

Impact of Stamp Duty on Corporate Restructuring



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Introduction

- Stamp duty provisions are governed by The Indian Stamp Act, 1899 (“**Stamp Act**”) which is a Central enactment and the States are vested with powers either to adopt the said Stamp Act (with amendments, if any) or enact their own legislations governing payment of stamp duty on instruments.
- Stamp Duty is payable on “Instruments” not on “Transactions”.
- Section 3 of the Stamp Act is the charging section which provides for levy of stamp duty on execution of an instrument.
- Conveyance includes a conveyance on sale....whether movable or immovable property.
- Transfer *inter vivos* (no gift no will no minor...juristic person transfer permitted).
- Three important factors for computing stamp duty are:
 - a) there has to be an instrument;
 - b) proper execution; and
 - c) rate of stamp duty applicable in the State where instrument is executed.

Instruments under the Indian Constitution

➤ Seventh Schedule to the Constitution of India, 1949 has divided the respective powers to levy stamp duty on instruments among the Union and State Governments in the following manner:

Entry 91 of Union List

- Bill of exchange,
- Cheques,
- Promissory notes,
- Bills of lading,
- Letters of credit,
- Policies of insurance,
- *Transfer of shares,*
- *Debentures,* proxies and receipts

Entry 63 of State List

- Documents other than those specified in the provisions of entry 91 of the Union List with regard to rates of Stamp Duty (*for example- issuance of shares, transfer of debentures*)

Entry 44 of Concurrent List

- Stamp duties other than duties or fees collected by means of judicial stamps but not including rates of Stamp duty.

States and their respective Stamp Acts

States which have adopted the Stamp Act

- Arunachal Pradesh, Jharkhand, Uttarakhand, Andaman & Nicobar Islands

States which have adopted Schedule 1-A with amendments

- Andhra Pradesh, Assam, Bihar, Chattisgarh, Goa, Punjab, Haryana, Delhi, Chandigarh, Himachal Pradesh, Madhya Pradesh, Manipur, Mizoram, Nagaland, Orissa, Tamil Nadu, West Bengal, Daman & Diu, Pondicherry, Uttar Pradesh, Telengana

States with their own Stamp Act

- Rajasthan, Maharashtra, Karnataka, Kerala, Gujarat

Stamp Duty on order u/s 230-232 of the Companies Act, 2013

- An order of National Company Law Tribunal (“NCLT”) under section 232 of the Companies Act, 2013, through which assets and liabilities are transferred is treated as an instrument of conveyance and stamp duty is leviable.
- Many States (viz. Delhi, Tamil Nadu, Punjab, Uttar Pradesh etc.) does not have a specific entry including an order of a competent NCLT under section 232 of the Companies Act, 2013 and hence pose practical difficulty in adjudication of stamp duty.
- In the State of Delhi, there are several orders of the Revenue Department wherein they have adjudicated stamp duty on the basis of: i) consideration discharged; or ii) the NAV of the business, whichever is higher. Technically, there is no uniform code for such levy as under Delhi stamp laws, stamp duty is paid on the consideration discharged.
- Few substantial issues which are being experienced while adjudication of stamp duty on the order of a competent Court as mentioned above, are as under:
 - Principal instrument of transfer wherein different Courts approves the Scheme;
 - Differential payment of stamp duty; and
 - Bifurcating the consideration issued based on the value of units being transferred.

**Important Judicial Pronouncements on
Stamp Duty on order u/s 232 of the
Companies Act, 2013 (earlier section 394 of
the Companies Act, 1956)**

Judicial Pronouncements

S. No	Cit.	Case	Court	Ratio
1.	(1994) 1 SCC 531	Ruby Sales & Services Pvt. Ltd.	Supreme Court	Consent Decree - is an Instrument of Conveyance
2.	(1998) 91 Comp Cas 871 (Bom)	Li Taka Pharmaceuticals Ltd. v. State of Maharashtra	Bombay	An order under section 394 is founded or based upon compromise or arrangement between the two companies of transferring assets and liabilities of one company to another company known as "transferor-company" and that order is an "instrument" as defined under section 2(1) of the Bombay Stamp Act which includes every document by which any right or liability is transferred.

Judicial Pronouncements

3.	(2003) 114 Comp Cas 92	Gemini Silk Limited v. Gemini Overseas Limited	Calcutta	Order sanctioning a scheme, where properties together with liabilities are transferred, has all the trappings of a sale and is a "Conveyance" as well as an "Instrument" by which property whether movable or immovable is transferred Inter -vivos
4.	(2004) 9 SCC 438	Hindustan lever v. State Of Maharashtra	Supreme Court	Order under 394 is based on compromise between 2 or more companies and accordingly stamp duty shall be payable
5.	(2006) 130 Comp Cas 510 (Cal)	Madhu Intra Limited v. Registrar of Companies	Calcutta	The provisions of the Indian Stamp Act in relation to such definition and the definition of 'conveyance' and/ or 'instrument' does not apply to an order under Section 394 of the Companies Act for the purpose of stamp duty.

