법제교류 연구 16-18-⑧
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Abstract

Ⅰ. Background and Purpose

□ Research background

○ Korea has continuously arranged commercial law regulation in order for the enterprises to smoothly utilize merger·division as a means to actively treat the temporal change in the process of the rapid progress of social·economic condition.

○ However, tax burden is a very important factor for an enterprise to determine merger·division, accordingly, tax support is indispensible to enable commercial law amendment to function as intended.

○ Therefore, it is necessary to systematically research the tax system of merger·division not merely stopping at regulation research on merger·division based on commercial law.

□ Research purpose

○ Korea has established an unprecedented economic development in the late 20th century, currently receiving interest of several developing countries. Particularly, the point that several developing countries are paying attention to is the method of legislation of the institutional means required along with social·economic condition change.

○ In view of this, this research intended to concretely and systematically the history and current legislation model of Korean merger·division taxation system to make reference to enactment or amendment of legislation of developing countries.

Ⅱ. Major contents

□ Development of legislation related to merger and division

○ Minute examination of the development process of merger·division institution on commercial law from the point of enactment of commercial law up to now

○ Examination of development of merger · division taxation institution on corporate tax law, responding to the development of merger · division institution on commercial law

□ Review of commercial law and tax law regulation on merger and division

○ Taxation on merger·division is based on merger·division available in commercial law, accordingly, the method and progress of merger · division available in commercial law was reviewed

○ Korea basically puts the taxation regulation of merger·division on corporate law, therefore, this research minutely reviewed merger · division taxation regulation on corporate law

○ Various acts are applied in merger·division besides commercial law and corporate law, among them, the acts that include special regulation on taxation law were reviewed

□ Establishment of legislation model of the legislation related to merger and division taxation

○ Research on the legislation related to merger·division taxation based on Korean legislation model

Ⅲ. Expected effects

□ To contribute to comprehension of correlation between commercial law and corporate tax law by systematically studying the regulation related to merger·division of commercial law and corporate tax law.

□ To enable the developing countries to utilize this data for their reference in their later legislation, by systematically reviewing the change aspect of Korean merger·division taxation institution along with temporal· economic condition change.

Key words : merger, division, taxation system, corporate tax law, special tax treatment control act

Contents

Chapter 1 Introduction

Part 1 Purpose of research

Merger · division has a very significant meaning in respect of enhancement of competitiveness of corporation as the representative type for reorganization of the company. In Korea, merger · division has been regularly utilized from the point of IMF economic crisis, currently it has become regular · routine to some degree to respond to rapidly changing world economic stream. This way, the reason why merger · division was regularized · routinized was due to the support of laws related to commercial law or corporate taxation, etc.

In Korea, institutional support has been continuously conducted to utilize merger · division to actively react to the change and reinforce competitiveness of company in the process of rapid change in social · economic condition. For example, division institution was adopted while simplifying merger procedure by amending commercial law in 1998, when necessity of smooth and reasonable rearrangement of organization was strongly raised since the point of IMF economic crisis, also, adopted a new type of merger system, such as grand merger and triangle merger, etc. to prepare legal basis to properly respond to rapidly changing business management environment since global financial crisis. Furthermore, when growth of our company has become sharply weakened, i.e. decrease of sales and export of Korean companies due to decrease of global demand and excessive supply, etc. of global market in 2015, Korea has institutionally supported smooth utilization of merger·division institute by expansion of market and promotion of economy through corporation merger · division, such as triangle division merger, etc.

However, tax caused by merger · division is a very important factor in determination of merger · division, accordingly, support on taxation is indispensible to enable function of amendment of merger · division on commercial law as intended. Due to this reason, Korea ha· continuously amended corporate taxation law based on the amendment of commercial law. For example, in 1998, Korea adopted merger · division special treatment in taxation based on commercial law amendment and corporation working-level needs, also in 2011, amended to complement related regulation along with introduction of grand merger and triangle merger, etc. on commercial law. However, corporate taxation was not merely amended based on the amendment of commercial law. In 2009, full-scale corporate taxation was amended to support smooth corporate downsizing and competitive reinforcement by advancement of special treatment in taxation by considering social · economic condition change, instead of commercial law amendment.

Due to this background, it is necessary to comprehend interrelationship between commercial law and corporate taxation by systematically studying taxation system of merger · division, not merely studying regulation on merger · division on commercial law in respect of study on merger · division.

Korea is one of the developing countries in Asia, which achieved unprecedented economic development in late 20th century, which moved its position from the aid recipient country to aid offering country for the first time in history. Accordingly, Korean development model is receiving attention from several developing countries. Particularly, the developing countries are paying attention to the legislation of institutional means required along with social · economic condition change.[1] Therefore, this

1) Jo, hyesin · Lee, seoyeong, 「Legislation model design to support Asian developing countries' legislation」, Korea Legislation Research Institute(2013), p.13.

research intended to concretely and systematically research Korean taxation system of merger · division to make a reference in enactment or revision of legislation from the history to current legislation model. Here, taxation system on merger · division should be established with consideration of social · economic condition and the regulation on commercial law in general, this research intended to review both commercial law regulation and corporate taxation regulation on merger · division.

Part 2 Scope of research

This research fully reviewed taxation system of merger · division from chapter 2.

Chapter2 reviewed development process of commercial law and corporate law as the legislation related to merger · division. Concretely, this research concretely investigated how each legislation changed along with social · economic condition change, after investigating the concept, legal property, accounting theory, and effectiveness, etc. of merger and division. Particularly, minutely investigated how each of the law have changed since IMF economic crisis or global financial crisis, which are significant in Korea.

Chapter3 reviewed regulation of commercial law and corporate taxation on merger · division. Above all, this research investigated how commercial law regulates the process of merger · division, which regulation was arranged to support smooth corporate downsizing, and how the profit of minority stockholders and creditors are protected from merger · division, etc. Also, investigated how the corporate taxation supports corporate merger · division on which taxation system, and whether there's any possibility that merger · division could be misused as the tax avoidance means.

Chapter 4 reviewed the establishment method of legislation model related to merger · division taxation. Also, suggested the establishment method of legislation model related to merger · division related legislation, after investigating the legislation model of current commercial law and corporate taxation and the legislation model of special cases thereof. In respect of reviewing legislation model of special cases, this research intended to minutely review in which case the exemption law could be utilized, and which factors should be considered.

This research aimed at minutely reviewing Korean merger · division taxation system from the history to current legislation model, based on this, suggesting the legislation model related to merger · division taxation.

To achieve this research purpose efficiently, this research intended to progress the research in following method.

Above all, it is necessary to exactly understand Korean merger · division taxation system and based on it the understanding of how development of merger · division related laws according to temporal change in order to establish the legislation model. Due to this reason, this research intended to minutely review the report article, books, etc. related to enactment and revision of merger · division, which part would be researched by Lee, sanghoon, a tax accountant.

Next, this research concretely investigate how the legislation related to merger · division taxation is currently established. Here, this research analyzed the system of current provision by referring to several scholars' research papers, basic book, research report, and proposal of the economic circles on the regulation of commercial law and corporate taxation which are significant in merger · division taxation related legislation, this part would be research by Dr. Sucheon Lee.

Lastly, this research intended to review legislation model related to merger · division taxation based on Korean legislation, which part would be researched by Dr. Sucheon Lee.

Researcher	Division of the research
Dr. Sucheon Lee	Chapter1 Introduction
	Chapter3 Review of commercial law and taxation regulation on merger and division
	Chapter4 Establishment of legislation model related to taxation on merger and division
	Chapter5 Conclusion
Sanghoon Lee, Accountant	Chapter2 Development of legislation related merger and division

Chapter 2 Development of Legislation related to Merger and Division

Part 1 General theory of merger and division

1. General theory of merger

A. Concept

Merger is conducted by more than 2 companies based on a contract, which is to combine more than two companies as one company without liquidation procedure according to commercial law regulation. Here, merger is the case when a company between the 2 companies is partially dissolved and all rights and obligation of the dissolved company (the dissolved company) are succeeded by the existing company (existing company), and consolidation is the case when all of the companies are dissolved and the rights and obligation are comprehensively succeeded by a newly established company (newly established company). Commercial law regulates both merger and consolidation, however in Korea, the ratio of merger is dominant. This is because there's no actual difference between the two, accordingly, there's no reason to choose consolidation which requires establish a new company.[2)]

Merger is the typical corporation combination method predicted by commercial law, which is differentiated from Kartell or Konzern, etc., which maintain independence of several companies respectively in law.

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2) Song, okryeol, 「Lecture on commercial law」 volume 6, Hongmunsa(2016), p.1192.

B. Legal properties

(1) Pooling of interest method

Pooling of interest method is to combine more than 2 companies on the whole, accordingly, succession of all rights and obligation of dissolved company (predecessor company) to newly established company (merger corporate) is the natural result of pooling of interest method. According to this, all of the asset and debt of predecessor corporate are transferred to the merger corporate upon book value, and there's no gain from merger.

(2) Investment in kind

Investment in kind is an opinion to understand merger as investment in kind of the whole sales in the merger corporate by the predecessor company. That is, the predecessor company makes investment in kind of its asset and debt in the merger corporate, on behalf of it, receive newly issued stocks of the merger corporate.[3] According to this, merger corporate succeeds the asset and debt of predecessor company in the market price, and the difference between the asset and debt on book value and merger value becomes the profit from merger. Also, sum of equity capital of the merger parties does not change regardless of the scale of shared stocks.

(3) Conclusion

In respect of commercial law, investment in kind cannot explain the legal characteristics to divide merger and corporation take over, as it

3) The main agent of investment in kind is the predecessor company, however the actual owners of predecessor company's asset are the stockholders, accordingly, merger new stocks are issued to the stockholders.

pays attention to the economic actuality of merger, it is desirable to take pooling of interest method.[4] However, current taxation basically takes pooling of interest method restricted to the case equipped with the condition, while taking the position of investment in kind.[5]

Corporate taxation considers the asset of the corporation is transferred to the merger corporate in case when predecessor corporate is dissolved by merger(equal act provision 44 no.1). That is, current corporate taxation views transfer of the asset and debt along with merger as the transfer deal to change the ownership of asset. In this respect, current corporate taxation can be viewed to be near to the investment in kind.[6] However, current corporate taxation takes pooling of interest method based on the asset and debt of predecessor company on book value in respect of eligible merger, prepared with the condition, while investment in kind based on the market price of the asset and debt of predecessor company on ineligible merger that did not prepare condition, dividing merger into eligible merger and ineligible merger.

C. Accounting theory related to merger

(1) Pooling of interests method

Pooling of interest method(or equity infusion method) is an accounting treatment method to view merger as joint sharing of risk and profit by

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4) Song, okryeol, op. cit., p.1193.

5) Lee gang, “Improvement plan for taxation to activate M&A – Focus on triangle merger-”, 「Study on the economic laws」 volume no.13 issue no.2, Korean Economic Law Association(2014), p.33.

6) Lee, geon-guk · Jeong, raeyong, “Problem of revised company takeover · merger taxation”, 「Study on the law」 volume no.23 issue no.3, Law research center, Yonsei University(2013), p.69.

merely combining stock shares, not the actual deal between the merger corporate and predecessor company. According to this, merger corporate succeeds the asset and debt of predecessor company upon book value, and there's no business rights of the business rights of debt.

(2) Purchase method

Purchase method(or acquisition law) is an accounting treatment method to understand merger that the merger corporate acquires the net assets of predecessor corporation on the whole. According to this, general accounting treatment procedure related to overall acquisition of net profit is applied also in case of merger deal. Therefore, the net asset that the merger corporate attains from the predecessor company and the stocks issued upon merger, etc. are all evaluated as fair value, and in case when the fair value of net asset and the fair value of merger reward do not coincide, this is counted up as the business rights or the business rights of debt(負).

(3) Conclusion

In Korea, eventually an integrated merger accounting standard was prepared on December 16, 1986, along with enactment of 'merger accounting regulation' which determines the items related to accounting treatment and financial report of merger deal.[7] Later, on March 25, 1999, the previous merger accounting regulation was abolished, and enacted 'accounting treatment regulation on company takeover · merger, etc.' based on the international accounting standard, which has been

7) Later, Kang, gimyeong · Park, yong-il, "Study on taxation institution of company merger", 「Finance and accounting information journal」 volume no.13 issue no.4, Korea Accounting Information Society(2013), refer to p.49.

applied to company merger that is concluded since January 1, 2000.

However, as the border of capital market disappeared, a necessity of unified accounting standard was raised internationally, accordingly, as the adopted international accounting standard was rapidly settled down, it also came to influence Korea. Korea composed the working-level work group in February, 2006, and prepared the road map toward introduction of the international accounting standard based on the content reviewed by the working-level work group. Accordingly, Korea adopted international accounting standard was introduced, which has been obligatorily applied to all listed companies since 2011. Also, merger accounting treatment regulation was newly arranged upon introduction of Korea adopted international accounting standard.

Today merger related accounting treatment basically follows Korea dtopted international accounting standard no. 1103 (business combination) or the regulation of general company accounting standard chapter 12 (business combination). According to this, merger, one of business combination means, should be treated with accounting applied with purchase method. In the previous accounting standard, one between purchase method (or acquisition method) or pooling of interest method (or equity infusion) could be selected according to the actuality of business combination, however purchase method only is applied in current accounting standard to business combination, since it is viewed as the actual acquisition deal based on the acquisition of control over business.

However, merger between the companies under the equal control is applied with general company accounting standard chapter no.32(equal control deal).[8] According to this, merger between control · subordinate

8) General corporate accounting standard chapter12(business combination) 12.4 (3).

company is considered as the linked book value on the asset and debt of the subordinate company, however the difference in the amount of linked book value of the predecessor company and the reward is reflected as the capital surplus.[9)]

D. Usefulness of merger

Usefulness of merger is, ① available for the expansion of business field, such as achievement of economy of scale or expansion of territory or market, advance into the global market, etc., ② corporate competitiveness could be reinforced by acquiring new technology or intellectual property, ③ available for useful utilization of management resources or improvement of financial achievement, ④ maximization of profit through evading competition or improvement of market share, and efficiency of business as concentration on production, etc.[10)]

2. General theory of division

A. Concept

Division is the act of a company(divided corporation) which aims at transferring the whole or partial rights and obligation on the business to another company (succeeding company) after dividing the whole or partial rights and obligation, or to a newly founded company(newly founded

9) General corporate accounting standard chapter32(equal control deal) 32.9 and 32.10.

10) Choi, seungjae, "Views on harmony of revision of merger legislation and merger taxation －Focus on the discussion on introduction of inverted triangle merger for the activation of merger-", 「Study on the advanced law merchant」 consecutive no.67, (2014), p.32; Sin, chansu · Park, seongbae, "Problem of revised merger · division taxation and improvement plan", 「Study on listed company association」 no.64, Korean listed company association(2011), p.149.

company) by division. On this, divided company becomes extinct or downsized, and the stockholders acquire the stocks of the company which succeeded the divided company's rights and obligation.

Division is to adopt the institution of France in 1998 in order to support flexible restructuring of corporation in 1998.

B. Legal property

In respect of the legal property of division, ① equity spinoff theory, ② investment in kind, ③ special law relation, etc. are conflicting, however the actual profit of the discussion is not big compared to merger. Because integrated explanation on various types of division is difficult regardless of any theory. For example, according to equity spinoff theory, legal relation of equity spinoff can be explained, however it is difficult to explain the legal relation of physical division which has no change in stockholder composition, while according to investment in kind, physical division can be effectively understood, however equity spinoff cannot be reasonably explained.

However, the opinion of ① or ③, related to legal property of division, is about how to explain division from he viewpoint of commercial law, accordingly, it is not necessary to be restricted by this in respect of comprehending legal property of division based on taxation.

C. Accounting theory on division

Accounting treatment related to division in the past demanded on accounting treatment by purchase method in case of physical division, while pooling of interest method when distributing in proportion of share ratio to the stockholders by issuing stocks by divided new company in

case of equity spinoff, dividing into physical division and equity spinoff. However, Korea adopted international accounting standard did not provide specific standard of accounting treatment of equal control division, accordingly, the companies applied with Korea adopted international accounting standard have been mostly based on pooling of interest method.[11)]

Accounting standard committee paid attention to the point that accounting treatment regulation of proportional equity spinoff, which has no change in the economic actuality equally, does not coincide, when demanding accounting treatment on physical division, which has no change in economic actuality, and non-proportional equity spinoff based on purchase law. Also, accounting treatment by purchase law is different from pooling of interest method which the corporations applied with Korea adopted international accounting standard apply, accordingly, burden on work group of the corporations applied with general corporation accounting standard can be increased. To resolve this, accounting standard committee determined not to separately conduct accounting treatment along with legal form (physical division, equity spinoff) of division. That is, when the whole or partial business is divided and transferred to other company, it should be transferred to one's own book value, and the transferred business should be perceived as the book value of transferred company's book value for the new company.[12)]

D. Efficiency of division

In respect of usefulness of company division, there are ① to promote specialization and efficiency of business by separating some part from the

11) General company accounting standard chapter32(equal control deal) ref 32.21.
12) General company accounting standard chapter32(equal control deal) ref 32.22.

large enterprise arranged with several businesses or complicatedly tangled with function per stage, ② to limit the range of risk by separating high risky business division from mother company, ③ a method to separate the business regulated by the positive law from that is not, ④ a means to passively solve a problem when interest between stockholders sharply conflicts, ⑤ a means to transfer some part of business while giving corporate personality, and ⑥ a method to differentiate wage and personnel management currently existing in the same company, etc.[13)]

In Korea, particularly, usefulness of company division is cognized from the viewpoint of ⑥.[14)] To see Korean personnel management, wage differentiation in the same company is actually impossible. Due to that reason, burden of wage increases even in low waged manpower being accompanied by high waged manpower. In this case, corporations can divide high waged manpower and low waged manpower and distributing them into different companies, through this, reduction of personnel expenses and efficiency of personnel management can be promoted.

3. Correlation between merger and division

Under the industrial structure controlled by mass production and mass consumption, as the result of operation of economy of scale, reorganization of organization received attention that can expand the economy of scale. Due to this reason, merger as the reorganization of organization intending to extension of business scale was popular in 1970s and 1980s. However, as the overall economic environment changes such as diversification of customer needs, IT technology development, and growth of intellectual

13) Lee, cheolsong, 「Lecture on company law」 vol no. 23, Bagyeongsa(2015), p.1077.
14) Lee, cheolsong, Ibid, p.1077.

property industry, etc., economy of scale itself is not necessarily efficient. As the result, the previous cognition on corporate scale and productivity has been changed. There's a cognition that elastic response to economic environment change is necessary by resolving noneconomy of scale and realizing rationalization of corporate scale or efficiency per business division. Division system appeared in this background.

That is, if merger is basd on the purpose of realizing the economy of scale by combining more than 2 companies as one, while division aims at resolving noneconomy of scale by dividing one company into more than 2 companies, the other way. Therefore, in respect of functional aspect, merger and division have the opposite purpose and usefulness.[15)]

However, in respect of taxation aspect, merger or equity spinoff can be said equal in regard that the asset and debt are comprehensively transferred from one company to another, and the reward is paid to the stockholders of the transferred company.

Part 2 Development of Legislation related to merger and division

1. Development of merger and division institution on commercial law

A. Before revision in 1998 after enactment of commercial law

Korea enacted commercial law on January 20, 1962 to respond to a new capitalistic economic order and contribute to national economic development. Enacted commercial law regulated concrete articles related

15) Lee, cheolsong, Ibid, p.1056.

to merger as a means of reorganization of organization, allowing merger (enacted commercial law art no. 523, no. 526) and consolidation (enacted commercial law art no. 524, no. 527). However, there's no regulation in respect of corporate division.

Since the enactment of commercial law, corporate scale and economic condition changed, however revision of commercial law was not conducted during 20 years. Due to this, corporate gap between reality and commercial regulation became intensified. To resolve this, finally revision of commercial law was executed on April 10, 1984. Through 1984 revision, acquisition of mother company stock was allowed by the affiliated company was approved from the viewpoint of promotion of reasonable reorganization of corporation and efficiency of operation (1984 revised commercial law item no.2 of art no. 342).

Since the revision of commercial law in 1984, Korean social · economic condition rapidly progressed. In the process, an opinion to settle down realistic and global deal while actively accepting such change in order to reinforce international competitiveness of Korean corporations. Eventually, commercial law revision was conducted in 1995 in order to promote overall activation of corporate activity by improving inefficient factors that hinder corporate operation, in the process, simple merger institution, etc. were adopted. Simple merger institution, adopted in 1995, was applied to the case when "there's agreement of the overall stockholders of the extinct company due to merger or the existing company after merger owns the overall number of the company's issue stock[16], in case when one part of the companies to merge exists after merger", differently from

16) Current commercial law regulates the condition of simple merger as "over 90 among 100 of total number of issue stock"(Commercial law no.2 of art 527).

current commercial law (1995 revised commercial law art no. 522, item no. 1).

1995 revised commercial law acknowledged stock purchase right (no.2 of art 522 of 1995 revised commercial law) of antimerger stockholders from the viewpoint of stockholder profit protection, while enabling merger only with approval of board of directors without approval agreement of the general meeting of stockholders of the extinct company, in case when satisfying commercial law condition by adopting simple merger institution.

B. 1998 commercial law amendment

In Korea, necessity of smooth and reasonable economic structure reorganization was strongly suggested with the opportunity of IMF economic crisis, and restructuring of corporation to be supported institutionally by adopting a new institution as company division system, as well as simplification of company merger procedure. As the result, 1998 commercial law revision was executed, which has a very important significance in history of merger and division institution.

(1) Activation support of merger institution

In 1998 revised commercial law, small scale merger institution was adopted to relieve the condition of simple merger institution, adopted in 1995, furthermore, more actively support activation of restructuring and takeover·merger of corporation.

