provided that for the purposes of this definition –*
>
> *(i) any company that would, but for the provisions of this definition, form part of a group companies shall not form part of that group of companies if –*
>
> *(aa) that company is a company contemplated in paragraph (c), (d) or (e) of the definition of "company";*
>
> *(bb) that company is a non-profit company as defined in section 1 of the Companies Act, 2008;*
>
> *(cc) any amount constituting gross income of whatever nature would be exempt from tax in terms of section 10 were it to be received by or to accrue to that company;*

[308] De Koker *Silke on South African Income Tax* at 13.32; Stiglingh *SILKE* 497 – For the purposes of Part III, this definition is narrower and certain types of companies are excluded, namely:

(i) co-operatives;
(ii) an association formed in the Republic to serve a specified purpose beneficial to the public or a section of the public;
(iii) a foreign collective investment scheme;
(iv) a non-profit company as defined in section 1 of the 'new' Companies Act;
(v) a company that is a public benefit organisation or a recreational club approved by the Commissioner in terms of section 30 and 30A of the Income Tax Act;
(vi) a company whose gross income is exempt from tax in terms of section 10 of the Income Tax Act; and
(vii) associations, corporations or companies incorporated under the law of any country other than the Republic or bodies corporate formed or established under such law, unless such a company has its place of effective management if the Republic. Such an entity is deemed to be a resident by virtue of having its place of effective management in the Republic.

(dd) that company is a public benefit organisation or recreational club that has been approved by the Commissioner in terms of section 30 or 30A; or

(ee) that company is a company contemplated in paragraph (b) of the definition of "company", unless that company has its place of effective management in the Republic; and

(ii) any share that would, but for the provision of this definition, be an equity share shall be deemed not to be an equity share if –

(aa) that share is held as trading stock; or

(bb) any person is under a contractual obligation to sell or purchase that share, or has an option to sell or purchase that share unless that obligation or option provides for the sale or purchase of that share at its market value at the time of that sale or purchase.[309]

For the purpose of the corporate rollover relief rules, an equity share will not be included in the above definition if the share is held as trading stock, or where any person is under a contractual obligation to sell or purchase the share, or has an option sell or purchase the share, unless the obligation or option provides for a sale or purchase of the share at its market value.[310]

3.3 AMALGAMATION TRANSACTIONS

An "amalgamation transaction" under section 44 of the Income Tax Act, envisages that one company (the "amalgamated company") disposes all of its assets to another company (the "resultant company"), with the exception of the assets it elects to use to settle any debts incurred in the ordinary course of its trade.[311] When transferring assets, the resultant company issues shares to the amalgamated company.[312] The newly issued shares are then distributed to the shareholders in the amalgamated company, in the course of liquidation or deregistration of the amalgamated

[309] Section 41 of the Income Tax act.

[310] De Koker *Silke on South African Income Tax* at 13.32; Stiglingh *SILKE* 498.

[311] De Koker *Silke on South African Income Tax* at 13.34; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3.7.

[312] De Koker *Silke on South African Income Tax* at 13.34.

company.[313] Once the transaction has been effected, the former amalgamated company shareholders will join the shareholders in the resultant company.[314]

For the purposes of section 44 of the Income Tax Act (read with the Taxation Laws Amendment Act, 2012), subsection (1) an "amalgamation transaction" means:

any transaction –

(a)

(i) in terms of which any company (hereinafter referred to as the "amalgamated company") which is a resident disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to another company (hereinafter referred to as the "resultant company") which is resident, by means of an amalgamation, conversion or merger; and

(ii) as a result of which the existence of that amalgamated company will be terminated;

(b)

(i) in terms of which an amalgamated company which is a foreign company disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to a resultant company which is a resident, by means of an amalgamation, conversion or merger;

(ii) if, immediately before that transaction, any shares in that amalgamated company that are directly or indirectly held by that resultant company are held as capital assets; and

(iii) as a result of which the existence of that amalgamated company will be terminated; or

(c)

(i) in terms of which an amalgamated company which is a foreign company disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its

[313] De Koker *Silke on South African Income Tax* at 13.34.
[314] *Ibid.*

trade) to a resultant company which is a foreign company, by means of an amalgamation, conversion or merger;

(ii) if –

(aa) immediately before that transaction –

(A) that amalgamated company and that resultant company form part of the same group of companies (as defined in section 1);

(B) that resultant company is a controlled foreign company in relation to any resident that is part of the group of companies contemplated in sub-item (A); and

(C) any shares in that amalgamated company that are directly or indirectly held by that resultant company are held as capital assets; and

(bb) immediately after that transaction, more than 50% (fifty per cent) of the equity shares in that resultant company are directly or indirectly held by a resident (whether alone or together with any other person that is a resident and that forms part of the same group of companies as that resident); and

(iii) as a result of which the existence of that amalgamated company will be terminated.[315]

Generally, an "amalgamation transaction" involves the disposal by a company, the amalgamated company[316], of all its assets to a resident company, the resultant company[317], by means of an amalgamation, conversion or merger resulting in the termination of the amalgamated company's existence.[318] The transfer or disposal of assets would, in normal circumstances, be taxable. However, where a transaction is as contemplated in terms of section 44, this provision facilitates tax rollover relief. In terms of section 44(4) of the Income Tax Act, rollover relief applies only to the extent

[315] The above provision reflects the current section 44(1) of the Income Tax Act but also refers to the proposed changes of the Taxation Laws Amendment Act 2012. Words in bold type in square brackets indicate omissions from existing enactments. Words underlined with a solid line indicate insertions in existing enactments.
[316] An amalgamated company refers to a company that disposes of its assets.
[317] A resultant company refers to the company acquiring the assets from the amalgamated company.
[318] De Koker *Silke on South African Income Tax* at 13.34.

that the assets are disposed of in exchange for equity shares in the resultant company or, the resultant company assumes a debt of the amalgamated company or both.[319]

Subsection (13) of section 44 (read with the Taxation Laws Amendment Act, 2012) states that the provisions of this section do not apply where the amalgamated company –

> (a) *has not, within a period of 36 (thirty-six) months*[320] *after the date of the amalgamation transaction, or such further period as the Commissioner may allow, taken the steps contemplated in section 41(4) to liquidate, wind up or deregister; or*
>
> (b) *has at any stage withdrawn any step taken to liquidate, wind up or deregister that company, as contemplated in paragraph (a), or does anything to invalidate any step so taken, with the result that the company will not be liquidated, wound up or deregistered:*
>
> *provided that any tax which becomes payable as a result of the application of this subsection may be recoverable from the resultant company.*[321]

Clegg and Stretch aver that the corporate rules are all subject to election in one form or another.[322] Previously, these rules were voluntary and elective in respect of asset-for-share transactions, intra-group transactions and transactions which relate to liquidation, winding-up and deregistration of a company, but with effect from 2011 this is no longer voluntary and therefore the parties need to “elect out” of these sections.[323]

According to De Koker, should the resultant company and the shareholder disposing of equity shares in an amalgamated company form part of the same group of

---

[319] De Koker *Silke on South African Income Tax* at 13.34.
[320] The Taxation Laws Amendment Act increased this period from 18 (eighteen) months to 36 (thirty-six) months.
[321] Section 44(13) of the Income Tax Act.
[322] Clegg and Stretch *Income Tax in South Africa* at 24.9.
[323] *Ibid.*

companies as defined in section 1 of the Income Tax Act, immediately before and after the disposal, and the amalgamated company, the resultant company and the shareholders jointly elect, the amalgamation provisions would not apply.[324] In terms of section 44(14) of the Income Tax Act (read with the Taxation Laws Amendment Act, 2012), the rollover relief would not apply –

(i) in respect of any transaction that constitutes a liquidation distribution as defined in section 47(1);

(i) in respect of any transaction if the resultant company is a company contemplated in paragraph (c) or (d) of the definition of company;

(bA) in respect of any transaction if the resultant company is portfolio of a collective investment scheme in securities and the amalgamated company is not a portfolio of a collective investment scheme in securities;

(ii) in respect of any transaction if the resultant company is a non-profit company as defined in section 1 of the Companies Act, 2008 (Act No. 71 of 2008);

(iii) in respect of any transaction contemplated in paragraph (a) of the definition of amalgamation company if the resultant company is a company contemplated in paragraph (b) or (e)(ii) of the definition of company and does not have its place of effective management in the Republic;

(iv) in respect of any transaction if any amount constituting gross income of whatever nature would be exempt from tax in terms of section 10 were it to be received by or to accrued to the resultant company;

(v) in respect of any transaction of the resultant company is a public benefit organisation or recreational club approved by the Commissioner in terms of section 30 or 30A; or

(vi) to a disposal of an asset by an amalgamated company to a resultant company -

(i) in terms of an amalgamation transaction contemplated in paragraph(a) of the definition of amalgamation transaction where

[324] De Koker *Silke on South African Income Tax* at 13.34.

that resultant company and the person contemplated in subsection (6) form part of the same group of companies immediately before and after that disposal; or

(ii) in terms of an amalgamation transaction contemplated in paragraph (b) of the definition of amalgamation transaction where the resultant company and the person contemplated in subsection (6) form part of the same group of companies (without regard to paragraph (i)(ee) of the proviso to the definition of group of companies in section 41) immediately before and after that disposal, if that amalgamated company, resultant company and person jointly so elect."[325]

Where a restructuring transaction complies with the provisions of section 44 of the Income Tax Act, relief is obtained by deferring the possible normal tax and capital gains tax implications that may arise on the disposal to a later date when the asset is ultimately disposed of by the resultant company.[326] Beukes suggests that for this to be achieved, the following requirements need to be satisfied:

(i) The person disposing of the asset (the amalgamated company) must be a company (which includes a close corporation);

(ii) The person acquiring the asset (the resultant company) must be a company (which includes a close corporation) and a resident as defined for tax purposes;

(iii) The amalgamated company must dispose of all its assets other than those that it will use to settle debts incurred in the ordinary course of its trade;

(iv) The resultant company must acquire the asset as the same type of asset as the amalgamated company was disposing of. This means that a capital asset must be acquired as a capital asset, similarly, trading stock as trading stock.

[325] De Koker *Silke on South African Income Tax* at 13.34.

[326] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3.2.

(v) After the transaction date, the steps set out in section 41(4) of the Income Tax Act must be taken to liquidate, wind-up, or deregister the amalgamated company, within eighteen months (the Taxation Laws Amendment Act, 2012, has changed this period to 36 (thirty-six) months).

(vi) Section 44 of the Income Tax Act would not apply when the resultant company holds at least 70 per cent of the equity shares in the amalgamated company immediately before the transaction is undertaken.

(vii) The relief afforded by section 44 of the Income Tax Act is mandatory unless the resultant company and the shareholders of the amalgamated company form part of the same group of companies and all parties (including the amalgamated company) elect that its provisions do not apply.[327]

3.3.1 AMALGAMATION TRANSACTIONS: ROLLOVER RELIEF PROVIDED FOR AN AMALGAMATED COMPANY AND THE RESULTANT COMPANY

Sections 44(2) and (3) of the Income Tax Act set out the applicable rollover relief available to amalgamated companies and resultant companies whereby the amalgamated companies dispose of assets to a resultant company. These provisions envisage that an amalgamated company may dispose of various assets to a resultant company, which may include capital assets, trading stock, allowance assets and a contract, as part of the disposal of a business as a going concern.[328]

In each case, the asset that the resultant company acquires must be the same type of asset as the amalgamated company disposed of.[329] Where an amalgamated company disposes of capital assets, allowance assets or trading stock to a resultant company, the assets will not change their "nature" and the resultant company will subsequently acquire the assets as such.[330]

[327] Beukes (2012) 25 *Tax Planning* at 94 – 95.
[328] Section 44 subsections (2)(a), (b), (3)(a) and (b) of the Income Tax Act; Haupt *Notes on South African Income Tax* 365.
[329] Haupt *Notes on South African Income Tax* 366.
[330] De Koker *Silke on South African Income Tax* at 13.34; Clegg and Stretch *Income Tax in South Africa* at 24.9.4.

Subsection (2) of section 44 of the Income Tax Act provides that:

Where an amalgamated company disposes of –

(a) a capital asset in terms of an amalgamation transaction to a resultant company which acquires it as a capital asset –

(i) the amalgamated company must be deemed to have disposed of that asset for an amount equal to the base cost of that asset on the date of that disposal; and

(ii) that resultant company and that amalgamated company must, for purposes of determining any capital gain or capital loss in respect of a disposal of that asset by that resultant company, be deemed to be one and the same person with respect to–

(aa) the date of acquisition of that asset by that amalgamated company and the amount and date of incurral by that amalgamated company of any expenditure in respect of that asset allowable in terms of paragraph 20 of the Eighth Schedule; and

(bb) any valuation of that asset affected by that amalgamated company as contemplated in paragraph 29(4) of the Eighth Schedule:

Provided that this paragraph does not apply to any asset disposed of in terms of an amalgamation transaction contemplated in paragraph (b) of the definition of "amalgamation transaction" if, on the date of that disposal, the market value of that asset is less than the base cost of that asset;

(b) an asset held by it as trading stock in terms of an amalgamation transaction to a resultant company which acquires it as trading stock –

(i) that amalgamated company must be deemed to have disposed of that asset for an amount equal to the amount taken into account by that amalgamated company in respect of that asset in terms of section 11(a) or 22(1) or (2); and

(ii) *that amalgamated company and that resultant company must, for purposes of determining any taxable income derived by that resultant company from a trade carried on by it, be deemed to be one and the same person with respect to the date of acquisition of that asset by that amalgamated company and the amount and date of incurral by that amalgamated company of any cost or expenditure incurred in respect of that asset as contemplated in section 11(a) or 22(1) or (2).* [331]

Provided that this paragraph does not apply to any asset disposed of in terms of an amalgamation transaction contemplated in paragraph (b) of the definition of "amalgamation transaction" if, on the date of that disposal, the market value of that asset is less that the amount taken into account in respect of that asset in terms of section 11(a) or 22(1) or (2).

Where the resultant company acquires an asset from the amalgamated company, it must acquire the asset as the same type of asset as the amalgamated company was disposing of.[332] Thus, according to De Koker, where an amalgamated company disposes of capital assets, allowance assets or trading stock to a resultant company, the assets will not change their "nature" and the resultant company will subsequently acquire the assets as such.[333]

In terms of section 44 of the Income Tax Act where an "amalgamation transaction" is adopted, the resulting tax consequences in respect of subsection (2) and (3) can be summarised as the following:

(i) *the amalgamated company is deemed to have disposed of any capital asset at its base cost and the resultant company and the amalgamated company are deemed to be one and the same person with respect to the date of acquisition of the asset and all expenses allowable, under*

[331] Section 44(2) of the Income Tax Act.
[332] Haupt *Notes on South African Income Tax* 366.
[333] De Koker *Silke on South African Income Tax* at 13.34; Clegg and Stretch *Income Tax in South Africa* at 24.9.4.

paragraph 20 of the Eighth Schedule, and the valuation of the asset for the capital gains or capital loss tax purposes;

(ii) the amalgamated company is deemed to have disposed of any trading stock at tax value, and the resultant company is deemed to be one and the same person as the amalgamated company as far as the date of acquisition of the stock is concerned, and any costs or expenses incurred in respect of the cost of acquisition of the stock are concerned;

(iii) the amalgamated company is deemed to have disposed of any allowance asset at its tax value, the resultant company is deemed to be one and the same person as the amalgamated company as far as claiming allowances on the asset is concerned, and as far as recoupment is concerned; and

(iv) where a contract is transferred, as part of the disposal of a business as a going concern, any section 24C allowances (in respect of future expenditure on contracts) will also be transferred.[334]

3.3.1.1 CAPITAL ASSETS

An amalgamating company transferring a capital asset to a resultant company in terms of an amalgamation transaction, would be deemed as having disposed of the asset for an amount equal to the base cost on the date of disposal.[335] The amalgamated company would not realise a capital gain or incur a capital loss on the transfer of the asset. Furthermore, any amount recovered or recouped by the person or company will be treated as not having been recovered or recouped.[336]

The resultant company will be treated as having acquired the capital asset at the same time the amalgamated company disposing the asset acquired the asset. Where the asset is a capital asset, the base cost, as determined in terms of paragraph 20 of the Eighth Schedule, of the amalgamated company is carried over to the resultant company.[337] Any valuation of an asset effected by the amalgamated

---

[334] Haupt *Notes on South African Income Tax* 366.
[335] De Koker *Silke on South African Income Tax* at 13.34.
[336] *Ibid.*
[337] De Koker *Silke on South African Income Tax* at 13.34 - In determining any capital gain or capital loss on disposal of the asset by the resultant company, the two companies are deemed to be one and the same person with respect to the date of acquisition of the asset by the amalgamated company

company, as “contemplated in” paragraph 29(4) of the Eighth Schedule, for Capital Gains Tax (hereinafter referred to as “CGT”) purposes, it will be treated as having been effected by the resultant company.[338] This means, if the asset was acquired by the amalgamated company before 1 October 2001, and the company chose its valuation-date value, that value plus any allowable expenditure incurred between 1 October 2001 and the date of the amalgamation will be the base cost of the asset in the hands of the resultant company.[339]

3.3.1.2 TRADING STOCK

According to Stiglingh *et al*, trading stock is transferred in a manner similar to capital assets and section 44(2)(b) of the Income Tax Act provides for relief in respect of any possible normal tax implications.[340] When an amalgamated company disposes of trading stock to a resultant company, which in turn acquires it as such, the amalgamated company is deemed to have disposed of it, as a going concern, for an amount equal to its cost or trading stock value, as contemplated in section 11(a) or section 22(1) or (2) of the Income Tax Act.[341] The cost, or trading stock value, in the hands of the amalgamated company is deemed to be the cost or trading stock value in the hands of the resultant company, in terms of section 44(2)(b) of the Income Tax Act.[342]

3.3.1.3 ALLOWANCE ASSET

In terms of section 44(3) of the Income Tax Act:

> *Where an amalgamated company disposes of –*

---

and the amount due and date of incurral by it of any allowable “paragraph 20 base cost expenditure”. Consequently, the amalgamated company does not realize a capital gain or incur a capital loss on transfer of the asset and the base cost in the hands of the amalgamated company is deemed to be the base cost in the hands of the resultant company.