Judicial Pronouncements

6.	2006	T.T. Krishnamachari and Co v. Joint Sub-registrar I and Anr	Madras	“Where a sanctioned scheme provides for the transfer of any property or liability of the sick industrial company in favour of any other company or person or where such scheme provides for the transfer of any property or liability of any other company or person in favour of the sick industrial company, then, by virtue of, and to the extent provided in, the scheme on and from the date of coming into operation of the sanctioned scheme or any provision thereof, the property shall be transferred to, and vest in and the liability shall become the liability of such other company or person or, as the case may be, the sick industrial company.
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Judicial Pronouncements

7.	(2009) (1) ADJ 569	Hero Motors Ltd v. The State of U.P	Allahabad	An order sanctioning a scheme of arrangement of merger or demerger is both an instrument and a conveyance within the meaning of the applicable Stamp Act, on the basis as it is a movable asset
8.	2009	The Kusum Agrotech Ltd v The State of Rajasthan and Ors	Rajasthan	The definition of word conveyance as contained in Rajasthan Stamps Act (section 2(xi)) has been amended and enlarged to include “every order made by High Court” under section 394 of Companies Act 1956, in respect of amalgamation of companies
9.	(2010)159 CompCa s 129 (Delhi)	Delhi Towers v. G.N.C.T. of Delhi	Delhi	Relying on the Supreme Court judgment in Hindustan Lever, the Delhi High Court held that an order, is an “Instrument” and should be stamped as a conveyance. 1937 notf. upheld

1937 notification benefit:

- **Notification No. 1 dated January 16, 1937**, issued by the Finance Department, Central Board of Revenue, provided for remission of stamp duty chargeable on instruments evidencing transfer of property in cases, where the transfer of properties is between a parent company and its subsidiary company, where the transferor is the beneficial owner of not less than 90% of the issued share capital of the transferee or vice-versa or both are held by a common parent company.
- The said notification was superseded by **Notification No. 13 dated 25th December, 1937**
- **Notification No. 1 dated January 16, 1937** is withdrawn in Delhi vide notification number **No. F.1(423)/Regn.Br./HQ/Div.Com./IO/ 266 dated 1st June, 2011**.
- However, there is no clarity on whether the benefits of this notification still persist in the remaining states where the same has not been explicitly withdrawn.

Stamp Duty on order u/s 230-232 of the Companies Act , 2013

Legal status of Notification No. 1 dated 16th of January, 1937 and the notification No. 13 dated the 25th of December, 1937 (“Notifications”).

- The aforementioned notification were issued prior to enactment of the Constitution of India, which provides for *remission of Stamp Duty* in case of transfer of assets between a Parent Company and its subsidiaries under certain circumstances.
- In re: **Delhi Towers Limited vs GNCT of Delhi**, the petitioners took cover under the Notifications, issued in the pre-independence era i.e., prior to enactment of the Constitution of India. The Notifications provide remission of Stamp Duty in certain circumstances, which inter alia included transfer of assets between Parent Company and its subsidiaries under certain circumstances. The Government challenged the contention of the Petitioner on grounds that the notifications are not having been accepted by the legislative assembly of the Government of National Capital Territory of Delhi and will stand repealed
- The said argument of the Government was considered untenable by the High Court as under the provisions of the Constitution of India a pre- constitution law also does not require a specific adoption as has been urged on behalf of the respondent herein and a specific repeal thereof is required.

