

The (~~dilemma of~~) stamp duty- Mergers...!

- ▶ Stamp Duty a State and not Central subject matter. While some of the States in India have enacted their own Stamp Acts and others have adopted the Indian Stamp Act, 1899 (the “IS Act”) with their state amendments.
- ▶ The Stamp Duty is levied on the Instruments and the term instrument is covered under the definition of ‘Conveyance’ in IS Act and it has also been given a separate definition under the IS Act.
- ▶ The term "Conveyance" includes a conveyance on sale and every instrument by which property, whether moveable or immoveable is transferred and which is not otherwise specifically provided for by Schedule I of the IS Act.

- ▶ In the case of Hindustan Lever & Anr. v/s. State of Maharashtra & Anr., the following observations were made by the Hon'ble Supreme Court of India:
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- ▶ “Thus the amalgamation scheme sanctioned by the Court would be an “instrument” within the meaning of Section 2(i). By the said “instrument” the properties are transferred from the transferor company to the transferee company, the basis of which is the compromise or arrangement arrived at between the two companies.”
- ▶ It was further held that, the basis for passing an Order sanctioning the Scheme of Amalgamation is an agreement between two or more companies. The Scheme of Amalgamation has its genesis in an agreement between the prescribed majority of shareholders and creditors of the transferor company with the prescribed majority of shareholders and creditors of the transferee company.
- ▶ “The intended transfer is a voluntary act of the contracting parties. The transfer has all the trappings of a sale.”
- ▶ Supreme Court of India held that, the definition of “conveyance” in the Act was an inclusive definition and includes within its ambit an order of the High Court under section 394 of the Companies Act, 1956 and therefore it attracts stamp duty.”

- ▶ In the matter of Chief Controlling Revenue Authority v. Reliance Industries Limited, the Hon'ble Full Bench of the Bombay High Court on 31st March, 2016,
 - pursues to retort the question of quantum of stamp duty payable where companies involved in the merger are incorporated in more than one state which was left open for past several years.
- ▶ In the amalgamation of Reliance Petroleum Limited (RPL) into Reliance Industries Limited (RIL), whereby the assets, liabilities and entire undertaking of RPL were to be transferred to and vested in RIL. While RPL was incorporated in the state of Gujarat, RIL was incorporated in Maharashtra. For this reason, the High Courts of both the states were seized of the matter, and passed separate orders sanctioning the scheme after the companies complied with the necessary formalities. While the Bombay High Court passed its order (on a petition by RIL) on 7th June, 2002, the Gujarat High Court passed its order (on a petition by RPL) subsequently on 13th September, 2002. After both the orders were passed, RIL paid a stamp duty of INR.10 crores in the State of Gujarat on the order passed on the Gujarat High Court. Given that the stamp duty of a maximum of INR.25 crores was payable in Maharashtra on the amalgamation, RIL took up the contention that it only needed to pay INR.15 crores, claiming credit for the INR.10 crores that it had already paid in Gujarat. The revenue authorities in Maharashtra refused to accept this position, and instead sought full stamp duty. After a series of appeals, the revenue authorities in Maharashtra preferred a reference to the Hon'ble Bombay High Court to decide on the questions of law.

- ▶ The Hon'ble Full Bench identified and answered the questions for consideration as follows:
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- ▶ Whether a scheme sanctioned between the two companies under Section 391 and 394 of the Companies Act, 1956 is one and the same document chargeable to stamp duty regardless of the fact that order sanctioning the scheme may have been passed by two different High Courts by virtue of the fact that the Registered Office of the two companies are situated in different States?
- ▶ Answer: A scheme settled by two companies is not a document chargeable to stamp duty. An order passed by the Court sanctioning such a Scheme under Section 394 of the said Act, which effects transfer is a document chargeable to stamp duty. In case if the Registered Offices of the two Companies are situated in two different States, requiring such Orders, sanctioning the Scheme to be passed under Section 394 of the Companies Act by two different High Courts, then in that event, the order of this High Court which sanctions the Scheme passed under Section 394 of the Companies Act, 1956 will be the instrument chargeable to stamp duty.

- ▶ Whether the instrument in respect of amalgamation or compromise or scheme between the two Companies is such a scheme, compromise or arrangement and the orders sanctioning the same are incidental as the computation of stamp duty and valuation is solely based on the scheme and scheme alone?
- ▶ Answer: The orders of the court, sanctioning a Scheme of amalgamation are not just incidental orders even in accordance with the Scheme of the Companies Act, 1956 laid down by Section 391 r/w, Section 394. Only after the orders are passed by the Court, sanctioning the Scheme of Amalgamation, such a scheme becomes operational and effective. Computation of stamp duty and valuation does not make Scheme of Amalgamation alone chargeable to stamp duty. The order is the instrument.

- ▶ Whether in a scheme, compromise or arrangement sanctioned under Sections 391 and 394 of the Companies Act, 1956 where Registered Offices of the two Companies are situated in two different States, the Company in State of Maharashtra is entitled for rebate under Section 19 in respect of the stamp duty paid on the said scheme in another State?
- ▶ Answer: The answer to this question will be in the negative for the reasons set out in detail herein above.