[338] De Koker *Silke on South African Income Tax* at 13.34.
[339] *Ibid.*
[340] Stiglingh *et al SILKE* 509.
[341] Clegg and Stretch *Income Tax in South Africa* at 24.9.
[342] De Koker *Silke on South African Income Tax* at 13.34.

(a) an asset that constitutes an allowance asset in that amalgamated company's hands to a resultant company as part of an amalgamation transaction and that resultant company acquires that asset as an allowance asset –

(i) no allowance allowed to that amalgamated company in respect of that asset must be recovered or recouped by that amalgamated company or included in that amalgamated company's income for the year of that transfer; and

(ii) that amalgamated company and that resultant company must be deemed to be one and the same person for purposes of determining the amount of any allowance or deduction -

(aa) to which that resultant company may be entitled in respect of that asset; or that is to be recovered or recouped by or included in the income of that resultant company in respect of that asset . . .[343]

Section 44(3)(a) of the Income Tax Act makes provision for the resultant company to claim an allowance in respect of any "allowance asset" transferred, and also for any amounts in respect of such assets to be recouped or recovered by the resultant company. This provision would only apply where the assets constitute "allowance assets" in the hands of both the amalgamated company and the resultant company.[344] It follows that where a person has elected the special "rollover" relief provisions under paragraph 65 and 66 of the Eighth Schedule and thereafter disposes of or distributes the replacement assets in terms of section 44 of the Income Tax Act, the result is that the transferee effectively "steps into the shoes" of the transferor and takes over the paragraph 65 or 66 rollover relief.[345]

In terms of section 41(1) of the Income Tax Act, an "allowance asset" means a capital asset in respect of which a deduction or allowance is allowable in terms of the Income Tax Act, for the purpose other than the determination of any capital gain or

[343] Section 44(3)(a) of the Income Tax Act.
[344] Clegg and Stretch *Income Tax in South Africa* at 24.9.
[345] *Ibid.*

capital loss, or a bad or doubtful debt as set out in section 11(i) or (j) of the Income Tax Act respectively.[346]

When the asset is an "allowance asset" as defined in section 41(1) of the Income Tax Act, the amalgamated company is deemed not to have recovered or recouped a portion of an allowance in the year of disposal, and therefore, no taxable income arises on the transfer of an "allowance asset".[347] Moreover, allowances or potential recoupment are merely carried over from the amalgamated company to the resultant company.[348]

According to de Koker, when an amalgamated company disposes of an allowance asset to a resultant company, and the resultant company subsequently acquires it, the rollover relief rules allow for the transferee to effectively "step into the shoes" of the transferor. Hence, the parties involved are deemed to be one and the same and therefore the following implications arise:

- *(i)* *no allowance or deduction can be recovered or recouped by the amalgamated company;*
- *(ii)* *allowances or deductions in respect of the transferred asset or liability which have not been utilized by the amalgamated company shift to the resultant company, in whose hands they will continue to be deductible in the same way as if the resultant company had held them all along; and*
- *(iii)* *the resultant company will be taxed on the recovery or recoupment*.[349]

The amalgamated company must, within 18 (eighteen months) (the Taxation Laws Amendment Act, 2012, has extended this period to 36 (thirty-six) months), after the date of the amalgamation transaction, take the necessary steps to liquidate, wind-up or deregister the remaining company or target company or resultant company, at

---

[346] Section 41(1) of the Income Tax Act.
[347] De Koker *Silke on South African Income Tax* at 13.34.
[348] *Ibid.*
[349] *Ibid.*

which point the shares in the resultant company will be transferred to the shareholders of the amalgamated company.[350]

The results of the abovementioned provisions is that taxable income, or a capital gain in relation to an asset transferred as part of an amalgamation transaction, is determined only once the asset is ultimately disposed of by the resultant company.[351] It would follow that in the determination of the amount to be included in taxable income on the disposal date, the same calculation and information that would have been applicable to the amalgamated company, in the absence of section 44, would apply to the resultant company, therefore, deferring the calculation to a later date.[352]

3.3.1.4 OTHER ALLOWANCES

In terms of section 44(3)(b) of the Income Tax Act:

> *where an amalgamated company disposes of . . .*
>
> *(b) a contract to a resultant company as part of a disposal of a business as a going concern in terms of an amalgamation transaction and that contract imposes an obligation on that amalgamated company in respect of which an allowance in terms of section 24C was allowable to that amalgamated company for the year preceding that in which that contract is transferred or would have been allowable to that amalgamated company for the year of that transfer had that contract not been so transferred –*
>
> *(i) no allowance allowed to that amalgamated company in respect of that obligation must be included in that amalgamated company's income for the year of that transfer; and*
>
> *(ii) that amalgamated company and that resultant company must be deemed to be one and the same person for purposes of determining the amount of any allowance –*

[350] De Koker *Silke on South African Income Tax* at 13.34.
[351] Beukes (2012) 25 *Tax Planning* at 95.
[352] *Ibid.*

(aa) to which that resultant company may be entitled in respect of that obligation; or

(bb) that is to be included in the income of that resultant company in respect of that obligation.[353]

Provision is made for the resultant company to "step into the shoes" of the amalgamating company transferring the assets and to claim the section 24C allowance the amalgamated company would have been entitled to.[354] A special rule comes into play when an amalgamated company disposes of a contract, to a resultant company, as part of a disposal of a business as a going concern.[355] For this rule to apply the contract must impose an obligation on the amalgamated company in respect of an allowance provided for in section 24C to that amalgamated company for the year preceding that in which the contract is transferred or would have been allowable to that amalgamated company for the year of that transfer had the contract not been so transferred.[356] The rule itself states that no allowance granted to the amalgamated company for that obligation must be included in its income for the year of the transfer.[357]

The amalgamated company and the resultant company are deemed to be one and the same in respect of determining the amount of any allowance that the resultant company may be entitled to for the obligation, or the amount that is to be included in the income of the resultant company for the obligation.[358]

3.3.2 AMALGAMATION TRANSACTIONS: ROLLOVER RELIEF PROVIDED FOR THE AMALGAMATED COMPANY'S SHAREHOLDERS

Section 44(6) of the Income Tax Act provides for a shareholder of an amalgamated company to dispose of equity shares in the amalgamated company in return for

[353] Section 44(3)(b) of the Income Tax Act.
[354] Clegg and Stretch *Income Tax in South Africa* at 24.9.4.
[355] De Koker *Silke on South African Income Tax* at 13.34.
[356] *Ibid.*
[357] *Ibid.*
[358] *Ibid.*

equity shares in the resultant company.[359] However, in terms of the Taxation Laws Amendment Act, 2012, the use of the phrase *"any equity shares"* in subsection (6)(a)(i) is replaced with the phrase "an equity share" which came into operation on 1 January 2013 and applies in respect of transactions entered into on or after that date. Subject to subsection (7) of section 44, special rollover relief rules would come into come into play where:

(a) a person disposes of any equity shares, an equity share in an amalgamated company as a result of the liquidation, winding up or deregistration of that amalgamated company and acquires equity shares in the resultant company as part of an amalgamation transaction in respect of which subsection (2) or (3) applied, which equity shares in the resultant company are acquired –

(i) as either capital assets or trading stock, in the case where that equity share in the amalgamated company is disposed of as a capital asset; or

(ii) as trading stock in the case where that equity share in the amalgamated company is disposed of as trading stock.

(b) The person contemplated in paragraph (a) is deemed to have -

(i) disposed of the equity share in that amalgamated company for an amount equal to the expenditure incurred by that person in respect of that equity share which is or was allowable in terms of paragraph 20 of the Eighth Schedule or taken into account in terms of section 11(a) or 22(1) or (2), as the case may be;

(ii) acquired the equity shares in the resultant company on the date on which that person acquired the equity share in the amalgamated company for a cost equal to the expenditure incurred by that person as contemplated in subparagraph (i); and

(iii) incurred the cost contemplated in subparagraph (ii) on the date on which that person incurred the expenditure in respect of the equity share in the amalgamated company, which cost must be treated as -

[359] Beukes (2012) 25 *Tax Planning* at 95.

(aa) an expenditure actually incurred and paid by that person in respect of those equity shares for the purposes of paragraph 20 of the Eighth Schedule, if those equity shares in the resultant company are acquired as capital assets; or

(bb) the amount to be taken into account by that person in respect of those equity shares for the purposes of section 11(a) or 22(1) or (2), if those equity shares in the resultant company are acquired as trading stock;

(c) Any valuation of the equity share in the amalgamated company which was done by the person contemplated in paragraph (a) within the period contemplated in paragraph 29(4) of the Eighth Schedule is deemed to have been done by that person in respect of the equity shares in the resultant company.[360]

For shareholders of the amalgamated company to qualify for the relief provided for in section 44(6) of the Income Tax Act, the shareholder must dispose of its equity shares in the amalgamated company as a result of the liquidation, deregistration or winding-up, and must have acquired shares in the resultant company as part of the amalgamation transaction.[361] The shareholders are deemed to have disposed of the equity shares in the amalgamated company for an amount equal to their base cost or their cost or trading stock value.[362] At the same time, the shareholders are deemed to have acquired the equity shares in the resultant company on the date on which the shareholders acquired the equity shares in the amalgamated company. The shareholders are deemed to have acquired the equity shares in the resultant company at the same base cost or their cost or trading stock value as the original shares.[363]

To qualify for the relief the shareholders of the amalgamated company should acquire the shares in the resultant company as either a capital asset or trading stock

---

[360] Section 44(6) of the Income Tax Act with the proposed changes provided by the Taxation Laws Amendment Boll 2012.
[361] Stiglingh *et al SILKE* 510.
[362] De Koker *Silke on South African Income Tax* at 13.34.
[363] *Ibid.*

(in the case where the shares in the amalgamated company were disposed of as a capital asset, or trading stock in the case where the shares in the amalgamated company were disposed of as trading stock).[364] Prior to 1 January 2012, the shareholder merely needed to hold a "qualifying interest" in the resultant company. In terms of section 44(1) a "qualifying interest" in the resultant company was defined as:

> *(i)* *any quantity of equity shares held by a person where the company is a listed company or a company to be listed within twelve months;*
>
> *(ii)* *any quantity of equity shares held by a person in a portfolio investment scheme in securities; or*
>
> *(iii)* *equity shares held by a person in a company that constitutes at least twenty per cent of the equity shares and voting rights of the company.*[365]

The requirement that a shareholder should hold a qualifying share in the resultant company to qualify for the relief provided under section 44(6) of the Income Tax Act is no longer applicable in respect of transactions entered into on or after 1 January 2012.[366]

Section 44(6) of the Income Tax Act provides that the shares in the amalgamated company are deemed to be disposed of for proceeds equal to their base cost. This means that the disposal of the amalgamated company's shares, as a result of its liquidation, will not have normal tax consequences for the shareholder. The shareholder is deemed to have acquired the equity shares in the resultant company

---

[364] Stiglingh *et al SILKE* 510.

[365] *Ibid.*

[366] Stiglingh *et al SILKE* 510; L Mitchell *et al Income Tax Reporter* 51 (2012) at 353 – According to the Explanatory Memorandum on the Taxation Laws Amendment Bill 2011, under the current law "target" shareholders fall within amalgamation rollover relief only if they have a "qualifying interest", which often requires a twenty per cent minimum equity stake. However, the "qualifying interest" requirement operates separately from other aspects of the amalgamation rollover provisions. This means that rollover relief may give rise to technical anomalies and could potentially be unfair to minority shareholders who may be "involuntary" participants. Therefore, the "qualifying interest" requirement for the "target" shareholder has been deleted

for the same amount and on the same day on which the equity shares in the amalgamated company were acquired.[367]

3.3.3 AMALGMATION TRANSACTIONS: LIMITATION ON THE APPLICATION OF ROLLOVER RELIEF

In terms of section 44(4) of the Income Tax Act, as set out in the Taxation Laws Amendment Act, 2012:

> *The provisions of subsections (2) and (3) will not apply to a disposal of an asset by an amalgamated company to a resultant company as part of an amalgamation transaction to the extent that such asset is so disposed of in exchange for consideration other than –*
>
> *(a) an equity share or shares in that resultant company; or*
>
> *(b) the assumption by that resultant company of a debt of that amalgamated company, that -*
>
> *(i) was incurred by that amalgamated company -*
>
> *(aa) more than 18 months before that disposal; or*
>
> *(bb) within a period of 18 months before that disposal, to the extent that the debt -*
>
> *(A) constitutes the refinancing of any debt incurred as contemplated in subparagraph (aa); or*
>
> *(B) is attributable to and arose in the ordinary course of [the disposal, as a going concern, of] a business undertaking disposed of, as a going concern, to that resultant company as part of that amalgamation transaction; and*
>
> *(ii) was not incurred by that amalgamated company for the purpose of procuring, enabling, facilitating or funding the acquisition by that resultant company of any asset in terms of that amalgamation transaction.*[368]

---

[367] Stiglingh *et al SILKE* 510; Mitchell *et al Income Tax Reporter* 51 (2012) at 353.

[368] Stiglingh *et al SILKE* 508 – 509. Subsection (b)(ii) of section 44(4) of the Income Tax Act, has taken effect as from 1 January 2012.

The rollover relief provisions, set out under section 44(2) and (3), will only apply to the extent that the amalgamated company receives equity shares in the resultant company, or assumes certain debts incurred by the amalgamated company, in return for the assets disposed of by the amalgamated company.[369] The debt which may be assumed by the resultant company is:

(i) *a debt incurred more than eighteen months before the disposal;*

(ii) *any refinancing of the above debt; and*

(iii) *any debt which is attributable to and arose in the normal course of the disposal, as a going concern, of a business undertaking to the resultant company as part of the amalgamation transaction.*[370]

With effect from 1 January 2012, no debt can be assumed and qualify for a rollover under this provision if it was incurred for the purpose of *"procuring, enabling, facilitating or funding the acquisition by that resultant company of any asset in terms of the amalgamation transaction."*[371] The effect is that no debt may be created in the resultant company, in order to pay for assets transferred under the amalgamation transaction and, if such "new" debt is created then the assets which it finances will not be subject to rollover relief. The sale of these assets will be subject to tax and any funds arising out of the sale, which are paid to shareholders as a dividend, will be subject to the dividends tax in the normal way.[372]

In terms of section 44(14) of the Income Tax Act, the amalgamation provisions, in section 44 of the Income Tax Act, *"do not apply in respect of any transaction if the resultant company:*

- *held at least 70 per cent of the equity shares in the amalgamated company immediately before the amalgamation, conversion or merger (section 44(14)(a)). However, since 1 January 2013, the aforementioned provision*

[369] Haupt *Notes on South African Income Tax* 366.
[370] Clegg and Stretch *Income Tax in South Africa* at 24.9; Haupt *Notes on South African Income Tax* 366.
[371] De Koker *Silke on South African Income Tax* at 13.34; Haupt *Notes on South African Income Tax* 366.
[372] *Ibid.*

has been substituted by the Taxation Laws Amendment Act, 2012, to read as follows: any transaction that constitutes a liquidation distribution as defined in section 47(1);

- *is a co-operative or an association formed in the Republic to serve a specified purpose beneficial to the public (section 44(14)(b));*
- *is an "equity" collective investment scheme and the amalgamated company is not (section 44(14)(bA));*
- *is a "non-profit" company as defined in section 1 of the "new" Companies Act (section 44(14)(c));*
- *is an association, body corporate, corporation or company incorporated under the law of any country other the Republic or a foreign portfolio of collective investment scheme. It follows that the section 44 relief measures will not apply to any of these entities if it does not have its place of effective management in the Republic (section 44(14)(d));*
- *is a company whose gross income, of whatever nature, would be exempt from tax, in terms of section 10 of the Income Tax Act, were it to be received by or to accrue to it (section 44(14)(e)); and*
- *is an approved public benefit organization, or recreational club, approved by the Commissioner in terms of section 30 or 30A of the Income Tax Act (section 44(14)(f))."*[373]

In terms of section 44(14)(g) of the Income Tax Act, the amalgamation provisions do not apply where the resultant company, and the shareholder of the amalgamated company, form part of the same group of companies immediately before and after the disposal, and the amalgamated company, resultant company and shareholder jointly so elect.[374] Prior to 1 January 2012, the amalgamated and resultant companies were the only parties which had to elect out of the application of this section.[375]

---

[373] De Koker *Silke on South African Income Tax* at 13.32.
[374] *Ibid.*
[375] *Ibid.*