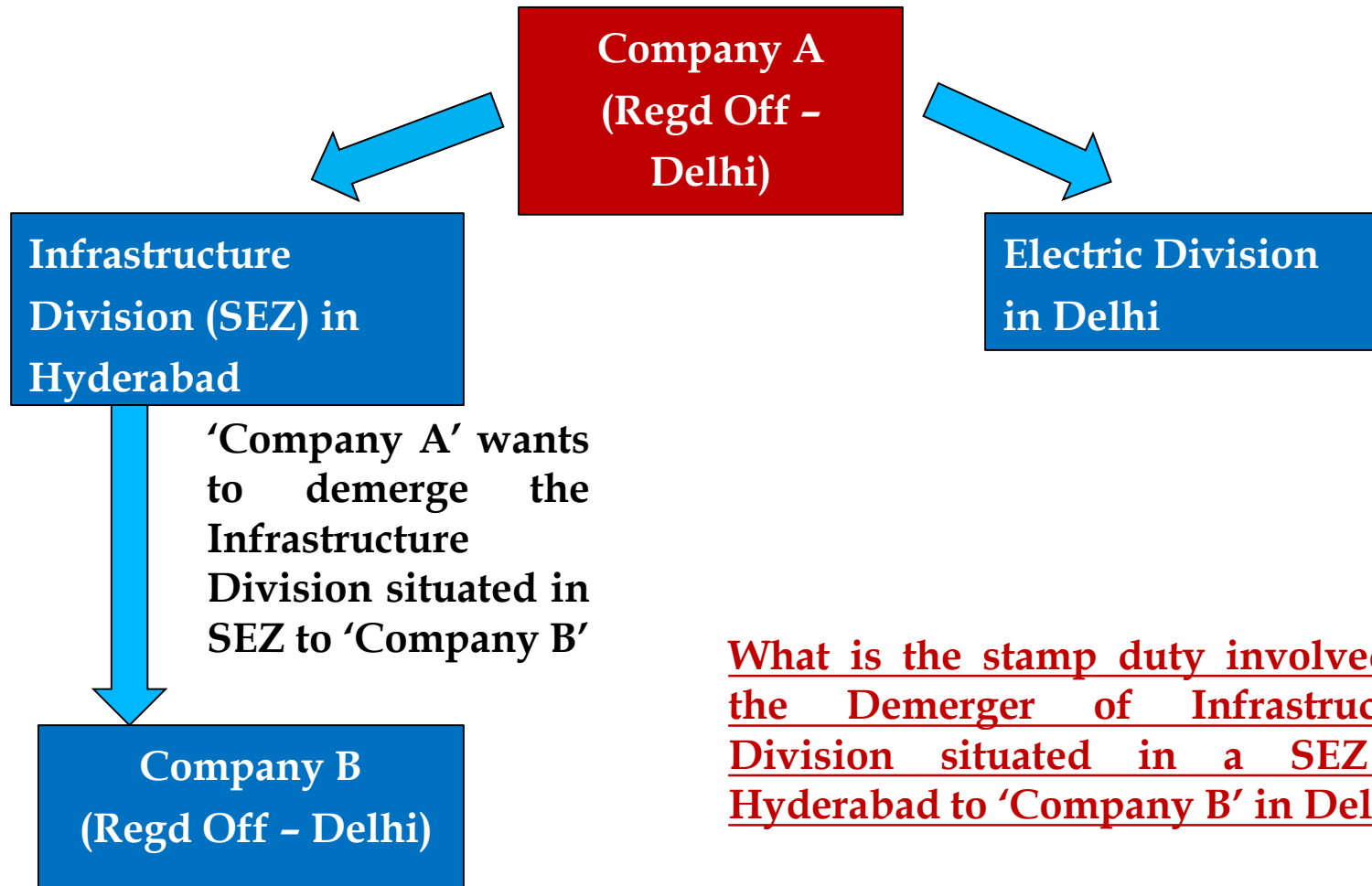
Judicial Pronouncements

10.	2010	Automac (Madras) Pvt. Ltd.	Madras	HC was of the opinion that it is premature at the time of sanctioning a scheme of arrangement to hold as to whether the order would be exigible to stamp duty, but observed that nothing in the order should be construed as exempting the concerned company from the liability to pay stamp duty, if applicable.
11.	(2012)170 Comp Cas 212 (Cal)	Emami Biotech Limited	Calcutta	Madhu Intra overruled. By sanctioning of amalgamation scheme, the property including the liabilities are transferred as provided in Section 394 of the Companies Act and on that transfer instrument, stamp duty is levied. It, therefore, cannot be said that the State Legislature has no jurisdiction to levy such duty

Case Studies



Study-1



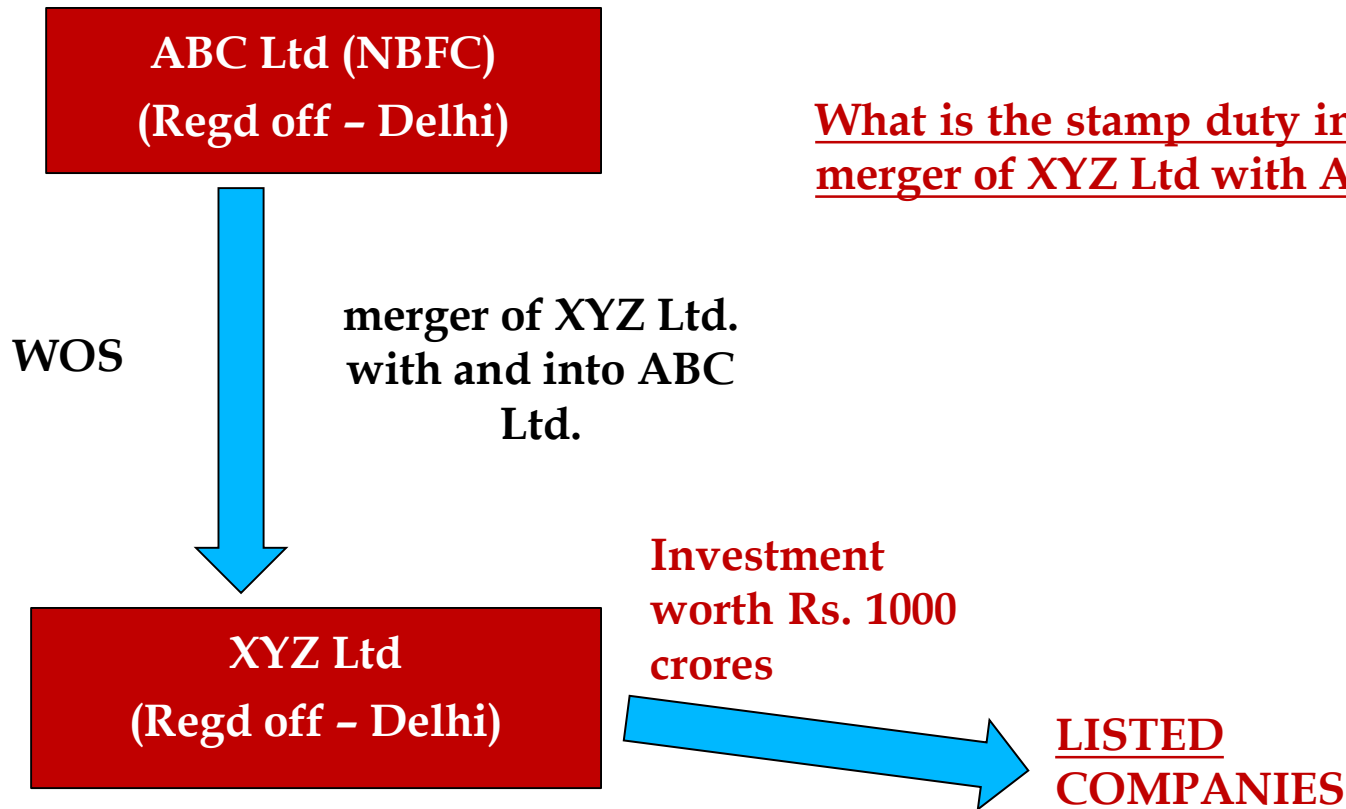
What is the stamp duty involved in the Demerger of Infrastructure Division situated in a SEZ in Hyderabad to 'Company B' in Delhi ?