Before 1998 revision of commercial law, simple merger was allowed in case of ‘agreement of total stockholders or when the existing company owns total number of issue stock’, however 1998 revision relieved the condition as ‘the case of agreement of total stockholders or the existing

company own over 90 among 100 of total issue stock'(1998 revised commercial law no.1 of art 2). Instead, intent to simple merger should be notified or sent notification to stockholders within 2 weeks after composing a merger contract by the extinct company, if it's not the case of agreement of the whole stockholders(1998 revised commercial law no.2 of art 527).

Also, as the result of adopting the small scale merger in 1998 revised commercial law, in case when the total number of new stocks issued by the existing company due to merger does not exceed 5 of 100[17] of total number of issued stock, accordingly, approval of general meeting of stockholders of the existing company could be substituted for the board of director(text of item no.1 of art 527 item no.3 revised in 1998). However, it was necessary to prevent take over of large extinct company to small scale merger by reducing merger new stocks with the method of providing merger grand, which was not acknowledged in commercial law in principle. Due to this reason, 1998 revised commercial law did not allow to omit approval of general meeting of stockholders in case of ① when the amount determined to be paid to the stockholders of the dissolved company exceeds 2 of 100[18] of net asset currently existing in the final balance sheet of the existing company"(item no.1 of art 527 item no.3 of 1998 revised commercial law) or ② "when the stockholder who owns 20 of 100 of total number of existing company issue stocks ... notifies the intent to oppose merger of item no.1 upon written notice"[19]

17) The standard was changed from '5 of 100' to '10 of 100' in 2011 revised commercial law, and 2015 revised commercial law included treasury stock in determination standard.

18) In 2011 commercial law revision, the standard was changed from '2 of 100' to '5 of 100', and in 2015, other asset provided by the extinct company stockholders besides merger grant was also included in determination standard.

19) The point to substitute approval of general meeting of stockholders in small scale merger for the approval of board of directors was not to cause a significant change in

(item no.4 of art 527 item no.3 of 1998 revised commercial law).

In addition to this, 1998 revised commercial law adopted stock split institution (1998 revised commercial law item 2 of art 329) to easily regulate stock value difference in the preparation state of company merger, reducing the creditors' objection submission period from February to January when merging companies (1998 revised commercial law art 232, item 5 of art 527).

(2) Introduction of split institution

Before 1998 revision, split of company was not allowed. 1998 revised commercial law enabled company split upon agreement of general meeting of stockholders restricted to corporation to institutionally support flexible restructuring of corporation, resolving inconvenience along with this, preparing protective device for the stockholders and creditors before split(1998 revised commercial law item 2 of art 530 to item 12 of art 530).

Company split regulation on 1998 revised commercial law

Item 2 of art 530 (Company split · split merger)
Item 3 of art 530 (split plan · approval of split merger contract)
Item 4 of art 530 (establishment of company by split)
Item 5 of art 530 (entered items of split plan)
Item 6 of art 530 (entered items of split merger contract)
Item 7 of art 530 (notification of split balance sheet, etc.)
Item 8 of art 530 (calculation of split and split merger)

the interest between the stockholders by merger. However, approval of general meeting of stockholders was not made to be omitted, since the objection of the stockholders with over 20% share would be a wrong premise.

Item 9 of art 530 (responsibility of company after split merger) Item 10 of art 530 (effect of split of split merger) Item 11 of art 530 (provisions applicable) Item 12 of art 530 (physical split)

C. After 1998 revision before 2011 revision

Since 1998 revision of commercial law and before 2011 revision of commercial law, there was no significant commercial law revision related to merger · division. However, to enhance clarity of business management and reinforce global competitiveness, a revision was executed mainly with expansion of agreement of stockholders general meeting, etc. on July 24, 2001. Revision of that time added the item, 'name or residence registration number should be added when determining the director, audit, or the members of audit committee to be appointed to the existing (established) company by merger' (2001 revised commercial law art 523 phrase 1 item 9 and art 524 item 6)[20], etc. was added as the entered matters of merger contract.

For reference, inclusive exchange institution of stock was adopted in 2001 commercial revision, which is equal in respect of the inverse triangle merger and economic effect which was enabled triangle merger adopted in 2011 commercial law revision or inverse triangle merger enabled due to 2015 commercial law revision. It can be determined when considering the method of commercial law that company A controls company B in the form of affiliated company by 100%. Comprehensive

20) In case of merger, besides, "limit amount when each company shares profit with money by the provision of profit share or provision of art 462 phrase 3 item 1 by merger" was added (2001 revised commercial law art 523 phrase 1 item 8).

exchange of stocks or triangle merger · inverse triangle merger has difference in the concrete method, resultingly there's no difference in respect that company A can acquire 100% of the stocks of company T, at the same time, stockholders of company T can be the stockholders of company A.

D. 2011 commercial law revision

To prepare the legal basis to for the corporation to properly respond to rapidly changing business environment, commercial law was revised in 2011. When over 2 companies merge before 2011 commercial law revision, new stocks of the existing company were distributed the extinct company stockholders in principle. Merger grant could be also paid in money during that time (commercial law art 523 item 4 before 2011 revision), precedent had a position to pay most of merger grant cannot be paid in money.[21] As the result, paying the money for merger grant in working level was restricted to the exceptional case as odd-lot treatment, etc. However, there's an opinion that flexibility of merger grant is necessary to promote effectiveness of corporation restructuring by supporting merger in strategic aspect.

2011 revised commercial law enabled provision of "the whole or partial

21) Supreme court 2003. 2. 11. sentence 2001 Da 14351 judgment : "Company merger is to establish a new company by contract between more than two companies or one of the companies absorb the other company, bringing an effect of transfer · receipt of the asset and employees (stockholders) to the new company or existing company according to legal procedure, the employees (stockholders) of the extinct company become the employees (stockholders) of the existing or new company by acquiring the right of employees (stockholders) of the existing company or new company according to merger rate and distribution method in principle, except special cases as acquisition of odd stock below 1 stock or stock purchase grant by merger"

money or other asset" of merger grant, considering this (2011 revised commercial law item no.4 of art 523). Also, acknowledged exception of acquisition prohibition of mother company stock by affiliated company based on the premise that mother company stocks are included in "other asset"(2011 revised commercial law item no.2 of art 523). As the result that 2011 revised commercial law smoothened merger grant through substantive enactment, a new type mergers such as grant merger and triangle merger were enabled.

On the other hand, 2011 revised commercial law enabled substitution of the approval of stockholders general meeting of the existing company for the approval of the board of directors, in case when merger new stocks issued by the existing company do not exceed 10 of 100 (previously 5 of 100) of total number of issue stocks of the existing company, by relieving the condition of small scale merger adopted in 1998 (2011 revised commercial law item no.1 of art 527 provision 3). It was the result based on determination that the merger new stocks issued by the existing company had no big influence on the interest among the stockholders of the existing company when merger new stocks were below 10% of total number of issue stock.

E. 2015 commercial law revision (current commercial law)

Since the financial crisis, Korean corporate growth has been sharply weakened, e.g. decrease of sales and export of Korean companies due to global demand decrease and excessive supply, etc.[22] In this background, commercial law was revised to improve·complement some insufficience in

22) In the first half of 2015, Korean corporate turnover decreased by 7.1%. Among them, sales of large companies decreased by 1.2% in the first half of 2014, which decreased as much as 7.3% in the early 2015.

the management of the institution during that time, e.g. arrangement of stock purchase claim institution of anti-merger stockholders, etc., while adopting corporate takeover·merger method in various types to enable smooth restructuring of corporate to promote expansion or corporate takeover·merger market and economic activation on December 1, 2015.

(1) Inverse triangle merger and triangle division merger

In the process of discussing 2015 commercial law revision, there was an opinion to adopt inverse triangle merger, as the triangle merger was already adopted.[23] However, inverse triangle merger was not directly adopted considering the point that there are the parts that cannot be technically solved in Korean legislation. Instead, 2015 revised commercial law enabled to provide "money or other asset as the whole or part of the grant", in case of stock exchange(Art 360 provision 3 item no.3 phrase 4). That is, triangle stock exchange to enable payment of mother company stocks in case of comprehensive exchange of stock was adopted, enabling achievement of the effect of inverse triangle merger[24] through this inverse triangle merger.

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23) In respect of introduction of inverse triangle merger, the points that inverse triangle merger is necessary in business strategy such as intellectual property right or brand utilization of predecessor company, and relevant license, contract, etc. cannot be succeeded by maintaining the existing corporation as the listed corporation while taking over the whole of the stocks of the listed corporation when inverse triangle merger method was not utilized were suggested(Korea Federation of Small and Medium Business · Korean independent medium-sized enterprise association · Korean Chamber of Commerce · Federation of Korean Industries · Korean Listed Companies Association, Opinion about the enactment method of special case (idea) for the enhancement of company activation(2015. 6), p.14).

24) Inverse triangle merger is to merge company T into the existing company while distributing the stocks of company A, the mother company, to the stockholders of company T, in case of comprehensive exchange of stocks between company S, the affiliated company of company A, and company T.

Also, 2015 revised commercial law enabled provision of “the whole of part of the grant in money or other asset” in respect of division merger (Art 530 provision 6 item no.1 phrase no.4). Therefore, triangle division merger was enabled, which provides mother company stocks to the stockholders of divided company while conducting company division merger.

This way, 2015 revised commercial law intended to institutionally support economic demand for company takeover·merger by preparing various company takeover·merger utilizing the affiliated company.

(2) Arrangement of stock purchase claim of anti-merger stockholders

The commercial law before 2015 revision did not take a separate regulation in the scope of stockholders acknowledged with stock purchase claim of the anti-merger stockholders. Accordingly, whether the stock purchase claim was acknowledged on the working-level non-voting stockholder s[25] became a problem, also, there was a point out that it was insufficient in protection of non-voting stockholders’ right. In consideration of this, 2015 revised commercial law regulated the right of non-voting stockholders on stock purchase claim in express terms, also, stockholders general meeting summoning to be also notified non-voting stockholders when stock purchase claim is acknowledged(Art 360 provision 5 item no. 1 and Art 374 provision 2).

This is to promote stability of company takeover·merger deal and anti-merger stockholders protection by dissolving legal confusion on anti-merger stockholder stock purchase claim acknowledgement, notification of stockholders general meeting collection, which can be caused in the process of corporate takeover · merger.

25) Stockholders of non-voting or voting restricted

(3) Arrangement of other company division · merger related regulation

2015 revised commercial law clearly arranged company division related terms, e.g. clarification of corporate division related terms (the company to bi divided while division to divided company, newly established company through division to simple divided newly established company, the existing company of divided and absorbed merger to division succeeding company, and newly established company due to division new merger to divided merger newly established company), and approval of treasury stock transfer while division (Art 530 provision 5).

Also, considering that point that working-level confusion is caused due to unclear provision of treatment while distributing treasury stock instead of issuing new stocks in relation to small scale merger condition, 2015 revised commercial law amended the condition of small scale merger as "issued new stocks or total number of treasury stock to be transferred to be 10 of 100 among the total number of the company issue stocks"[26] (Art 527 provision 3 item no.1).

2. Development of merger on corporate taxation and division taxation

A. Corporate taxation enactment and before 1998 revision

(1) Overview

In Korea, taxation on corporate income has been conducted since 1916, while since 1934, corporate income was taxed by being included in general

26) Previously, it was defined "total number of issued new stocks to be 10 of 100 among the total number of company issued stocks".

income tax as the class 1 income. Meanwhile, corporate taxation was enacted to separate the items related to corporation on November 11, 1949. However, this period was before the introduction of division institution of commercial law, which defined only merger also on enactment corporate taxation[27].

Nevertheless enactment corporate taxation went through several times of revision, all of them were revised under the purpose of satisfying financial demand that were expanded by effectively supporting the 2nd economic development plan and reinforced taxation administration along with starting of National Tax Service on November 29, 1967. In respect of merger, taxation regulation was prepared for merger liquidation income of predecessor company, deemed dividend income of predecessor company, and merger evaluation margin of corporation merger. Corporate taxation was annually conducted with revision since the revision after the whole revision in 1967, however taxation regulation on merger was performed with partial revision until 1998 overall revision. In 1990, corporate taxation was revised to enhance sound corporate management and tax burden balance by regulating tax evasion act controlling corporate non-productive investment of company using investment deal. Accordingly, taxation was conducted with taxation on the profit in case of returning the profit to the stockholders in capital deal as merger, etc.

In 1997, when demand for preparation to promote corporate financial structure improvement and restructuring began, an institution to release tax on merger margin to next month to support smooth restructuring through corporate merger was adopted. Concretely, 1997 revised corporate

27) Enactment corporate taxation included taxation regulation of merger liquidation income of extinct corporation (enactment corporate taxation art 6), etc.

taxation was made to smoothen merger by market price evaluation by releasing tax to next month to tax upon sale of the asset or depreciation on merger point of time, which had been imposed to tax upon merger point of time regarding merger margin from the evaluation of the asset based on market price in case of corporate merger(1997 revised corporate taxation Art 14 provision 5).

(2) Merger taxation before 1998 revision

Corporate taxation before 1998 revision adopted corporate taxation structure on merger liquidation income, predecessor company stockholders' deemed dividend income of predecessor company stockholders, and merger evaluation margin of predecessor corporation, in case of merger. On the other hand, corporate taxation before 1998 revision was based on calculation of merger grant along with evaluation of succeeded asset based on book value and face amount in principle, based on the idea that merger cannot be viewed as the opportunity of taxation of non-realization profit by accepting the concept of pooling of interest method on commercial law.[28] In respect of the corporate taxation before 1998 revision, such problems as ① merger in the form of receiving only money without stock, without continuing interest before and after merger cannot be determined as the taxation case of non-realization profit, ② it distorts corporate accounting by disabling purchase method on corporate accounting with the market price evaluation as the basic principle being connected with the idea to have the financial statement of merger corporations to be combined in book value were pointed out.[29]

28) Kim, seokhwan, "whether of 'transfer' of asset transfer along with division · merger : End of pooling of interest method on taxation? -Supreme court 2013. 11. 28. sentence 2009 Da 79736 judgment critical notes", 「Study on taxation」 Volume no.20 Issue no.1, Tax system academy(2014), p.132.

B. 1998 overall revision

(1) Overview

In Korea, an opinion to support financial structure improvement and restructuring of corporation institutionally became louder since IMF economic crisis. With this background, it is determined that division institution on commercial law was adopted and overall corporate taxation was executed.

On the other hand, corporate taxation was executed with revision through 28 times until overall revision again on December 28, 1998 since overall revision in 1967. In that process, corporate taxation was a lot complicated, and quite a few problems were raised in the interpretation · application. Due to this, reason, overall revision in 1998 enabled understanding·interpretation·application of corporation and institution workers by revising corporate taxation system on the whole besides the extensive arrangement of merger · division taxation institution to support corporate restructuring as merger · division, etc.

(2) Adoption of merger · division taxation special case

Overall revision of 1998 corporate taxation regulated ‘Provision 6 A special case related to merger and division, etc.’ with the content of adoption of taxation special case institution along with complementation of merger margin, liquidation profit, and sales right, etc. to support corporate restructuring.[30] Due to this, the merger that satisfies a regular condition enables postponement of tax on liquidation income of predecessor company,

29) Kim, seokhwan, Ibid paper p.137.

30) Kim, jinsu · Lee, junguyu, 「Corporate takeover · merger(M&A) Study on taxation institution」, Korea Institute of Public Finance(2006), p.17,18.

deemed dividend income of predecessor company stockholders, and tax on liquidation income of predecessor company on merger evaluation margin of merger corporation, and the merger corporation could be deducted with merger evaluation margin.

Overall revised 1998 corporate taxation was allowed with succession of book value frontally in respect of the method of applying taxation special case, however predecessor corporation enabled calculation of liquidation income with the method to calculate market value of merger grant in case of predecessor corporation, on the other hand, merger corporation intended to achieve taxation special case effect in a roundabout method deducting in the advanced depreciation provision or temporary depreciation allowance again in case of business fixed asset while including in gross income on merger evaluation margin that occurs based on market price evaluation, however taxation special case effect was intended to achieve in a roundabout method to deduce as the advanced depreciation provision or temporal depreciation allowance again based on business fixed asset.[31)]

1998 overall revised corporate taxation Provision 6 Special case regulation on merger and division

Art 44 (Deduction of merger evaluation margin amount)
Art 45 (Succession of carry forward deficit upon merger)
Art 46 (Deduction of division evaluation margin amount)
Art 47 (Deduction of asset transfer margin amount upon physical division)
Art 48 (Income amount calculation special case for the existing corporation after division)
Art 49 (Succession of asset · debt upon merger and division)

31) Kim, seokhwa, op. cit. paper, p.133.

C. Before 2009 revision after 1998 revision

(1) 2001 revision

In 2011, corporate taxation was revised to support smooth corporate restructuring along with shift of corporate restructuring to permanent system.

2001 revised corporate taxation enabled ① succession of loss carried forward considering there's no big worry about tax evasion during merger between corporations in special relation, since succeeded loss carried forward is deducted within the range of income generated from the succeeded business, while the loss carried forward of predecessor company cannot be transferred to merger corporation during the merger between the corporations in special relation in previous cases(2001 revised corporate taxation art 45) and on the other hand, ② divided corporation made to include the amount calculated as deficit again in profit in case when the corporation newly established in physical division after including a certain amount of asset transfer margin generated from physical division merges with another corporation within 3 years, however a newly established corporation by physical division can continuously include in deficit even when merging sith another corporation (2001 revised corporate taxation art 47 provision 2 item no. 3), supporting smooth corporate restructuring by complementing support system in various taxes on merger · division.

(2) 2008 revision

In 2008, corporate taxation was revised to improve deficit carried forward deduction institution upon merger to reduce tax burden or corporations.

2008 revised corporate taxation abolished the regulation to define deficit deduction of merger corporation in case of merger of a corporation with

a big deficit, in consideration of the necessity to improve to equalize deficit deduction range regardless of merger form such as deficit corporate merger of black figure corporation, black figure corporation merger of deficit corporation, etc., deducing deficit carried forward between merger corporation and predecessor corporation upon merger from the income amount generated from each business after merger (2008 revised corporate taxation art 45 provision 1 and 2). This is significant in view of enhancement of tax balance between merger form and prevention of tax evasion using merger.

D. 2009 revision

1998 corporate taxation revision brought a big change in merger · division taxation institution. However, since IMF economic crisis, 1998 overall revision taxation was pointed out with various problems such as imbalance between corporate taxation and corporate accounting standard as the result of hurriedly adopting U.S. taxation special case institution in the situation when corporate restructuring emerged as a national task.[32] Korea executed overall corporate taxation revision to support smooth corporate restructuring and reinforcement of competitiveness through advancement of tax special case institution on merger · division on December 31, 2009, while continuing revision of corporate taxation to resolve the problems of 1998 overall revision corporate taxation. Also, as the follow-up thereof,

32) Corporate taxation before 2009 revision postponed taxation on the corporation or stockholders when a certain condition is satisfied in case of comprehensive transfer · succession of the asset upon merger · division, however it became a burden to promote corporate restructuring due to incomplete tax postponement effect since the taxation system is too complicated and the tax postponement effect was incomplete by limiting tax postponement to tangible fixed asset for business.

revised corporate taxation enforcement ordinance on February 18, 2010.

2009 revised corporate taxation is based on the principle of market value evaluation succession in case of non-qualified case, and book value succession in case of qualified case by dividing merger·division into non-qualification and qualification, while following the principle that merger · division could be viewed as the taxation opportunity of unrealized gain.[33] This is similar to U.S. taxation special case and Japanese merger · division taxation institution that was executed with overall revision in 2001 based on the U.S. case.

[Table] 2009 revised content[34]

<table>
<tr><th>Before 2009 revision</th><th>2009 revision</th></tr>
<tr><td>□ Taxation on merger · division
○ (Predecessor company, etc.) liquidation income taxation
* Taxed by being separated from business year income
○ (Merger corporation, etc.) merger evaluation margin · division evaluation margin taxation</td><td>□ Taxation on merger · division
○ (Predecessor company · merger corporation, etc.)
: Taxation on transfer profit and loss
<table><tr><td>non-qualified</td><td>Taxation on merger for predecessor company</td></tr><tr><td>qualified</td><td>Taxation on liquidation for merger corporation</td></tr></table>* Taxation by being integrated with business year income</td></tr>
<tr><td>□ Tax postponement on merger that satisfies following conditions
㉠ Merger between the corporations that managed business over 1 year</td><td>□ Arrangement of tax postponement condition
㉠ Same as the left</td></tr>
</table>

33) Kim, seokhwan, op. cit. paper p.133.

34) National Tax Service, 「Revised tax law commentary 2010」, National Tax Service(2010), p.174, 175.

Before 2009 revision	2009 revision
㉡ Value of stock, etc. among total sum of merger (division) grant is over 95% ㉢ Succeeded business until termination of business year such as merger is continued * Liquidation income · deemed dividend tax postponement require satisfaction of ㉠ · ㉡, tax postponement as merger evaluation margin, etc. requires satisfaction of ㉠ · ㉡ · ㉢ ※ Target for merger evaluation margin taxation postponement : Tangible fixed asset for business (corporate order)	㉡ Over 80% of stock ratio and a certain degree of stockholders continue holding of merger new stocks ㉢ Same as the left * Transfer profit and loss · deemed dividend tax postponement require satisfaction of ㉠ · ㉡ · ㉢ ※ Target for transfer profit and loss tax postponement : all assets(corporation order)
□ Tax special case follow-up ○ Period : within 3 years after termination of business year that includes merger registration date, etc. ○ Condition - Continuing succeeded business <New establishment> <New establishment>	□ Arrangement of follow-up ○ Period : the period determined by the presidential order within the range of 3 years ○ Condition - Same as the left - A certain degree of stockholders continue holding of merger new stocks * However, exception is allowed in unavoidable cases
□ Deficit carried forward of predecessor company and succession of tax adjustment	□ Unification of succession condition such as deficit carried forward with taxation special case condition

Before 2009 revision	2009 revision
○ Deficit carried forward succession condition - To satisfy tax postponement special case condition - To succeed book value of predecessor corporation asset - In case when merger new stocks are over 10% of total number of merger corporation issue stocks ○ Succession of tax adjustment - Division of tax adjustment per item(enforced succession, enforced non-succession, selected succession)	○ To relieve condition of deficit carried forward succession - To satisfy condition of tax postponement special case - Deleted - Deleted ○ Arrangement of succession condition of tax adjustment - Qualified : overall succession in principle Non-qualified : non-succession in principle * Details are defined in presidential order
<New establishment>	□ Limitation of liquidation loss deduction of succeeded asset ○ The loss generated upon liquidation of the asset succeeded from predecessor company within 5 years after merger - can be deducted only within the range of the income of succeeded business

E. Present after 2009 revision

(1) 2011 revision

In 2011, corporate taxation (and the ordinance) was conducted to improve·complement some insufficient points that appeared in the operation

of current institutions such as connective tax payment institution and corporate restructuring tax, etc. while directly regulating the content of 'business purpose division' in law among the qualified division condition to complement relevant regulation according to Korea adoption international accounting standard introduction and commercial revision and realize the principle of no taxation without law.