3.3.4 AMALGAMATION TRANSACTIONS: ANTI-AVOIDANCE PROVISIONS

Section 44(5) of the Income Tax Act contains anti-avoidance provisions which would apply in the event that an asset is acquired as part of an amalgamated transaction and then disposed of by the resultant company within eighteen months after the date of the transaction.[376] In such circumstances, special rules come into play.[377] Where the resultant company disposes of an asset within eighteen months after acquiring it under an amalgamation transaction, a portion of the gain or the recoupment, depending on whether capital or revenue in nature, cannot be set-off against the assessed loss or assessed capital loss and instead immediate recognition of this portion is needed.[378]

Where an asset constitutes a capital asset in the hands of the resultant company, any capital gain, not exceeding the gain that would have been determined had it been disposed of for proceeds equal to its market value at the beginning of the eighteen month period, may not be taken into account in the determination of any net capital gain or assessed capital loss of the resultant company, but is taxable as a gain.[379] This capital gain is subject to paragraph 10 of the Eighth Schedule for the purposes of determining the taxable capital gain derived from that transaction (the inclusion rate of 66,6 (sixty-six point six) per cent). The taxable gain may not be set-off against any assessed loss or balance of assessed loss of the resultant company.[380] This means that 50% (fifty per cent) (66,6 (sixty-six point six) per cent from 1 April 2012) of the capital gain will be included in the resultant company's taxable income, even if it has an assessed capital loss for the year of assessment or an assessed capital loss brought forward from previous years of assessment.[381]

In terms of the amount disregarded, this may be deducted from the amount of any capital gain determined, in respect of the disposal during the year or any subsequent

[376] Beukes (2008) 20 *SA Merc LJ* 479 at 96.
[377] De Koker *Silke on South African Income Tax* at 13.34.
[378] Beukes (2008) 20 *SA Merc LJ* 479 at 96.
[379] Stiglingh *et al SILKE* 512.
[380] *Ibid.*
[381] De Koker *Silke on South African Income Tax* at 13.34.

year of assessment, of any other asset acquired by the resultant company from the amalgamated company in terms of that particular amalgamation transaction.[382]

Where the asset disposed of constitutes trading stock in the hands of the resultant company, so much of the proceeds not exceeding its market value at the beginning of the eighteen month period, and the amount taken into account as its cost or trading stock value, must be attributable to a separate trade carried on by the resultant company.[383] The taxable income, or assessed loss from this separate trade, may not be set-off against, or added to, any assessed loss or balance of assessed loss of the resultant company. However, in terms of section 44(5)(b)(i) of the Income Tax Act, this is not applicable to an asset that constitutes trading stock that is regularly and continuously disposed of by the resultant company.[384]

If the asset disposed of constitutes an allowance asset in the hands of the resultant company, so much of any allowance in respect of the asset recovered or recouped by or included in the income of the resultant company as a result of the disposal, not exceeding the amount that would have been recovered had it been disposed of for proceeds equal to its market value at the beginning of the eighteen month period, must be attributed to a separate trade carried on by the company.[385] In terms of section 44(5)(b)(ii) of the Income Tax Act, the taxable income from this separate trade of the company, may not be set-off against any assessed loss or balance of assessed loss of the resultant company.[386]

Prior to 1 January 2012, a shareholder of an amalgamated company who disposed of his/her shares in the amalgamated company, in terms of a qualifying transaction as contemplated in section 44(6) of the Income Tax Act, and who ceased to hold at least twenty per cent of the equity shares in the resultant company within a period of eighteen months after that disposal, that person was deemed to have disposed of all equity shares in the resultant company that were still held immediately after the

[382] De Koker *Silke on South African Income Tax* at 13.34.
[383] Stiglingh *et al SILKE* 512.
[384] *Ibid.*
[385] De Koker *Silke on South African Income Tax* at 13.34; Stiglingh *et al SILKE* 512.
[386] *Ibid.*

person ceased to hold a qualifying interest in the resultant company at their market value at the beginning of the eighteen month period, and immediately reacquired the equity shares at a cost equal to such market value, in terms of section 44(11) of the Income Tax Act.[387]

The requirement that a shareholder should hold a qualifying share in the resultant company to qualify for the relief under section 44(6) of the Income Tax Act, no longer applies in respect of transactions entered into on or after 1 January 2012. Furthermore, the section 44(11) anti-avoidance provision has also been removed in respect of transactions entered into after 1 January 2012.[388]

3.3.5 SECURITIES TRANSFER TAX, TRANSFER DUTY AND VALUE-ADDED TAX

According to Liedenburg, the Income Tax Act, the Value-Added Tax Act, the Securities Transfer Tax Act and the Transfer Duty Act all provide tax relief where certain transactions are undertaken.[389] In terms of section 8(1)(a) of the Securities Transfer Tax Act, under qualifying circumstances an exemption is permitted from securities transfer tax.[390]

Section 8(1)(a) of the Securities Transfer Tax Act provides that:

> *tax is not payable in respect of a transfer of a security –*
> *(a) if the security is transferred to a person –*
> > *(i) in terms of an asset-for-share transaction referred to in section 42 of the Income Tax Act;*
> > *(ii) in terms of an amalgamation transaction referred to in section 44 of the Income Tax Act;*

[387] Stiglingh *et al SILKE* 512.
[388] *Ibid.*
[389] J Liedenburg "New VAT requirements for corporate restructuring transactions" (2010) http://www.lexology.com/library/detail.aspx?g=af805522-ac3c-49e9-b4a7-41b1ee219460 (accessed 30/12/2012) at 1.
[390] Stiglingh *et al SILKE* 496.

(iii) in terms of an intra-group transaction referred to in section 45 of the Income Tax Act;

(iv) in terms of an unbundling transaction referred to in section 46 of the Income Tax Act;

(v) in terms of a liquidation distribution referred to in section 47 of the Income Tax Act; or

(vi) in terms of any transaction which would have constituted a transaction or distribution referred to –

(A) in subparagraphs (i) to (v) regardless of whether or not an election has been made for the purposes of the relevant section to apply;

(B) in subparagraph (i) to (iii) regardless of the market value of the asset disposed of in exchange for that security; or

(C) in subparagraphs (i) to (v) regardless of whether or not that person acquired that security as a capital asset or as trading stock,

where the public officer of the relevant company has made a sworn affidavit or solemn declaration that the acquisition of that security complies with the provisions of this paragraph. . .[391]

The Securities Transfer Tax Act provides that securities transfer tax must be levied (at the rate of 0,25 per cent) against the transfer of every security.[392] For clarity a security means any share or depository receipt in a company or member's interest in a close corporation.[393] In normal circumstances, the taxable amount on which Securities Transfer Tax is payable is the consideration paid for shares or the open market value, whichever is the higher.[394] As set out above, section 8(1)(a) of the Securities Transfer Tax Act provides an exemption in respect of the transfer of shares in terms of asset-for-share, amalgamation, intra-group and unbundling

---

[391] Section 8(1)(a) of the Securities Transfer Tax Act.

[392] A Camay "Securities Transfer Tax: Temporary adjustment to the member exemption" (2011) http://www.ens.co.za/news/news_article.aspx?iID=268&iType=4 (accessed 6/11/2013) at 1.

[393] SARS *"Securities Transfer Tax"* (2012) http://www.sars.gov.za/TaxTypes/STT/Pages/default.aspx (accessed 6/11/2013) at 1.

[394] Grant Thornton "Stamp Duty/Securities Taxes" (2011) http://www.budget2011.co.za/fiscal-e-file/other-taxes/stamp-dutysecurities-taxes/ (accessed 6/11/2013) at 1.

transactions, and liquidation distributions as provided for in section 42, 44, 45, 46 and 47 of the Income Tax Act.[395]

In terms of section 9(1)(l)(i) of the Transfer Duty Act, no transfer duty is payable in respect of property acquired by a company in terms of an "amalgamation transaction", contemplated in section 44 of the Income Tax Act, where the public officer of the company has submitted a sworn affidavit or solemn declaration that the amalgamation complies with the provisions contained in section 44 of the Income Tax Act.[396]

For value-added tax (VAT) purposes, a special rule comes into play where goods or services are supplied by one vendor to another under an amalgamation transaction.[397] As for the rule itself, it deems the vendors, for purposes of that supply or subsequent supplies, to be the same person. Where both the transferor and transferee are VAT vendors, section 8(25) of the VAT Act deems the transfer to be a non-supply and therefore the transferee merely "steps into the shoes" of the transferor.[398] This effectively means that no VAT needs to be accounted for by the supplier or recipient on these supplies.[399] With regard to section 44 transactions, a further requirement was inserted in section 8(25), and this applies to supplies made on or after 30 September 2009.[400] A section 44 transaction will only qualify for the VAT relief if the supply is of an enterprise (or part thereof) where the supplier and recipient have agreed in writing that the enterprise is disposed of as a going concern.[401]

3.4 CONCLUSION

It is evident from the above discussion that compliance with the Income Tax Act corporate rules is absolutely necessary in order to obtain the maximum tax benefits

[395] Grant Thornton "Stamp Duty/Securities Taxes" at 1.
[396] Stiglingh *et al SILKE* 496; De Koker *Silke on South African Income Tax* at 13.34.
[397] De Koker *Silke on South African Income Tax* at 13.34.
[398] Haupt *Notes on South African Income Tax* 370.
[399] De Koker *Silke on South African Income Tax* at 13.34; Haupt *Notes on South African Income Tax* 370.
[400] Stiglingh *et al SILKE* 496.
[401] *Ibid.*

when entering corporate restructuring transactions. Moreover, it is clear that in order to take advantage of such tax rollover relief the transaction needs to comply with specific requirements which, in many ways, differ from those that are presented by the statutory merger provisions in the "new" Companies Act.[402]

In this regard, it is important to take cognisance of the argument presented by Gad and Straus, who are of the view that there is a general misconception that a statutory merger transaction automatically qualifies as an "amalgamation transaction" as envisaged in terms of section 44 of the Income Tax Act.[403] These words ring very true as it is clear that for a corporate restructuring transaction, such as an amalgamation transaction, to qualify for tax rollover relief, the specific transaction needs to satisfy the requirements as provided for in the rollover provisions.

This submission provides the foundation whereupon Chapter 4 is based, and essentially addresses the main goal of this research, which identifies the anomalies that exist between the "new" Companies Act and the Income Tax Act, as they relate to amalgamation and/or merger transactions.

---

[402] D Van der Berg "Companies Act v Tax Law: Guidelines" (2012) *Moneywebtax* http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page265?oid=71603&sn=Detail (accessed 29 October 2012) at 1.

[403] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.

CHAPTER 4: POTENTIAL INCONSISTENCIES BETWEEN THE "NEW" COMPANIES ACT AND THE INCOME TAX ACT

4.1 INTRODUCTION

Chapter 4 goes to the very heart of this research; it identifies the potential inconsistencies that exist between the "new" Companies Act and the Income Tax Act, with a specific focus on the provisions of for the "amalgamation or merger" transactions and the "amalgamation transactions" respectively. By comparing the plain wording of the corporate definition in the "new" Companies Act, and the requirements of section 44 of the Income Tax Act, it becomes questionable whether the tax regime is adequately aligned with the legal implications of the "new" Companies Act. This chapter also considers the possible income tax, capital gains tax, value-added tax, transfer duty and/or securities transfer tax consequences should the "amalgamation or merger" transaction, wholly or partly, fall outside the ambit of the rollover relief provisions as envisaged under section 44 of the Income Tax Act.

4.2 A CRITICAL COMPARISON BETWEEN THE "NEW" COMPANIES ACT AND THE INCOME TAX ACT

Previously, in Chapter 2 of this thesis, it was mentioned that in terms of the "new" Companies Act, the underlying *causa* of an "amalgamation or merger" transaction facilitating the transfer of assets and liabilities can be either:

(i) the typical contractual causes for the transfer of assets and liabilities (such as sale, cession, delegation, etc) in terms of the agreement between the parties; or

(ii) the automatic operation of law, whereby the assets and liabilities pass ex lege and there would be no sale causa where the amalgamating

companies dispose of assets in exchange for consideration and the assumption of liabilities, to the amalgamated company.[404]

In terms of section 116(7) of the "new" Companies Act:

When an amalgamation or merger agreement has been implemented –

(a) the property of each amalgamating or merging company becomes the property of the newly amalgamated, or surviving merged, company or companies; and

(b) each newly amalgamated company, or surviving merged company is liable for all of the obligations of every amalgamating or merging company, in accordance with the provisions of the amalgamation or merger agreement, or any other relevant agreement, but in any case subject to the requirement that each amalgamated or merged company must satisfy the solvency and liquidity test, and subject to subsection (8), if it is applicable.[405]

From the above it is clear that the transfer of property and obligations is subject, *inter alia*, to the provisions of the amalgamation transaction or any other relevant agreement, and therefore it may be argued that such a transfer has a contractual

---

[404] Gad and Strauss The impact of statutory mergers on current tax Legislation: Part 1 at para 1.2 - 1.2.2; In *Tecmed (Pty) Ltd v Nissho Iwai Corporation* (705/08) [2009] ZASCA 143 (25 November 2009) a merger agreement was effected, in terms of articles 101, 102 and 103 of the Japanese Commercial Code, between Nissho Iwai and another Japanese company, Nichiman Corporation, which was renamed Sojitz Corporation. Clause 1 and 8 of the merger agreement provided the following:

1. Method of Merger - Nichiman and Nissho Iwai will merge in a spirit of equality. However, as a result of the merger, Nichiman will survive and Nissho Iwai will be dissolved.

8. Succession of Company Assets – Nichiman shall, as at the date of the merger, succeed any and all of Nissho Iwai"s assets, liabilities and rights and obligations . . .

Sojitz Corporation (the newly amalgamated company) relied upon the universal succession of all Nissho Iwai's rights and obligations by operation of Japanese law and not the transfer of rights by means of cession. This position is materially the same as the Banks Act 94 of 1990, which provides for an amalgamation or takeover agreement between respective banks. Section 54(3) of the Banks Act explicitly provides that all the rights and obligations of the amalgamating banks (or transferor bank) will vest in the amalgamated bank (or transferee bank) by operation of law, which means that the amalgamating banks step into the shoes of the amalgamated bank.

[405] Section 116(7) of the 'new' Companies Act.

causa.[406] Arguably, in any amalgamation transaction, there will invariably be a contract that will provide for the transfer of assets to either the surviving or the new company to which both parties will transfer their assets. To the extent that the contract does not deal with the transfer of any specific assets, the transfer of the ownership of that asset happens by operation of law in accordance with section 116(7)(a) of the "new" Companies Act. Section 116(8) of the "new" Companies Act supports this interpretation, as it deals with the transfer of registered property (for example land) where a copy of the amalgamation or merger agreement must be provided in order to effect the transfer (therefore it clearly happens by agreement and not only by operation of law). However, there are good legal arguments in favour of the *"by operation of law"* interpretation.[407]

In *Tecmed (Pty) Ltd v Nissho Iwai Corporation*[408] a merger agreement was effected in terms of articles 101, 102 and 103 of the Japanese Commercial Code, between Nissho Iwai and another Japanese company, Nichiman Corporation, which was renamed Sojitz Corporation (the newly amalgamated company), in terms of clause 1 and 8 of the merger agreement. The Japanese Commercial Code provided the following:

> *1. Method of Merger - Nichiman and Nissho Iwai will merge in a spirit of equality. However, as a result of the merger, Nichiman will survive and Nissho Iwai will be dissolved.*
>
> *8.1 Succession of Company Assets – Nichiman shall, as at the date of the merger, succeed any and all of Nissho Iwai"s assets, liabilities and rights and obligations . . .*

Sojitz Corporation (the newly amalgamated company) relied upon the universal succession of all of Nissho Iwai's rights and obligations by operation of Japanese law and not the transfer of rights by means of cession. This position is materially the same as the Banks Act, 94 of 1990, which provides for an amalgamation or takeover agreement between respective banks. Section 54(3) of the Banks Act explicitly

[406] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 2.
[407] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 2.
[408] (705/08) [2009] ZASCA 143 (25 November 2009).

provides that all the rights and obligations of the amalgamating banks (or transferor bank) will vest in the amalgamated bank (or transferee bank) by operation of law, which means that the amalgamating banks "step into the shoes" of the amalgamated bank.