Study-1

Answer:

1. The provisions of Stamp Act were amended in 2005 (through section 57 of SEZ Act) by insertion of proviso (3) to section 3 of the stamp act. The above referred proviso **exempts stamp duty on any instrument executed, by, or, on behalf of, or, in favour of, the Developer, or unit, or in connection with the carrying out of purposes of the SEZ.**
2. Explanation to section 3 of stamp act clarifies the expression “Developer” Special Economic Zone” and “Unit” shall have the meanings assigned to it under the provisions of SEZ Act.
3. In view of the above, **there would, be no stamp duty implications on transfer of SEZ Infrastructure Division .**

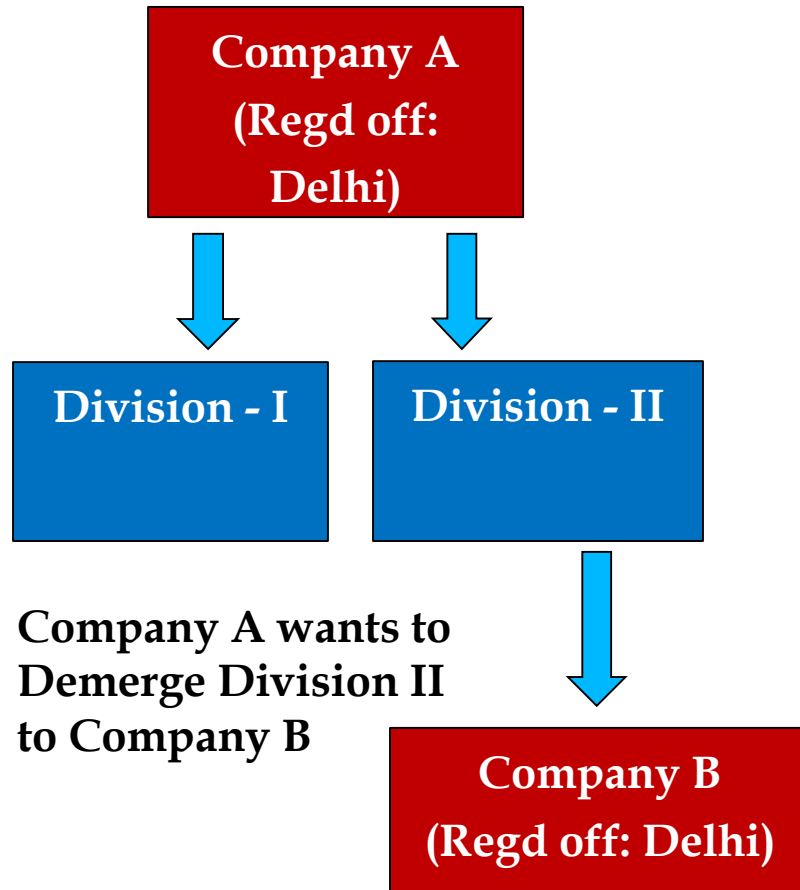
Study-2



What is the stamp duty involved in the merger of XYZ Ltd with ABC Ltd ??

In re: L&T Finance Company Ltd v/s The Superintendent of stamps and Collector of stamps, Mumbai (2005).

Study-3



Facts:

1. Division II has a land in RICCO, Rajasthan
2. RICCO transfer charges applicable or not
3. Merger in RICCO rules is Exempt.
4. Demerger is not at par with transfer for Conveyance.
5. Delhi - Stamp Duty on order unclear.

Issue 1:

Whether the Parties are free to choose the principal instrument wherein the transfer is effected by orders of two different NCLTs?

Stamp Duty on order u/s 230-232 of the Companies Act, 2013

Whether the Parties are free to choose the principal instrument wherein the transfer is effected by orders of two different NCLT?

- A transferor company and transferee company having registered offices situated in the State of Gujarat and Maharashtra at Mumbai, respectively, undertakes a scheme of amalgamation.
- Bombay High Court and Gujarat High Court approved the scheme on 01.05.2015 and 01.07.2015, respectively.
- In terms of section 4 of the Stamp Act, stamp duty is levied on the **principal instrument** wherein several instruments are employed for completing a transaction of sale, mortgage or settlement.
- There is no guidance in the Stamp Act as to how such a situation is to be handled, wherein in a case of amalgamation, the parties can avail the benefit of section 4. The Stamp Act also does not give any power to the Stamp Authorities to unilaterally decide which of the several instruments is a principal instrument
- Reasonable it can be said that in such a case the parties may decide the principal instrument themselves.

Stamp Duty on order u/s 230-232 of the Companies Act, 2013

Whether the Parties are free to choose the principal instrument wherein the transfer is effected by orders of two different NCLT ?

- The principal instrument, in the instant case, can be regarded as the order of the Bombay High Court, being the last order, upon which the scheme becomes effective and accordingly no stamp duty shall be leviable on the order of the Gujarat High Court.
- However, the Bombay High Court in *Chief Controlling Revenue Authority v. Reliance Industries Limited (CR No 1 of 2007 in Writ Petition No 1293 of 2007 in Reference Application No 8 of 2005, decided on March 31, 2016)* has taken a contrary view.
- The Bombay High Court, *inter-alia*, has out rightly rejected the contention that section 4 of the Stamp Act does not have any relevance in the instant case as the transaction is not that of a sale, mortgage or settlement. It was also held that the term 'settlement' has to be confined to its definition given in the Stamp Act and cannot be imported for the purposes of a scheme of amalgamation in terms of section 391-394 of the Companies Act, 1956. (presently, section 230-232 of the Companies Act, 2013)
- Hence, in terms of the Ratio-decindi in Reliance (supra), section 4 of the Stamp Act is of no relevance in cases .