- ▶ Whether for the purposes of Section 19 of the Act, the scheme/compromise /arrangement between the two Companies must be construed as document executed outside the state on which the stamp duty is legally levied, demanded and paid in another State?
- ▶ Answer: Basically a scheme /compromise /arrangement between the two companies is never a document chargeable to stamp duty, whether such a document is executed in the State or outside the State of Maharashtra. Moreover, in view of our conclusions above, Section 19 of the Act in any event, has no application whatsoever.

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- ▶ **In summary, the decision of the Full Bench of Bombay High Court amplifies the occurrence of the stamp duty on a scheme of amalgamation. Granted that parties should not recourse to the schemes of amalgamation/ arrangement as a means of evading stamp duty that would have otherwise been payable on a transfer through a private contractual arrangement between the parties.**

Exemption Notification:

- ▶ An Exemption can be claimed under Notification No. 1 dated 16th January, 1937 and Notification No. 13 dated 25th December, 1937, issued in exercise of the powers conferred by clause (a) of section 9 of the IS Act (II of 1899), the Governor General in Council was pleased to remit the stamp duty chargeable under articles 23 and 62 of Schedule I to the IS Act (II of 1899), on instruments evidencing transfer of property between companies limited by shares as defined in the Indian Companies Act, 1913, in following cases:–
- ▶ where at least 90 per cent of the issued share capital of the transferee company is in the beneficial ownership of the transferor company; or,
- ▶ where the transfer takes place between a parent company and a subsidiary company one of which is the beneficial owner of not less than 90 per cent of the issued share capital of the other; or
- ▶ where the transfer takes place between two subsidiary companies of each of which not less than 90 per cent of the share capital is in the beneficial ownership of a common parent company.
- ▶ Provided that in each case a certificate is obtained by the parties from the officer appointed in this behalf by the local Government concerned that the conditions above prescribed are fulfilled.

- ▶ However in the States like Delhi, the State Government had withdrawn this stamp duty exemption vide Notification dated 1st June, 2011 and a reference was made by stamp authorities as regards continuity of the Notification dated 25th December, 1937.
- ▶ The Hon'ble Delhi High Court 'In Re: Chief Controlling Revenue' on 17th January, 2019 held that,
- ▶ “15. Having found the Reference not maintainable, if we still proceed to adjudicate the Reference on merits, the same will defeat at least one of the reasons given by us above for holding the Reference to be not maintainable.”
- ▶ “16. Resultantly the Reference is disposed of as not maintainable and is returned. Needless to state that this will not come in the way of CCRA seeking a fresh Reference in an appropriate case coming before it including with respect to a document or instrument of a class with respect to which Reference in abstract was sought by way of this Reference.”

- ▶ The states of Maharashtra, Gujarat, Karnataka, Rajasthan, Chhattisgarh, Madhya Pradesh and Andhra Pradesh have already classified order of the Tribunal approving mergers in the definition of “Conveyance” and made specific entries in their state Stamp Laws and hence doesn’t follow the Exemption Notification.
- ▶ Hence, the Stamp duty being a state subject, an Exemption Notification will apply only in those states where the State Government follows above Notification of the Central Government otherwise stamp duty would be applicable irrespective of inter se relations of companies.

The Stamp Duty Liability in Maharashtra:

- ▶ As per the provisions of Article 25(da) of the Maharashtra Stamp Act, 1958 (the 'MSA') as amended by Maharashtra Stamp (Amendment & Validation) Act, 2017, the Order of the Tribunal sanctioning the Scheme is liable to stamp duty as follows:
 - ▶ 10% of the aggregate of the market value of the shares issued/allotted in exchange or otherwise and the amount of consideration paid, subject to higher of:
 - ▶ 5% of the true market value of the immovable property (located in the State of Maharashtra) and 0.7% of aggregate of the market value of the shares issued/allotted in exchange or otherwise and the amount of consideration paid.

In view of the aforesaid provisions, the broad calculation of stamp duty payable would be determined by the Adjudication officer as under:

Particulars	INR.
Number of Shares issued by the Applicant Company	X
Value of each Share (as on Appointed Date)	Y
Total consideration	(X+Y)
10% of total consideration	(A)
5% of the market value of the immovable property	(B)
0.7% of the total consideration	(C)
Stamp Duty liability	(higher of B & C, however limited to A)

- ▶ However, in view of the Notification No. Mudrank 2-2/875/CR-173/M-1 published in MGG Extra No. 124 Part IV-B at page no. 510 dated May 6, 2002 (the 'Notification') issued in exercise of power under Section 9 of the MSA, it is provided that, in public interest with effect from May 1, 2002 the maximum stamp duty chargeable is INR. 25/- crores.
- ▶ Hence, the Adjudicating officer has to consider the application for the adjudication under Section 31(1) of the MSA and issued necessary adjudication order stating the maximum stamp duty liability in view of the aforesaid provisions of the MSA i.e. (higher of B & C, however limited to A) and as per the Notification i.e. not exceeding INR. 25/- cores, as the case may be.

Thank You !

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