In his judgment, of *Tecmed (Pty) Ltd v Nissho Iwai Corporation*, Harms DP emphasized the decision handed down in *Eurosteel Ltd v Stinnes AG*[409], which according to the learned Judge provides persuasive authority in respect of the transfer of assets and liabilities by operation of law. In terms of section 20 of the German Umwandlungsgesetz (or Transformation Law) a merger would have the effect of all assets and liabilities transferring by operation of law, and thereafter the amalgamated company would terminate and cease to exist.[410]

Moreover, it would seem that our law accommodates the transfer of rights and obligations by operation of law or statute as an independent method of transferring rights and obligations.[411] This reasoning was amplified in *Kessoopersadh en 'n Ander v Essop en 'n Ander*[412] where the appeal court held that where a leased property is sold, the purchaser is substituted *ex lege* (by operation of law) for the original lessor and acquires all the rights and obligations of his/her predecessor in title by operation of law.[413]

Accordingly, Emslie argues that, in terms of section 116(7) of the "new" Companies Act, all of the obligations of every merging or amalgamating company shall be enforceable against the surviving company upon the implementation of a merger or amalgamation.[414]

David's *et al* opine that section 116(7)(b) of the "new" Companies Act should not be interpreted as meaning that parties to the amalgamation or merger may exclude the

---

[409] [2000] 1 ALL ER (Comm) 964 (QB).
[410] [2009] ZASCA 143 (25 November 2009) at 11.
[411] T Emslie *"New Company Law Merger Provisions"* (2012) *The Taxpayer* at 5.
[412] [1970] 1 ALL SA 325 (A).
[413] *Ibid.*
[414] Emslie "New Company Law" at 5.

transfer of any liability to the merged or amalgamated entity. In this regard Davids *et al* state:

> *One would presume that in making the liability of the merged entities for the merging entities' obligations subject to the merger agreement, section 116(7)(b) does not imply that it is open to the merging parties to agree that certain liabilities would not be transferred to the merged entities at all. It is clear from the definition of "amalgamation or merger" that all of the liabilities must be transferred, and the fact that the entities which are not intended to survive the merger are automatically dissolved upon the implementation of the merger, would also mean that it would not be possible for any liabilities to remain behind.*

Based on the argument above, it is evident that the transfer of property and obligations is subject, *inter alia*, to the provisions of the *"amalgamation transaction or any other relevant agreement*", which suggests that the transfer of property and obligations would have an underlying contractual *causa*. Importantly, this does not suggest that parties to an amalgamation or merger would be able to contractually exclude obligations from being transferred.[415]

Further, it was suggested that to the extent that the contract forming the basis of the amalgamation transaction excludes certain assets or obligations, there is scope to suggest that these would in any event be transferred by operation of law in accordance to section 116(8) of the "new" Companies Act.[416] Notwithstanding, the persuasive authority in favour of the latter interpretation, it still remains unclear whether the transfer of assets and liabilities occurs in terms of an agreement between the parties or automatically by operation of law. In any event, regardless of which interpretation is correct, in law, both interpretations would no doubt still present far-reaching tax implications.[417]

---

[415] Emslie "New Company Law" *at* 5.
[416] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 2.
[417] *Ibid.*

4.2.1 POTENTIAL INCONSISTENCIES

In terms of section 1 of the "new" Companies Act an amalgamation or merger means:

> *a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in –*
>
> *(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreements, and the dissolution of each of the amalgamating or merging companies; or*
>
> *(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by the amalgamating or merging companies immediately before the implementation of the agreement.*[418]

For the purposes of section 44 of the Income Tax Act (read with the amendments in terms of the Taxation Laws Amendment Act, 2012), subsection (1) defines an "amalgamation transaction" as:

> *any transaction in terms of which –*
>
> *(a)*
>
> *(i) in terms of which any company (hereinafter referred to as the "amalgamated company") which is a resident disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to another company (hereinafter referred to as the "resultant company") which is resident, by means of an amalgamation, conversion or merger; and*

[418] Section 1 of the Companies Act 71 of 2008; Cassim *et al Contemporary Company Law* 678; Davids *et al* 2010 *Acta Juridica* 337 at 341; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 2.

(ii) as a result of which the existence of that amalgamated company will be terminated;

(b)

(i) in terms of which an amalgamated company which is a foreign company disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to a resultant company which is a resident, by means of an amalgamation, conversion or merger;

(ii) if, immediately before that transaction, any shares in that amalgamated company that are directly or indirectly held by that resultant company are held as capital assets; and

(iii) as a result of which that the existence of that amalgamated company will be terminated.

(c)

(i) in terms of which an amalgamated company which is a foreign company disposes of all of its assets (other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade) to a resultant company which is a foreign company, by means of an amalgamation, conversion or merger;

(ii) if –

(aa) immediately before that transaction –

(D) that amalgamated company and that resultant company form part of the same group of companies (as defined in section 1);

(E) that resultant company is a controlled foreign company in relation to any resident that is part of the group of companies contemplated in sub-item (A); and

(F) any shares in that amalgamated company that are directly or indirectly held by that resultant company are held as capital assets; and

(bb) immediately after that transaction, more than 50% (fifty per cent) of the equity shares in that resultant company

are directly or indirectly held by a resident (whether alone or together with any other person that is a resident and that forms part of the same group of companies as that resident); and

(iii) *as a result of which the existence of that amalgamated company will be terminated.*[419]

According to Lewis, the "amalgamation or merger" provisions under the "new" Companies Act contemplates a scenario where there is either the formation of a new company, with the dissolution of the old amalgamating or merging companies, or the survival of one of the amalgamating or merging companies.[420] This is in contrast to section 44 of the Income Tax Act, which only contemplates a scenario where a company disposes of all of its assets to another company by means of *"amalgamation, conversion or merger",* and as a result of which that amalgamated company's existence is terminated.[421]

Section 44 of the Income Tax Act, clearly does not provide for a scenario contemplated under paragraph (b) of the "amalgamation or merger" definition in the "new" Companies Act.[422] The tax rollover relief available under section 44 of the Income Tax Act has not been amended to align with the "new" Companies Act.[423] Where one considers implementing an amalgamation transaction contemplated in paragraph (b) of the "new" Companies Act, the rollover relief provided for under section 44 of the Income Tax Act will not be available to the parties to the transaction, thus giving rise to potential tax implications. The proposed paragraph (c) would also be excluded from rollover relief therefore giving rise to further tax implications.

---

[419] Section 44(1) of the Income Tax Act 58 of 1962 – For the purposes of this section an amalgamated company and a resultant company will only form part of the same group of companies if the expression "at least 70 per cent" in paragraph (a) and (b) of the definition of "group of companies" in section 1 of the Income Tax Act, were replaced by the expression "at least 95 per cent".
[420] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8.
[421] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8; Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" at 15.
[422] Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" at 15.
[423] *Ibid.*

4.2.1.1 DISSOLUTION, TERMINATION, LIQUIDATION, WINDING-UP OR DEREGISTRATION

The corporate definition of "amalgamation or merger" in the "new" Companies Act refers to *"a transaction between two or more companies, resulting in the formation of one or more companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreements, and the dissolution of each of the amalgamating or merging companies."*[424]

On the other hand, section 44(1) of the Income Tax Act defines an "amalgamation transaction" as *"any transaction in terms of which – (a) any amalgamated company disposes of all of its assets, other than assets it elects to use to settle any debts incurred by it in the ordinary course of its trade, to a resultant company which is a resident, by means of an amalgamation, conversion or merger; and as a result of which that amalgamated company's existence will be terminated. . ."*[425]

Section 44(13) of the Income Tax Act, provides that the provisions of section 44 do not apply where the amalgamated company –

(a) has not, within a period 18 months after the date of the amalgamation transaction, or such further period as the Commissioner may allow, taken the steps contemplated in section 41(4) to liquidate, wind-up or deregister. . .[426]

It is evident that the "new" Companies Act refers to the *"dissolution"* of the amalgamating or merging companies, whereas the Income Tax Act has referred to the *"termination"* of the amalgamated company's existence. Moreover, section 44(13) of the Income Tax Act requires that steps be taken to *"liquidate, wind-up or deregister the amalgamating or merging company or companies"* within eighteen months after the disposal, and according to Gad and Strauss, the word *"dissolution"*

[424] Section 1 of the Companies Act 71 of 2008.
[425] Section 44(1) of the Income Tax Act.
[426] Section 44(13) of the Income Tax Act.

is a legal concept distinct from *"liquidation", "winding-up", or "deregistration",* therefore these words should not be used interchangeably.[427]

The company law definition of "amalgamation or merger" states that the dissolution of the amalgamating or merging company or companies must occur immediately upon the implementation of the transaction, whereas section 44 of the Income Tax Act affords the parties to the transactions eighteen months after the disposal, to "take steps" to liquidate, wind-up or deregister the amalgamating or merging company or companies. There is a clear discrepancy with regard to the time period between the "new" Companies Act and the Income Tax Act.

The terms "liquidation" and "winding-up" would appear to bear the same meaning.[428] In *Valley View Homeowners" Association v Universal Pulse Trading 27 (Pty) Ltd*[429] "winding-up" or "liquidation" was defined as *"the process by which, prior to its dissolution, the management of a company's affairs is taken out of its director's hands, its assets are ascertained, realized and applied in payment of its creditors according to their order of preference, and any residue distributed amongst its members according to their rights. The company's corporate existence is then put to an end by the formal process of dissolution."*[430]

Moreover, "deregistration" is the process whereby a formal end is put to a company which has become extinct. It is defined as the cancellation by the Registrar of the registration of a company's Memorandum and Articles, *as per* section 1(1) of the Companies Act. Deregistration is to be distinguished from dissolution which takes place either after the winding-up of a company in terms of section 419, or when a court provides for the dissolution of the transferor company after a reconstruction or amalgamation in terms of section 313(1)(d) of the "old" Companies Act.

---

[427] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 3.8.1.
[428] In *Ex Parte Trans-African Staff Pension Fund* 1959 (2) SA 23 (W) Dowling J held that the term: winding-up meant winding-up in the company law sense and nothing more or less.
[429] (70639/2010) [2011] ZAGPPHC 154 (13 May 2011).
[430] Cloete JA, in *R Miller v Nofcac Investment Holding Company Ltd* 2012 [4] SA 44 (SCA) at para 11 stated that deregistration *puts an end to the existence of the company. Its corporate personality ends in the same way that a natural person ceases to exist on death.* This was confirmed in *Suid-Afrikaanse Nasionale Lewensassuransie-Maatskapy v Rainbow Diamonds (Edms)* 1984 (3) SA 1 (A) at 10 -12.

4.2.1.2 TRANSFER OF ASSETS AND LIABILITIES

Brincker argues that, the "amalgamation or merger" provisions under the "new" Companies Act are not consistent with the "amalgamation transaction" provisions under section 44 of the Income Tax Act. Although section 44 of the Income Tax Act provides for the assumption of certain debts, it fails to expressly provide for the transfer of all assets and liabilities from the amalgamating company to the resulting company, as envisaged by section 1 of the "new" Companies Act.[431]

Brincker opines that the newly amalgamated company, in terms of the corporate definition of "amalgamation or merger" in the "new" Companies Act, must hold or be vested with *"all of the assets and liabilities that were held by the amalgamating companies."*[432] Section 44 of the Income Tax Act seems to restrict the assets of the amalgamating or merging company which may be disposed of and liabilities which may be assumed. Section 44 restricts the assumption of debts incurred within a period of eighteen months before the disposal of the assets, unless the debt constitutes the refinancing of a debt incurred more than eighteen months before that disposal, or where the debt is attributable to and arose in the normal course of the disposal, as a going concern, of a business undertaking of the newly amalgamated company as part of the transaction.[433]

One needs to be mindful of the enactment of the 2011 Amendment Act, in terms of which the debts incurred by an amalgamating company for the purposes of *"procuring, enabling, facilitating or funding the acquisition",* by the amalgamated company, may no longer be assumed by the amalgamated company. In contrast, the "amalgamation or merger" provisions in the "new" Companies Act do not include any similar restrictions as to which debts may be transferred.[434] This anti-avoidance rule,

---

[431] E Brincker "Interaction between company law and income tax law" (2012) *Cliffe Dekker Hofmeyr* http://www.polity.org.za/article/interaction-between-company-law-and-income-tax-law-2012-02-23 (accessed 13/08/2012) at 1.

[432] Brincker" Interaction between company law and income tax law" at 1.

[433] *Ibid.*

[434] *Ibid.*

in respect of debt-funded transactions, is an area of concern which merits the attention of either party wishing to qualify for rollover relief.[435]

The corporate restructuring provisions of the Income Tax Act envisage the assumption by an acquiring company of certain debts of the transferring company as part of a corporate restructuring transaction.[436] The "new" Companies Act refers to the term "liabilities" whereas the corporate restructuring rules, contained in Part III of the Income Tax Act, do not refer to "liabilities", but rather "debts".[437] There is clearly a discrepancy between the two legislations in this respect. Van der Berg states that, the understanding of the term "debt" from a tax point of view differs considerably from the concept of "liabilities" as referred in the "new" Companies Act, as "debt" would not include contingent liabilities.[438] The significance of this discrepancy lies in the fact that, in order to qualify for corporate rollover relief for income tax purposes, the transfer of assets from a qualifying transferor to a transferee together with qualifying debt generally obtains relief.[439] Where a liability that does not constitute a qualifying debt is transferred together with the qualifying assets, the subsequent relief would not necessarily be obtained. Ultimately, this would result in adverse income tax consequences for the parties to the transaction.[440]

In the case of a section 44 amalgamation transaction, the implication is that a portion of the assets taken over by the transferee would not be transferred to the transferor at tax cost, therefore triggering potential capital or revenue gains for the transferor.[441] Furthermore, the transferee would not acquire such portion of the assets at the transferor's base cost and would not assume the transferor's tax history to such portion of the assets.[442]

---

[435] Brincker" Interaction between company law and income tax law" at 1.
[436] Van der Berg "Companies Act v Tax Law: Guidelines" at 1.
[437] Van der Berg "Companies Act v Tax Law: Guidelines" at 1.
[438] *Ibid.*
[439] *Ibid.*
[440] BDO Tax Flash "Contingent liabilities and the corporate rules" (2012) *Moneywebtax* http://www.bdo.co.za/resources/showitemarticle.asp?ResourceSectionId=4&ResourceSectionName=Publications&ResourceId=7&ResourceName=Tax%20Flash&IssueId=373&ContentPageID=&Archive=&articleid=361 (accessed 15/12/2012) at 1.
[441] BDO Tax Flash "Contingent liabilities and the corporate rules" at 1.
[442] *Ibid.*

Despite the Taxation Laws Amendment Act introducing a new definition for the term "debt", it adds no significant value to the commonly understood meaning of the term.[443] The definition of the term "debt", being *"any amount owing by or to a person",* appears to be in line with the dictionary definition of the term. It is therefore plausible that this is the meaning that would most likely be ascribed to the term by an Income Tax Court even if the term has not been defined in the Income Tax Act.[444]

Gad and Strauss argue that, before the 2011 Amendment Act was promulgated, section 44 of the Income Tax Act and the statutory merger provisions, were irreconcilable mainly because previously section 44 required that the assets of the amalgamated company had to be disposed of to the resultant company "in exchange" for equity shares or for the *"assumption"* of certain debts. It is believed that where the underlying *causa* of the transaction is by operation of law, the assets would pass *ex lege* and not *"in exchange"* for equity shares or debts.[445] Therefore the rollover relief provisions would not apply, regardless of whether the transaction fell into paragraph (a) or paragraph (b) of the company definition of "amalgamation or merger".

When the 2011 Amendment Act came into effect it no longer required that the resultant company had to acquire the assets of the amalgamated company for a consideration. Prior thereto, the 2011 Amendment Act, section 44(4) of the Income Tax Act stated that rollover relief would apply only to the extent that the assets were disposed of *"in exchange for equity shares or the assumption of the relevant debts"*. Once the 2011 Amendment Act came into effect, section 44(4) provided that rollover relief would not apply to the extent that assets are *"disposed of in exchange for consideration other than equity shares or the assumption of the relevant debts".*[446] Therefore, where an amalgamated company disposes of its assets for no *quid quo pro*, as envisaged by operation of law *causa,* section 44(4) would no longer prevent the transaction from qualifying for the rollover relief.[447]

[443] BDO Tax Flash "Contingent liabilities and the corporate rules" at 1.
[444] *Ibid.*
[445] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 3.9.1.
[446] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 3.9.2.
[447] *Ibid.*

4.2.2 POTENTIAL TAX IMPLICATIONS IF NO ROLLOVER RELIEF APPLIES

The current corporate restructuring rules under the Income Tax Act fail to adequately deal with the introduction of the "amalgamation or merger" concept in company law. Where parties enter into such transactions but rollover relief as provided for in section 44 of the Income Tax Act does not apply, this may well give rise to unexpected tax consequences, which have not previously been considered. The tax authorities will therefore need to give due consideration to this newly introduced concept and the subsequent tax implications, which may arise, and amend the fiscal legislation accordingly.

As discussed hereinabove, the "amalgamation or merger" provisions under the "new" Companies Act contemplate a scenario where there is a either a formation of a new company, resulting in the dissolution of the amalgamating or merging companies, or the survival of one of the amalgamating or merging companies.[448] This is in contrast to section 44 of the Income Tax Act, which only contemplates a scenario where the company disposes of all of its assets to another company by means of *"amalgamation, conversion or merger"*, resulting in the termination of the amalgamated company's existence.[449] In this regard, as previously stated, where a party contemplates the implementation of an amalgamation transaction in terms of section 44(1)(b) of the Income Tax Act, the rollover relief provided for under section 44 of the Income Tax Act would not be available to the parties to the transaction, thus giving rise to potential tax implications, for instance:

(i) *the conversion of shares held in the amalgamating company into shares in the amalgamated company may trigger capital gains tax or income tax consequences for the shareholders;*

(ii) *the disposal of the assets by the amalgamating companies to the amalgamated company may trigger capital gains tax, income tax and recoupments for the amalgamating company itself.*[450]

[448] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8.
[449] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8; Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" at 15.
[450] *Ibid.*

In this regard, the Income Tax Act contains a number of provisions stipulating that in specific circumstances the disposal of asset will be deemed to take place at market value.[451] In this regard, paragraph 38 of the Eighth Schedule contains a deemed market value provision where an asset is disposed of for a consideration not measurable in money or for a price that is not arm's length between connected persons.[452]

According to Napier, the Income Tax Act has introduced a whole host of additional anti-avoidance provisions to address circumstances where value is transferred without triggering the appropriate tax, specifically where the parties concerned are not *"connected parties".*[453] In particular, section 40CA of the Income Tax Act provides that if a person acquires an asset in exchange for shares, that person is deemed to have incurred expenditure in relation to the acquisition of the asset equal to the market value of the shares issued as consideration immediately after the acquisition.[454] This provision deems that where a company acquires any assets in exchange for debt issued by it, the company must be deemed to have actually incurred an amount of expenditure in respect of the acquisition of the assets equal to the amount of that debt.