Issue 2:

Whether rebate of stamp duty already paid, be availed wherein two different NCLT orders are leviable for stamp duty ?

Stamp Duty on order u/s 230-232 of the Companies Act, 2013

Whether rebate of stamp duty already paid, be availed wherein two different NCLT orders are leviable for stamp duty ?

- Section 19 A or any similar section of the Stamp Act (adopted in several states) provides for the payment of the difference in stamp duty, if any, in accordance with the rates as in force in the second State, in case the instruments chargeable with a higher rate of duty is executed in the first State (i.e. outside the second State) are later brought into the second State for anything to be done relating to a property situated in the second State.
- In a similar situation, as discussed before, it can reasonably be said that the stamp duty as paid in the State of Gujarat on the order of the Gujarat High Court (NCLT, Ahmedabad Bench) should be deducted from the stamp duty as leviable in the State of Maharashtra on the order of the Bombay High Court (NCLT, Mumbai Bench), thereby availing the benefit under section 19A of the Stamp Act.
- However, the Bombay High Court in **Reliance (supra)**, has, inter-alia, held that under the Bombay Stamp Act, 1958, order of the jurisdictional High Court (now NCLT) sanctioning scheme of amalgamation under section 391-394 of the Companies Act, 1956 (presently, section 230-232 of the Companies Act, 2013) is the “instrument” on which stamp duty is to be paid, and **that the scheme cannot be regarded as an “instrument”** as it cannot be enforced unless and until it is sanctioned by the court.

Stamp Duty on order u/s 230-232 of the Companies Act, 2013

Whether rebate of stamp duty be availed wherein two different NCLT orders are leviable for stamp duty ?

- The Bombay High Court in Reliance (supra) held that *“[As] per the scheme of the [Bombay Stamp Act, 1958], instrument is chargeable to duty and not the transaction and therefore even if the scheme may be the same, i.e., transaction being the same, if the scheme is given effect by a document signed in State of Maharashtra it is chargeable to duty as per rates provided in Schedule I [of the said Act].”*
- The Court further held that *“Although the two orders of two different high courts (now, NCLT) are pertaining to same scheme they are independently different instruments and cannot be said to be same document especially when the two orders of different high courts (now NCLT) are upon two different petitions by two different companies. When the scheme of the said Act is based on chargeability on instrument and not on transactions, it is immaterial whether it is pertaining to one and the same transaction. The duty is attracted on the instrument and not on transaction.”*
- In view of the above, if the registered offices of the amalgamating companies are situated in different states and scheme is required to be approved by two different NCLTs, **then the order passed by each jurisdictional NCLTs would be the instrument chargeable to stamp duty in the respective states.**

Stamp Duty - on order u/s 230-232 of the Companies Act, 2013

Whether rebate of stamp duty be availed wherein two different NCLT orders are leviable for stamp duty ?

- Hence, in respect of the companies situated in Mumbai, pursuant to the aforesaid order, in a scheme, compromise or arrangement sanctioned under section 230-232 of the Companies Act, 2013, no rebate (in respect of stamp duty paid on the said scheme in another state) will be available to the company in the State of Maharashtra at Mumbai, as the essential ingredients of Section 19 of the Bombay Stamp Act, 1958 are not fulfilled which is a pre-requisite to claim a rebate.
- Pursuant to the above judgement of the Bombay High Court, substantial cost will be incurred in cases of amalgamation/arrangements which involve two different NCLTs.