Major content is, ① introduction of triangle merger to merger tax special case also in corporate taxation along with introduction of triangle merger in commercial law (2011 revised corporate taxation art 44, the same revision ordinance art 80 provision 2),[35] ② extension of deemed dividend tax target to resolve the problem that deemed dividend cannot be taxed in case of capital transfer along with transition of profit surplus of predecessor corporation to stock issue surplus of merger corporation upon merger (same revision art 16, same revision ordinance 12),[36] ③ application of merger tax special case also in case of merger of complete mother corporation by affiliated corporation to support efficient corporate restructuring (same revision art 44 provision 3), ④ extension of limitation of asset liquidation loss deduction upon merger to paper company, etc. expected with asset liquidation loss as the merger corporation (same revision art 45 and 46 provision 4), ⑤ Improvement of continuity condition of stock among the condition of merger·division tax special case to complement

35) Included the case of distributing over 80% of complete mother corporation stocks to predecessor company stockholders by merger corporation in merger taxation special case condition.

36) Surplus(asset adjustment account, taxed part among predecessor company capital surplus, profit surplus of predecessor company) based on the taxed income among the surplus succeeded from predecessor corporation as the qualified merger(qualified division) is taxed as deemed dividend (National Tax Service, 「Revised taxation explanation 2012」, National Tax Service(2012), p.153).

the problems that differ whether of satisfaction of continuity of share along with the case that pays merger grant or not on the inclusive stock (same revision ordinance art 80 provision 2 item 3, art 82 provision 2 item 3),[37] ⑥ improvement of stock distribution condition among merger·division tax special case condition to complement the problems that differ whether of satisfaction of merger tax special case condition along with assignment of merger grant on predecessor corporation stock (inclusive stock) that had been held by the merger corporate, the prominent stockholder, before merger registration date (same revision ordinance art 80 provision 2 item 4, art 82 provision 2 item 4)[38], ⑦ improvement of merger·division follow-up condition to complement the problem as exclusion of tax postponement of merger corporation when some dominant stockholders randomly violate follow-up condition randomly (same revision ordinance art 80 provision 2, art 80 provision 4, art 82 provision 2, art 82 provision 4),[39] ⑧ improvement of physical division tax special case in order not to tax each case of sale of stock and succeeded asset by divided corporation and divided newly established corporation after division (same revision art 47, art 47 provision 2),[40] ⑨ regulation of liquidation asset range of divided newly established corporation as the land that greatly

37) When determining whether of satisfaction of continuity condition of share among merger tax special case, it is considered to be distributed with merger grant even when merger grant is distributed on the inclusive stock by regulating calculation method on inclusive stock, on the other hand, the inclusive stock acquired within 2 years is considered to be paid with money even when paid in stock for the merger grant.

38) Combined stock determines dominant stockholder arrangement condition considering that the merger grant was given with the stock for the merger price even when merger price is not given.

39) A regulation on relieving dominant stockholders' stock holding condition and dominant stockholders' holding stock liquidation order (considered to sell off the acquired stock in advance in another method besides merger) was newly established.

40) Differently from the previous case, only divided corporation was taxed.

generates depreciation asset and transfer profit related continuity of business and stock·investment share (same revision ordinance art 84, art 84 provision 2), definite regulation of value of stock acquired along with physical division for legal stability reinforcement (same revision ordinance art 72 provision 2).

(2) 2015 revision

On December 15, 2015, corporate taxation was revised, later, February 12, 2016, corporate taxation ordinance was revised. In 2016 revised corporate taxation ordinance, ① tax postponement was newly established upon merger with a foreign corporation in 100% dominant relation to support overseas affiliated company restructuring of domestic corporation [41] (corporate taxation ordinance art 14), and ② exception for taxation after physical division tax postponement to support additional restructuring of domestic corporation given with tax postponement upon physical division was added[42] (corporate taxation ordinance art 84).

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41) Previously, deemed dividend postponement was approved on domestic corporation, the stockholders of merger between 100% dominant domestic corporations, however 2015 revision approved deemed dividend tax postponement even in case of merger between foreign corporations in 100% control relation in case when ① foreign corporation is 100% mother company of another foreign corporation, and it should be merged the other foreign corporation, ② merger corporation should be the corporate of the same nationality concluded with tax treaty with Korea, ③ corporate tax along with merger should be tax-free or postponed on the domestic corporation of predecessor company in the relevant country, ④ deemed divident tax postponement is approved also in merger between foreign corporation in 100% dominant relation in case of the condition to present the documents that can determine the facts of ① or ③ to the head of tax payment district tax office (National Tax Service, 「Revision tax explanation 2016」, National Tax Service(2016), p.89).

42) Qualified division (except division merger) of divided corporation was added to the previous collection exceptional case.

Chapter 3 Review of commercial law and taxation regulation on merger and division

Part 1 Regulation of commercial law on merger and division

1. Regulation of commercial law on merger

A. Merger method available in commercial law

(1) Merger and division merger

In commercial law, merger basically is divided into merger and newly establishment merger. Merger is the comprehensive succession of the predecessor company's right and obligation to the existing company as one part among merger parties is dissolved, while newly establishment merger is to be comprehensively succeeded with the right and obligation to the newly established company as all merger parties are dissolved. However, due to the advantage of legal procedure or taxation, merger is popular in Korea.

(2) Grant merger, triangle merger, inverse triangle merger

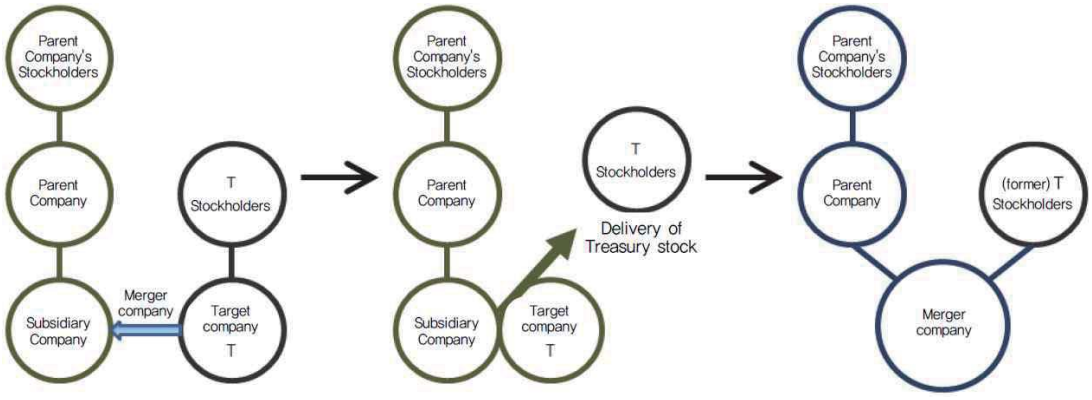
2011 revised commercial law softened merger grant by enabling provision of money or other asset as the whole or part of merger grant. Furthermore, in case of paying merger grant based on inclusion of mother company stock in the other asset acknowledged exception of acquisition prohibition of mother company stock by affiliated company.[43] As the result, grant merger and triangle merger on commercial law became enabled.

43) The core point of triangle organization reorganization was in approval of acquisition of mother company stock by affiliated company.

Grant merger calls the merger that the existing company pays money or other asset for the whole merger grant to the stockholders of the dissolved company. When using this grant merger, stocks of dissolved company can be completely excluded from the existing company after merger.

Each merger does not merge the company by the mother company being the subject of merger, however pays the stocks of mother company to the target company as the price while merging the company through the affiliated company. When utilizing this triangle merger, ① evasion of responsible succession, ② resolution of stockholders general meeting and evasion of stock purchase claim, ③ maintaining of organization and reorganization within the group, ④ triangle merger with a foreign corporation, and ⑤ roundabout listing effect, etc. can be expected.[44)]

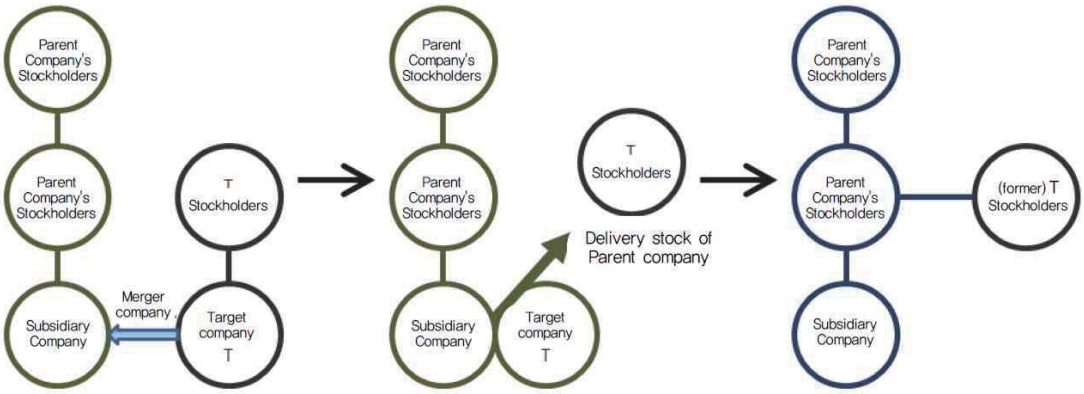
General merger aspect in case of having a mother company[45)]



44) Yun, heewoong · Kim, gayeong, "Legal review on triangle merger", 「Study on securities act」 volume no.14 issue no.2, Korean securities law association(2013), refer to p.284 and below.

45) Ministry of Justice, "Revision to reinforce dynamism of economy through vitalizing merger and acquisition (M&A) 「Commercial law」 is conducted on March 2 (Wednesday)", Ministry of Justice report data (2016. 2. 29), p.9.

Triangle merger[46)]



However, inverse triangle merger on 2011 revised commercial law[47)] was not allowed. However, as the result of adopting triangle stock exchange in 2015 revised commercial law, inverse triangle merger effect that takes the takeover corporation as the existing company could attained.[48)] As the result, the original corporate value of takeover company, such as intellectual property, trade name right, and exclusive contract right, etc. as the asset developed by takeover company, patent right, etc. could be fully utilized. On the other hand, an opportunity for various investment fund return, such as payment for price in stock of mother company, the actual agent of takeover, could be secured for the merged company stockholders or investors as venture business.

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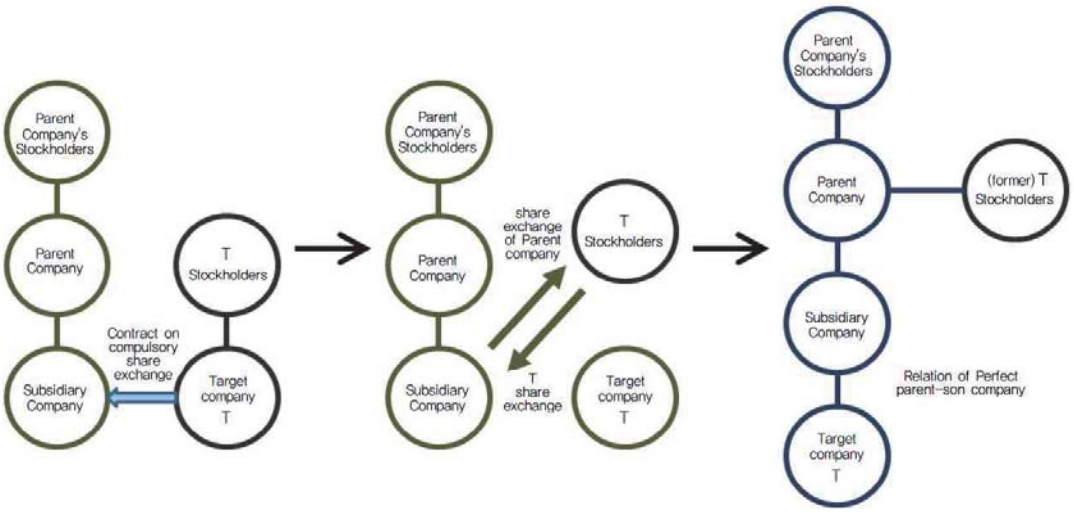
46) Ministry of Justice, Ibid, p.9.

47) Inverse triangle merger is practically the mother company merges with the predecessor company, however formally the mother company establishes the affiliated company and promotes merger with the predecessor company trough the affiliated company to absorb the affiliated company into the predecessor company.

48) After triangle stock exchange, takeover company could be existing company through inverse merge between affiliated company and takeover company.

Inverse triangle merger utilizing triangle stock exchange[49)]



B. Procedure of merger

(1) Merger contract

Corporations generally go through investigation and negotiation process on the merger corporation before merger contract. Also, merger is determined based on overall review of necessity of merger, accounting and tax matter, and legal matter, etc. and merger contract is made on the merger condition and content.

(A) Issue related to merger contract

1) Merger ratio

When more than 2 companies merge, whether of how many stocks of the existing company would be paid to the stockholders who are holding

49) Ministry of Justice, Ibid, p.2.

1 stock of the dissolved company is the core point of merger contract. Merger ratio basically is determined by the contract between the merger companies by considering corporate value of the existing company and dissolved company, however capital market act ordinance art 176 provision 5 item 1 defines evaluation method of corporate value upon merger as follows.

① Merger between listed companies

The previous day of the foregoing day among the resolution date of board of directors and the merger contract date as the initial date i) recent 1 months' average final price[50], ii) recent 1 week's average final price, iii) discounted or extra charged value within the range of 30 among 100 (10 among 100 in case of merger between affiliated companies) based on the arithmetic mean value of the latest day's final value.[51]

② Merger between listed company (except listed companies of CONEX market) and unlisted company

In case of listed company, value of ①,[52] in case of unlisted company, weighted arithmetic average of asset value and profit value.

In working-level, merger including listed company is actually enforced with merger ratio calculation by the evaluation method of the above. If it does not follow this, Financial Services Commission does not accept securities report on the basis of Capital market act art 120 provision 2.

There's a conflict in opinion in respect of determining uniform standard

50) Final price that came into stock market.

51) In this case, average final price of i) and ii) is calculated in arithmetic average based on the final price as the deal amount.

52) However, in case when value of ① falls short of asset value, asset value is available.

of merger ratio and actually compelling this. However, in Korea, most of mergers are conducted between the affiliated companies within corporate group, in such case, it is necessary to compel uniform evaluation method considering the point that merger ratio can be determined in the direction to promote profit of dominant stockholders.[53]

2) Merger with corporation in excessive debt

There's no regulation in commercial law that prohibits merger with a company with excessive debt. However, whether of approval of such merger is a problem in principle of capital adequacy.

The previous commercial registration precedent did not allow merger registration with the corporation with excessive debt as the dissolved company considering the principle of capital adequacy, protection of stockholders and creditors of the existing company by maintaining fairness of merger, and the regulation on commercial law (art 523 provision 1 to 3, art 459 provision 2), based on merger margin.[54]

However, it is not proper to deny this when considering that merger is acknowledged as corporate restructuring means, and commerce takes a protection means for anti-merger stockholders and creditors, etc.[55]

To see the recent commercial registration precedent, "in case of merger registration application with corporate with excessive debt as the dissolved company, the document that certifies that the dissolved company due to merger is not the corporation with excessive debt (for example, statement

53) Song, okryeol, op. cit., p.1194.

54) Commercial registration precedent no.1-237(2001. 10. 31 revision).

55) Hong, bokgi, "Regulation of commercial law on M&A and a few problems – Focus on comprehensive deal of merger, division, and stock-", 「Seonjinsangsa Law Study」 consecutive book no.67, Ministry of Justice(2014), p.6; Song, okryeol, Ibid, p.1196.

of position of dissolved company) doesn't have to be attached to the application, even if this document is attached, registration officer cannot evaluate whether of excessive debt of dissolved company", showing different position from the previous cases.[56]

3) Non-capital increasement merger

Commercial registration precedent takes the position that "non-capital increasement merger in merger with predecessor company with non excessive debt is available when the position of relevant company stockholders and creditors is not influenced as ① the existing company owns the whole stocks of dissolved company ② the existing company owns enough treasury stocks in distributing stocks to dissolved corporation stockholders".[57] Because ① and ② have no reason to issue merger new stocks.

4) Treatment of combined stock

In respect of merger, there is a case that the existing company owns the stocks of dissolved company. This is called combined stock in working-level.

Combined stocks occur generally when the mother company combines the affiliated company or the existing company purchases the stocks of dissolved company before merger. Distribution of merger new stocks for the combined stocks is not different from treasury stock acquisition by new stock issue, however majority of the opinion is to arrange merger new stocks also in combined stocks. In working-level, merger new stocks are arranged for the combined stocks, however, not arranged in some

56) Commercial registration precedent no.2-78(2014. 1. 9 enactment).
57) Commercial registration precedent no.1-237(2001. 10. 31 enactment).

cases.

However, a systematic review is necessary, since merger new stock scale is reduced without arranging merger new stocks on combined stocks, and there are cases to satisfy the condition of small scale merger.[58)]

(B) Composition of merger contract

For a corporate merger, approval of stockholders general meeting upon composition of merger contract (commercial law art522 provision1), however commercial law divides the entered matters of merger contract into absorptive merger and newly establishment merger.

1) Court entered matters of absorptive merger contract

Commercial law defines that absorptive merger contract should include following matters (commercial law art 523 provision 1 to 9).

① Total number of stocks of the existing company to increase, types and number due to merger[59)]

② capital or reserve fund to increase in case of increase of capital or reserve fund of the existing company[60)61)]

58) Yu, goeun, “Status and case of recent 3 years’ small case merger : Focus on reduction case of merger grant”, 「CGS Report」 2016 volume 6 issue no.4, Korea Corporate Governance Fund(2016), p.21.

59) The number should be increased when there’s no reserve to be paid for merger grant for total number of issue expected stock of the existing company when the existing company issues new stocks for merger.

60) In case when the existing issues the market price stock, total number of new stocks to be issued for merger price* market price is the capital to increase, and reserve fund when the existing company succeeds merger margin or court reserve fund of dissolved company by the existing company. Also, in case when the existing company issues no-par stocks, as the net asset value succeeded from the dissolved company by the existing company becomes the issue value of new stocks issued on the stockholders, accordingly, more than half of them is taken as the capital, and the remainder as the reserve fund.

③ In case when the existing company issues new stocks or transfers treasury stocks upon merger, total number, types and number, and issue stocks or transfer of treasury stocks, arrangement of new stocks for the stockholders of the dissolved company due to merger

④ The content and arrangement in case when the existing company provides money of other asset as the whole or partial price to the stockholders of dissolved company due to merger nevertheless ③

⑤ The general meeting date of the employees or the stockholders to determine approval of merger in each company

⑥ Date to merge[62)]

⑦ The regulation when the existing company determines to change the articles association due to merger

⑧ The limit amount when each company assigns profit due to merger[63)]

⑨ In case when the directors and audits or audit committee members to be appointed to the existing company are determined, name and residence registration number

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61) Basically, total amount of capital to increase and reserve fund should not exceed the asset succeeded by the existing company from the dissolved company. However, in working-level, dissolved company asset is merged based on high evaluation, considering synergy effect, etc. due to merger. Accordingly, total amount of capital to increase and reserve fund sometimes exceeds the asset, in this case, loss is compensated by counting up the sales right. The precedent acknowledges the efficiency of this merger (Supreme court 2008. 1. 10. sentence 2007 Da 64136 judgment).

62) 'Date to merge' is the date expected to complete the working-level procedure to merge merger companies practically, such as transfer of the asset of dissolved company to the existing company and payment of the merger price accordingly.

63) This means the profit distribution by the existing company or dissolved company before merger registration after merger contract.

2) Court entered matters of newly established merger contract

Commercial law regulates that following matters should be entered in merger contract (commercial law art 524 provision 1 to 6).

① In case of issuing the purpose of foundation, company name of the established company, total number of stocks to be issued, and issue of market price stock, price per 1 stock, the type, number, and the headquarter when issuing market price stock

② Total number of stocks, types, number to be issued during merger by the established company, and arrangement of stock for each company stockholders

③ Total amount of capital and reserve fund of established company

④ In case when providing money or other asset to each company stockholders nevertheless ②, matters of the content and arrangement

⑤ Employees who would make approval on merger in each company or the date of stockholders general meeting and the date of merger

⑥ Name and residence registration number when determining director or audit of the established company or audit committee

3) Arbitrary entered matters

In case of merger, purpose of merger contract, duty of central election committee of the company, change of merger condition, dissolution of merger contract, transfer of asset, retirement allowance of executives, number of employees besides court entered matters can be entered. It's general to enter such matters in working-level. For example, in case of transfer of labor relation by the merger of company, the position of the existing employment contract is transferred, accordingly, the employees of

dissolved company attain the position equal to the existing employment contract also in the existing company or the newly established company as far as an agreement is newly made.[64]

(2) Public announcement of merger contract, etc.

Commercial law regulates to place merger contract, etc.[65] until 6 month after merger from 2 weeks before stockholders general meeting for merger approval resolution in the headquarter (Commercial law art 522 provision 2 item 1). Also, stockholders and company creditors can demand view of merger contract, etc. any time during the business hours or pay the cost determined by the company and demand issue of the copy or abstract (same article 2).