Moreover, section 24BA[455] of the Income Tax Act applies in circumstances where a company acquires an asset in exchange for the issue of shares by that company and the consideration differs from the consideration that would have applied between independent persons dealing at arm's length.[456] Accordingly, where there is a difference in the market values of the assets disposed of and shares issued as consideration for the acquisition of the assets, then section 24BA becomes applicable in the following terms:

---

[451] N Napier "Issues of shares as consideration" (2013) *Tax Man SA* http://taxmansa.co.za/issue-shares-consideration/ (accessed 19/11/2013) 1.

[452] Napier *"Issues of shares as consideration"* at 2.

[453] *Ibid.*

[454] *Ibid.*

[455] Section 24BA of the Income Tax Act applies if *"a company, for consideration, acquires an asset from a person in exchange for the issue by that company to that person of shares in that company; and the consideration . . . is . . . different from the consideration that would have applied had that asset been acquired in exchange for the issue of those shares in terms of [an arm's length transaction]."*

[456] Napier "Issues of shares as consideration" at 2.

(i) where the market value of the assets immediately before the disposal exceeds the market value after their issue, the amount of the excess must be deemed to be a capital gain;

(ii) where the market value of the shares issued in consideration immediately after that issue exceeds the market value of the assets immediately before the disposal, the amount of the excess must be deemed to be a section 64D dividend that consists of a distribution that consists of a distribution of an asset in specie.[457]

According to Mazansky, under the current rules where a creditor accepts an inadequate consideration in the discharge of a debt, this would invariably give rise to various consequences, *inter alia*, such as:

(i) if the debt used to fund deductible expenditure or assets in respect of which an allowance could be granted, an assessed loss could be reduced;

(ii) alternatively, the deductible expenditure, could be regarded as having been recouped, which would trigger a tax liability'; or

(iii) in the event that neither of the above applies, the reduction of the debt triggers CGT for the debtor.[458]

4.2.2.1 INCOME TAX IMPLICATIONS:

In normal circumstances, where shares are held as "trading stock", and those shares have been bought with the main objective of resale at a profit, any gain or subsequent loss on disposal would be revenue in nature. On the other hand, where shares are held as a capital asset, being a long term dividend-producing investment, any gain or subsequent loss upon disposal would be capital in nature.[459] In terms of

[457] Napier "Issues of shares as consideration" at 2 – 3.
[458] E Mazansky "South African: Tax Amendments – 2012" (2012) *Mondaq* http://www.mondaq.com/x/211024/tax+authorities/Tax+amendments+2012 (accessed 19/11/2013) at 2.
[459] SARS "Tax Guide foe Share Owners" (2006) http://www.moneywebtax.co.za/moneywebtax/action/media/downloadFile?media_fileid=129 (accessed 24/11/2013) at 5.

"amalgamation transactions", where trading stock of the amalgamating or merging company is transferred to the newly amalgamated or surviving merged company or companies, it clear that the definition of "gross income" in section 1 of the Income Tax Act needs to be considered in order to determine whether such transaction would be liable for income tax purposes and/or whether the necessary deductions in terms of section 11(a) of the Income Tax Act would be applicable.

> *Gross Income, in relation to any year or period of assessment, means –*
>
> *(i) in the case of any resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such resident; or*
>
> *(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic, during such year or period of assessment, excluding receipts or accruals of a capital nature.*[460]

The definition of gross income requires that the *"total amount, in cash or otherwise, received by or accrued to or in favour of"* the amalgamating or merging company, must be included in its gross income. In the case of *Lategan v CIR*[461], the court had to decide what amount had to be included in the taxpayer's gross income. The court held that the term amount included not only money, but the value of every form of property earned by the taxpayer, whether corporeal or incorporeal, which has a monetary value.[462] The court went on to say that gross income was not confined to an amount of money, but embraced every other form of property, including debts and rights of action.[463] Thus, it was established that there needs to be an actual amount received or accrued before any questions as to gross income arises and this amount need not necessarily be in the form of money. This position was confirmed in *CIR v People's Stores (Walvis Bay) (Pty) Ltd* 1933 AD 251.[464]

[460] Stiglingh *SILKE* 16.
[461] 1926 CPD 203, 2 SATC 16.
[462] Stiglingh *SILKE* 14.
[463] Haupt *Notes on South African Income Tax* 18.
[464] 1990 (2) SA 353 (A), 52 SATC 9 at 21.

Furthermore, to comply with the requirements of the gross income definition the said amount must be received *in cash or otherwise*.[465] These words were only added to the definition of gross income after the *Lategan* case. In *CIR v Delfos*[466] the court found *"in case or otherwise"* means not only receipts or accruals of money will be included in gross income, but this would also extend to amounts that have a monetary value and can be converted into money. In other words it is not only receipts and accruals of money that could fall into gross income. In respect of accrual, the court in *People's Stores* held that amounts "accrue" when a person *"becomes entitled"* thereto.[467]

Where assets and liabilities are transferred under contractual cause, the amalgamating company or companies will accrue an amount equal to the value of the assets and liabilities which the amalgamated company assumes.[468] In this respect, where assets and liabilities are transferred by operation of law, there is no need to comply with any of the legal formalities associated with transfer, it remains unclear whether in such circumstances the amalgamating company/companies would accrue or receive anything. However, in this regard it is suggested that the amalgamating company could have an accrual based on the mere fact that it automatically *"becomes entitled to"* a discharge of debt by operation of law.[469]

On the other hand, a more plausible argument could be that the amalgamating company/companies would earn no property from the transaction. The ordinary meaning of the word "earn" means to obtain or deserve (something) in return for efforts or merit. As the transaction occurs by operation of law, assets and liabilities would be transferred automatically and not for a *quid pro quo,* therefore, no "amount" accrues as contemplated in the *People's Stores* decision and the amalgamating company or companies would not *"become entitled"* to something in return for the transfer of its assets.[470]

---

[465] Stiglingh *SILKE* 18.
[466] 1933 AD 251 at 252.
[467] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.1.
[468] *Ibid.*
[469] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.1.1 – 2.1.2.
[470] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.1.2.

Where an amalgamated company has acquired trading stock it is necessary to consider whether it will be allowed to claim a deduction, in terms of section 11(a) of the Income Tax Act, which states "*expenditure and losses actually incurred in the production of income, provided such expenditure and losses are not of a capital nature.*"[471] In the matter of *CSARS v Labat*[472] it was held that the word "expenditure" is not restricted to an outlay of cash, but includes outlays of amounts in a form other than cash.[473] In other words, the cost of the trading stock is the value of the shares issued in exchange for the stock.

Section 22(4) of the Income Tax Act provides that the cost price of trading stock, for a person who acquires trading stock for no consideration or for consideration that is not measurable in terms of money, will be deemed to be its current market value on the date on which it was acquired by him/her.[474] Where it is not trading stock, its value is determined at its market value as at the date it is given in consideration.[475] Therefore, the cost of the trading stock, as set out in the agreement, would be deductible. Where, the trading stock is acquired by operation of law for no consideration, section 22(4) of the Income Tax Act would deem the cost of the trading stock to be equal to the current market price. In this instance the market value of the asset constitutes that base cost for the purposes of CGT, based on the market value of the asset.[476]

In the event that the amalgamating company or companies had previously claimed allowances in respect of capital assets, in terms section 8(4)(a) of the Income Tax Act, those amounts may be recovered or recouped.[477] In *Omnia Fertilizer Ltd v CSARS*[478] the appellant, a fertilizer manufacturer, had claimed a deduction against his income for expenditure relating to the purchase of raw materials. When certain of

[471] Stiglingh *SILKE* 135.
[472] (669/10) (2011) ZASCA 157.
[473] This description follows the decision in *Caltex Oil (SA) Limited v SIR* 1975 (1) SA 665 (A), in which it was held that, in a transaction of barter the value of the commodity promised in satisfaction of the obligation incurred would constitute expenditure incurred.
[474] Stiglingh *SILKE* 698.
[475] *Ibid.*
[476] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.4.
[477] Qualifying amounts, amounts previously allowed as a deduction or an allowance will be included in income if they have been recovered or recouped during the year of assessment.
[478] 65 SATC 159.

these creditors later failed to claim payment, the company, for accounting purposes, allocated the unclaimed debts to income, which the Commissioner included in the taxpayer's income under section 8(4)(a) of the Income Tax Act.[479] The court considered the meaning of "recovered or recouped" within the context of section 8(4)(a) of the Income Tax Act and held that it essentially meant to "return to the taxpayer's pocket" something which had previously been an expense. The Supreme Court of Appeal held that section 8(4)(a) had to do with recoupment of an amount, and not the extinction of a debt, and that a recoupment could occur, despite the continuing chance that the taxpayer might be asked to make payment. Therefore a recoupment had been made by the taxpayer.[480]

According to Gad and Strauss, an amalgamating company would have recoupments in respect of all allowances previously claimed, once the assets in respect of those allowances were claimed and are transferred in terms of the agreement. On the other hand, it is unclear whether the amalgamating company "returns" anything to its "pocket" when assets are transferred in exchange for nothing. However, in the *Omnia* case it was held that the taxpayer concerned "returned" something to its pocket by merely reversing an expense for accounting purposes, without actually receiving anything. The court further stated that as long as an amount, previously expended in the eyes of tax law, has reverted to the taxpayer's pocket, such taxpayer would be deemed to have recouped those amounts. This occurs when the resultant company assumes the liabilities of the amalgamating company by operation of law.

Where the amalgamated company has acquired capital assets from the amalgamating company, it may be entitled to claim capital allowances in respect of these assets. According to Gad and Strauss, capital allowances are calculated with reference to the "cost" of the asset or the expenditure actually incurred in respect of the asset.[481] In terms of the first scenario, where the transfer has occurred by

[479] Stiglingh *SILKE* 304.
[480] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.5 – 2.5.2; Stiglingh *SILKE* 304.
[481] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.5 – 2.5.2; Stiglingh *SILKE* 304.

agreement, the amalgamated company should be able to allocate a cost (typically the purchase consideration of the asset) to each asset acquired from the amalgamating company and should be entitled to claim allowances accordingly. Where the acquisition of assets has occurred by operation of law, the amalgamated company acquires the asset for no consideration and therefore incurs no expenses and bears no costs in respect of the assets acquired.[482]

4.2.2.2 CAPITAL GAINS TAX IMPLICATIONS

In South Africa there is no separate capital gains tax (hereinafter referred to as CGT), instead it has been incorporated into the Income Tax Act, as it is regarded as tax on income.[483] For a particular transaction to be subject to CGT, there must be a CGT event, i.e. it must either qualify as a disposal or as a deemed disposal and therefore CGT needs to be determined with reference to the "disposal" of an asset.[484] As a general rule, an asset is acquired or disposed of whenever there is a change of ownership of the asset. For the purposes of CGT "disposal" is broadly defined as *"any event, act, forbearance or operation of law which results in the creation, variation, transfer or extinction of an asset."*[485] Due to this wide definition, where an "amalgamation or merger" transaction is entered into either by means of a sale agreement or by the operation of law, the amalgamating companies would "dispose" of assets, assuming the agreement is not subject to suspensive conditions (which would not apply in the context of an amalgamation or merger).[486]

In the widest sense of the term rollover relief is a method for deferring a capital gain or loss. The deferral is achieved where the disposing party disregards the capital gain or loss, and the acquiring party simply "steps into the shoes" of the disposing party with regard to the details of the asset, such as date of acquisition, dates of incurral of expenditure, amount of expenditure and market value on valuation date.

---

[482] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.4.
[483] Stiglingh *et al SILKE* 848.
[484] Stiglingh *et al SILKE* 857.
[485] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 3.1; Stiglingh *et al SILKE* 857.
[486] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 3.1.

A capital gain or loss is the difference between the "base cost" of an affected asset and the consideration ("proceeds") realized or deemed to be realized upon the disposal or deemed disposal of that same asset. Base cost, in terms of paragraph 20 of the Eighth Schedule, refers to the cost of an asset against which any proceeds upon disposal are compared in order to determine whether a capital gain or loss has been realized. The base cost includes those costs actually incurred in acquiring, enhancing or disposing of a capital asset, that are not allowable as a deduction from income. Paragraph 20 generally contemplates "*expenditure actually incurred in respect of the cost of acquisition*" and *"amounts actually incurred as expenditure directly related to the acquisition."*[487]

It is submitted that the amalgamated company should be able to use the value of the purchase consideration, in terms of the agreement, as the base cost of the assets acquired. Gad and Strauss opine that the wording of paragraph 20 may, in fact, prevent the amalgamated company from having a base cost where the acquisition has occurred by operation of law, as the amalgamated company incurs no actual expenses or costs as a consideration for the assets acquired.[488] It is suggested that nothing will be incurred *"in respect of"* or *"directly-related"* to the acquisition, as the amalgamated company automatically becomes the owner of the assets by operation of law. [489]

In terms of paragraph 35 of the Eighth Schedule:

> *the proceeds from the disposal of an asset by a person are equal to the amount received by or accrued to, or which is treated as having been received by, or accrued to or in favour of, that person in respect of that disposal, and includes (a) the amount by which any debt owed by that person has been reduced or discharged. . .*[490]

[487] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 3.3.
[488] *Ibid.*
[489] *Ibid.*
[490] Paragraph 35 of the Eighth Schedule of the Income Tax Act.

The amalgamating company, in terms of the agreement, will have proceeds equal to the consideration value received or accrued which may include any debt assumed.[491] On the other hand, where the disposal occurs by operation of law, the amalgamating company would have no proceeds. The words "from" and "in respect of", as set out in paragraph 35, envisage a direct or causal relationship between the disposal and the proceeds, and such a link may be absent if the disposal is caused by operation of law.[492]

Paragraph 38 of the Eighth Schedule applies where:

> *a person disposed of an asset by means of a donation or for consideration not measurable in money or to a person who is a connected person in relation to that person for a consideration which does not reflect an arm's length price.*[493]

It is clear that the disposal to the amalgamated company will not be a donation, as a donation envisages a separate *causa.* Arguably, the amalgamating company disposes of assets for no consideration as a *quid quo pro*. In this regard, the assets are disposed of in return for shares. This paragraph should only apply where the parties are "connected persons", and the consideration would not reflect *an arm's length price.* Parties to an amalgamation transaction run the risk of being *connected persons*, especially where they share the same shareholders or where shares in the amalgamating company are converted into shares of the amalgamated company. In this regard, should paragraph 38 apply to either underlying *causa*, the disposal will be deemed to take place for proceeds equal to the market value of the assets.[494]

4.2.2.3 VALUE-ADDED TAX IMPLICATIONS

The Value-Added Tax Act[495] (hereinafter referred to as the "VAT Act") levies output tax on the supply of goods and services by a vendor in the course or furtherance of

---

[491] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 2.3.
[492] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 2.3.
[493] Paragraph 38 of the Eighth Schedule of the Income Tax Act.
[494] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 2.2 - 2.3.
[495] Act 89 of 1997.

an enterprise.[496] VAT is an indirect tax, which means that the tax is not assessed directly by SARS, but indirectly through the taxation of transactions. In turn, the supplier must pay the tax over to SARS, whilst the user pays VAT to the supplier when the goods or services are acquired.[497] Almost every time consumers purchase goods or services from a vendor in South Africa, they have to pay a price that includes VAT. In certain circumstances, an enterprise registered as a vendor may claim the VAT back from SARS.[498] Section 1 of the VAT Act defines supply as to include:

> *performance in terms of a sale, rental agreement, installment credit agreement and all other forms of supply, whether voluntary, compulsory or by operation of law, irrespective of where the supply is effected, and any derivative of supply shall be construed accordingly.*[499]

This definition can be widely interpreted so as to effectively cover most transactions.[500]

Where the underlying *causa* of the "amalgamation transaction" is a contractual cause, provided the amalgamating company is a registered vendor, a supply will be made to the amalgamated company in respect of goods sold for a consideration.[501] Where the transfer of goods occurs by operation of law this would constitute a supply as the definition of supply expressly provides for it.[502] Once a transfer constitutes a supply, the VAT Act requires that the value of such supply must be determined in relation to its consideration.[503] Section 1 of the VAT Act envisages consideration in relation to the supply of goods or services to include:

---

[496] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 4.1.
[497] Stiglingh *SILKE* 1017.
[498] Stiglingh *SILKE* 1016.
[499] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 4.1.
[500] *Ibid.*
[501] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 4.1.1.
[502] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 4.1.2.
[503] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 4.2.

any payment (whether cash or otherwise) made or to be made . . . in respect of, in response to, or for the inducement of, supply of any goods or services.[504]

Section 8(25) of the VAT Act envisages:

where any goods or services are supplied by a vendor to another vendor, those vendors must for the purposes of that supply or subsequent supplies of those goods or services, be deemed to be one and the same person provided the provisions of section 42, 44, 45 or 47 of the Income Tax Act are complied with: Provided that this subsection shall not apply to a supply contemplated in section 42 or 45 of the Income Tax Act, unless –

(i) that supply is of an enterprise or part of an enterprise which is capable of separate operation, where the supplier and recipient have agreed in writing that such enterprise or part, as the case may be, is disposed of as a going concern; or

(ii) the enterprise or part, as the case may be, disposed of as a going concern has been carried on in, on or in relation to goods or services applied mainly for purposes of such enterprise or part, as the case may be, and partly for other purposes, such goods or services shall, where disposed of to such recipient, for the purposes of this paragraph be deemed to form part of such enterprise or part, as the case may be, notwithstanding the provisions of paragraph (v) of the proviso to the definition of "enterprise" in section 1.