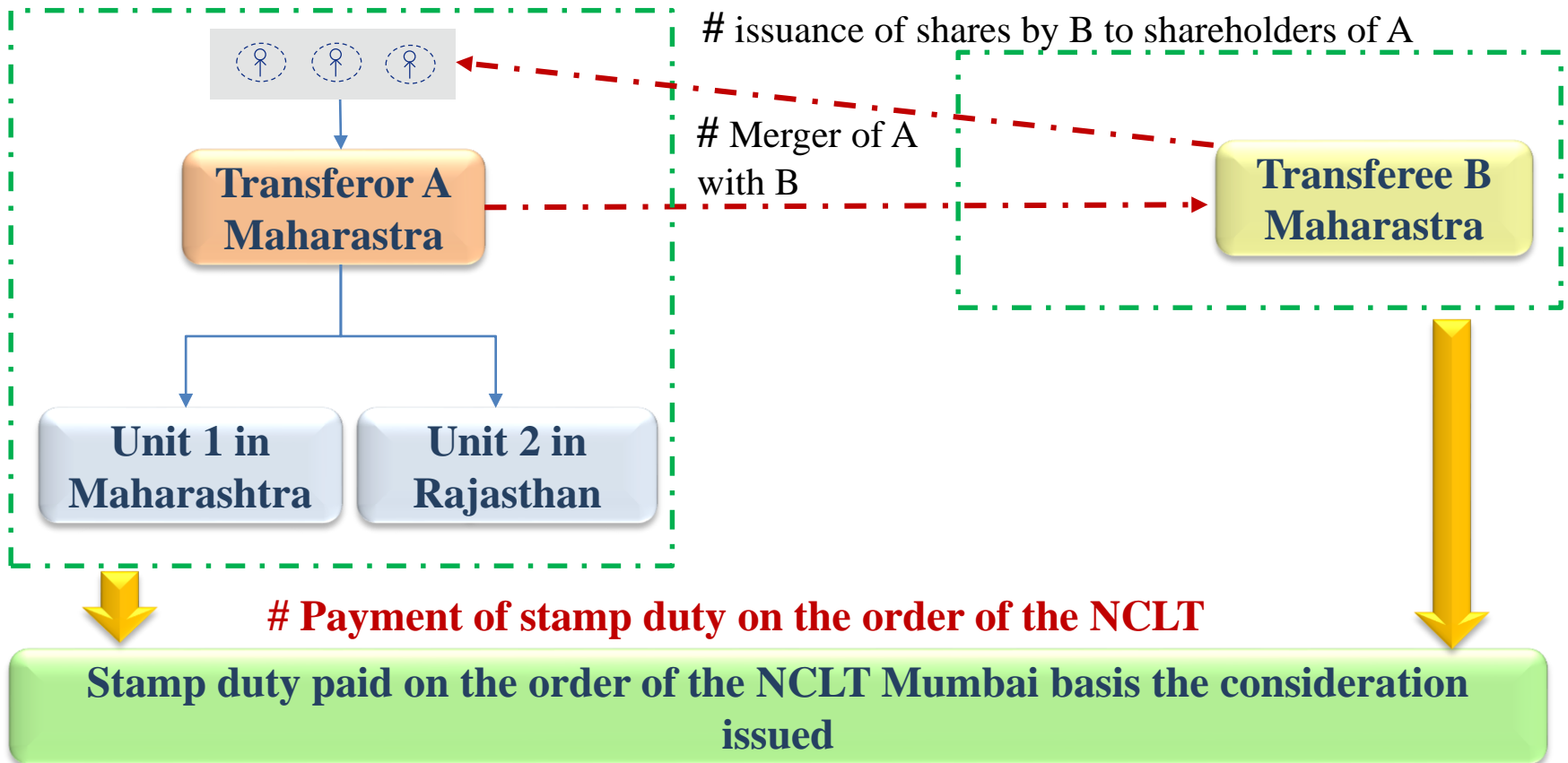
Issue 3:

Whether bifurcating the consideration issued based on the value of units being transferred possible ?

Stamp Duty – on order u/s 230-232 of the Companies Act, 2013

Whether bifurcating the consideration issued based on the value of units being transferred possible ?

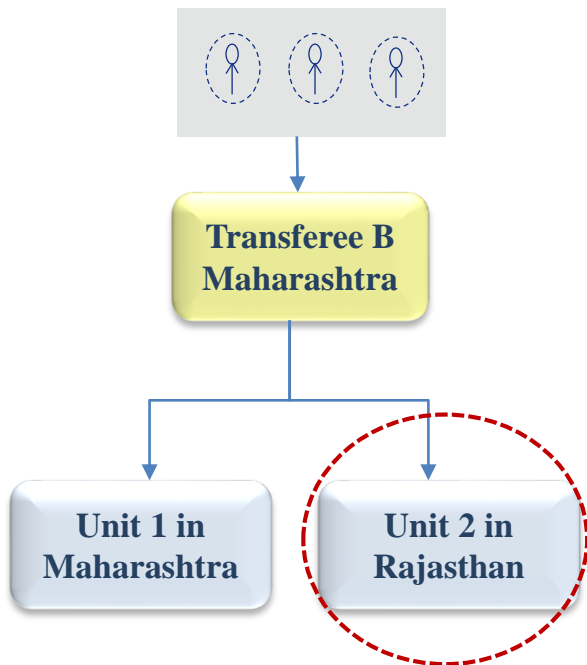
➤ The facts are as under and the transaction matrix is as below **(SCENARIO -1)**:



Stamp Duty on order u/s 230-232 of the Companies Act, 2013

Whether bifurcating the consideration issued based on the value of units being transferred possible.

➤ Resultant structure and the issues:



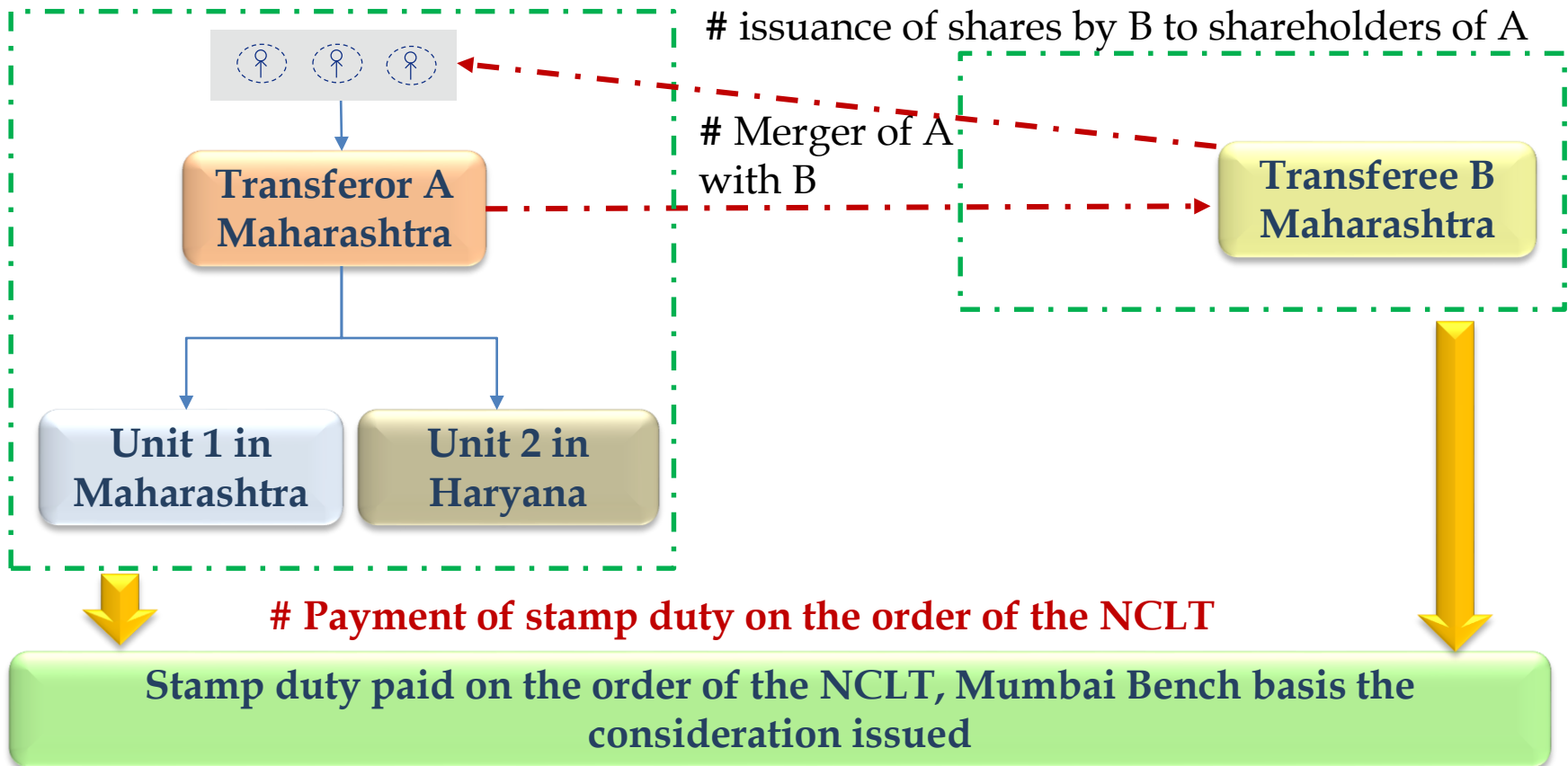
- In Maharashtra, Stamp duty on the order was paid on basis of the consideration issued which included the value of both the units.
- Now, in the State of Rajasthan, the property belonging to Unit 2 was sought to be mutated in the name of the Transferee B.
- Stamp Authorities in the State of Rajasthan sought to levy stamp duty on the consideration paid by B to the shareholders of A which includes the value of both units and other factors.

Now the issue is that, on what basis should the consideration be bifurcated so as to have unit-wise values. If the same is not possible stamp duty shall be payable on the entire consideration again and no benefit of Section 19, basis Reliance (supra) be availed of.

Stamp Duty - on order u/s 230-232 of the Companies Act, 2013

Whether bifurcating the consideration issued based on the value of units being transferred possible ?

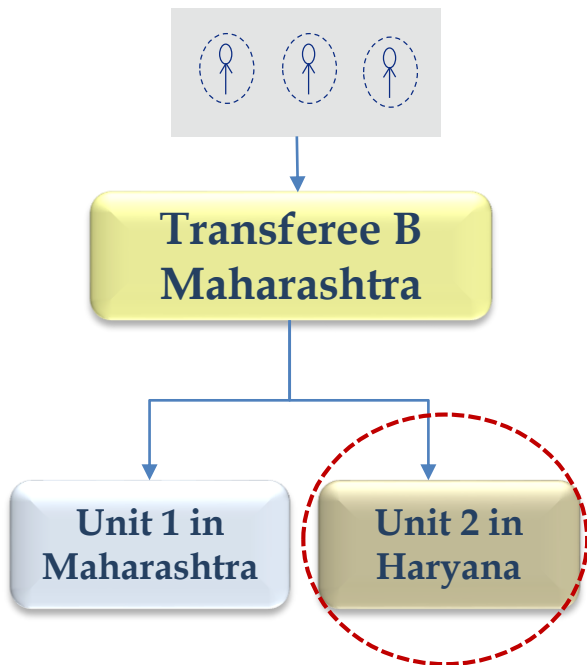
- The facts are as under and the transaction matrix is as below (**SCENARIO -2**):



Stamp Duty - on order u/s 230-232 of the Companies Act, 2013

Whether bifurcating the consideration issued based on the value of units being transferred possible.

➤ Resultant structure and the issues:



- In Maharashtra, Stamp duty on the order was paid on basis of the consideration issued which included the value of both the units.
- Now in the State of Haryana, the property belonging to Unit 2 was sought to be mutated in the name of the Transferee B.
- Stamp Authorities in the State of Haryana sought to levy stamp duty treating the order as an instrument for sale of immovable property at the CIRCLE RATE of the immovable property.

Now the issue is that, whether the Stamp Authorities in the State of Haryana can levy stamp duty treating the order as an instrument of sale, considering that there many judgments which dictates that amalgamation is not a 'sale'.

Rate of Stamp Duty on order u/s 230-232 of the Companies Act, 2013

➤ In the State of Uttar Pradesh:

The rate is prescribed under Article 24(e) of Schedule to the Uttar Pradesh Stamp Act, 2008 which is as follows:

24. Conveyance [as defined by Section 2 (viii)], not being a transfer charged or exempted under No. 60:

(e) (i) if relating to the order of High Court in respect of the amalgamation or reconstruction of companies under Section 394 of the Companies Act, 1956 or under the order of the Reserve Bank of India under Section 44-A of the Banking Regulation Act, 1949.