This is to provide the data to determine the opinion on merger approval by judging fairness of merger condition by the stockholders or to determine whether of suggestion of objection to merger by the company creditor.

(3) Merger approval resolution and stock purchase claim of anti-merger stockholders

When merging, merger companies should attain approval for special resolution of stockholders general meeting (commercial law art 522 provision 1 item 3). Furthermore, in case of the worry of damage on any specific class of stockholders by merger, approval resolution of specific class of stockholders is also necessary (commercial law art 436). However, an exception is approved in a simple merger or small scale merger.

However, commercial law approves stock purchase claim to promote

64) Supreme court 1994. 3. 8. sentence 93 Da 1589 judgment.

65) Merger contract, etc. means written document such as ① merger contract, ② new arrangement of stock on dissolved company stockholders or the cause of treasury stock transfer on final balance sheet and income statement of each company.

return of invested capital of anti-merger stockholders (including the stockholders with no resolution right or limited) (commercial law art 522 provision 3). That is, stockholders who oppose merger can notify the company with objection before stockholders general meeting before stockholders general meeting, and the stockholders who notified objection can claim the company for the purchase of stocks they own regarding the types and number in written notice within 20 days since stockholders general meeting resolution date (same article 1). In case of simple merger[66], also, an opinion to solidify the will for the dissolved company to merge without approval of stockholders general meeting can be notified, or the will to oppose merger in written notice against the company within 2 weeks since the notice on the stockholders, and the stockholders who made objection notice can claim for the purchase of stocks on the company within 20 days since 2 weeks from the above point (same article 2). However, in case of small scale merger, anti-merger stockholders' stock purchase claim is not approved (commercial law art 527 provision 3 item 5).[67]

In regard that commercial law demands for special resolution of stockholders general meeting in merger, on the contrary, acknowledgement of stock purchase claim of anti-merger stockholders is to promote stockholder protection.

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66) In case when all stockholders of dissolved company agree or the existing company owns the total number of issue stocks of dissolved company, there's no problem in stock purchase claim since there's no anti-merger stockholders.

67) This is the biggest profit to utilize small scale merger institution, however the point out of a problem in view of regulation margin, Gwon, jaeyeol · Hwang, namseok, 「Study on improvement method of corporate reorganization institution on commercial law」, Ministry of Justice research labor report(2013), p.10.

(4) Creditor protection procedure

When a company merges, it influences interest of creditors of existing company or dissolved company, there's a necessity of creditor protection. Due to this reason, commercial law requests both existing company and dissolved company to go through creditor protection procedure. Therefore, if there's an objection in merger on creditor within 2 weeks after stockholders general meeting approval, the company notifies the creditor with submission within over 1 month if there's an objection on merger, and the creditor who already know this[68] should notify this respectively (commercial law art 527 provision 5 item 1).

In case of simple merger or small scale merger, also, necessity of creditor protection exists, accordingly, creditor protection procedure should go through the creditor protection procedure within 2 weeks since the approval of board of directors (same article 2).

(5) General meeting opening

(A) Report general meeting of absorptive merger

In case of absorptive merger, the director of existing company should collect stockholder general meeting without delay after termination of creditor protection procedure and report the matters related to merger (commercial law art 526 provision 1). absorptive merger report general meeting gets the same right as the delivery and taking stocks of new stocks issued during merger (same article 2).

68) As the discussion on the scope of already knowing creditor, Gwon, jaeyeol · Hwang, namseok, Ibid, report, p.56.

However, report general meeting of absorptive merger has no big significance in reality, and 1995 revision substituted board of director notification for this (same article 3).

(B) Foundation general committee of newly established merge

In case of newly establishment merger, establishment committee should collect foundation general committee without delay after termination of creditor protection procedure (commercial law art 527 provision 1). Foundation general committee should report the matter related to newly established merger by the foundation members, and appoint director and audit (same article 3 → art 311 and art 312). Therefore, in order to substitute director committee notification for foundation general meeting (same article 4), merger contract should determine the director and audit of newly established company.

Also, foundation general meeting can determine articles of association change (same article 2). However, the resolution that violates the purpose of merger contract as establishment abolishment cannot be made (same article 2 clue).

In case of foundation general meeting of newly established company, regulation on foundation general meeting upon corporation establishment is applied.

(6) Merger registration

In case of corporate merger, on the termination date of absorptive merger or the notification date that substitutes for report, within 2 weeks in the headquarter since the termination date of foundation general meeting of newly establishment merger or the notification date that substitutes for

report, changed registration for the existing company within 3 weeks in the branch office, dissolution registration for the dissolved company, and establishment registration should be done for the established company (commercial law art 528 provision 1). Also, when the existing company or newly established company succeeds the convertible bond or new stock take over right mortgage, mortgage should be registered simultaneously as merger registration (same article 2).

Merger gets effectiveness by merger registration (commercial law art 530 provision 2 → art 234).

(7) Public announcement

Directors of the existing company or newly established company should place the matters written in document regarding the process of creditor protection procedure, merger date, value of succeeded asset from the dissolved company and other merger on debt amount besides merger in the head office for 6 months since merger date (art 527 provision 6 item 1). Stockholders and company creditors can demand for reading of the relevant document any time within business hours or claim for the issue of copy·abstract thereof upon payment of the expense determined by the company (same article provision 2).

C. Special procedure

Commercial law demands for stockholders general meeting approval as the merger procedure, acknowledging anti-merger stockholders' stock purchase claim. This is to protect the stockholders. However the position of the company is expected with complexity of merger affair and temporal · cost burden due to this procedure. Commercial law enables substitution the

resolution of the board of directors for the approval of stockholders general meeting in case when the necessity for stockholders protection is not big (simple merger and small scale merger), considering this matter.

However, simple merger and small scale merger are the same in respect that approval resolution of stockholders general meeting can be substituted with resolution of board of directors, however there's a difference in whether of acknowledgement of stock purchase claim of the company that can be substituted with board of director resolution for the stockholders general meeting (whether of existing company or dissolved company) and anti-merger stockholders' stock purchase claim, based on different purpose.

(1) Simple merger

Simple merger can substitute board of director resolution for the stockholders general meeting approval in case of simple merger (if there's agreement of total stockholders of dissolved company or over 90 among 100 of total number of issue stock of dissolved company are owned by the existing company) (commercial law art 527 provision 2). However, simple merger institution can be applied to dissolved company in case of absorptive merger.

Simple merger institution based on short form merger, acknowledged by U.S. corporation law is utilized to simplify the procedure in case of absorptive merger of closed unlisted company, or usefully utilized in case when merger is expected and the existing company acquires the stock of dissolved company.

In case of simple merger, stock purchase claim procedure of anti-merger stockholders cannot be omitted. In case of simple merger, also, there's a possibility that the stockholders significantly influenced by the interest

due to merger can oppose merger. However, in case of agreement of total stockholders of dissolved company or when the existing company owns total number of issue stock of dissolved company, stock purchase claim of the anti-merger stockholders does not matter.

(2) Small scale merger

Small scale merger means that the merger new stock issued by the existing company and treasury stocks transferred are below 10 among 100 of total number of issue stock of the existing company. However, from the position of a large scale company, such small scale merger is only an acquisition of asset in the similar scale of ordinary sales activity. Therefore, demanding on the equal procedure to the general merger emphasizing stockholder protection on this case is not desirable in the aspect of efficiency.[69] Commercial law, considering this, enabled substitution of board of director approval for the stockholders general meeting approval of the existing company in case of small scale merger (commercial law art 527 provision 3 item 1).[70] Such small scale merger institution is applied only to the existing company, differently from simple merger.

Also, in case of small scale merger, stock purchase claim of anti-merger stockholders of the existing company is not approved (art 527 provision 3 item 5). This way, small scale merger not only requires stockholders

69) Kim, seongwang, "Legislative consideration on corporate structure change －Focus on simple merger and small scale merger-", 「Economic Law Study」 volume no.10 issue no.1, Korea Economic Law Academy(2011), p.53.

70) Nevertheless the scale, in case when succeeding the business of another company has a significance influence on the company's business, special resolution of stockholders general meeting is required, however substitution of board of directors resolution for it even in case of merger, which is much more significant than sales transfer, which is pointed out to be off balance Lee, cheolsong, op. cit., p.1069.

general meeting approval of the existing company, but also has an advantage not to acknowledge stock purchase claim of anti-merger stockholders, accordingly, it has a significance in respect of merger strategy of the existing company.

However, stockholders general meeting resolution cannot be considered ① when the grant exceeds 5 among 100 of the net asset of the existing company, when the grant is paid to the stockholders of the dissolved company (commercial law art 527 provision 3 item 1 clue), ② When the stockholder who owns over 20 among 100 of total number of issue stock of the existing company notifies anti-merger in written notice (same article 4).

D. Invalidity of merger

Invalidity of merger can be claimed only with suit restricted to the stockholder· director· audit· liquidator· trustee in bankruptcy or creditor who did not approve merger of each company (commercial law art 529 provision 1). Commercial law does not define the cause of invalidity of merger, however in general defect in merger contract, default of creditor protection procedure, defect in the approval of stockholders general meeting, and unfairness in merger ratio can be considered.

Complain against merger invalidity is a form, which should be presented within 6 months since merger registration (same article 2).

2. Regulation of Commercial law on division

A. Division method available in commercial law

(1) Simple division and division merger

According to commercial law regulation, the company (divided company) can establish 1 or several companies (simple divided newly established company) by division (commercial law art 530 provision 2 item no. 1), also, can be merged with several existing companies (divided succession company) (same article 2). The former is called simple division, the latter, divided merger.[71]

Simple division is a method to establish a new company that the divided company newly establishes a new company by separating some part of business. This can be divided into dissolved division and existing division along with whether of dissolution or existence of the divided company by division. On the other hand, in case of dissolved division, the capital of newly established company can be composed ① only with the asset invested by the divided company, ② with the asset invested by the divided company + investment from the 3rd party[72]. In case of ① and ②, establishment procedure of newly established company differs.

Divided merger is a method to combine some part of the divided company with the whole or part of another company, differently from the merger combining the whole of over 2 companies as a single unit. Such division merger also has the cases of dissolution or existence of divided company, accordingly, it can be divided into dissolved division merger and existing division merger. Also, in case of division merger, there are the methods to merge some part of divided company into another company through investment and establish a new company by combining with the

71) In case of simple division, divided business maintains independence, however divided merger is merged into other company losing independence.

72) Commercial registration precedent no.1-245(2003. 9. 1 enactment) : “In case of newly establishing company by dividing a corporation, it can be established by collecting new stockholders besides the investment of the divided company”

whole or part of another company. The former is called absorptive division merger, the latter, new establishment division merger. Division merger basically is combined with dissolved division merger · existing division merger and absorptive division merger · newly establishment division merger.

Commercial law approves newly establishment of a company as a part of divided business, combining simple division and division merger, on the other hand, merger with another existing company (same article 3). However, most cases of Korean corporate division are simple division, while division merger is rarely used.

(2) Personal division and physical division

In case of company division, divided company separates business and transfers it to the simple division newly establishment company (or divided succession company), as the reward, receives stocks of simple division new establishment company (or divided succession company). Here, it can be divided into personal division and physical division according to the point who receive the stock. Personal division is the case when the stockholders of divided company receive the stock, and physical division is for the divided company to receive the stock (commercial law art 530 provision 12).

In case of personal division, the stockholders of divided company owns divided company and simple division newly establishment company (or divided succession company) in parallel, on the contrary, in case of physical division, the stockholders of divided company owns only the divided company as divided company and simple division newly establishment company (or divided succession company) are in the relation of complete affiliated company.

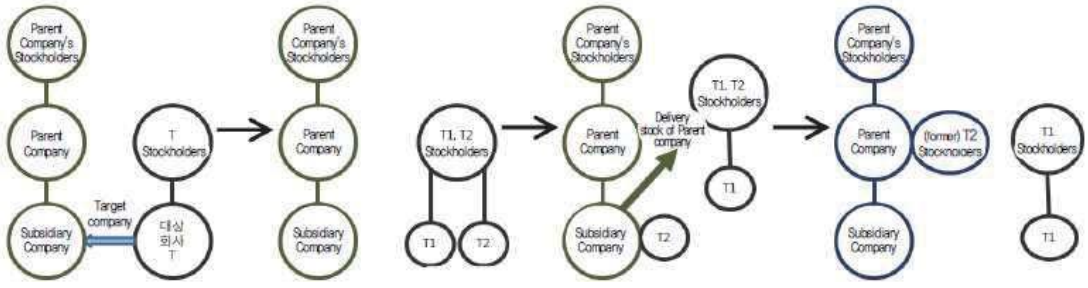
(3) Grant division merger and triangle division merger

2015 revised commercial law adopted grand division merger and triangle division merger for the company to secure new growth drive by utilizing various takeover · merger structure.

Grant division merger is for the divided succession company provides the whole or part of division grant in money or other asset (commercial law art 530 provision 6 item no.1 phrase 4). Considering that grant merger is acknowledged, grant division merger is properly acknowledged.

Triangle division merger is to provide more valuable mother company stocks of divided succession company, which are more valuable to the stockholders of divided company, when merging some part of divided company with divided succession company (commercial law art 530 provision 6 item no. 4).[73] From the position of divided succession company, there's difference only in scale in respect that the absorbed party is not a company, but some business of the company, however the actuality is the same as triangle merger.[74]

Triangle division merger[75]



73) In case when the divided succession company continues to hold mother company stocks acquired to pay division grant, the stocks should be liquidated within 6 months since the effective date of division merger (Commercial law art 530 provision 6 item no. 5).

74) Song, okryeol, op. cit., p.1227.

75) Ministry of Justice, Ibid, p.10.

B. Procedure of division

(1) Division plan · contract

(A) Division plan · contract related issue

1) Target for division

Actually, there was an issue on whether division only of individual asset was available on 2003 commercial law. Here, the Ministry of Justice suggested an opinion, "Our commercial law does not specify the target for company division only as business, accordingly, it cannot be defined that only targeting asset for division is prohibited. However, according to commercial law revised special subcommittee minutes of working-level, who undertook 1998 commercial law revision, division of company 'sales' unit was premised by commercial law revision members during that time in respect of progressing discussion on company division institution, also, majority of academic opinion was premised with division of business unit, and the discussion that special individual asset only can be the target for division is not actively progressed, also, considering the legislation of Japan and Germany, which we referred to while enacting · revising commercial law, it is determined to accumulate deliberate and in-depth academic discussion and concrete case study as well as judical determination of Supreme court and Constitutional court on this beforehand in order to acknowledge company division of individual asset in current legal system without commercial revision".[76] The Ministry of Justice did not say that division of individual asset was prohibited, however this can be said to

76) Ministry of Justice 2004. 3. 11. Deputy Director General of Legal Counsel - 995 Reply to the question about division merger on commercial law.

be negatively evaluated based on the overall intension.

However, the opinion is still conflicting about whether the target for division should be business, or should include individual asset, accordingly, legislative complementation is required.[77)]

2) Division of the company with exceeding debt

Simple division of the company with exceeding debt has no reason to prohibit this. In case of physical division, divided company owns all stocks of simple division newly establishment company, while in case of personal division, simple division newly establishment company takes joint liability regarding the debt of divided company, accordingly, creditor protection is available.

Division merger of the company with exceeding debt is also available, however a complicated problem is caused compared to simple division. In case when divided company is in exceeding debt, divided succession company takes joint liability on the debt of divided company as the case of simple division, so there's no big problem in respect that creditor protection is possible. However, it differs in case of exceeding debt of divided succession company. Due to this, in such case, the opinions that

77) Gang, hyeongu on the opinion to raise a necessity of legislative complementation, "Study on the target for division of listed company －Focus on the possibility of company division only of the 'asset'-', 「Study on securities law」 Volume 11 provision 3, Korea securities law association(2010), p.362; on the other hand, there's a worry that the holding company can return the profit of the affiliated company evading dividend institution or misuse division to evade transfer limitation defined by the law, in principle, a method to limit target for division as sales unit asset, approving individual asset division exceptionally in case of necessary case in the purpose of company organization change, Jeong, juna, "Division related capital market act issue －Focus on practical issue related to division target · notification · listing -", 「BFL」 issue no.49, Seoul National University Financial Law Center(2011), p.103.

division merger should be allowed restricted to the case of overall consent of divided company stockholders and division merger should be allowed when the other procedure of division merger was properly proceeded are conflicting. Currently, it is impossible to determine which opinion is valid, however, it is necessary to additionally discuss upon working-level trend, etc.

3) Non-capital increase division merger

In case of division merger, whether of non-capital increase division merger is allowed can be a problem. On this, commercial registration precedent views non-capital increase division merger is available in case when ① net asset value of division target is 0[78] or ② divided succession company owns the whole stocks of divided company.[79]

4) Division of liquidated company

According to commercial registration precedent[80], the company dissolved by than establish a new company through physical division or personal

78) Commercial registration precedent no.1-243 (2002. 1. 2 enactment) : "In so-called absorptive division merger where some business part is merged into the existing company upon personal division, while divided company is existing, when a specific business division divided has net asset value 0 on the balance sheet of art 530 provision 7 item no.1 and 2, non-capital increase merger is available with no allocation of the stock of the other company of division merger to the stockholders of divided company, since there's no merger margin."

79) Commercial registration precedent no.2-85 (2009. 9. 2 enactment) : "In case when the other company of division merger owns the whole stocks of divided company, a contract that divided company stocks, the other party of division merger, or the divided company does not receive the stocks of the other party of division merger should be made (accordingly, total number of issue stock of the other party of division merger and total amount of capital do not increase), also, change registration can be applied along with division merger by attaching that division emrger contract."

80) Commercial registration precedent no.2-79 (2006. 5. 24 enactment).

division as a method of disposition of realization(commercial law art 542 provision 1, art 254 provision 1, item no.3) of asset (art 530 provision 2 item no.4). However, liquidation procedure after division should be continued, business before dissolution cannot be operated without resolution of continuance of company (art 519).

There's no difference in procedure between physical division and personal division (art 530 provision 12), creditor protection also is enough when following the same procedure as company division before dissolution. Therefore, liquidated company can establish several companies simultaneously through physical division and personal division, accordingly, each newly established company can be established upon establishment registration in the headquarter location district register office (art 530 provision 11 item no.1, art 528, art 317, art 234).

(B) Division plan · division merger contract

In case of division or division merger, division plan or division merger contract should be made and get approval of stockholders general meeting (commercial law art 530 provision 3 item no.1).

Entered matters of division plan and division merger contract are based on the entered matters of merger contract.

1) Court entered matters of division plan

Court entered matters of division plan differ in dissolution division and existing division.

Dissolution division includes following matters in the division plan (art 530 provision 5 item no.1).

① Company name, purpose of simple division newly establishment

company, location of headquarter, and notification method

② Total number of stocks to be issued by the simple division newly establishment company and market value stock · no-par stock

③ Total number of stocks to be issued during division by simple division newly establishment company, type, number per stock type, division of market value stock · no-par stock

④ Matters of stock distribution of simple division newly establishment company on the stockholders of divided company and the matters related to the case of combination or division of stock along with allocation

⑤ The content and allocation in case of providing money or asset to the stockholders of divided company

⑥ Capital and reserve fund of simple division newly establishment company

⑦ Asset and the value to be transferred to simple division newly establishment company

⑧ The content in case when there's a determination that the debt to be succeeded upon the division plan among the debt of divided company

⑨ Divided date

⑩ Name and residence registration no. in case of determining director and audit of simple division newly establishment company

⑪ Other matters to be entered in the articles of association of simple division newly establishment company

However, following matters should be entered regarding existing division company by adding to the above division plan in case of existing

division (art 530 provision 5 item no.2).

① Capital to be decreased and reserve fund amount[81)]

② Method of capital decrease

③ Asset and the value to be transferred due to division

④ Total number of issue stock after division

⑤ In case of decrease of total number of stock to be issued by the company, total number of stock to decrease, type, and the number per stock type

⑥ Ohter matters to bring articles of association change[82)]

2) Court entered matters of division merger contract

Court entered matters of division merger contract differ along with whether of absorptive division merger or newly establishment division merger. Whether of dissolved division merger or existing division merger does not matter.

In case of absorptive division merger, following matters should be entered in division merger contract (commercial law art 530 provision 6 item no. 1).

① In case when the divided succession company increases the total number of stock to be issued due to division merger, total number

81) In case of division, business asset of divided company is transferred to the newly established company, accordingly, the asset of divided company decreases, however the divided company should not have to reduce capital since the asset of divided company decreases.

82) For example, when a division company establishes a new company by dividing home appliances from home appliances and semiconductor division and limits its business purpose on the articles of association to semiconductor division, furthermore, in order to change the company name, etc. according to business change, this should be reflected on the division plan.

of stocks to increase, type, and the number per stock type

② In case when the divided succession company issues new stocks while division merger or transfers treasury stock, new stock to be issued or total number of transferred treasury stock, type, and the number per stock type

③ In case when the divided succession company issues new stocks or transfers treasury stocks while division merger, matters of new stock allocation of divided succession company on divided company stockholders or transfer of treasury stock and the matters of combination or division of stock

④ The content and allocation when the divided succession company provides money or other asset to the divided company stockholders as the whole or part of grant

⑤ In case of increase of capital or reserve fund of divided succession company, matters of capital to increase or reserve fund

⑥ Asset and the value to be transferred to divided succession company by divided company

⑦ In case when there's a determination of taking the responsibility for the debt determined to be succeeded upon division merger contract among the debt of divided company by divided succession company

⑧ Date of stockholders general meeting to make resolution on division merger by each company[83)]

⑨ Date of division merger

⑩ Name and residence registration number in case of determining

83) Division merger contract should attain resolution of general meeting of stockholders also in the other party, besides the divided company, accordingly, both parties should agree the date of stockholders general meeting and enter this in division merger contract.

divided succession company director and audit

⑪ Other matters to bring articles of association change of divided succession company

In case of newly establishment division merger, following matters should be entered in division merger contract (Commercial law art 530 provision 6 item no. 2).