In terms of section 8(25) of the VAT Act, a special rule applies where goods or services are supplied by one vendor to another under a company formation transaction, such as an amalgamation transaction, as set out in Chapter 2 Part III of the Income Tax Act. The rule deems the vendors, for purposes of that supply or subsequent supplies, to be the same person/company. Effectively, therefore, no VAT needs to be levied on supplies under the corporate rules.

[504] Section 1 of the VAT Act.

According to Gad and Strauss, prior to the Revenue Laws Amendment Act, 2012, section 8(25) of the Vat Act provided relief in relation to the supply of goods or services by a vendor to another vendor where the supply took place pursuant to the vendors entering into one of the corporate restructures set out in section 42, 44, 45 or 47 of the Income Tax Act.[505] Where the requirements laid out in the Income Tax Act were satisfied, the vendors were deemed to be one and the same person and no tax consequence arose.[506] Following the amendment, the VAT relief will continue to apply to amalgamation and liquidation transactions as it did previously. In terms of the amendment, the relief will only apply in relation to intra-group and asset-for-share transactions if the disposal amounts to the supply of an enterprise or part of an enterprise which is capable of separate operation and where the supplier and recipient have agreed in writing that the enterprise or part is disposed of as a going concern.[507] In this case the two vendors are deemed to be one and the same person and therefore no VAT considerations arise.

If the amalgamation or merger does not comply with section 8(25) of the VAT Act, it could still qualify for zero rating as a going concern sale (section 11(1)(e) of the Income Tax Act).[508] In this regard, for a disposal to qualify for the zero rate of VAT the following requirements must be met:

- *(i) The parties must agree in writing that the enterprise is disposed of as a going concern;*
- *(ii) supplier and recipient must be registered vendors;*
- *(iii) The supply must be of an enterprise or part of an enterprise capable of separate operation;*
- *(iv) The supplier and the recipient must, at the time of concluding the agreement, agree in writing that the enterprise (or part thereof) will be an income earning activity on transfer;*

---

505 Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 4.2.
506 *Ibid.*
507 *Ibid.*
508 Cliffe Dekker Hofmeyr "Going concern and leased commercial property" (2013) https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm (accessed 24/10/2013) at 1.

(v) *The assets necessary for the carrying on of the enterprise must be disposed of; and*

(vi) *The supplier and the recipient must agree in writing that the consideration for the supply is inclusive of tax at the rate of zero per cent.*[509]

Accordingly, in concluding any agreement for the disposal of an enterprise or part thereof as a going concern, the taxpayer must ensure that the above requirements are satisfied. Failure to do so would automatically preclude the application of any zero rating of a transaction.[510]

4.2.2.4 TRANSFER DUTY IMPLICATIONS

Transfer duty is imposed on the transfer of immovable property. Generally, either transfer duty or VAT will apply to a transaction, but not both. However, in an amalgamation or merger, if section 8(25) of the VAT Act does not apply, the amalgamated company may, in certain circumstances, incur a transfer duty liability in respect of its acquisitions of immovable property.[511] This duty is imposed as a percentage on the higher of either the purchase price of the property being transferred (for companies this would be 8 per cent of the consideration) or the fair market value of the property. Where the transfer of assets occurs by contractual cause and transfer duty is levied, the amalgamated company would be liable for a duty equal to eight per cent of the consideration paid for the property or the market value, whichever is higher. Where the amalgamated company acquires immovable property for no consideration by operation of law, if transfer duty is levied it will be calculated in relation to the market value of the property.[512]

---

[509] Cliffe Dekker Hofmeyr "The sale of an enterprise as a going concern – SARS' interpretation" (2009)

[510] *Ibid.*

[511] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 5.1.

[512] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 5.1.1 – 5.1.2.

4.2.2.5 SECURITIES TRANSFER TAX

Securities transfer tax, in terms of the Securities Transfer Act, is levied on every transfer of a security at a rate of 0.25 per cent of the higher of the market value or the consideration paid for the security.[513]The tax is payable by the company which issued that security.[514]

Lewis opines that where a particular corporate restructure does not qualify for tax rollover relief in terms of section 42 to 47 of the Income Tax Act, it does not necessarily mean that it will not qualify for the securities transfer tax exemption in section 8(1)(a) of the Securities Transfer Tax Act.[515] It is submitted that amalgamation transactions which do not qualify for the income and capital gains tax relief may still qualify for securities transfer tax in terms of section 8(1)(a) of the Securities Transfer Act.[516]

Further, Lewis argues that securities transfer tax would not be payable in respect of transfer of a security in terms of an amalgamation transaction referred to in section 44 of the Income Tax Act.[517] In terms of section 44 of the Income Tax Act, one may enter into an "amalgamation transaction" even if the assets (including shares) are disposed of by an amalgamated company in exchange for a consideration other than equity shares in the resultant company. In these circumstances, the amalgamated company will not receive any tax rollover relief but may be entitled to rely on the securities transfer tax exemption in terms of section 8(1)(a)(ii) of the Securities Transfer Tax Act. Therefore, it is suggested that if this interpretation is correct, then there may be other corporate restructures which do not qualify for income tax and capital gains tax relief but qualify for the exemption.[518]

---

[513] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 6.1.
[514] *Ibid.*
[515] A Lewis "STT exemption may have wider application that originally thought" (2011) *Moneywebtax* http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page265?oid=62308&sn=Detail (accessed 25/06/2012) at 1.
[516] Lewis "STT exemption may have wider application that originally thought" at 1.
[517] *Ibid.*
[518] *Ibid.*

Moreover, section 113(2) of the "new" Companies Act provides that:

> *Two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out. . . (c) the manner in which the securities of each amalgamating or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property. . .*[519]

In light of the aforegoing, shares held in the amalgamating company may be converted into shares held in the amalgamated company. In this regard, the amalgamating company disposed of its net assets in return for shares in the amalgamated company. In the circumstances, these shares are transferred to the shareholders who in turn surrender their shares in the amalgamating company. The conversion from a securities law perspective is uncertain and it is questionable whether such conversion would give rise to securities transfer tax and/or other tax consequences.[520]

Inconsistencies between the "new" Companies Act and the Income Tax Act include, *inter alia,* the following:

- Section 44 of the Income Tax Act only contemplates a scenario where there are two companies, the amalgamating company and the amalgamated company, whilst the "new" Companies Act contemplates a scenario which includes multiples companies; and
- Section 44 of the Income Tax Act requires that all the assets of the amalgamating company be exchanged for shares in the amalgamated company, except in those instances where the debt is attributable to and arose in the normal course of the disposal, as a going concern.

---

[519] Section 113(2)(c) of the 'new' Companies Act.
[520] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 6.2 – 6.3.

4.2.3 THE TREATMENT OF INCONSISTENT PROVISIONS

According to Wellsted and Baptiste, the introduction of the "new" Companies Act has had a significant impact on the commercial landscape of South Africa.[521] The new company regime has introduced a number of significant changes in the way that business is done and it is questionable whether the tax legislation has adequately aligned itself with the legal implications of the "new" Companies Act. The purposes of the "new" Companies Act and the Income Tax Act are completely different.[522] The "new" Companies Act is more preoccupied with regulation of the affairs of corporate entities, such as promoting the development of the South African economy, innovation and investment in South African markets and balancing the rights and obligations of shareholders and directors within companies, and encouraging the efficient and responsible management of companies and providing for the efficient rescue and recovery of financially distressed companies in a manner that balances the rights and interests of all relevant stakeholders.[523] The Income Tax Act, on the other hand, constitutes fiscal legislation which has been designed to specify the taxation on income and provide mechanisms for the collection of these taxes.[524]

Another aspect which has not been dealt with sufficiently is what would happen in the event that the "new" Companies Act and the Income Tax Act provisions are not aligned? In this regard, the "new" Companies Act provides that in the case of inconsistency between the Acts, the provisions of both Acts would apply concurrently, to the extent that it is possible to apply the one inconsistent provision without contravening the other, and when it is impossible to apply or comply with one of the inconsistent provisions without contravening the other, the "new" Companies Act would prevail over the Income Tax Act.[525] It is questionable whether a rule such as this in one piece of legislation is competent in the way it seeks to establish itself

[521] A Wellsted and T Baptiste "CGT and the Companies Act – Some Issues to Consider" (2012) *The South African Institute of Tax Practitioners* http://www.thesait.org.za/news/103226/CGT-and-the-Companies-Act--Some-Issues-to-Consider.htm (accessed 23/08/2012) at 1.
[522] *Ibid.*
[523] Wellsted and Baptiste "CGT and the Companies Act – Some Issues to Consider" at 1.
[524] *Ibid.*
[525] Lewis "STT exemption may have wider application that originally thought" at 1.

above other legislations. It is suggested that the Legislator would need to take cognizance of this fact and make the necessary rulings.

4.2.4 CONCLUSION

The purpose of this chapter was to marry the discussion in Chapter 2 and 3 of this research thesis and more importantly identify the potential inconsistencies that exist between the “new” Companies Act and the Income Tax Act, specifically with regard to “amalgamation transactions”.

Moreover, this chapter presents a discussion of the potential income tax, capital gains tax, value-added tax, transfer duty and the securities transfer tax implications that may arise due to the “amalgamation or merger” transaction wholly or partly falling outside the ambit of the rollover relief provisions as envisaged by the Income Tax Act. By presenting this discussion it becomes abundantly clear that certain anomalies exist between the “new” Companies Act and the Income Tax Act and as a result of this certain implications, particularly tax implications, have been overlooked by the Legislature.

Furthermore, it was argued that regardless of which interpretation of the underlying *causa* with regard to the “amalgamation or merger transaction” is correct, contractual or by operation of law, the implementation of an amalgamation transaction or any other restructuring transaction may lead to unexpected tax consequences if the requirements of the corporate rules in section 42 to 47 of the Income Tax Act are not satisfied. Therefore, it was submitted that until such time that the Legislator makes the necessary amendments to the “new” Companies Act and/or the Income Tax Act to bring them in line with one another, it is advisable that parties wishing to initiate corporate restructuring provisions would need to seek professional advice to ensure that they are made aware of the potential tax implications.

Another difference between the provisions of the “new” Companies Act and the provisions of section 44 of the Income Tax Act is that, in the definition of an “amalgamation transaction” in section 44(1), reference is made to the transfer of

assets by an amalgamated company to the resultant company by means of "an amalgamation, conversion or merger". The term "conversion" is not defined or dealt with in the Income Tax Act at all, or contemplated in the amalgamation provisions of the "new" Companies Act. Although the present thesis deals only with amalgamations and mergers, the use of this term gives rise to further uncertainty.

CHAPTER 5: CONCLUSION

5.1 INTRODUCTION

As set out in Chapter 1, the goals of the research are, firstly, to discuss the "new" Companies Act 71 of 2008 and the Income Tax Act 58 of 1962 with regard to the newly introduced "amalgamation and merger" provisions in the "new" Companies Act and to highlight the potential tax implications resulting from such corporate restructuring, and, secondly, to identify the inconsistencies that exist between the "new" Companies Act and the Income Tax Act , with respect to the newly introduced "amalgamation and merger" provisions. This thesis also identifies the potential income tax, capital gains tax, value-added tax, transfer duty and securities transfer tax effects of a statutory merger, on the assumption that the corporate rollover relief does not apply.

The importance of this research originates from the 2012 Budget Review, where the Minister of Finance acknowledged that the introduction of the "new" Companies Act has given rise to certain anomalies in relation to tax, and confirmed that the South African government would review the nature of company mergers, acquisitions and other corporate restructurings with the view to amending either the Income Tax Act and/or the "new" Companies Act over the next two years, to overcome these anomalies. It is of concern that the application and implementation of merger and/or amalgamation transactions, in particular, as it stands now, could have far reaching consequences and tax implications due to the anomalies that exist between the two Legislations.

In this regard, the need for and the importance of this research thesis is to identify the tax implications that may arise when entering into amalgamation or merger transactions and the consequences arising from the various inconsistencies that exist between the Income Tax Act and the "new" Companies Act, which result in certain transactions falling outside the ambit of the corporate rollover relief provisions that allow for tax deferrals.

5.2 REVIEW OF FINDINGS OF THE RESEARCH

5.2.1 CHAPTER 2: FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

Chapter 2 of this research thesis reviewed the so-called "fundamental transaction" which falls within the ambit of Chapter 5 Part A of the "new" Companies Act. More importantly, this research focused on the on the newly introduced "amalgamation or merger" transaction/concept, which has created a statutory mechanism whereby two or more companies can merge their respective assets and liabilities into one or more combined company/companies.[526]

The discussion, in Chapter 2, highlighted the importance of the "new" Companies Act in that, in a number instances, the "old" Companies Act regime was outdated and out of line with company law international trends. It was submitted that the promulgation of the "new" Companies Act has effectively modernized the South African company law framework, by overhauling the previous company regime and, *inter alia*, introduced new concepts such as "fundamental transaction", a generic term given to all business transactions or dealings falling within Chapter 5 Part A of the "new" Companies Act.[527]

Although Chapter 2 briefly introduced the traditional mechanisms under the "old" Companies Act, the focus in this chapter is with regard to the newly introduced "amalgamation or merger" transaction. This introduction was described by Cassim *et al*, as one of the leading reforms of the "new" Companies Act, in that the "old" Companies Act did not provide rules for the combination of two or more companies into one as envisaged by the "amalgamation or merger" concept.[528]

---

[526] Cassim *et al Contemporary Law* 676.
[527] Oppenheim and Douglas "South Africa: Heating up" at 1; Douglas and Green "South Africa: Modernising corporate law" (2010) at 1.
[528] Cassim *et al Contemporary Law* 674; Druker (2011) 1 *JSR* at 1.

In essence, the adoption of the "amalgamation or merger", or so-called "statutory merger"[529] procedure, into the "new" Companies Act represents the pooling of assets and liabilities of two or more companies into one or more companies, which may be achieved by combining the companies or, alternatively, by forming a new company.[530]

Section 1 of the "new" Companies Act contemplates the mechanism as follows:

> *a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in –*
>
> *(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreements, and the dissolution of each of the amalgamating or merging companies; or*
>
> *(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by the amalgamating or merging companies immediately before the implementation of the agreement.*[531]

It was submitted that this statutory mechanism represents a significant departure from the previous company regime and has, effectively, aligned South African company law with a number of major jurisdictions worldwide, including the United States of America, France, Germany and Canada, all of whom have implemented or adopted some form of statutory merger procedure.[532] Gad and Straus have

[529] Bouwman (2009) 9 *Without Prejudice* at 34.
[530] Cassim *et al Contemporary Law* 676.
[531] Section 1 of the Companies Act 71 of 2008; Cassim *et al Contemporary Company Law* 678; Davids *et al* 2010 *Acta Juridica* 337 at 341; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 2.
[532] Cassim *et al Contemporary Company Law* 677.

described this regime as *"a simple, uncomplicated and effective procedure by which companies may merge by agreement, with the approval of the prescribed majority of shareholders and without the need of any court procedure, which brings South Africa in line with international best practice."*[533]

Under the "old" Companies Act, companies could only merge by way of a sale of shares or business, whereas the "new" Companies Act provides new provisions which deal specifically with mergers and amalgamations.

Further, it was submitted that, despite the best intentions of the Legislator, the introduction of the much needed statutory "amalgamation or merger", has given rise to a fair amount of valid criticism against the interpretation of the concept and the implementation thereof.

Chapter 2 identified the significance of the "amalgamation or merger" concept, by reviewing the opinions of various leading academics who have published work on the subject matter. As evidenced by the discussion, it is abundantly clear that even scholars on this subject matter are not yet at consensus in terms of the ramifications and implications which the concept of "amalgamation or merger" poses.

Further, the central theme of Chapter 2 revolved around sections 113 and 116 of the "new" Companies Act, which sets out the amalgamation and merger procedures. In this regard it is shown that these provisions are new and unfamiliar as they cater for the transfer of property through legislative mechanisms. It was shown that before the inception of the amalgamation or merger provision, the transfer of assets and liabilities was facilitated by the registration of immovable property, the delivery of movable things and the delegation or assignment of liabilities.[534] In comparison, the "new" Companies Act contains a long and detailed list of requirements for the conclusion of a merger transaction, including that each merged entity must comply with the solvency and liquidity tests after the implementation of the merger.

---

[533] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1; Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at 1.

[534] Bouwman (2009) 9 *Without Prejudice* at 34.