Rate: *10% of--The aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount of the consideration paid for such amalgamation or demerger, or Provided that the amount of duty chargeable under this clause shall not exceed--*

- i. An amount equal to 5% of the market value of the immovable property located within the territory of Uttar Pradesh of the transferor company, or*
- ii. An amount equal to 0.70 % of the aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount of consideration paid for such amalgamation or demerger whichever is higher among (i) or (ii),*

Rate of Stamp Duty on order u/s 230-232 of the Companies Act, 2013

➤ In the State of Uttar Pradesh:

Explanation 2

(i) For the purposes of clause (e), the market value of shares--

(a) in relation to the transferee company, whose share are listed and quoted for trading on a stock exchange, means the market value of shares as on the appointed day mentioned in the scheme of amalgamation or when appointed day is not so fixed, the date of order of the High Court; and

(b) in relation to the transferee company whose shares are not listed/or listed but not quoted for trading on a stock exchange, means the market value of the shares issued or allotted with reference to the market value of the shares issued or allotted with reference to the market value of the shares of the transferor company or as determined by the Collector after giving the transferee company an opportunity of being heard.

(ii) For the purposes of clause (e), the number of shares issued or allotted in exchange or otherwise shall mean, the number of shares of the transferor company accounted as per exchange ratio as on appointed date

Rate of Stamp Duty on order u/s 230-232 of the Companies Act, 2013

➤ In the state of Maharashtra:

The rate is prescribed under Article 25(da) of First Schedule to the Maharashtra Stamp Act, 1958 which is as follows:

25. CONVEYANCE (*not being a transfer charged or exempted under Article 59*) –
(da) *if relating to the order of the High Court in respect of the amalgamation or reconstruction of companies under section 394 of the Companies Act, 1956 or under the order of the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949*

Rate: *10 % of the aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount of consideration paid for such amalgamation or demerger or reconstruction:*

Provided that, the amount of duty, chargeable under this clause shall not exceed,

- i. an amount equal to 5% of the true market value of the immovable property located within the State of Maharashtra of the transferor company ; or*
- ii. an amount equal to 0.7% of the aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount of consideration paid for such amalgamation or demerger or reconstruction, whichever is higher:*

Rate of Stamp Duty on order u/s 230-232 of the Companies Act, 2013

➤ In the state of Maharashtra:

Explanation:- III

(i) For the purposes of clause (da) the market value of shares,--

(a) in relation to the transferee company, whose shares are listed and quoted for trading on a stock exchange, means the market value of shares as on the appointed day mentioned in the Scheme of Amalgamation or when appointed day is not so fixed, the date of order of the High Court; and

(b) in relation to the transferee company, whose shares are not listed/or listed but not quoted for trading on a stock exchange, means the market value of the shares issued or allotted with Reference to the market value of the shares of the transferor company or as determined by the Collector after giving the Transferee company an opportunity of being heard.

(ii) For the purposes of clause (da), the number of shares issued or allotted in exchange or otherwise shall mean, the number of shares of the transferor company accounted as per exchange ratio as on appointed date.

Rate of Stamp Duty on order u/s 230-232 of the Companies Act, 2013

➤ In the state of Rajasthan:

The rate is prescribed under Article 21 of First Schedule to The Rajasthan Stamp Act, 1998:

21. Conveyance as defined by Section 2(xi),-

(iii) if relating to the order under section 394 of the Companies Act, 1956 (Central Act No. 1 of 1956) or section 44-A of the Banking Regulation Act, 1949 (Central Act No. 10 of 1949) in respect of amalgamation, demerger or reconstruction of a company.

Rate: *Subject to a maximum of Rs. 25 crores rupees-*

- i. an amount equal to 4% of the aggregate amount comprising of the market value of share issued or allotted or cancelled in exchange of or otherwise, or on the face value of such shares, whichever is higher and the amount of consideration, if any, paid for such amalgamation, demerger or reconstruction, or*
- ii. an amount equal to 4% of the market value of the immovable property situated in the State of Rajasthan of the transferor company, whichever is higher.*

Rate of Stamp Duty on order u/s 230-232 of the Companies Act, 2013

➤ In the state of Haryana:

The Haryana Government vide notification no. Leg. 32/2017 dated 22.11.2017 has introduced rate of stamp duty leviable on order u/s 232 and 233 of the Companies Act, 2013. The said rate is as follows:

23A. Conveyance, so far as it relates to reconstruction or amalgamation or merger/de-merger of companies by an order of the High Court under section 394 of the Companies Act, 1956 or reconstruction or amalgamation or merger/de-merger of companies under sections 232 and 233 of the Companies Act, 2013 by the NCLT.

***Rate:** 1.5% subject to a maximum of Rs. 7.5 crore on an amount of the market value of the property or the amount of such consideration as set forth in the instrument or order, whichever is higher.”;*

** **Fair Market Value (FMV)** is the price, in terms of cash or equivalent, that a buyer could reasonably be expected to pay, and a seller could reasonably be expected to accept, if the business were exposed for sale on the open market for a reasonable period of time, with both buyer and seller being in possession of the pertinent facts and neither being under any compulsion to act.*

THANK YOU

For any further clarifications, please contact: NPS Chawla, Associate Partner, Vaish Associates Advocates (npschawla@vaishlaw.com/ 9958535300).

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