① In case of dissolved division, ①, ②, ⑥, ⑦, ⑧, ⑨, ⑩, ⑪ among the matters to be entered in the division plan

② Total number of stocks to be issued while division merger by division merger newly establishment company, type, and the number per stock type

③ Matters of allocation of stocks on each company stockholders, combination of stocks along with allocation, or the regulation in case of division

④ Asset and the value to be transferred to division merger newly establishment company by each company

⑤ Regulation when the amount to be paid to the stockholders of each company was determined

⑥ Date of stockholders general meeting to make resolution on approval of division merger by each company

⑦ Date of division merger

(2) Notification of division plan · division merger contract, etc.

Director of divided company director should place division plan· division merger contract for 6 months since the date of division registration or division merger from 2 weeks before stockholders general meeting for division or division merger resolution[84] in the headquarter (commercial

law art 530 provision 7 item no.1). Also, the director of divided succession director should locate division merger contract, etc.[85] in the headquarter for 6 months after division merger registration 2 weeks before stockholders general meeting to approve division merger (same article 2). Stockholders and company creditors can request reading of the documents any time during business hours, or claim for the issue of copy or abstract upon payment of the cost determined by the company (same article 3).

This is to provide a material for the stockholders to determine fairness in division condition as merger or to determine whether of objection on division by company creditor.

(3) Approval resolution and stock purchase claim of anti-merger stockholders

(A) Approval resolution

In case of division or division merger, approval upon special resolution of stockholders general meeting should be attained (commercial law art 530 provision 3 item no. 1・2). In respect of the relevant stockholders general meeting resolution, the stockholders who are excluded from voting right can be acknowledged with voting right (same article 3). However, any specific class stockholders general meeting is acknowledged considering that other restructuring has no such regulation as merger,

84) Division plan・division merger contract means ① division plan or division merger contract, ② balance sheet to be divided, ③ in case of division merger, balance sheet of the other party of division merger, ④ in case when new stocks are issued or treasury stocks are transferred due to division merger, the cause of allocation of new stocks on the stockholders of divided company or transfer of treasury stock.

85) Division merger contract means ① division merger contract, ② balance sheet on the divided part of divided company, ③ cause of new stock allocation on the stockholders of divided company when issuing new stocks or transferring treasury stock while division merger.

stock exchange · stock transfer, etc., and any specific class stockholders could be damaged by division or division merger (commercial law art 436), accordingly, voting right shouldn't have to be obstinately acknowledged on the stockholders excluded from voting right.

However, in case when burden of each company stockholders related to division or division merger due to division or division merger increases, consent of all stockholders is required besides resolution of specific class stockholders general meeting (commercial law art 530 provision 6). Here, 'the case of adding burden' of stockholders means the additional capital increase.

In case of division merger, simple division merger or small scale division merger is approved, which can omit approval resolution of stockholders general meeting by applying simple merger and small scale merger (art 530 provision 11 item 2).

(B) Anti-merger stockholders' stock purchase claim

Anti-merger stockholders' stock purchase claim is acknowledged only in case od division merger (commercial law art 530 provision 11 item no. 2). Because simple division only divides company asset and business in physical · functional aspect, however no big change is caused in the interest of stockholders.

Anti-merger stockholders stock purchase claim procedure of division merger is same as merger.

(4) Creditor protection procedure

Commercial law defines joint liability of the debt of divided company before division registration on divided company, simple division newly establishment company, and divided succession company (commercial law

art 503 provision 9 item no.1). As the result, simple division can be said to have no actual change in the responsible asset or responsible subject, however in case of division merger, the creditor of division merger company shares responsible asset, accordingly, a critical change occurs in the responsible asset and responsible subject. Due to this reason, there's a difference in creditor protection method along with simple division or division merger in case of company division.

In case of simple division, basically the necessity to pass creditor protection procedure is not big. However, in case of excluding joint responsibility for the debt of divided company (same article 2), there's a necessity of creditor protection, accordingly, creditor protection procedure is definitely required along with stockholders general meeting special resolution (same article 4).

On the other hand, in case of division merger, there's a necessity of creditor protection as mentioned in the above, creditor protection procedure is always required regardless of exclusion of joint liability (same article 3) (art 530 provision 11 item no.2). Here, creditor protection procedure should pass divided succession company besides divided company.

Creditor protection procedure of company division should apply the creditor protection procedure on merger.

(5) Company establishment and general meeting

In respect of company establishment along with division or newly establishment division merger, commercial law regulation on company establishment should be fully applied (commercial law art 530 provision 4). However, in case of issuing the stocks of newly established company in proportion of the share on the stockholders of the divided company, art 299 on the inspector's investigation · report is not applied (same article

clue). In this case, there's no shareholder invitation, accordingly, there's no new interested party on the evaluation of investment in kind, and no worry about fairness of investment in kind when the stockholders of divided company receive stock of newly established company in proportion of their share.

(6) Division registration

Registration time differs along with division method in case of company division. In case of simple division or newly establishment division merger, registration should be conducted within 3 weeks in the branch district, while within 2 weeks in the headquarter district office from the termination date of newly established company foundation general meeting. In case of absorptive division merger, registration should be made within the same period as above by calculating from the termination date of approval resolution of stockholders general meeting on division merger contract.

Divided company should register change in case of existing division, while dissolution in case of dissolved division, also, newly established company by division should perform establishment registration. Also, in case of absorptive division merger, divided succession company should perform change registration.

Company division becomes effective upon registration (commercial law art 530 provision 11 item no.1).

(7) Notification upon approval

After division or division merger, the director should place the document entered with the progress of creditor protection procedure, date of division or division merger, the value of the asset succeeded from the divided company, debt, and other matters of division and division merger for 6

months from the date of division or division merger in the headquarter (commercial law art 530 provision 11 item no.1). Stockholders and company creditors can request reading of the document any time during business hours or request issue of the copy · abstract upon payment of the cost determined by the company.

C. Special procedure

1) Simple division merger

Commercial law enables substitution of board of directors approval for stockholders general meeting approval of divided company in case when there's consent of overall stockholders of divided company or the divided succession company owns 90 among 100 of total number of issue stock by divided company, also in case of division merger (commercial law art 530 provision 11 item no.2). This is called simple division merger, which is applied only to divided company, as the case of simple merger.

(2) Small scale division merger

Commercial law enables substitution of board of directors approval for stockholders general meeting approval of divided succession company, in case when division new stock or transferred treasury stock of divided succession company are below 10 among 100 of total number of issue stocks by divided succession company, also in case of division merger (commercial law art 530 provision 11 item no.2). This is called small scale division merger, differently from simple division merger, it is applied only to divided succession company.

However, in case of division merger, divided succession company takes joint liability on the debt of divided company regardless of the amount

of takeover, in case of division merger, accordingly, the risk by division merger cannot be determined small due to small quantity of stock to be issued. Therefore, in case of small scale division merger, there's a question about the validity.[86)]

D. Invalidity of division

Invalidity of company division can be treated as the suit of invalidity of division, as the case of merger. Also, suit of company division invalidity applies the regulation on the suit of merger invalidity, therefore, the condition, procedure of accusation, effectiveness of invalidity judgment, etc. are the same as the suit of merger invalidity (commercial law art 530 provision 11 item no.1).

Commercial law does not determine the cause of company division invalidity, however generally such cases when the division plan of division merger contract content violate forced act or noticeably unfair, and in case of the cause for invalidity or cancellation in approval resolution, also, the case that did not pass creditor protection procedure in division merger, etc. can be considered.

Part 2 Taxation regulation on merger and division : Corporate taxation

1. Corporate taxation regulation on merger

The interested parties with economic profit in respect of merger are the predecessor corporation, merger corporation, stockholders of predecessor

86) Lee, cheolsong, op. cit., p.1104; Song, okryeol, op. cit., p.1234.

corporation and merger corporation, and the taxation effect on them can be arranged as follows.

Merger company	Taxation effect
Taxation on predecessor corporation	Taxation on transfer margin Qualified merger and merger with complete affiliated corporation * Transfer value = book value → transfer margin 0
Taxation on merger corporation	Taxation on merger purchase margin * Taxation on special case in case of qualified merger * Qualified merger management upon approval Succession of deficit carried forward, etc.
Predecessor corporation and merger corporation stockholders	Deemed dividend Donation agenda along with unfair merger and denial of unfair deed calculation

A. Taxation on predecessor company

(1) Principle

In case when predecessor company is dissolved due to merger, the asset of the corporation is considered to be transferred to the merger corporation. Here, transfer margin along with that transfer is calculated into the profit or deficit when calculating income amount of business year including merger registration date where predecessor corporation (corporation taxation art 44 provision 1). Here, merger loss and profit is the amount to deduct net asset book value[87] of predecessor company from the transferred value[88]

87) Net asset book value is the value of deduction of book value total amount of debt from the book value total amount of current asset on merger registration date of

that the predecessor company received from the merger corporation (corporation taxation art 44 provision 1 item no.2).

(2) Qualified merger taxation on special case

Corporation taxation can determine there's no transfer loss and profit considering current net asset book value of merger registration date of predecessor corporation regarding transfer value that the predecessor company received from the merger corporation in case of merger (qualified merger) prepared with all of following conditions (corporate taxation art 44 provision 2).

On the other hand, in case of dissolving of predecessor corporation due to merger, predecessor company is considered to transfer the asset to merger corporation, and the tax adjustment matter of predecessor company cannot be succeeded by merger corporation in principle upon income calculation of each business year, however qualified merger exceptionally can transfer tax adjustment matter of predecessor company to merger corporation. This is the same in deficit carried forward.

(A) Merger on business purpose

To be a qualified merger, it should be a merger between domestic corporations that have continued business over 1 year based on current merger registration (corporate taxation art 44 provision 2 item no.1). However,

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predecessor company (corporate taxation art 44 provision 1 item no.2).

88) Transfer value is the net asset book value of merger registration date of predecessor company in case of qualified merger, and in other cases, the amount added with mother company stock value of merger corporation paid with stock by predecessor company or merger corporation due to merger and money or other asset value total and the corporate tax of predecessor corporation paid by merger corporation and national tax and local tax imposed on that corporate tax (corporate taxation ordinance art 80 provision 1 item no.1 and2).

when the condition of capital market act ordinance art 6 provision 4 item no.14 is prepared as a company takeover purposed company aiming only at merger with other corporation, an exception is approved (same article clue and same act ordinance art 80 provision 2 item no.2).

In case when divided newly establishment corporation merges with another corporation, business operation period is calculated by including the business period before division of divided corporation (corporate taxation law basic principle 44-0…1 ②).

(B) Continuity of share

To be a qualified merger, stock value of merger corporation or mother company of merger corporation should be over 80 among 100 among total amount[89] of merger grant given to predecessor company stockholders due to merger.[90] Furthermore, the stock should be distributed according to the matters set by the presidential ordinance, and the predecessor company stockholders (hereafter 'dominant stockholders of predecessor company)[91] determined by the presidential ordinance should hold the stocks, etc. until

89) Value as stocks included in total amount of merger grant follows market price (corporate taxation basic principle 44-0…1 ①).

90) In case when merger grant given to predecessor company stockholders is money or other asset, that is not different from sell of net asset of predecessor corporation, accordingly, it considered that there's no big reason to apply taxation on special case.

91) According to the presidential ordinance, predecessor company stockholders include, among the dominant stockholders of predecessor company, ① corporate taxation ordinance art 43 provision 8 item no.1 family over cousins and relatives among the bloodline, ② those who have share value less than 1 billion won evaluated upon market price, while share ratio on merger registration predecessor company is below 1 among 100, ③ stockholders except dominant stockholders of predecessor company merged with company takeover purposed company prepared with the condition according to capital market act ordinance art 6 provision 4 item no.14 (corporate taxation ordinance art 80 provision 2 art 5 provision 1 and 3).

termination date of business year including merger registration date[92] (corporate taxation art 44 provision 2 item no.2).

When determining the ratio of stock value among total amount of merger grant given to predecessor company stockholders, when merger combined stocks were acquired within 2 years before merger registration date before merger corporation, it is determined as the distribution of money on this (corporate taxation ordinance art 80 provision 2 item no.3).

When distributing merger new stocks to the stockholders of predecessor company, stocks over the value along with (total amount of merger stock value that predecessor company stockholders received) x (share ratio of predecessor company of predecessor company dominant stockholders) should be distributed respectively to the dominant stockholders of predecessor company (corporate taxation ordinance art 80 provision 2 item no.4).

However, taxation on special case can be applied along with qualified merger, even when share continuity was not prepared in case when ① predecessor corporation dominant stockholders liquidated below the half of overall stocks given to predecessor company dominant stockholders due to merger,[93] ② stockholders liquidated the stocks due to death or bankruptcy, ③ stockholders liquidated stocks according to qualified merger, qualified division, qualified physical division or qualified investment in

92) The point to hold merger new stocks until termination date of business year including merger registration date can neutralize regulation on distribution by liquidating merger new stocks after satisfying the condition for distribution by predecessor company stockholders determined by the presidential ordinance (Hwang, namseok, "Consideration on qualified merger condition on taxation", 「Business management law」 volume no.24 issue no.4, Korea business management law academy (2014), p.53).

93) In this case, stockholders' liquidation of stocks given by merger among them is not considered liquidation of stocks, however when the stockholders holding the stocks acquired through other way besides merger as well as merger stocks liquidate stock, it is considered to liquidate stocks from other way besides merger are firstly liquidated.

kind, ④ stockholders comprehensively transfer, invest in kind, or exchange · transfer the stocks according to Restriction of Special Taxation Act art 37 · art 38 or art 38 provision 2, and liquidate stocks while having tax postponed, ⑤ stockholders liquidate stocks upon approval of the court according to reorganization proceedings along with the act on debtor revival and bankruptcy, ⑥ stockholders liquidate stocks according to special contract for fulfillment of normalization of management according to Restriction of Special Taxation Act ordinance art 34 provision 6 item no.1 or the same article 2, ⑦ stockholders liquidate stocks to fulfill legal duty (corporate taxation art 44 provision 2 clue).

(C) Continuity of business

To be a qualified merger, merger corporation should continue the succeeded business from predecessor company until termination date of business year including merger registration date (corporate taxation art 44 provision 2 item no.3). Because, if the merger corporation does not operate the relevant business, merger corporation share acquired by predecessor company stockholders, etc. become invalid.

In case when the merger corporation liquidates over the half of fixed asset value succeeded from predecessor corporation before termination date of business year including merger registration date or does not utilized it for business, it's not determined to continue the business succeeded by predecessor company (corporate taxation ordinance art 80 provision 2 item no.6). However, in case when predecessor company sells off treasury stock by receiving the stocks from merger corporation, whether of continuing business is determined based on the fixed asset succeeded from predecessor company besides the merger corporation stocks, however when the succeeded

fixed asset includes only merger corporation stocks, it's considered continuing of business (same article clue).

On the other hand, taxation on special case can be applied along with qualified merger, even when the condition for business continuity was not prepared in case when ① merger corporation liquidates succeeded asset along with bankruptcy, ② merger corporation abolishes business along with qualified merger, qualified division, qualified physical division or qualified investment in kind, ③ merger corporation abolishes business while transferring the asset on book value according to the comprehensive transference of asset, ④ merger corporation liquidates succeeded asset upon approval of the court according to revival procedure by the act on debtor revival and bankruptcy (corporate taxation art 44 provision 2 clue).

(3) Merger with complete affiliated corporation

When a domestic corporation merges with another corporation (complete affiliated corporation) that owns total number of issue stocks or investment total amount or merged into another corporation, it is determined there's no transfer loss and profit even when qualified merger condition was not prepared (corporate taxation art 44 provision 3). Since in this case, the actuality is a mere change in form.[94)]

B. Taxation on merger corporation

(1) Principle

In case when predecessor corporation is determined to transfer the asset to merger corporation, when the merger corporation transfers the asset of

94) Hwang, namseok, op. cit. p.55.

predecessor corporation, the asset is determined to be transferred from the predecessor company upon the current market price on merger registration date (corporate taxation art 44 provision 2 item no.1 former part). In this case, merger corporation can succeed the amount entered into the profit or deficit while predecessor corporation calculates income and taxation standard of each business year or which not entered, and other asset · debt, etc. determined by the presidential ordinance[95] (same article latter part).

In case when the transfer amount paid to predecessor corporation by merger corporation is less than current net asset market price[96] of merger registration date of predecessor corporation, the difference (merger purchase profit), on the contrary, payment for the price when the merger corporation considers business value on predecessor company's company name· business relation, and other business secret, etc., as the case that exceeds current net asset market price on merger registration of predecessor company, the difference(merger purchase loss) is counted up to tax adjustment bill, then the former is entered in the profit and the latter in the loss by equally dividing for 5 years since merger registration date (same article 2 and 3, corporate taxation ordinance art 80 provision 3 item 2). The point that corporate taxation defined merger purchase loss and profit was to tax on unrealized loss and profit included in merger asset as transfer loss and profit in the stage of predecessor company

95) Tax adjustment matters can be succeeded by merger corporation on the whole in case of qualified merger, however in other cases, tax adjustment matter can be succeeded in case when the allowance for retirement or allowance for bad debt are succeeded by merger corporation, and other tax adjustment matters cannot succeeded by merger corporation (corporate taxation ordinance art 85 provision 1 item no.2).

96) The amount deducted with debt total amount from the asset total amount.

level, while on merger purchase loss and profit in the process of merger corporation level.[97]

(2) Qualified merger taxation on special case

In case of qualified merger, taxation is postponed considering that merger corporation succeeded the asset of predecessor corporation in book value instead of market value (corporate taxation art 44 provision 3 item no. 1 former part).

(A) Asset adjustment account counting up

In case when the asset of predecessor company was transferred in book value according to qualified merger, difference between book value and market value per the asset according to presidential ordinance (corporate taxation art 44 provision 3 item no.1 latter part). In corporate taxation ordinance, in case when merger corporation succeeds predecessor company asset in book value, value of the asset and debt is counted up as the current market value on merger date, however the amount deducted with predecessor company book value[98] from market price is regulated to be calculated as the asset adjustment account (corporate taxation ordinance art 80 provision 4 item no.1). Here, in case of the asset adjustment account established in depreciation asset, while counting with depreciation of the asset when asset adjustment account is bigger than 0, added to depreciation in case of being smaller than 0, when liquidating the relevant

97) Hwang, namseok · Lee, jungyu, "Problem in interpretation·application of revised merger taxation", 「Study on taxation」 volume no. 16 issue no. 3, Korea Taxation Academy (2010), p.59.

98) When there's tax adjustment matter, the exclusion from gross income among the tax adjustment matter is added and the value deducted with the exclusion from deductible expenses.

asset, remaining total amount after counting up or adding is entered in the profit of deficit of the business year of liquidation (same article 1). In case of asset adjustment account established in the other asset, the total relevant asset is entered in the profit or deficit of the business year to liquidate the asset (same article 2).[99)]

(B) Succession of tax adjustment, etc.

In case of qualified merger, merger corporation succeeds the current deficit on predecessor company's merger registration date and the amount that is not counted into the profit or deficit when predecessor company calculates income and tax standard of each year, and the other asset· debt and corporate tax reduction· tax deduction, etc. according to the presidential ordinance (corporate taxation art 44 provision 3 item no.2). In case of qualified merger, tax adjustment matter should be succeeded on the whole, differently from non-qualified merger.[100)]

(C) Management of qualified merger

Merger corporation that succeeds the asset of predecessor company in book value based on qualified merger condition should add the difference[101)] between the transferred asset book value and the market price on merger registration date and deducted amount among the transferred deficit, when calculating income of business year upon the date of the cause such as ① when merger corporation closes the business transferred from predecessor

99) However, in case of liquidating treasury stock, it is dissolved without counting into profit or deficit.

100) National Tax Service, 「Revised taxation explanation 2010」, National Tax Service (2010), p.175.

101) Only in case when the market price is bigger than book value.

company ② dominant stockholders of predecessor company liquidate the stocks transferred from merger corporation, within 3 years[102], however, reduction or tax deduction is not applied since the relevant business year after payment added with corporate tax of the relevant business year regarding reduction· tax deduction, etc., deducted by succeeding from predecessor company (corporate taxation art 44 provision 3 item no.3). That is, in case of qualified merger, when the cause of ① and ② occurs, taxation on special case applied to merger corporation is revived. However, However, in case of unavoidable cause[103] determined by the presidential ordinance, it is not available (same article clue, corporate taxation ordinance art 80 provision 4 item no.7).

In case when merger corporation enters difference between book value of transferred asset and the market price on merger registration date in profit according to the cause of ① and ②, difference between transfer value paid to predecessor company by merger corporation and current net asset market price of predecessor corporate on merger registration date should be entered in the profit or deficit until 5 years since merger registration date since the above cause occurs according to the presidential ordinance (corporate taxation art 44 provision 3 item no.4).

(D) Merger with complete affiliated corporation

In case of merger with complete affiliated corporation, taxation on special case regulation on qualified merger is applied, considering the merger

102) 2 years since the opening date of the next business year of the business year including merger registration date (corporate taxation ordinance art 80 provision 4 item no. 3).

103) Same as the cause to acknowledge the exception of connectivity of share and continuity condition of business.

corporation succeeded predecessor company asset in book value (corporate taxation art 44 provision 3 item no.5 former part), even when the merger is unqualified. However, in this case, management regulation on qualified merger is not applied (same article latter part).

(3) Limitation of deduction on deficit carried forward

(A) Deficit carried forward

Deficit of merger corporation on merger registration date is not deducted within the income range of the business succeeded from predecessor company, when calculating taxation standard of each buiness year (corporate taxation art 45 provision1). In case of qualified merger, deficit of predecessor company succeeded by merger corporation is deducted when calculating taxation standard of each business year of merger corporation within the range of income generated from the business succeeded from predecessor company (same article 2).

(B) Liquidation loss of the asset

Merger corporation of qualified merger enters the liquidation loss[104] of the asset owned by merger corporation and predecessor company before merger, by calculating income of the relevant business year, in deficit within the range of income[105] that was generated from the business of the relevant corporation before merger respectively (corporate taxation art 45 provision 3 former part). In this case, liquidation loss that was not entered in deficit is equally treated as the case of (A), considering it as

104) Only the amount from the business year that terminates within 5 years after merger registration date.