In this regard, section 116(7) of the "new" Companies Act provides that upon implementation of a merger agreement, the property of each merging company becomes the property of the surviving company, which is in turn liable for all the obligations of the amalgamating or merging company. In this respect, all assets and liabilities of the amalgamating or merger company would vest in the amalgamated or merged company once the amalgamation or merger has been implemented, which arguably occurs by operation of law.[535]

Upon analysing the effect of the implementation of an amalgamation or merger agreement in terms of section 116(7) and (8) of the "new" Companies Act, it was submitted that, on the face of it, one of the key advantages of the new merger procedure is that all the assets and liabilities of the merging companies would vest automatically in the amalgamated company or companies, by operation of law, as mentioned above.[536]

However, upon closer inspection, it would seem that the provisions provided for in the "new" Companies Act, do not necessarily necessitate the transfer of assets and obligations by operation of law, as the relevant provisions fail to expressly state that the company or companies would automatically "step into the shoes" of the merging companies (or that the assets and obligations would transfer by operation of law). In this regard, Davids *et al* are of the opinion that the qualification of the general rule that all liabilities of the merging companies are assumed by the surviving company subject to any other agreement is unfortunate and potentially confusing. The fact that the transfer of obligations (under section 116(7)(b) of the "new" Companies Act) is subject to certain qualifications, whereas the transfer of property (under section 116(7)(a)) is not, presents a potentially confusing situation which is not clarified by the relevant Legislation.[537]

From the discussion in Chapter 2, it is obvious that there are a number of issues and ramifications which will arise upon the implementation of a merger. In this regard, it is submitted that, due to the many outstanding issues surrounding the

[535] Bouwman (2009) 9 *Without Prejudice* at 34; Davids *et al* 2012 *Acta Juridica* 337 at 349.
[536] *Ibid.*
[537] Davids *et al* 2012 *Acta Juridica* 337 at 349.

implementation of mergers, certain amendments would need to be effected to a variety of different legislation, to clarify the implementation thereof. In particular, and relevant for this research, it is clear that certain amendments would need to be effected to the tax and/or the company law legislation to bring them in line with each other, to avoid the many unnecessary tax implications surrounding "mergers or amalgamations".

Notwithstanding the many anomalies that exist between the Income Tax Act and the "new" Companies Act, the introduction of the "amalgamation or merger" transaction, into South Africa's company law framework, is largely welcomed. However, it is common cause that due to the anomalies that do exist, there is a fair amount of uncertainty surrounding the tax implications of "mergers or amalgamations" that need to be ironed out by the Legislature.

5.2.2 CHAPTER 3: CORPORATE RESTRUCTURING RULES - ROLLOVER RELIEF

Chapter 3 addressed the corporate restructuring rules contained in sections 41 to 47 of the Income Tax Act, which provide special rules for corporate rollover relief and allow for deferrals of normal tax consequences in corporate restructuring transactions. More specifically, this Chapter analysed section 44 of the Income Tax Act (dealing with amalgamation transactions) which provides for the disposal of assets by one company to another. This Chapter demonstrated that an amalgamation transaction, like any other corporate restructuring transaction, has its own set of requirements that need to be satisfied in order for the transaction to be entered into with no immediate capital gains or income tax implications.[538] Where such transaction fails to satisfy all the requirements, it will fall outside the applicability of the corporate rules and will be subject to certain tax implications.[539]

An amalgamation transaction, under section 44 of the Income Tax Act, envisages that the amalgamated company disposes of all its assets to the resultant company,

---

[538] De Koker *Silke on South African Income Tax* at 13.32.
[539] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 3.2.

with the exception of the assets it elects to use to settle debts incurred in the ordinary course of trade.[540] Where a transfer, or disposal, of assets occurs this would, in normal circumstances, give rise to various tax implications, but where a transaction is structured as contemplated in terms of section 44 of the Income Tax Act, this would facilitate corporate rollover relief in terms of which tax is deferred.

The analysis of section 44 of the Income Tax Act demonstrated that it is clear in that in order to obtain the maximum tax benefits upon entering into corporate restructuring, such as the "amalgamation transaction", strict compliance with the specific corporate rules, as set out in the Income Tax Act, is absolutely necessary.[541] Notwithstanding this, Chapter 3 showed that compliance with the corporate rules differs in many ways to the requirements presented by the statutory merger provisions in the "new" Companies Act.[542] In this regard, it was shown that there is a general misconception that a statutory merger transaction automatically qualifies as an "amalgamation transaction", as envisaged in terms of section 44 of the Income Tax Act, which ordinarily qualifies for tax rollover relief.[543]

In amplification of the above, Chapter 3 provided an in-depth analysis of the tax consequences that flow from sections 44(2) and (3) of the Income Tax Act, which would ordinarily provide tax rollover relief to an amalgamated company, and the resultant company, where the amalgamated company disposes of assets to the resultant company. It was shown that this may include capital assets, trading stock, an allowance asset or other allowances, as set out more fully hereunder:

(i) the amalgamated company is deemed to have disposed of any capital asset, at its base cost, and the resultant company and the amalgamated company are deemed to be one and the same person, with respect to the date of acquisition of the asset, and all expenses allowable, under

[540] De Koker *Silke on South African Income Tax* at 13.34; Gad and Strauss The impact of statutory mergers on current tax Legislation: Part 1 at para 3.7.
[541] Van der Berg "Companies Act v Tax Law: Guidelines" (2012) at 1.
[542] *Ibid.*
[543] Gad and Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" at 1.

paragraph 20 of the Eighth Schedule, and the valuation of the asset for the capital gains or capital loss tax purposes;

(ii) the amalgamated company is deemed to have disposed of any trading stock at tax value, and the resultant company is deemed to be one and the same person as the amalgamated company as far as the date of acquisition of the stock is concerned, and any costs or expenses incurred in respect of the cost or acquisition of the stock are concerned;

(iii) the amalgamated company is deemed to have disposed of any allowance asset at its tax value, the resultant company is deemed to be one and the same person as the amalgamated company as far as claiming allowances on the asset is concerned, and as far as recoupment is concerned; and

(iv) where a contract is transferred, as part of the disposal of a business as a going concern, any section 24C allowances (in respect of future expenditure on contracts) will also be transferred.[544]

Chapter 3 also sets out the limitations of sections 44(2) and (3) of the Income Tax Act. In this regard, it is submitted that an “amalgamation transaction” involves the disposal by a company, (the amalgamated company) of all its assets to a resident company (the resultant company) by means of an amalgamation, conversion or merger resulting in the termination of the amalgamated company’s existence.[545] The transfer or disposal of assets would, in normal circumstances, be taxable. However, a transaction as contemplated in terms of section 44 of the Income Tax Act facilitates tax rollover relief that one would not normally be afforded.

Moreover, the limitation on the application of the rollover relief is set out more clearly in section 44(4) of the Income Tax Act. This provision provides that the rollover relief provisions would only apply to the extent that the amalgamated company receives equity shares in the resultant company, or assumes certain debts incurred by the amalgamated company, in return for the assets disposed of by the amalgamated company.[546]

[544] Haupt *Notes on South African Income Tax* 366.
[545] De Koker *Silke on South African Income Tax* at 13.34.
[546] Haupt *Notes on South African Income Tax* 366.

Further, it was highlighted that the debt, which may be assumed in these circumstances, extends only to a debt incurred more than eighteen months before the disposal, and refinancing of the aforesaid debt, and any debt which is attributable to, and arose in the normal course of the disposal, as a going concern, of a business undertaking to the resultant company as part of the amalgamation transaction.[547]

Chapter 3 also briefly discussed the tax relief that is provided for in addition to the Income Tax Act. It was explained that the Value-Added Tax Act, the Securities Transfer Tax Act, and the Transfer Duty Act each provide tax relief in various circumstances when certain transactions are undertaken.[548] In this regard, it was submitted that section 8(1)(a) of the Securities Transfer Tax Act provides relief under qualifying circumstances from securities transfer tax.[549] Moreover, in terms of section 9(1)(l)(i) of the Transfer Duty Act, no transfer duty is payable in respect of property acquired by a company in terms of an "amalgamation transaction", contemplated in section 44 of the Income Tax Act, where the public officer of the company has submitted a sworn affidavit or solemn declaration that the amalgamation complies with the provisions contained in section 44 of the Income Tax Act.[550]

It was demonstrated that, in respect of VAT, a special rule comes into play where goods or services are supplied by one vendor to another under an amalgamation transaction.[551] In this regard, in terms of section 8(25) of the VAT Act, the transfer between two VAT vendors is deemed to be a non-supply and therefore the transferee merely "steps into the shoes" of the transferor.[552] Importantly, a section 44 transaction will only qualify for the VAT relief if the supply is of an enterprise (or part thereof) where the supplier and recipient have agreed in writing that the enterprise is disposed of as a going concern.[553]

---

[547] Clegg and Stretch *Income Tax in South Africa* at 24.9; Haupt *Notes on South African Income Tax* 366.
[548] J Liedenburg "New VAT requirements for corporate restructuring transactions" (2010) http://www.lexology.com/library/detail.aspx?g=af805522-ac3c-49e9-b4a7-41b1ee219460 (accessed 30/12/2012) at 1.
[549] Stiglingh *et al SILKE* 496.
[550] Stiglingh *et al SILKE* 496; De Koker *Silke on South African Income Tax* at 13.34.
[551] De Koker *Silke on South African Income Tax* at 13.34.
[552] Haupt *Notes on South African Income Tax* 370.
[553] *Ibid.*

5.2.3 CHAPTER 4: POTENTIAL INCONSISTENCIES BETWEEN THE "NEW" COMPANIES ACT AND THE INCOME TAX ACT

Chapter 4 of this research thesis attempted to address the main goal of this thesis by comparing the provisions of the "new" Companies Act and the Income Tax Act as discussed in Chapters 2 and 3 respectively, and by identifying the potential inconsistencies that exist between the "new" Companies Act and the Income Tax Act, specifically in relation to the provisions for an amalgamation or merger transaction and the amalgamation transaction in the respective statutes. In doing so, Chapter 4 provided a critical comparison of the "new" Companies Act and the Income Tax Act, insofar as they relate to "amalgamation or merger" transactions. Moreover, Chapter 4 considered the requirements of section 44 of the Income Tax Act and identified certain instances where the Income Tax Act and the "new" Companies Act are not adequately aligned, resulting in various tax implications.

In this regard, Chapter 4 showed that, in terms of the "new" Companies Act, the underlying *causa* of an "amalgamation or merger" transaction facilitating the transfer of assets and liabilities can be either:

(i) *the typical contractual causes for the transfer of assets and liabilities (such as sale, cession, delegation, etc.) in terms of the agreement between the parties; or*

(ii) *the automatic operation of law, whereby the assets and liabilities pass ex lege and there would be no sale causa where the amalgamating companies dispose of assets in exchange for consideration and the assumption of liabilities, to the amalgamated company.*[554]

Further, it was submitted that section 1 of the "new" Companies Act, clearly contemplates two scenarios where there is either the formation of a new company and the amalgamating or merging companies are dissolved, or one of the

[554] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 1" at para 1.2 - 1.2.2.

amalgamating or merging companies survives.[555] By comparison, section 44 of the Income Tax Act only contemplates a situation where a company disposes of all of its assets to another company, by means of *amalgamation, conversion or merger,* in which case the amalgamated company's existence is terminated.[556] On the plain reading of the above provisions, section 44 of the Income Tax Act clearly does not contemplate a scenario where at least one of the amalgamating or merging companies survives, and all of the assets and liabilities are vested in the surviving company.[557] Essentially, where one considers implementing an amalgamation transaction contemplated in the aforesaid scenario, the rollover relief provided for in terms of section 44 of the Income Tax Act would not be available, which would invariably give rise to tax implications.[558]

In addition, Chapter 4 set out certain technical inconsistencies between the "new" Companies Act and the Income Tax Act. For example, the "new" Companies Act refers to the *"dissolution"* of the amalgamating or merging companies, whereas the Income Tax Act makes reference to the *"termination"* of the amalgamated company's existence. In amplification of this, it was argued that section 44(13) of the Income Tax Act requires that steps be taken to *liquidate, wind-up or deregister the amalgamating or merging company or companies*. In this regard, Gad and Strauss disagree on the basis that the word *"dissolution"* is a legal concept distinct from *"liquidation", "winding-up" or "deregistration"*.[559]

Moreover, the definition of "amalgamation or merger", in the "new" Companies Act, provides that the dissolution of the amalgamating or merging company or companies must occur immediately upon the implementation of the transaction, whereas section 44 of the Income Tax Act affords the parties to the transactions, eighteen months after the disposal, to "take steps" to liquidate, wind-up or deregister the amalgamating or merging company or companies. As submitted in Chapter 4, there

---

[555] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8.
[556] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8; Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" at 15.
[557] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8.
[558] Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" at 15.
[559] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 3.8.1.

is no doubt that an inconsistent approach exists insofar as it relates to the time periods for the dissolution, liquidation, winding-up or deregistration, whatever the case may be.

Chapter 4 also addressed the potential tax implications which would arise where parties/companies enter into transactions but no rollover relief as provided for in section 44 of the Income Tax Act applies due to current corporate restructuring rules under the Income Tax Act failing to adequately deal with the introduction of the "amalgamation or merger" concept under the new company regime. It was submitted that the aforementioned scenario may well give rise to unexpected tax consequences and implications which have not previously been considered. In this regard the possible income tax, capital gains tax, value-added tax, transfer duty and securities transfer tax consequences were discussed on the assumption that the "amalgamation or merger" transaction, wholly or partly, falls outside the ambit of the rollover relief provisions of section 44 of the Income Tax Act.

5.2.3.1 INCOME TAX IMPLICATIONS

Chapter 4 of this research thesis briefly highlighted the potential income tax implications in respect of "merger or amalgamation" transactions. In this regard, it was shown, *inter alia*, that where assets and liabilities are transferred in terms of a contractual *causa*, the amalgamating company or companies will accrue an amount equal to the value of the assets and liabilities which the amalgamated company assumes.[560]

On the other hand, it was argued that where assets and liabilities are transferred by operation of law, it remains unclear whether the amalgamating companies would accrue or receive anything. However, it was inferred that the amalgamating company could have an accrual on the premise that the amalgamating company automatically becomes entitled to a discharge of debt by operation of law.[561] In this regard, a more

[560] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.1.2.
[561] *Ibid.*

plausible argument was presented, in that the amalgamating company or companies would earn no property from the “amalgamation or merger” transaction.[562]

In light of the aforegoing, the ordinary meaning of the word “earn” was considered and suggested to mean “obtain or deserve (something) in return for efforts or merits”, and where a transaction occurs by operation of law, assets and liabilities would be transferred automatically with no *quid pro quo* being proffered.[563] Thus, no “amount” would accrue as envisaged by the *People’s Stores* decision.[564] In this respect, the amalgamating company or companies would not “become entitled” to something in return for the transfer of its assets, and no income tax implication would be occasioned.[565]

Moreover, in terms of section 11(a) of the Income Tax Act, *“expenditure and losses actually incurred in the production of income*” would be deductible and therefore where an amalgamated company has acquired trading stock the question was whether the cost (or value) would be deductible.[566] In this regard, it was submitted that the cost price paid for the trading stock would be deductible. However, where the amalgamating company acquires revenue assets which do not fall within the definition of “trading stock”, no deduction would be allowable in terms of section 11(a) of the Income Tax Act.[567] Therefore, it is pertinent that the acquisition of trading stock falls within the definition of same in order to allow the deduction. Where the trading stock is acquired by operation of law for no consideration, then section 22(4) of the Income Tax Act would deem the cost of the trading stock to be equal to the market price, which would therefore be deductible.[568]

Further, in terms of the acquisition of capital assets, where an amalgamated company has acquired capital assets from the amalgamating company, it may claim

---

[562] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at para 2.1.2.
[563] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at para 2.1.1 - 2.1.2.
[564] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at para 2.1.2.
[565] *Ibid.*
[566] Stiglingh *SILKE* 135.
[567] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at para 2.4.
[568] *Ibid.*

a capital allowance in respect of these assets acquired.[569] On the other hand, where the transfer has occurred by agreement, the amalgamated company may allocate a cost to each asset acquired from the amalgamating company and would be allowed to claim the allowance. On the other hand, where the acquisition of assets has occurred by operation of law, the amalgamated company acquires the asset, for no consideration, and would therefore not incur any expense, meaning that no deduction would be allowed in this scenario.[570]

5.2.3.2 CAPITAL GAINS TAX IMPLICATIONS

In terms of CGT, it was explained that in order for a transaction to attract CGT there must be a CGT event, which would be occasioned by a disposal or a deemed disposal.[571] In this respect rollover relief provides for the deferral of a capital gain or loss, whereby the disposing party disregards the capital gain or loss, and the acquiring party steps into the shoes of the disposing party with regard to the details of the asset, such as date of acquisition, date of incurred expenditure, amount of expenditure and market value on valuation date.