105) Income amount before deduction of the relevant liquidation loss.

the deficit generated from the business of relevant corporation before merger respectively before asset liquidation (same article latter part).

(C) Reduction or tax deduction

In case of a qualified merger, reduction or tax deduction of predecessor company succeeded by merger corporation is applied according to the presidential ordinance within the range of income amount generated in the succeeded company transferred from predecessor company or corporate tax based on it (corporate taxation art 45 provision 4). According to corporate taxation ordinance, tax reduction on the income of each business year (corporate taxation art 59 provision 1 item no.1) can be applied with the reduction until each business year that terminates within the remaining reduction period during merger in respect of the income from the business that corporate merger succeeded, and in case of non-deduction amount carried forward as the tax deduction (same article 3) acknowledged with deduction carried forward can be deducted until each business year amount that terminates within deduction carried forward remaining period according to non-deduction amount carried forward in case of ① non-deduction amount of foreign payment tax deduction carried forward, ② non-deduction amount carried forward according to the same article 144 as the amount that was not deducted due to shortfall of corporate tax minimum amount along with Restriction of Special Taxation Act art 132, ③ as the non-deducted amount since there's no tax to pay, besides ① and ②, according to non-deduction division carried forward along with Restriction of Special Taxation Act art 144 (corporate taxation ordinance art 81 provision 3).

C. Taxation on the stockholders of predecessor company and merger corporation

(1) Taxation on the stockholders of predecessor company

In case when the merger grant[106] given to the stockholders of predecessor company by the merger corporation exceeds the amount used to attain the stocks of the predecessor company, the amount is taxed, considering that the amount is the profit or surplus distributed by the company (corporate taxation art 16 provision 1 item no.5, income tax act art 17 provision 2 item no.4). In this case, the point to receive profit or surplus is merger registration date (corporate taxation ordinance art 13 provision 3).

When evaluating merger grant that the stockholders of predecessor company from merger corporation, value of stocks[107], ect. acquired by merger grant besides money is considered book value[108] in case of business purpose merger and continuity of share among the conditions of qualified merger or merger with complete affiliated corporation (corporate taxation ordinance art 14 provision 1 item no.1 Na list). In special provisions on taxation on predecessor company stockholders, it is necessary to pay attention to the point that the condition of continuity of business is not required.[109]

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106) Total amount of value of stocks of merger corporation or merger corporation mother company, money.

107) Other things than stocks are based on the market price upon receipt of that asset (corporate taxation ordinance art 14 provision 1 item no.2).

108) In case that received some of merger grant in money or other asset, and the value evaluated with stock, etc. by merger based on market price is smaller than the existing book value, market value is valid.

109) Since taxation on special case for the stockholders of predecessor corporation has no significant necessity in management after merger (Ma, jeonghwa, “Problem and improvement plan for taxation on the stockholders of predecessor company upon merger”,

(2) Taxation on the stockholders of predecessor company

In case when a domestic corporation is acknowledged to decrease burden of tax on the corporate income unfairly due to merger with a corporation in a special relation, income amount of the corporation in each business year can be calculated regardless of the income amount calculation (calculation of unfair act) of the corporation (corporate taxation art 52 provision 1). Here, in case when burden of taxation was acknowledged to be reduced unfairly are such cases as ① reduction of transfer loss and profit along with merger due to unfair ratio of merger in merger between corporations in a special relation, ② distribution of profit to other stockholders in special relation with the corporation including stockholders, by merging in unfair proportion by evaluating stocks higher or lower than market price in respect of merging between corporations in special relation (corporate taxation ordinance art 88 provision 1).

In respect of the case when the corporation including stockholders distributes profit to other stockholders in special relation with unfair merger, etc. between corporations in special relation, tax is imposed on the stockholders distributed with profit. In this case, stockholders distributed with profit due to unfair merger ratio of merger corporation stockholders, etc., corporate tax (corporate stockholders) or gift tax (private stockholders)[110] are taxed.

「Yonsei law study」 volume 22 issue no.2, Yonsei University Law Study Center(2012), p.74).

110) Inheritance tax and gift tax act art 38.

2. Corporate taxation regulation on division

A. Personal division

Personal division is the same as merger, in respect that divided corporate asset and debt are comprehensively transferred divided newly establishment corporation or divided merger the other party corporation (hereafter ‘divided newly establishment corporation). Considering this point, corporate taxation almost equally regulates merger and personal division. However, differently from merger, personal division can be misused as tax evasion means more easily compared to merger, since it selectively succeeds some part of business instead of the whole, which needs attention.

Personal division is composed of the deal between corporations and between the corporation and stockholders, accordingly, tax problem is raised between stockholders level as well as corporation level.

(1) Taxation on divided corporation, etc.

(A) Principle

1) In case of dissolution of divided corporation, etc. after division

In case of dissolution of domestic corporation due to division (except physical division), the corporate asset is considered to have been transferred to divided newly establishment corporation, etc. In this case, transfer loss and profit generated along with that transfer[111] is entered

111) Transfer profit and loss means transfer value that divided corporation, etc. receive from divided newly establishment corporation, etc. - net asset book value of division registration date of divided corporation, etc. (corporate taxation art 46 provision 1 item no.2).

into profit or deficit when calculating income amount of the business year including division registration date of divided corporation or the other party corporation of dissolved division corporation (hereafter 'divided corporation, etc.') (corporate taxation art 46 provision 1).

2) In case of existence of divided corporation after division

In case when a domestic corporation exists after division (except physical division), transfer loss and profit generated from transfer of the asset of divided business division is entered into the profit or deficit when calculating income amount of business year including division registration date of divided corporation (corporate taxation art 46 provision 5 item no.1).

In case when a divided corporation exists after division, transfer loss and profit calculation or taxation on divided newly establishment corporation, etc. are based on the dissolution case of divided corporation after division. However, deficit of divided corporation is not succeeded related to taxation on divided newly establishment corporation, etc. (same article 3 clue).

(B) Conditions for taxation on special case

Corporate taxation considers no imposition on transfer loss and profit when following conditions are satisfied (qualified division), since the transfer value that divided corporation, etc. received from divided newly establishment corporation, etc. as the net asset book value on division registration date of divided corporation, etc. (corporate taxation art 46 provision 2). As the result, unrealized loss and profit calculation and taxation point are postponed to the point of liquidation of the asset after division.

1) Division of business purpose

To perform a qualified division, following conditions as, the domestic corporation that continued business over 5 years[112] currently on division registration date ① should divide independent business division available for business[113] ② the asset and debt of divided business division should be comprehensively succeeded,[114] ③ division by the investment only by divided corporation, etc.[115] (corporate taxation art 46 provision 2 item

112) In case of division merger, it should be the domestic corporation that continued business over 1 year currently on division registration date of the other party corporation of dissolved division merger and the other party corporation of division merger.

113) Such cases as ① business division mainly on real estate lease determined by Ministry of Strategy and Finance, ② business division of which asset is 80 among 100 according to income taxation art 94 provision 1 item no.1 and 2 among fixed asset value for business succeeded by divided business division, ③ business division composed only of stocks and relevant asset · debt are not considered division of independent business division available for business by division (corporate taxation ordinance art 80 provision 2 item no.2). Nevertheless, such cases as ① business division composed only of domination purpose stocks owned by divided corporation since the previous day of division registration date and relevant asset · debt, ② business division that establishes a holding company along with monopoly regulation and fair trade act and financial holding companies act, division of independent business department available for business by division (same article 3).

114) However, the point determined by the presidential ordinance, such as the asset and debt, etc, difficult to divide, as the asset utilized in common, debt unavailable for change by debtor, etc. are excluded (corporate taxation art 46 provision 1 item no.1 Na list clue). In corporate taxation ordinance, the relevant asset are defined, ① substation facility · waste water treatment facility · electric power facility · water facility · steam facility, ② office · warehouse · restaurant · training center · company housing · company training facility, ③ joint production facility unavailable for physical division, business support facility and the affiliated land and asset, ④ the asset similar to ① or ③, determined by the Ministry of Strategy and Finance, the debt on this are regulated as ① bill payable, ② debt limited with transfer of borrower on loan condition, ③ debt changed negatively with borrower's borrowing condition due to division, ④ joint debt that was not directly used in divided business division, ⑤ similar debt as the debt of ① or ④, as the debt determined by the Ministry of Strategy and Finance ordinance (corporate taxation ordinance art 82 provision 2 item no.4).

no.1 Ga list and Da list). This is to apply the taxation on special case only in case of division upon necessity of business purpose.

2) Continuity of share

To be the qualified division, stockholders of divided corporation, etc. should receive overall amount of division price (over 80 among 100 in case of division merger) with the stocks of divided newly establishment corporation, etc. Here, the stocks should be distributed according to the ratio of stocks that were owned by the stockholders of divided corporation, etc.,[116] and the dominant stockholders of divided corporation, etc. should hold the stocks until termination date of business year including division registration date (corporate taxation art 46 provision 2 item no.2).

In respect of determining the ratio of stock among division price, in case when the other party corporation of division merger has division merger combined stocks acquired within 2 years before division registration date, this is considered as distribution in money in case of ① value of division merger grant stock distributed for the exceeding division merger combined stock in case when division merger combined stock exceed 20 among 100 of total number of issue stock of divided corporation, etc. (in case when the other party corporation of division merger is not the

115) Due to the relevant condition, in case of the 3rd party's participation as attraction of foreign capital, etc. there's a problem of increase in time · expense burden. In this case, in order to prepare the qualified division, the method of 3rd party's participation should be applied after establishment of a new company by investment only of divided corporation, etc.

116) In case of division merger, when distributing stock assigned to stockholders of divided corporation, etc. for division merger price, stocks over the value along with the calculation (total amount of value of division merger new stocks distributed to the stockholders of divided corporation, etc.) × (share ratio of divided corporation of dominant stockholders of divided corporation, etc.) should be respectively assigned (corporate taxation ordinance art 82 provision 2 item no.7).

dominant stockholder of current divided corporation currently on division registration date), ② value of division merger grant stock distributed for division combined stock (in case when the other party corporation of division merger is dominant stockholder of divided corporation currently on division registration date) is considered distribution in money (corporate taxation ordinance art 82 provision 2 item no.6).

However, if there's an unavoidable cause determined by the presidential ordinance, taxation on special case can be applied along with qualified division even in case of the condition of continuity of share is not prepared (corporate taxation art 46 provision 2 clue). Unavoidable cause is the same as that of qualified merger.

3) Continuity of business

To be a qualified division, divided newly establishment corporation, etc. should continue the business transferred from divided corporation, etc. until termination date of business year including division registration date (corporate taxation art 46 provision 2 item no.3).

In case when divided newly establishment corporation, etc. liquidate more than half of fixed asset value succeeded from divided corporation, etc. before termination date of business year including division registration date, or do not utilized for business, it is not determined continuity of business (corporate taxation ordinance art 82 provision 2 item no.9). However, in case when the divided corporation, etc. liquidates treasury stocks by succeeding stocks of divided newly establishment corporations that were owned by divided corporation, etc., whether of continuity of business is determined based on the fixed asset succeeded from divided corporation, etc. except the stocks of the relevant divided newly establishment corporation,

etc., however it is considered continuity of business in case when the succeeded fixed asset includes only the stocks of divided newly establishment corporation.

On the other hand, in case of an unavoidable cause determined by the presidential ordinance, taxation on special case along with qualified division can be applied even when continuity of business is not prepared (corporate taxation art 46 provision 2 clue). Unavoidable cause is the same as that of qualified merger.

(2) Taxation on divided newly establishment corportation, etc.

(A) Principle

In case when divided newly establishment corporation, etc. succeeds asset of divided corporation, etc. by division, the asset is considered transfer in market price currently on division registration date from divided corporation (corporate taxation art 46 provision 2 item no.1 former part). In this case, when calculating income amount and tax standard of each business year of divided corporation, etc., the amount entered into profit or deficit, or not entered, and other asset · debt, etc. can be succeeded by the divided newly establishment corporation, etc. only by determination of the presidential ordinance[117] (same article latter part).

In case when the transfer value paid to divided corporation, etc. by divided newly establishment corporation, etc. is less than net asset market

117) In case of qualified division, tax adjustment matters (limited to tax adjustment matter of divided business division) are all transferred to divided newly establishment corporation, etc., however other case besides qualified division succeeds tax adjustment matter related to the case when divided newly establishment corporation, etc. succeeds retirement allowance or the allowance for bad debt, relevant tax adjustment matter is succeeded, and other tax adjustment matters are not transferred to divided newly establishment corporation, etc. (corporate taxation ordinance art 85 provision 1 and 2).

value currently on division registration date of divided corporation, etc., the difference (division purchase margin), on the contrary, in case of payment of the price as the divided newly establishment corporation, etc. considers business value on the company name of divided corporation· business relation, and other business secret, etc., as the case which exceeds net asset value currently on division registration date, the difference (division purchase deficit) is entered in tax adjustment bill, the former is entered into profit, and the latter is entered into deficit, by equally dividing it for 5 years since division registration date (same article 2 provision 3, corporate taxation ordinance art 82 provision 3 item no.2).

(B) Taxation on special case of qualified division

In case of qualified division, tax is postponed, considering that divided newly establishment corporation, etc. succeeded the asset of divided corporation, etc. in book value instead of market value (corporate taxation art 46 provision 3 item no.1 former part).

1) Asset adjustment account count up

In case of succeeding the asset of divided corporation, etc. in book value along with qualified division, difference between book value and market value should be counted per asset along with the matter determined by the presidential ordinance (corporate taxation art 46 provision 3 item no.1 latter part). In corporate taxation ordinance, in case when the divided newly establishment corporation, etc. succeed the asset of divided corporation, etc. in book value, value of transferred asset and debt are counted as the market value currently on division registration date, however the amount deducted with book value[118] of divided corporation, etc. is

regulated to be counted as asset adjustment account (corporate taxation ordinance art 82 provision 4 item no.1). In respect of asset regulation account treatment, regulation on treatment of asset regulation account is applied based on qualified merger.

2) Succession of tax adjustment matter, etc.

In case of qualified division, divided newly establishment corporation, etc. succeed the amount that is entered or not entered into profit or deficit when calculating deficit currently on registration date of divided corporation, etc., income and tax standard of each business year, and other asset · debt, corporate tax reduction · tax deduction, etc. according to the presidential ordinance (corporate taxation art 46 provision 3 item no.2). In case of qualified division, also, tax adjustment matter is comprehensively succeeded in principle as qualified merger.[119)]

3) Management of qualified division upon division

Divided newly establishment corporation, etc. which succeeded the asset of divided corporation, etc. in book value upon the condition of qualified division should enter the difference[120)] between transferred asset book value and market price, and deducted amount, etc. among the transferred deficit when calculating the income amount of the business year including the causes, in case as ① divided newly establishment corporation, etc. closes the business succeeded from divided corporation, etc.[121)] ② divided

118) In case of tax adjustment matter, exclusion from gross income is added and exclusion from deductible expenses is deducted.

119) National Tax Service, 「Revised taxation explanation 2010」, National Tax Service (2010), p.175.

120) Only in case when market price is bigger than book value.

121) When divided newly establishment corporation, etc. liquidate more than half of

corporation, etc. liquidates the stocks that dominant stockholder of divided corporation, etc. received from divided newly establishment corporation, etc., within 2 years from the start date of next business year of the business year including division registration date, and after paying corporate tax of the relevant business year added with reduction· tax deduction amount, etc. deducted by succession from divided corporation, etc., reduction· tax deduction is not applied since the relevant business year (corporate taxation art 46 provision 3 item no.3) However, it's not valid in case when there's an unavoidable cause determined by the presidential ordinance.

Divided newly establishment corporation, etc. should enter difference between transfer value paid to divided corporation, etc. by divided newly establishment corporation, etc. and net asset market price currently on division registration date of divided corporation, etc. in case when entering the difference between book value of transferred asset due to the cause of ① and ② market value into profit, into profit or deficit according to the presidential ordinance until the date of 5 years since division registration date since the date when the cause of ① and ② occurred (same article 4).

(C) Limitation of deduction such as deficit carried forward, etc.

1) Deficit carried forward

In case of division merger, deficit currently on division registration date of the other party corporation of division merger is not allowed to be deducted from the income amount[122] generated from the business

fixed asset value that divided newly establishment corporation, etc. succeed from divided corporation, etc. or do not use for business, business is considered to be closed.

122) As the case of division merger between the small and medium sized corporations or corporations in equal business, in case when accounting was not divided and

transferred from divided corporation when calculating tax standard of each business year of the other party corporation of division merger (corporate taxation art 46 provision 4 item no.1). This is to avoid tax evasion act.

In case of qualified division, deficit of divided corporation, etc. that divided newly establishment corporation, etc. is deducted when calculating tax standard of each business year of divided newly establishment corporation, etc. from the income amount generated from the business transferred from divided corporation, etc. (equal article 2).

2) Asset liquidation loss

Divided newly establishment corporation, etc. which performed qualified division enters the liquidation loss[123] of the asset that divided corporation and the other party corporation owned before division merger into loss and profit when calculating income amount of the relevant business year within the range of income amount[124] generated from the business of relevant corporation before division merger (corporate taxation art 46 provision 4 item no.3 former part). In this case, liquidation loss which was not entered into loss and profit is considered as deficit generated from the business of relevant corporation respectively before division merger when liquidating the asset, accordingly, is equally treated as in case of 1) (same article latter part). Since the same effect as deficit carried forward is given when deducting the loss realized by liquidating the

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recorded (art 113 provision 4 clue), income is calculated based on proportional division amount in business fixed asset value ratio of divided corporation and the other party corporation of divided merger currently on division merger registration date (corporate taxation art 46 provision 4 item no.1, corporate taxation ordinance art 83 provision 1).

123) Only those occurred in the business year that ends within 5 years after division registration date.

124) Income amount before deduction of relevant liquidation loss.

relevant asset in the stage of divided newly establishment corporation, etc. level after dividing asset including unrealized loss from the income amount generated from the existing business division of divided newly establishment corporation, etc., this is restricted.[125)]

3) Reduction or tax deduction

In case of qualified division, reduction or tax deduction of divided corporation, etc. succeeded by divided newly corporation is applied according to the presidential ordinance within the range of income amount generated from the business transferred from divided corporation, etc. or relevant corporate tax (corporate taxation art 46 provision 4 item no.4). In case when applying reduction or tax deduction succeeded from divided corporation, etc. by divided newly establishment corporation, etc., qualified merger case is applied (corporate taxation ordinance art 83 provision 4).

(3) Taxation on the stockholders of divided corporation, etc. and divided newly establishment corporation, etc.

(A) Taxation on stockholders of divided corporation, etc.

In case when the division price acquired by the stockholders of divided corporation, etc. from divided newly establishment corporation, etc., exceeds the amount utilized to acquire the stocks[126)] of the divided corporation, etc., the amount is taxed, being considered to be distributed with profit from that corporation or as the surplus distributed (corporate taxation art 16 provision 1 item no.6, income tax art 17 provision 2 item no.6). In

125) Hwang, namseok, 「Study on corporation division taxation」, doctor's degree thesis, University of Seoul, Graduate school of tax affairs(2010), p.57.

126) In case when a divided corporation exists, reduced stocks due to liquidation, etc. only are valid.

this case, the point to view profit or surplus distribution is division registration date (corporate taxation ordinance art 13 provision 4).

When evaluating division price acquired by the stockholders of divided corporation, etc. from divided newly establishment corporation, in case when the condition of business purpose division and continuity of share among the condition for qualified division was prepared, value of stocks[127], etc. acquired as division price besides money is counted in book valu e[128] (corporate taxation ordinance art 14 provision 1 item no.1 Na list). Taxation on special case condition for stockholders of divided corporation, etc. also does not require the condition of business continuity as the case of merger.

(B) Taxation on the stockholders of divided newly establishment corporation, etc.

In case when a domestic corporation is acknowledged to unfairly reduce tax burden on the income of the corporation through division and division merger with the corporation in a special relation, income amount of each business year of the corporation can be calculated regardless of calculation of income amount of the corporation (unfair act calculation) (corporate taxation art 52 provision 1). Here, the cases acknowledged to unfairly reduce tax burden are ① reducing transfer loss and profit along with division and division merger through unfair ratio in respect of division and division merger between the corporations in a special relation, ② the corporation, stockholders, etc. share profit with other stockholders in a

127) Market price upon the acquisition date of the asset in case of other than stocks, etc. (corporate taxation ordinance art 14 provision 1 item no.2).

128) In case of receiving some of merger price as more or other asset, the value evaluated with market price of stocks acquired through merger is less than book value means market value.

special relation through division merger in an unfair ratio by evaluating stocks, etc. higher or lower than market price in respect of division merger between corporations in special relation (corporate taxation ordinance art 88 provision 1).

In case when the corporation, stockholders, etc. distribute profit to other stockholders in a special relation through unfair division and division merger, etc. between corporations in a special relation, tax is imposed on the stockholders who received the profit. In this case, the stockholders who received profit through unfair division and division merger are the stockholders of divided newly establishment corporation, etc., corporate tax (corporate stockholders) or gift tax (individual stockholders)[129] are imposed. This is significant in respect of prevention of tax evasion.

B. Physical division

Physical division is similar to investment in kind in respect that divided corporation, instead of the stockholders of divided corporation, acquires share of divided newly establishment corporation as the division price along with division. Considering this point, corporate taxation defines physical division and investment in kind almost the same.

Since in physical division, division price belongs to divided corporation, deemed dividend income tax problem on the stockholders of divided corporation does not occur.

(1) Principle

In case of physical division, divided corporation basically is conscious of transfer loss and profit. Laster, when the condition for taxation on special

129) Inheritance tax and gift tax act art 38.

case is prepared (qualified physical division), tax can be postponed only in case of transfer margin of divided corporation. Concretely, divided corporation can enter the amount of transfer margin of the asset generated by physical division among the value of stock, etc., acquired from divided newly establishment corporation into the loss and profit when calculating income amount of business year including division registration date by counting up as the advanced depreciation provision (corporate taxation art 47 provision 1, corporate taxation ordinance art 84 provision 1 and 2).

(2) Condition for taxation on special case

Corporate taxation applies the condition for qualified division in respect of the condition for qualified physical division (corporate taxation art 47 provision 1). Therefore, to be a qualified physical division, following conditions as ① business purpose physical division, ② continuity of share, ③ continuity of business as qualified division. However, in case of qualified physical division, the whole amount of division price should be stock, etc.

(3) Management of qualified physical division

Transfer margin entered into loss and profit due to qualified physical division of divided corporation should be entered into profit as much as the amount[130] determined by the presidential ordinance, considering

130) The amount determined by the presidential ordinance means ① the ratio of book value of stocks, etc. of divided newly establishment corporation liquidated in the relevant business year from the book value as stocks of divided newly establishment corporation that owns currently on termination date of the immediately preceding business year ② the amount multiplied with the balance of advanced depreciation provision such as divided newly establishment corporate stocks on termination date of immediately preceding business year by the multiplied ratio of ① and ② from the ratio added with the ratio of transfer margin of succeeded asset liquidated in the relevant business year from the transfer margin of succeeded asset owned by divided newly establishment corporation (corporate taxation ordinance art 84 provision 3).

liquidation ratio of the stocks, etc. and asset related to the business year when the cause occurs, in case when ① the divided corporation liquidates the stocks, etc. transferred from divided newly established corporation or ② divided newly establishment corporation liquidates depreciated assets, land, and stocks (corporate taxation ordinance art 84 provision 4), etc. transferred from divided corporation (corporate taxation art 47 provision 2). However, if there's an unavoidable cause[131] determined by the presidential ordinance, such as qualified merger or qualified division of divided newly establishment corporation, it's not valid (same article clue).

Furthermore, the divided corporation which entered transfer margin into loss and profit in case when ① divided newly establishment corporation closes the business transferred from divided corporation within 2 years from the opening date of next business year of the business year including division registration date since division registration date (corporate taxation ordinance art 84 provision 10) or ② divided corporation owns stocks, etc. below 50 among 100 of total numbers of issue stock or total amount of investment of divided newly establishment corporation, the rest amount after entering into profit according to corporate taxation art 47 provision 2 should be entered into profit when calculating income amount of business year that includes the date of cause (corporate taxation art 47 provision 3).

131) Unavoidable cause determined by the presidential law, such as qualified merger or qualified division of divided newly establishment company means ① the case of the initial qualified merger of divided newly establishment corporation with divided newly establishment corporation which was newly established due to physical division (overall amount of merger price is only stock, etc.), ② when the divided newly establishment performs qualified division for the first time (except division merger), and ③ the case that divided corporation divided by physical division performs qualified division for the first time (except division merger), which only refers to the first initial time (corporate taxation ordinance art 84 provision 5).

C. Taxation system of personal division and physical division

Taxation on special case system of personal division and physical division has difference whether in case of ① postponement of the awareness itself on unrealized loss and profit upon division (personal division), or postponement of taxation after counting deficit of equal amount using advanced depreciation provision after recognizing unrealized loss and profit (physical division), ② whether divided corporation can evade permanently postponed tax (personal division), whether tax cannot be evaded in case of liquidation of the stocks acquired due to division (physical division), ③ whether purchase loss and profit of divided newly establishment corporation is counted in taxation in case when taxation on special case was not applied upon division (personal division), or not counted (physical division).[132]

Part 3 Special case of commercial law and corporate taxation

1. Special law for corporate activation enhancement

A. Background

Recently, as global demand decreases due to slowdown of global economic growth, also, high-tech gap with newly rising countries as China · India, etc. decreases, as the export of our corporations is sharply decreasing, growth of shipbuilding, steel industry, shipping, petrochemistry, construction, and electronics, etc.[133] Due to this situation, a necessity for

132) Hwang, namseok, "Trend of recent Korean corporate taxation – Focus on organization restructuring taxation-", 「Kyunghee law study」 volume 47 issue no.1, Kyunghee University law research center(2012), p.272,273.

a necessity of support plan for the anticipative business reorganization was strongly suggested, eventually, Korea enacted a special act (so called 'one-shot act') for corporation activation enhancement to comprehensively support business reorganization conducted anticipatively in ordinary days by the normal corporation from the aspect of tax, finance, and law, and has been executed since August 13, 2016.

One-shot act aims at contributing sound development of national economy by enhancing vitality of corporation and industrial competitiveness through improving relevant procedure and regulation to promptly promote spontaneous business reorganization of the business type that faced excessive supply (one-shot act no. 1).

B. Regulation on special case related to merger and division

tOne-shot act regulates a special case on important business reorganization related act as commercial law or taxation to more effectively support division, a business reorganization promoted to minimize risk of merger, business reorganization to prevent overlapped investment and promote for business management rationalization, etc.

(1) Special case on commercial law

One-shot act enabled substitution of board of director approval for approved corporation stockholders general meeting resolution in case when total asset of corporation established by division according to business reorganization[134] plan[135] of approved corporation[136] by establishing ①

133) Yeom, yugyeong, "『Special act for corporate vitality enhancement』 and implication", 「Issue& diagnosis」 No.226, Gyeonggi research center, 2016, p.2.

134) Business reorganization is the activity aiming at improving the overall or partial productivity of business of a corporation ① changing the whole or part of business

small scale division institution that does not exist in current commercial law is less than 10% of total asset of approved corporation (one-shot act no.15 provision 1). Also, ② extended the scope of merger · division merger available only with board of directors' resolution by relieving condition of small scale merger and simple merger on commercial law. For example, small scale merger and simple merger on commercial law are applied to "the case of not exceeding 10 among 100 of total number of issue stocks" and "over 90 among 100 of total number of issue stocks", however one-shot act extended the applicable scope to "the case of not exceeding 20 among 100 of total number of issue stock" and "over 80 of 100 among total number of issue stock" (one shot act no. 16 provision 1 item no.17). Furthermore, ③ merger · division procedure on commercial law, such as simplification of stockholders general meeting procedure, reduction of objection presentation period of creditor or stock purchase claim period of the anti-merger stockholders, etc. (one-shot act no.18 or 20).[137]

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structure according to the method determined by the presidential law, such as merger, division, transfer · acquisition · possession of stock, establishment of company, etc., and ② promoting business innovation as advancement into new business or introduction of new technology by changing the whole or some part of field or method of business, prepared with all conditions regarding the activities determined by the presidential ordinance (one-shot act no.2 provision no.2).

135) Business reorganization plan is a plan composed for the purpose of receiving approval along with the law to promote corporation's business reorganization (one-shot act no. 2 provision 3).

136) A corporation approved with business reorganization.

137)

> Art 18 (Special case on merger procedure, etc.) ① When the approved company collects stockholders general meeting for merger by 「commercial law」 no.522, division· division merger by art 530 provision 2, comprehensive exchange of stock by art 360 provision 2, comprehensive transfer of stocks according to art 360 provision 15, sales

transfer and succession by art 374 (hereafter "merger, etc."), nevertheless 「commercial law」 art 363· provision 1, written notice should be sent to each stockholder 7 days before stockholders general meeting or electronic document can be sent upon each stockholder's consent.

② In case when the approved corporation conducts merger, etc., nevertheless 「commercial law」 art 360 provision 4 item no.1, art 360 provision 17 item no.1, art 522 provision 2 item no.1, art 530 provision 7 item no.1, document of the same article, provision, and item until 6 months since the merger date from 7 days before stockholders general meeting date for merger approval.

③ When stockholder list is abolished according to 「commercial law」 art 354 provision 1 to resolute approved corporation's merger, etc. or determine the standard date, nevertheless the same article provision 4, this can be notified from 7 days before the abolished date or the standard date. In this case, this should be notified in over 2 daily newspapers.

④ When calculating the period according to provision 1 and 3, holidays, Saturday, and laborer's day according to 「Laborer's day enactment」 are excluded.

Art 19 (Special case on creditor protection procedure) ① Approved corporation, nevertheless 「commercial law」 art 232, art 527 provision 5, art 530 provision 9 item no.4, art 530 provision 11 item no.2, intent to present objection against merger, etc. should be notified by determining over 10 days' period within 2 weeks since the resolution for merger, etc.

② In respect of approved corporation's merger, etc. according to business reorganization plan, as thmethod to present bank payment guarantee for debt or insurance policy, in case of proving the fact that there's no damage on creditor, 「commercial law」 art 232, art 527 provision 5, art 530 provision 9 item no.4, art 530 provision 11 item no.2 are not applied.

③ In case of calculating period along with item no.1, holidays, Saturday, and laborer's day according to 「Laborer's day enactment」 are excluded.

Art 20 (Special case on stock purchase claim) ① In case when the approved corporation conducts merger, etc. according to business reorganization plan, nevertheless 「Commercial law」 art 374 provision 2 item no.1 and 「Capital market and financial investment business act」 art 165 provision 5 item no.1, the stockholders who notified objection against the resolution in written notice toward the company before stockholders general meeting can claim purchase of their stock on the approved corporation in written notice of the type and number of the stocks within 10 days from the resoultion date.

② The approved corporation that received claim of provision 1, nevertheless 「commercial law」 art 374 provision 2 item no.2, should purchase the stocks within 6 months. However, in case of the stock-listed corporation according to 「Capital market and financial investment act」 art 9 provision 15, nevertheless the same act no. 165 provision 5 item no.2, should purchase the stocks within 3 months.

(2) Special case on taxation

One-shot act regulates, “the state and local governments can support tax on the approved corporation along with the determination by taxation related act” (one-shot act no.27). Therefore, in respect of approved corporation merger · division, taxation support is available in case as registration license tax along with Restriction of special taxation act on local tax as well as stock sell off transfer margin tax postponement along with restriction of special taxation act and exemption of stock exchange tax, overlapped asset transfer margin tax postponement along with merger, special case of taxation on financial debt succession· repayment of affiliated company by mother company, taxation on special case upon repayment of financial debt due to asset transfer, taxation on special case of asset free gift by stockholders, etc., and taxation on special case upon debt exemption by financial institute.

C. Evaluation

One-shot act can be usefully utilized in case of slowdown of domestic industry due to low growth of global economy or intensified competition with other countries while the major industry became mature to a certain degree, in respect that it can efficiently support business reorganization that is anticipatively performed ordinarily to actively response to the domestic and overseas environment change and reinforce international competitiveness.[138)]

138) As the expected effect of one-shot act, ① reinforcement of corporate industrial concentration and competitiveness improvement through restructuring within the business, ② prompt response is available according to market change due to required period reduction in case when the corporation faces the critical situation due to excessive supply of industry, ③ cost reduction effect upon business reorganization by one-shot act, ④ acceleration of business reorganization of small and medium-sized corporation,

However, as the special act, one-shot act can bring a preferential favor dispute along with unexpected side effect, if there's no agreement in the application scope, content of regulation on special case, etc., accordingly, attention is required. In Korea, various issues were treated before introduction of one-shot act, such as whether of including mutual investment restricted company group in the application target, whether of worry of violation of the regulation on special case of one-shot act on profit and the right of stockholders and creditors, what is the determination standard of excessive supply, whether of establishment of the system that can strictly manage selection procedure of approved corporation, etc.

2. Restriction of Special taxation Act

A. Background

Korea applies Restriction of special taxation act[139] to promote fairness of taxation and perform taxation policy efficiently by regulating taxation special act as reduction of taxation and overlapped imposition (Restriction of special taxation act no.1). Such Restriction of special taxation act includes special regulation of corporate taxation on merger · division. Because it was necessary to promote corporate restructuring, a current issue of our economy, and induce faithful tax payment, while reinforcing efficiency of

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⑤ promotion of holding company of large companies, ⑥ activation of domestic takeover merger market, ⑦ sound capital market by recovery of competitiveness of corporations, etc. Yeom, yugyeong, op. cit. below p7.

139) Korea enacted tax reduction regulation to secure fair taxation and tax income by regulating the matters on tax reduction on December 20, 1965, operated this on temporary act per 5 years. Meanwhile, considering that the application term of tax reduction regulation act of December 28, 1998 terminates on December 31, 1998, the government changed the act to all Taxation on special case regulation act including the content of the same act.

tax deduction by temporarily operating special regulation on merger・division by utilizing Restriction of special taxation.

B. Regulation on special case related to merger and division

(1) Tax deduction on technical innovation merger

Restriction of special taxation act determines, the amount of technical value up to 10% determined by the presidential ordinance from corporate tax of the relevant business year among the transfer value that merger corporation pays predecessor company, in case of ① merger between domestic corporations that continued business over 1 year currently on merger registration date regarding technical innovative small and medium sized company[140], ② transfer value is over 130% of net asset value of predecessor corporation currently on merger registration date, ③ as the case of value of stock or investment share is below 20% among total amount of merger price paid to stockholders of predecessor corporation by merger, stockholders, etc. of predecessor company determined by the

140) Restriction of special taxation act extended the scope of technical innovative small and medium sized corporation by revising ordinance to expand support for technical innovative M&A. As the result, since February 5, 2016, technical license company (Industrial Technology Innovation act (Ministry of Industry), new technology certified company of each division (Industrial Technology Innovation act (Ministry of Industry), or new technology certified company of Health and Medical Service Technology Promotion act (Ministry of Welfare), new product certified company of Industrial Technology Innovation act (Ministry of Industry), Innovative pharmaceutical company of Special Act on Pharmaceutical industry promotion and support (Ministry of Welfare) Global promising company of Special Act on growth promotion and competitiveness reinforcement of independent medium-size company (Small and Medium Business Administration), Technical growth enterprise of KOSDAQ market president regulation (Financial Committee) also belong to technical innovative small and medium sized company, besides venture enterprise. (National Tax Service, 「Revised act explanation 2016」, National Tax Service (2016), p.293).

presidential law do not receive investment share, and do not belong to dominant stockholders of merger corporation until termination date of business year including merger registration date from merger registration date, ④ merger prepared with condition that the merger corporation would continue the business succeeded from predecessor company until termination date of business year including merger registration date, on domestic corporation until December 31, 2018 for corporate takeover type technical transfer promotion (Restriction of special taxation act no.12 provision 3 item no.1).

However, in case if the domestic corporation deducted with corporate tax, within 2 years (same ordinance art 11 provision 3 item no.11) of opening date of next business year of the business year including merger registration date, in case of ① stockholders of predecessor company determined by the presidential ordinance belong to dominant stockholders of merger corporation, ② in case when merger corporation abolishes the business succeeded from predecessor company, in case, corporate tax added with interest, determined by the presidential ordinance, to the deducted tax amount upon tax standard report of the business year including the date of the cause (same article no.2).

(2) Taxation on special case on transfer of overlapped asset along with merger

Restriction of Special Taxation Act enables not to enter the transfer margin generated from transfer of the overlapped asset into the profit when calculating income amount of business year in case of the transfer profit generated along with transfer of that overlapped asset, in case of transferring the overlapped asset within 1 year since merger registration date by merger corporation and acquiring the new business fixed asset

until termination date of business year including the transfer date for transfer price of the overlapped asset, as the case of generating overlapped asset through merger · division merger between the domestic corporation s[141] until Dec 31, 2018, which manage the business type determined by the presidential act, such as pharmaceutical business, etc. (same act no. 47 provision 4 item no.1 former part). In this case, the relevant amount should be entered into profit over the amount equally divided during the 3 business year period since he business year which includes 3rd year date since termination of business year that includes transfer date (same article latter part).

That is, Restriction of Special Taxation Act specifies entering of asset transfer margin into 3-year term unredeemed, 3-year division profit inclusion in case of ① merger between specific businesses and ② satisfying the condition of acquisition of new business fixed asset as the overlapped asset transfer price. Originally, taxation on special case regulation on transfer of overlapped asset along with merger of Restriction of Special Taxation Act was expected to be applied until Dec 31, 2015, however the application term was extended to Dec 31, 2018 to support restructuring of the industry on excessive demand.[142]

On the other hand, as the merger · division merger of domestic corporations were enabled until Dec 31, 2018 along with business reorganization plan

141) Domestic corporation that manages the business type determined by the presidential act, such as pharmaceutical business, etc. means the domestic corporations that manage clinical substance, medical supplies manufacturer, medical equipment manufacturer, construction business, marine transportation, and shipbuilding business as the major business (Restriction of Special Taxation Act ordinance art 44 provision 4 item no.1 - 1 and 5).

142) National Tax Service, 「Revised taxation explanation 2016」, National Tax Service (2016), p.314.

related to one-shot act, taxation on special case is applied to overlapped asset transfer also in generation of overlapped asset (same article no. 121 provision 31).

(3) Taxation on special case of public institutes merger

Restriction of Special Taxation Act regulates taxation on special case on public institutes merger to prevent insolvency of financial state and political function performance due to a huge tax burden generated from reorganization process as public institutes merger, etc. for management efficiency[143].

For example, in case of establishing Korea Land Housing Corporation upon merger along with Korea Land Housing Corporation act provision 7, deemed dividend amount of the stockholders thereof is made to be entered into deficit in calculating income amount of business year that included merger registration date (same article 104 provision 21 item no.1). In this case, also, rejection of unfair act and calculation, etc.[144] is not applied nevertheless unfair merger (same article 2).

On the other hand, regarding Korea Deposit Insurance Corporation[145],

143) National Tax Service, 「Revised taxation explanation 2010」, National Tax Service (2010), p.379.

144) For the stockholders distributed with profit are not applied with the regulation of unfair act calculation denial, however the stockholders distributed with profit do not view this as profit.

145) Korea Deposit Insurance Corporation, later since 2010, carried forward privatization of Woori Finance Holdings through three times, however due to huge sell off scale and strict ownership restriction on finance holding company, etc. it was not accomplished. Here, Deposit Insurance Corporation is conducting a plan to separate and sell of the affiliated company of Woori Finance Holdings after personal division of Woori Finance Holdings and merging with affiliated companies, etc. to raise possibility of realization of privatization of Woori Finance Holdings. However, in the process, a regulation of taxation on special case was adopted to smoothly promote privatization of Woori finance Holdings and reinforce predictability of interested parties such as tax payers and

in case when financial holding company that invested over 50% of total number of issue stocks or total amount of investment, in case of dividing until April 30, 2016, as a part of public fund collection procedure, it is considered as a qualified division along with corporate taxation, and management condition after division is not applied (same article no.121 provision 24 item no.1). Also, in case when financial holding company (including financial holding company newly established by division) where Korea Deposit Insurance Corporation (including financial holding company newly established by division) invested over 50% of total amount of investment merges with the affiliated company of that financial holding company until April 30, 2016 as a part of public fund collection, it is considered a qualified merger along with corporate taxation, which does not allow management condition after merger (same article no. 2). Furthermore, as a part of public fund collection procedure, when the financial holding company (including financial holding company newly established by division) where Korea Deposit Insurance Company invested over 50% of total number of issue stock or total amount of investment merges with the affiliated company of the financial holding company until April 30, 2016, all tax adjustment matters (including asset adjustment account) related to the affiliated company stocks owned by the financial holding company are considered to be dissolved (same article no.3).

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stockholders, etc. by newly establishing support items on taxation, such as clearly determining applicable matters on taxation related to privatization of Woori Finance Holdings, since confusion can occur in promotion of privatization of Woori Finance Holdings, which can be an obstacle, since there's unclear part on interpretation on relevant taxation including qualified division on corporate taxation or management condition after qualified division, or tax burden.

C. Evaluation

Korean tax regulation related to corporate merger · division can be said dispersed in corporate taxation and restriction of special taxation act. Of course, tax support institution related to organization change as merger and division, etc. is basically treated by corporate taxation, however in case of special purpose, for example, such the matters that require complementation than before regarding tax burden on corporate merger · division to achieve policy purpose as promotion for company takeover type technical transfer or restructuring support for the industry on excessive supply, etc., restriction of special taxation act treats this matter.

Restriction of special taxation act performs a role to efficiently support smooth merger · division, while actively responding the economic situation change by utilizing special case regulation. However, in case when maintaining the adopted special institution for a long term, side effects as tax evasion, etc. could be causes, accordingly, it is necessary to extend or abolish the application limit of time by closely reviewing whether of purpose of the economic situation and institution. Due to that reason, in Korea, special case regulation of restriction of special taxation act is temporarily operated, which is extended or abolished upon determination on whether of achievement of the purpose of adoption of the relevant regulation, and the existence of the necessity at present point of time.

3. Other Acts

When the national economy becomes mature, there's a limit to promote recovery of economic activities and sustainable economic development in a large scale production method mainly with large companies. Accordingly,

as the national economy enters the mature stage, various aspects of measure are required, such as promotion of small and medium-sized company or foundation of venture enterprises, etc.

In Korea, special measure act on venture enterprise promotion was enacted, which is being operated to contribute to activation of restructuring of Korean industry and promotion for competitiveness by changing the existing companies to venture enterprises and promoting foundation of venture enterprises (same article no. 1 reference). The relevant regulation takes the taxation on special case (same article no.14) on merger, as well as the regulation on simplification of merger procedure (same article no.15 provision 3)[146], special case of venture enterprise small scale merger (same article 15 provision 9)[147] · simplified merger (same article no.15 provision 10)[148], in order to promote venture enterprise, as well as taxation on special case regulation on merger (same article no.14). In case when

146) In case when a venture corporation and other corporation merge, it is necessary to notify an objection on merger for 10 days within 1 week of that merger resolution toward the creditor, and the notification should be notified to the creditor who already is aware of this (special measure act on venture enterprise promotion article no. 15 provision 3 item no.1). Also, in case when notifying stockholders general meeting for merger resolution, the notification date can be 7 days before stockholders general meeting (same article no. 2). Besides, notification of merger contract, etc. can be made on the date when 1 month passes since merger date 7 days before stockholders general meeting (same article no.3), and anti-merger stockholders should claim for the purchase of stocks upon written notice of the type and number of stock that they own upon written notice of anti-merger toward the venture enterprise before stockholders general meeting (same article no.4). The venture enterprise that received stock purchase claim should purchase the stock within 2 months since resolution date of stockholders general meeting on merger (same article no. 5).