In respect of paragraph 20 of the Eighth Schedule, it was submitted that the wording of this schedule would prevent the amalgamated company from having a base cost where the acquisition of the amalgamating company occurs by operation of law, in that the amalgamating company would incur no actual expense or costs. Essentially, this would mean that nothing would be incurred in respect of the acquisition, due to the fact that the amalgamating company becomes the owner of the assets by operation of law.[572]

Further, in terms of paragraph 35 of the Eighth Schedule, it may be inferred that the amalgamating company, in terms of the merging or amalgamating agreement, would acquire proceeds equal to the consideration value received or accrued. On the other hand, where the disposal occurs by operation of law, the amalgamating company

[569] Stiglingh *SILKE* 304.
[570] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at para 2.4.
[571] Stiglingh *et al SILKE 857.*
[572] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 2.3.

would acquire no proceeds. In light of this, it is indicative that the words “from” and “in respect of” envisage a direct or causal relationship between the disposal and the proceeds. In this regard it was submitted that the link may be absent where the disposal occurs by operation of law.[573]

5.2.3.3 VALUE-ADDED TAX

It was submitted that where the underlying *causa* of the “amalgamation transaction” is a contractual cause, and the amalgamating company is a registered vendor, a supply would be made to the amalgamated company in respect of the goods sold for a consideration.[574] On the other hand, where the transfer of goods occurs by operation of law, this would constitute a supply in terms of the definition thereof.[575] In this regard, once a transfer constitutes a supply, the VAT Act requires that the value of such supply must be determined in relation to its consideration, which, in terms of section 1 of the VAT Act, includes *“any payment (whether cash or otherwise) made or to be made . . . in respect of, in response to, or for the inducement of, supply of any goods or services.”*[576]

However, as discussed in Chapter 4, section 8(25) of the VAT Act provides for a special rule where goods or services are supplied by one vendor to another under a company formation transaction, such as an amalgamation transaction. According to this rule, vendors are deemed to be the same company for that specific supply which means that no VAT would be levied on the supplies where one undertakes transactions in terms of the corporate rules.[577]

5.2.3.4 TRANSFER DUTY

Chapter 4 highlighted the fact that, in the circumstances where a transaction involved the transfer of immovable property, one would normally be liable for transfer

[573] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at 2.3.
[574] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at 4.1.1.
[575] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at 4.1.2.
[576] Section 1 of the VAT Act.
[577] Gad and Strauss “The impact of statutory mergers on current tax Legislation: Part 2” at 4.2.

duty or VAT on that specific transaction, but not both. Therefore, where section 8(25) of the VAT Act is not applicable, the "amalgamating transaction" may still incur transfer duty in respect of the acquisition of the immovable property.[578] Importantly, where the transfer of assets occurs by a contractual *causa* and transfer duty is levied, the amalgamating company would be liable for the duty, calculated by applying the rate of eight per cent of the consideration paid for the property or the market value thereof, whichever is the greater. On the other hand, where the amalgamating company acquires the immovable property for no consideration, by operation of law, if transfer duty is levied, this would be calculated in relation to the market value thereof.[579]

5.2.3.5 SECURITIES TRANSFER TAX

In Chapter 4 it was submitted that "amalgamation transactions", as envisaged by the Income Tax Act, which do not qualify for income tax and capital gains tax relief, may in certain circumstances qualify for securities transfer tax in terms of section 8(1)(a) of the Securities Transfer Tax Act.[580] Therefore, although the "amalgamation transaction" itself may not qualify for rollover relief, in terms of the corporate rules, it does not mean that the same transaction may not qualify for the securities transfer tax exemption.[581]

5.3 CONCLUDING REMARKS

Amalgamation or merger transactions have been introduced into the "new" Companies Act without fully appreciating the Income Tax Act implications. The fact is that, upon reading the respective provisions, it is clear that the provisions in the "new" Companies Act and the Income Tax Act do not make reference to one another. It has been submitted that the "new" Companies Act clearly contemplates two scenarios; there is either the formation of a new company and the amalgamating

---

[578] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 5.1.
[579] Gad and Strauss "The impact of statutory mergers on current tax Legislation: Part 2" at 5.1.1 – 5.1.2.
[580] Lewis "STT exemption may have wider application that originally thought" at 1.
[581] *Ibid.*

or merging companies are dissolved; or one of the amalgamating or merging companies survives. The Income Tax Act however only contemplates a company that disposes of all of its assets to another company by means of amalgamation, conversion or merger where the amalgamated company's existence is terminated.[582]

The present research has ultimately concluded that various inconsistencies exist between the "new" Companies Act and the Income Tax Act in respect of amalgamation or merger transactions.

In light of the inconsistencies existing between the legislation applying to amalgamations and mergers, it is submitted that the tax rollover relief, which would, in normal circumstances, be afforded to a transaction in terms of the corporate rules, will now fall outside the ambit and application of such and will therefore result in various tax implications being triggered.

Lastly, where inconsistencies do exist between the "new" Companies Act and the Income Tax Act, it is important to note that in normal circumstances the provisions of both legislations would apply concurrently, to the extent that it is possible to apply one inconsistent without contravening the other. However, to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the other, the "new" Companies Act would prevail over the Income Tax Act.[583]

[582] Lewis "New amalgamation provisions not aligned with the Income Tax Act" at 8; Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" at 15.
[583] Lewis "STT exemption may have wider application that originally thought" at 1.

BIBLIOGRAPHY

AT Adebanjo *Remedies for Dissenting Shareholders: A comparison of the current option of personal action and the proposed appraisal remedy under the Companies Bill of 2008* (Masters Degree Thesis Unpublished, University of South Africa, 2008).

C Beukes "Amalgamations: Possible BEE concessions" (2012) 25 *Tax Planning*.

HGL Beukes "An Introduction to the Appraisal Remedy as Proposed in the Companies Bill: Triggering Actions and the Differences between the Appraisal Remedy and Existing Shareholder Remedies" (2008) 20 *SA Merc LJ* 479.

BDO Tax Flash "Contingent liabilities and the corporate rules" (2012) *Moneywebtax* http://www.bdo.co.za/resources/showitemarticle.asp?ResourceSectionId=4&ResourceSectionName=Publications&ResourceId=7&ResourceName=Tax%20Flash&IssueId=373&ContentPageID=&Archive=&articleid=361 (accessed 15/12/2012).

N Boardman "A critical analysis of the new South African takeover laws as proposed under the Companies Act 71 of 2008" 2010 *Acta Juridica.*

N Bouwman "New road for M&As: Company Law" (2009) 9 *Without Prejudice.*

N Bouwman "Quorums and Resolutions" (2010) 10 *Without Prejudice* at 19.

N Bouwman "Disposing of a company's undertaking or assets: Company Law" (2008) 11 *Without Prejudice.*

E Brincker "Interaction between company law and income tax law" (2012) *Cliffe Dekker Hofmeyr* http://www.polity.org.za/article/interaction-between-company-law-and-income-tax-law-2012-02-23 (accessed 13/08/2012).

A Camay "*Securities Transfer Tax: Temporary adjustment to the member exemption"* (2011) http://www.ens.co.za/news/news_article.aspx?iID=268&iType=4 (accessed 6/11/2013).

MF Cassim "The introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right (Part 1)" (2008) 20 *SA Merc LJ.*

D Clegg and R Stretch *Income Tax in South Africa* (2012) Vol 1A LexisNexis: Durban.

E Davids, T Norwitz and D Yuill "A microscopic analysis of the new merger and amalgamation provision in the Companies Act 71 of 2008" 2010 *Acta Juridica* 337 at 338.

D Davis, F Cassim, W Geach, T Mongalo, A Loubser, D Burdette, D Butler and L Coetzee *Companies and other Business Structures in South Africa* 2 ed (2012) Oxford University Press: Southern Africa.

AP De Koker and RC Williams *Silke on South African Income Tax* (2012) Vol 2 LexisNexis: Durban.

PA Delport *Henochsberg on the Companies Act, 71 of 2008* (2011) Durban: LexisNexis.

PA Delport *The New Companies Act Manual* (2009) LexisNexis: Durban.

DLA Cliffe Dekker Hofmeyr "Key aspects of the New Companies Act" (2012) *Everything Matters* *http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/legal/sectors/downloads/Cliffe-Dekker-Hofmeyr-Key-Aspects-of-the-New-Companies-Act.pdf* (accessed 16/07/2012).

DLA Cliffe Dekker Hofmeyr "The sale of an enterprise as a going concern – SARS' interpretation" (2009) http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2009/tax/downloads/Cliffe-Dekker-Hofmeyr-Tax-Matters-Winter-2009.pdf (accessed 24/11/2013).

DLA Cliffe Dekker Hofmeyr "Going concern and leased commercial property" (2013) https://www.saica.co.za/integritax/2013/2196._Going_concern_and_leased_commercial_property.htm (accessed 24/10/2013).

C Douglas and C Green "South Africa: Modernising corporate law" (2010) *IFLR* http://www.iflr.com/Article/2594289/South-Africa-Modernising-corporate-law.html (accessed 20/11/2012).

G Driver and H Goolam "Stringent regulation: company law" (2011) 11 *Without Prejudice*.

D Druker "The Merits and Demerits of the Appraisal Remedy in the Context of Statutory Mergers and Amalgamations" (2011) 1 *JSR.*

T Emslie "New Company Law Merger Provisions" (2012) The Taxpayer http://www.exacteditions.com/print/20768/21509/34270/2/5 (accessed 20/11/2013).

S Evan "The Liquidity and Solvency Test under the new Companies Act 2008" 2011 *Dingley Attorneys* http://www.dingley.co.za/the-solvency-and-liquidity-test-under-the-new-companies-act-2008/ (accessed 19/11/2012).

R Gad and J Strauss "Company mergers and tax: The implications of separate legislation that is not fully aligned" 2012 http://www.ens.co.za/images/news/ENS%20-%2030%20March%202012.pdf (accessed 25/06/2012) at 1

R Gad and J Strauss "The impact of statutory mergers on current tax Legislation: Part 1" 2012 *ENSIGHT* http://www.ens.co.za/news/news_article.aspx?iID=584&iType=4 (accessed 25/06/2012).

R Gad and J Strauss "The impact of statutory mergers on current tax Legislation: Part 2" 2012 *ENSIGHT* http://www.ens.co.za/news/news_article.aspx?iID=591&iType=4 (accessed 25/06/2012).

Grant Thornton "Stamp Duty/Securities Taxes" (2011) http://www.budget2011.co.za/fiscal-e-file/other-taxes/stamp-dutysecurities-taxes/ (accessed 6/11/2013).

P Haupt *Notes on South African Income Tax* 32 ed (2013) H& H Publications: Hedron Tax Consulting and Publishing CC.

Horwath "The Solvency & Liquidity Test in terms of the Companies Act 2008" (2012) Vol 27 *Talking Companies* http://www.crowehorwath.net/uploadedFiles/ZA/insights/Talking_Companies/Talking%20Companies%20-%20Volume%2027%20-%20The%20Solvency%20and%20Liquidity%20Test.pdf (accessed 19/11/2012).

Horwath "The Solvency & Liquidity Test in terms of the Companies Act 2008" (2012) Vol 27 *Talking Companies* http://www.crowehorwath.net/uploadedFiles/ZA/insights/Talking_Companies/Talking%20Companies%20-%20Volume%2027%20-%20The%20Solvency%20and%20Liquidity%20Test.pdf (accessed 19/11/2012).

Horwath "Procedural Requirements for Fundamental Transactions in terms of the Companies Act 2008" (2010) Vol 26 *Talking Company* http://www.crowehorwath.net/uploadedFiles/ZA/insights/Talking_Companies/Talking%20Companies%20-%20Volume%2026%20

%20Procedural%20Requirements%20for%20Fundamental%20Transactions.pdf (accessed 19/11/2012).

KPMG "The Companies Act 71 of 2008" http://www.kpmg.com/ZA/en/IssuesAndInsights/ArticlesPublications/Documents/Companies%20Act%20Brochure.pdf (accessed 15/10/2012*).*

A Lewis "New amalgamation provisions not aligned with the Income Tax Act" 2011 *Tax Alert* http://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2011/tax/downloads/Cliffe-Dekker-Hofmeyr-Tax-Alert-27-May-2011.pdf (accessed 25/06/2012).

A Lewis "STT exemption may have wider application that originally thought" (2011) *Moneywebtax* http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page265?oid=62308&sn=Detail (accessed 25/06/2012).

J Liedenburg "New VAT requirements for corporate restructuring transactions" (2010) http://www.lexology.com/library/detail.aspx?g=af805522-ac3c-49e9-b4a7-41b1ee219460 (accessed 30/12/2012).

V Magubane "A practical guide to the implication of the new Companies Act (7) – fundamental transactions" (2010) *De Rebus* at 45.

K Markman and C Atkinson "Schemes of arrangement under the new Companies Act: better of worse? (2010) http://www.ens.co.za/news/news_article.aspx?iID=380&iType=4 (accessed 21/11/2012).

E Mazansky "South African: Tax Amendments – 2012" (2012) *Mondaq* http://www.mondaq.com/x/211024/tax+authorities/Tax+amendments+2012 (accessed 19/11/2013).

W Mennem "Court's interpretation of 'disposal' is hunky-dory" *DLA Cliffe Dekker Hofmeyr* (2009) http://www.cliffedekkerhofmeyr.com/en/news/press-releases/2009/court-interpretation.html (accessed 21/11/2012).

L Mitchell, M Stein and J Silke "Income Tax" (2012) *Reporter* 51 http://ebiz.lexisnexis.co.za/bws/MasterServlet/GetItemDetailsHandler;jsessionid=0000pQwUkxiLqMqRyabSDunL3o6:-1?iN=9780409068290&qty=1&viewMode=3&m=c (accessed 18/11/2012).

N Napier "Issues of shares as consideration" (2013) *Tax Man SA* http://taxmansa.co.za/issue-shares-consideration/ (accessed 19/11/2013).

J Oppenheim and C Douglas "South Africa: Heating up" (2012) http://www.iflr.com/Article/3002918/South-Africa-Heating-up.html (accessed 20/07/2012).

L Phakeng "M&A regulations in the new Companies Act" (2009) 9 *Without Prejudice.*

L Phakeng "Making sure SA's M&A regulations match the world's best" (2010) 10 *Without Prejudice.*

S Pretorius "Introducing a new instrument for mergers and amalgamations" (2010) 10 *Without Prejudice*.

K Pretorius and T De Wit "The solvency and liquidity test: where did we come from? Where do we go from here?" 2010 *ENSIGHT* http://www.ens.co.za/newsletter/briefs/corpCommNov10printAll.html (accessed 21/11/2012).

SARS "Securities Transfer Tax" (2012) http://www.sars.gov.za/TaxTypes/STT/Pages/default.aspx (accessed 6/11/2013).

SARS "Tax Guide foe Share Owners" (2006) http://www.moneywebtax.co.za/moneywebtax/action/media/downloadFile?media_fileid=129 (accessed 24/11/2013).

L Steenkamp "Aligning the Income Tax Act and the Companies Act for Amalgamations and Mergers" (2011) *TAxTalk* http://www.thesait.org.za/news/96670/TaxTalk-Aligning-The-Income-Tax-Act-And-The-Companies-Act-For-Amalgama.htm (accessed 10/09/2012).

M Stiglingh, A Koekemoer, L van Schalkwyk, J Wilcocks and R de Swardt *SILKE: South Africa Income Tax* (2012).

D Van der Berg "Companies Act v Tax Law: Guidelines" (2012) *Moneywebtax* http://www.moneywebtax.co.za/moneywebtax/view/moneywebtax/en/page265?oid=71603&sn=Detail (accessed 29/11/2012).

K Van der Linde "The solvency and liquidity approach in the Companies Act 2008" (2009) *TSAR*.

BA Van der Merwe "The meaning and Relevance of the Phrase 'Vested Right' in Income Tax Law" (2000) 12 *Merc LJ*.

A Wellsted and T Baptiste "CGT and the Companies Act – Some Issues to Consider" (2012) *The South African Institute of Tax Practitioners* http://www.thesait.org.za/news/103226/CGT-and-the-Companies-Act--Some-Issues-to-Consider.htm (accessed 23/08/2012).

CASE LAW

Caltex Oil (SA) Limited v SIR 1975 (1) SA (A) 674.

CSARS v Labat (669/10) (2011) ZASCA 157.

Eurosteel Ltd v Stinnes AG [2000] 1 ALL ER (Comm) 964 (QB).

Ex Parte Trans-African Staff Pension Fund 1959 (2) SA 23 (W).

Jewish Colonial Trust Ltd v Estate Nathan 1940 AD 163.

Kessoopersadh en 'n Ander v Essop en 'n Ander [1970] 1 ALL SA 325 (A).

Kinloch NO v Kinloch 1982 (1) SA 697 (A) at 697H – 698C.

Omnia Fertilizer Ltd v CSARS 65 SATC 159.

R Miller v Nofcac Investment Holding Company Ltd 2012 [4] SA 44 (SCA)

R v Black & Decker Manufacturing Co [1975] 1 SCR 441 (SCC).

Standard Bank of South Africa Ltd v Hunky-dory Investments 188 (Pty) Ltd (15427/08) [2009] ZAWCHC 81.

Suid-Afrikaanse Nasionale Lewensassuransie-Maatskapy v Rainbow Diamonds (Edms) 1984 (3) SA 1 (A).

Tecmed (Pty) Ltd v Nissho Iwai Corporation (705/08) [2009] ZASCA 143 (25 November 2009)

Valley View Homeowners' Association v Universal Pulse Trading 27 (Pty) Ltd (70639/2010) [2011] ZAGPPHC 154 (13 May 2011).

LEGISLATION

Banks Act, 94 of 1990.

Companies Act, 61 of 1973.

Companies Act, 71 of 2008.

Income Tax Act, 58 of 1962.

Securities Transfer Tax Act, 25 of 2007.

Transfer Duty Act, 40 of 1949.

Value-Added Tax Act, 89 of 1997.