147) When total number of new stocks issued on merger price by the existing company is less than 20 among 100 of the issue stock total number of that company, board of director approval can substitute for stockholders general meeting resolution.

148) In case when the existing company after merger owns over 80 among 100 of votable stocks among issue stock total number of the dissolved company, board of director approval can substitute for stockholders general meeting approval.

a venture corporation and other corporation merge, tax support can be performed along with the law related to tax.

Korea has placed a special act (hereafter 'small and medium-sized business change act') on the promotion for small and medium-sized business change to contribute to the sound development of national economy by reinforcing competitiveness of small and medium-sized company and achieving efficiency of industrial structure by promoting shift of business besides special act on venture enterprise promotion (same article no. 1 reference). Small and medium-sized company change act takes special act on simplification of merger procedure (same article no. 18)· division· division merger procedure (same article no.19) and simple merger (same article no.18 provision 2) regulation similar to the case of venture enterprise on the approved enterprise[149] to promote activation of business change procedure. Also, in order to support small and medium business who carries forward business change through merger can conduct necessary business to activate establishment support for mediation base or merger, information provision for merger, legal affair· accounting consultant support, financing and investment support for fund necessary for merger (same article no. 23). Furthermore, the government and local governments can support tax on the approved enterprise according to the taxation act (same article no. 29).

149) It refers to the small and medium-sized company with approval of business change plan.

Chapter 4 Establishment of legislative model of the legislation related to merger and division taxation

Part 1 Legislative model of basic law

1. Legislative model of merger · division on commercial law

A. Legislative model of merger

(1) Regulation on commercial law

Commercial law is largely composed of three ways regarding merger. They are the regulation on general merger procedure, regulation on simple merger and small scale merger, the special merger procedure, regulation on the term of the director and the audit of the existing corporation related to merger, which are the other procedures, and the method on regulating suit for merger invalidity, etc. That is, regardless of the type of merger, the legislation is based on merger procedure. In brief, it can be summarized as follows.

Merger procedure	Merger contract and the approval resolution - Merger contract of absorptive merger - Merger contract of newly established merger
	Notification of merger contract, etc.
	Stock purchase claim of anti-merger stockholders
	General meeting of absorptive merger report General meeting of foundation of new merger

	Creditor protection procedure
	Notification of document on merger after merger
	Merger registration
Special procedure	Simple merger
	Small scale merger
Others	Term of the board of director and the audit
	Suit for merger invalidity
	Regulation on application

(2) Available legislative model

As the legislative model of merger on commercial law, basically it is necessary to firstly determine the type of merger available in the law (new merger, absorptive merger). Later, it seems desirable to regulate procedure along with the type of merger respectively. That is, it is necessary to concretely determine which procedure should be followed along with each merger method after determination of available merger type on commercial law, how to treat the effectiveness in case when inspecting deficiency on it, etc. Because merger can have a significant influence on various interested parties including the stockholders, creditors, etc. around the company.

B. Divided legislative model

(1) Regulation on commercial law

As the merger, division is composed of three ways of legislation. They are regulation on general division procedure, special procedure regulation on simple division merger and small scale division merger, besides, the method to determine physical division, suit for division invalidity, etc.

That is, the legislation mainly with the procedure regardless of the type of division. It can be summarized briefly in the following table.

Division procedure	Division plan · division merger contract and the approval resolution - Entered matters in division plan - Entered matters in division merger contract
	Notification of division plan · division merger contract, etc.
	Stock purchase claim of anti-division merger stockholders
	Responsibility of company after division and division merger Creditor protection procedure
	Notification of document on division after division
	Division registration
Special procedure	Simple division merger
	Small scale division merger
Others	Physical division
	Applicable regulation

(2) Available legislative model

As the merger, legislative model of division, it is determined to be desirable to regulate the procedure along with respective types of division after firstly dividing (simple division, division merger). Because, simple division is a type of division along with division merger, however there's a big difference in stock purchase claim of anti-division stockholders or creditor protection procedure, a procedure to protect profit of the stockholders or creditors.

Above all, in case of division, anti-division stockholders' stock purchase claim is requested only on the case of division merger. In case of simple division, it is divided physical· functional aspect of the asset and business of the previous company, however there's no big change in the interest of stockholders.

Next, simple division does not have to necessarily pass creditor protection procedure.[150] Because the commercial law regulates responsibility for the debt of the divided company before division registration in alliance regarding divided company, simple division company, and division succeeding company. However, creditor protection procedure is required in case when excluding joint liability on the debt of divided company according to the legal regulation also in case of simple division.

C. Conclusion

Commercial law has passed continuous revision to promote economic activation by establishing smooth and reasonable merger · division institution. In this stream, simple merger institution or small scale merger institution, etc. were adopted, and various types of merger · division were enabled by making merger · division price flexible. As the result, it can be said that the legal basis for the enterprises to properly respond to rapidly changing business environment was prepared to a certain degree.

However, commercial law does not establish the legislative model only to support smooth merger · division of a corporation. Such regulations to

150) In case of division merger, there's a necessity to protect creditors, accordingly, it should necessarily pass creditor protection procedure, here, division succeeding company as well as divided company should also pass the same procedure.

protect the stockholders and creditors are prepared, considering the influence of corporate merger · division on them.

That is, merger · division legislative model is necessary to be established while comprehensively having the viewpoint of corporate restructuring support and protection for stockholders and creditors.

2. Legislative model of merger · division tax on corporate taxation

A. Legislative model on merger · division tax

(1) Regulation on corporate taxation

Corporate taxation regulates mainly with the relevant company and each stockholders related to merger · division regarding tax problem from merger · division. That is, it adopts a method to postpone the tax in case of qualified merger · division by again dividing into qualified and unqualified, after dividing the stockholders of predecessor company, merger corporation, and each corporation. Also, in order to prevent operation of taxable income by merger · division, there's a regulation on deduction limit, such as deficit carried forward, etc.

On the other hand, corporate taxation includes various merger · division approved by the commercial law as the target for taxation. For example, among the condition of qualified merger, it determines target for corporate taxation as triangle merger by regulating 'value of stocks, etc. of mother company among total amount of merger price over 80 among 100'. It can be summarized briefly as in the following table.

Legislative model		Content
Merger	Taxation on predecessor company	Taxation on transfer loss and profit In case of qualified merger : transfer value = book value * Merger on business purpose * Connectivity of share * Continuity of business Taxation on special case of merger with complete affiliated corporation
	Taxation on merger corporation	Taxation on merger purchase loss and profit Taxation on special case of qualified merger Management on qualified merger after merger Limitation of deduction as deficit carried forward
	Stockholders of each corporations	Stockholders of predecessor company * Deemed dividend Stockholders in special relationship with each corporation * Denial of unfair act calculation
Division	Taxation on divided corporation, etc.	Taxation on transfer loss and profit Incase of qualified division : transfer value = book value * Division on business purpose * Connectivity of share * Continuity of business
	Taxation on divided newly establishment corporation, etc.	Taxation on division purchase loss and profit Taxation on special case of qualified division Management of qualified division after division Limitation of deduction as deficit carried forward

Legislative model		Content
	Special case on taxation on division	In case when divided corporation exists after division Physical division
	Stockholders of each corporation	Stockholders of divided corporation, etc. * Deemed dividend Stockholders in special relationship with each corporation * Denial of unfair act calculation
	General regulation on merger · division	Issue of business year Corporate tax report · payment Tax payment obligator and payment district Merger, division margin, and exclusion from gross income

(2) Available legislative model

Means of business reorganization for merger · division, etc. has a significant meaning in respect of the viewpoint of rationalization of corporate management and reinforcement of international competitiveness. Due to that reason, it is necessary for taxation law to institutionally support the legal basis of commercial law to efficiently support corporate merger · division, in order to achieve the original purpose of the institution. For this, it is necessary firstly to divide into whether of take the unrealized profit from merger · division into the target for tax, that is, whether of qualified or unqualified, instead of composing the taxation system on merger · division mainly with the stockholders of the corporations for merger and the corporations. Later, it is determined to be desirable to

compose taxation system according to the method of merger and division respectively.

Also, corporate taxation law not only regulates the economic profit (for example, transfer loss and profit, etc.) of each corporation by merger · division as the target for taxation in order not for the corporations to misuse merger · division as tax evasion means, but also it is necessary to prepare a legislative model to support institutionally by acknowledging taxation on special case, etc. in order to smoothly utilize legal merger · division.

B. Conclusion

In commercial law, efficient utilization of merger · division institution and taxation are in a very close relation. The tax that is generated from corporate merger · division is the cost that does not occur if there's no merger · division, accordingly, the company cannot but consider taxation, etc. before conducting merger · division. In this background, corporate taxation

approaches taxation system on merger · division from the viewpoint of corporate restructuring support. They are regulations on taxation on special case of merger · division, treatment of merger · division price, etc. Basically, taxation should properly tax the economic profit from merger · division, through this, prevent misuse of merger · division by the corporations to evade tax. Due to that reason, corporate taxation regulates condition for taxation on special case (for example, calculation of business operation period, etc.), scope of taxation on special case, and response to tax evasion using unrealized loss from the viewpoint of tax evasion prevention of corporation.

Legislative model of taxation on merger · division should be established by comprehensively considering the viewpoint of corporate restructuring support and corporate tax evasion. On he other hand, taxation should be considerate to minimize dispute on interpretation in application of taxation on special case by including merger · division institution available on commercial law.

Part 2 Legislative model of taxation on special case

1. Legislative model on special case of corporate taxation

A. Regulation on restriction of taxation on special case

In Korea, restriction of taxation on special case determines regulation on special case of corporate taxation. Restriction of taxation on special case reinforces efficiency of tax reduction by temporarily operating regulation on special case of merger · division, on the other hand, promoting corporate restructuring, a current issue of our economy, preparing institutional device to induce faithful tax payment in our economy.

Restriction of taxation on special case regulates special case on merger · division, regarding tax deduction on technical innovative merger (restriction of special taxation act no. 12 provision 3), taxation on special case of succession of deficit carried forward upon merger (same article no. 46 provision 6), taxation on special case of succession of deficit carried forward upon merger of venture enterprise (same article no. 47 provision 3), taxation on special case of transfer of overlapped asset along with merger (same

article no. 47 provision 4), tax support system to enable smooth merger ・division as taxation on special case of corporate taxation on merger of Korea Land and Housing Corporation and Korea Land Corporation (same article no. 104 provision 21), and the regulation to prevent misuse of merger・division as tax evasion means as in the regulation (same article no.6) which does not determine the case of merger・division as a start-up in respect of tax reduction for start up small and medium-sized company, etc. This can be briefly summarized as in the below table.

Legislative model	
Corporate restructuring support	Tax deduction on technical innovative merger
	Taxation on special case of succession of deficit carried forward upon merger of logistics corporation
	Taxation on special case of succession of deficit carried forward upon merger of venture enterprise
	Taxation on special case of transfer of overlapped asset along with merger
	Taxation on special case of corporate tax regarding merger of Korea Land and Housing Corporation and Korea Land Corporation
Tax evasion prevention	Tax deduction on start up small and medium-sized company * Excluded from start up in case of merger・division

B. Conclusion

The legislative model based on the corporate taxation on special case can efficiently support smooth merger・division of corporation by more actively responding to the economic situation change. Due to economic situation change, when the necessity of venture enterprise promotion is

raised, deficit carried forward succession condition is relieved upon merger of venture enterprise to promote venture enterprise restructuring, and when the necessity of regular corporate restructuring support and new investment support of corporation since merger is suggested, application of taxation on special case of transfer of overlapped asset along with merger is enabled. However, in case of when taxation on special case applied is maintained for a long term, side effects as tax evasion, etc. can be caused, accordingly, it is necessary to extend or abolish the applicable period upon close inspection on economic situation and whether of achievement of purpose of institution[151].

2. Legislative model of uniform taxation on special case of commercial law and taxation

A. Legislative model of special case to achieve policy purpose

(1) Legislative model of special case on commercial law and taxation

In Korea, a special act (so called 'one-shot act') to reinforce corporate vitality since Aug 13, 2016 to uniformly support business reorganization on the aspect of tax, finance, and law, which is anticipatively conducted by normal corporations ordinarily. One-shot act takes a regulation on special case for the important business reorganization related act as commercial law or taxation to more efficiently support division, a business reorganization to be performed to minimize risk of merger and management, performed

151) Restriction of special taxation act abolished the relevant institution upon achievement of the purpose of institution while it was applying restriction of special corporate taxation act on transfer margin such as the land acquired for the purpose of corporate restructuring support to support corporate restructuring that sharply increased since IMF economic crisis.

to prevent overlapped investment and corporate management rationalization.

Concretely, one-shot act extended the scope of merger · division available only with board of director resolution by relieving condition for small case merger and simple merger on current commercial law, and enabled substitution of board of director resolution for special resolution of stockholders general meeting also in case of division of business division less than 10% of total amount of the asset by establishing the small scale division institution which does not exist in current commercial law. Furthermore, it greatly simplified the procedure of merger · division on commercial law, such as simplification of stockholders general meeting procedure, reduction of creditor objection presentation period, and stock purchase claim period of anti-merger stockholders, etc.

On the other hand, one-shot act decisively supports taxation on merger · division. As the result, 50% of registration license tax (0.4% of asset increase) in case of increase of corporate capital along with merger, etc., while corporate tax according to transfer margin or overlapped asset upon acquisition of net asset liquidating overlapped asset after merger is postponed for 3 years.[152] For example, as the result of absorptive merger of another domestic corporation B by a domestic corporation A, a corporation on excessive supply, for the advancement into a new business, considering the capital of company A increases 100 billion won, while stock purchase claim amount is caused 12 billion won and transfer margin of overlapped asset is caused 10 billion won, around 420 million won can be reduced compared to the existing method due to the interest cost reduction (220 million won) according to registration license tax reduction (200 million won) when applying one-shot act.

152) Ministry of Trade, Industry, and Energy, 「Special Act on Reinforcement of Company Vitality」 explanation data (2016.2), p.9.

Legislative model		Content
Special case on commercia l law	Special case on small case division	New establishment Division of business less than 10 among 100 compared to total amount of asset
	Special case on small scale merger, etc.	Extension of small scale merger condition (10 among 100 of total number of issue stocks 10 → 20 among 100) Relief of objection against small scale merger (20 among 100 of total number of issue stocks → 10 among 100)
	Special case on simple merger, etc.	Relief of exemption condition of special resolution of stockholders general meeting (90 among 100 of total number of issue stocks → over 80 among 100)
	Special case on merger procedure, etc.	Reduction of notification period of stockholders general meeting collection and financial statements (2 weeks → 7 days)
	Special case on creditor protection procedure	Reduction of creditor objection presentation period (over 1 month → over 10 days)
	Special case on stock purchase claim	Reduction of stock purchase claim period (stockholders general meeting date 20 days → within 10 days) Extension of stock purchase required period (Listed corporation 1 month → 3 months, non-listed corporation 2 months → 6 months)
Special case on taxation	Tax support	Review of approval of tax postponement on transfer margin of overlapped asset Review of reduction of registration license tax

(2) Conclusion

Legislative model as one-shot act can be usefully utilized in case when growth in domestic industry slows down due to low growth of global economy or severe competition with other countries in the mature state of key industries. Because, such legislative model can efficiently support business reorganization such as merger · division that are anticipatively conducted generally in order for the companies to actively respond to domestic and international environment change and reinforce international competitiveness.[153)]

However, legislative model as one-shot act is necessary in temporary term by limiting to business reorganization as merger · division which are carried forward for the advancement of a corporation from the business on excessive supply into a new business, and resolution of excessive supply, etc. On characteristic of special case act, in case when the application scope is extended to general corporations, unexpected side effects could occur, also, can bring unnecessary preferential favor dispute,[154)] and as it's a special act adopted according to necessity, there can be side effects as misuse· abuse, when it remains a long term.

In short, in case of a uniform regulation on special case on the legislation related to merger · division such as commercial law or taxation, etc. it is necessary to establish a legislative model while comprehensively considering the application scope, concrete content of special case regulation, and applicable period, etc. upon concrete determination on legislation.

153) Gwon, jongho, "Enactment background and content of special legislation for reinforcement of company vitality", 「Study on listed company association」 issue no. 72, Korea Listed Companies Association (2015), p.55.

154) Gwon, jongho, Ibid paper, p.83.

B. Legislative model of additional act on special case

When the national economy enters the mature state, there's a limitation to promote recovery of economic activity and continuous economic development based on a mass scale production method mainly with large companies. In this stage, various aspects of countermeasure such as promotion of small and medium-sized companies, promotion of venture enterprise start up, etc. are required.

In this regard, Korea also has restriction of special taxation act on special case of corporate taxation related to merger · division. Also, special treatment act for promotion of venture enterprise is operated, in order to effectively promote venture enterprises by relieving restriction on venture enterprise, through this, to reinforce international competitiveness of our industry. Among them, special treatment act on venture enterprise takes regulation on taxation on special case related to merger along with the regulation on special cases of simplification of merger procedure (same article 15 provision 3), venture enterprise small scale merger (same article 15 provision 9)· simple merger (same article 15 provision 10) in order to promote venture enterprises. Also, to contribute to reinforcement of competitiveness of small and medium-sized company and sound development of national economy by achieving upgrade of industrial structure through promotion of business change of small and medium-sized company, a special act on promotion of business change of small and medium-sized company (hereafter 'small and medium-sized business change act') is adopted, and the content of merger · division is not largely different from the content of special treatment act related to venture enterprise promotion.

Among them, the regulation and special treatment act related to small and medium-sized business change act have a great possibility to be mutually overlapped in the applicable object and applicable scope. Therefore, it is necessary to be considerate not to overlap the applicable scope and the concrete content of the special act regulation, after concretely defining the scope of the corporation applied by each act in respect of establishing legislative model by taking an additional special act.

Chapter 5 Conclusion

Merger · division are very significant in respect of the aspect of rationalization of corporate management and reinforcement of international competition, as a representative type of organization reorganization. Accordingly, Korea has continuously arranged legal basis to support smooth corporate merger · division. For example, commercial law prepared simple merger · division merger, small scale merger · division merger institution, in order to relieve procedural burden of merger · division, while adopting grant merger · division or triangle merger · division, etc. to support smooth corporate merger · division.

To efficiently utilize merger · division institution of commercial law, taxational support is very important. This is because the tax division is highly regarded, which is caused by merger · division in respect of determination of corporate merger · division. Due to such reason, Korea has continuously arranged corporate taxation in order to support smooth merger · division by rationally regulating merger · division taxation. As the result, corporate taxation today applies taxation on special case in case of qualified merger · division by dividing merger · division into qualified and unqualified from the viewpoint of smooth merger · division. However, in order to conduct corporate taxation reasonably on the economic profit due to merger · division, preventing misuse of corporate merger · division from tax evasion means, business purposer merger · division, connectivity of share, and continuity of business are required as the conditions for qualified merger · division. That is, corporate taxation supports smooth merger · division from the aspect of taxation, while restricting misuse of corporate merger · division for tax evasion means by determining whether

of business purpose merger · division, whether of value of stocks of merger corporation · division corporation, or mother company of merger corporation among merger · division price takes over 80 among 100, whether of continuity of business by merger corporation · divided newly establishment corporation, etc. after merger · division, etc. to determine qualified or unqualified merger · division.

Taxation system of merger · division is important in reasonably establishing taxation standard on the economic profit that is made by merger · division, through this, balance between smooth merger · division support and tax evasion prevention. From this viewpoint, legislative model related to merger · division taxation should be investigated, and following legislative models can be suggested.

First, legislative of basic act related to merger · division taxation. Legislative model of basic act basically should be established while considering merger · division type approved by the commercial law. For example, when merger · division type approved by the commercial law is not embraced, dispute on interpretation on application of taxation on special case along with qualification and disqualification can be caused. Therefore, basic act should be considerate to minimize dispute on interpretation in application of taxation on special case, etc. by embracing merger · division institution available on commercial law.

Basic act related to merger · division taxation performs a decisive role in the utilization of merger · division institution of commercial law. Accordingly, taxation should not basically disregard the attitude of commercial law on merger · division institution. Therefore, if commercial law focuses supporting smooth corporate merger · division, taxation also is necessary to support commercial law through taxation aspect through the regulation on regulation

of taxation on special case of merger · division or treatment of merger · division price. However, since taxation should prepare a device to prevent misuse of a special institution for tax evasion means, therefore, taxation on special case applicable condition (for example, calculation of business operation period, etc.), taxation on special case applicable scope, and tax evasion by unrealized loss should be utilized, nevertheless of placing of taxation on special case regulation.

Second, legislative model of special act related to merger · division taxation. Merger · division taxation system should be basically established by considering two aspects of support for smooth merger · division and tax evasion prevention. However, according to the necessary case in policy to overcome national economic crisis such as slow down of growth of domestic industry due to low growth of global economy or severe competition with other countries in the mature state of key industries, etc., or along with the situation that recovery of economic activity in the mass production method mainly with large companies and continuous economic development is difficult to be promoted, to resolve these problems through promotion of small and medium-sized companies or venture enterprises, in case when it is required to support smooth restructuring of these companies, it is necessary to support smooth corporate merger · division more intensively, accordingly, utilization of special act, etc. can be considered. That is, when establishing the legislative model of special act, the necessity should be premised.

In case of the special act, preferentially the applicable target and scope should be clearly defined. For example, the applicable target and scope should be clearly defined as the merger · division or venture enterprise, that are promoted for the advancement of the company of business on

excessive supply to advance into a new business, and resolution of excessive supply, etc. Furthermore, in case of targeting venture enterprise, it is desirable to determine the definition of venture enterprise. On characteristic of special act, in case when the applicable scope is extended to general merger · division or corporation, unexpected side effect could occur, also, unnecessary preferential favor dispute can be caused. Next, the idea of concrete determination of the content and temporary operation, since the special act is applied according to necessity. If the special act remains a long term, side effects as misuse· abuse can be caused.

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