Conundrum of Stamp Duty and Mergers

Thought Leadership • July 26, 2022

By: Safir Anand and **Ruchi Madan** The article was first published on mondaq It is a principle of law for interpretation of taxing statute that a subject will be liable to tax or exemption according to the strict language of the taxing statute. This principle was upheld by the Supreme Court which while referring to the Indian Stamp Act, 1899 [Main Act] held *"It is a true fiscal statute in nature, as such strict construction is required to be effected and no liberal* interpretation."[1] This means that if an instrument is not mentioned in the law, then no stamp duty is payable on it. When it comes to stamp duty the general principle is that the duty has to be determined with reference to an instrument and not a transaction and this general principle was followed in the case of Swadeshi Cotton mills Co, in Re,[2]. An instrument has been defined in the Sec 2(14) Indian Stamp Act as- "*Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded.*" Instrument has an inclusive definition in the act which means that it includes a spectrum of instruments other than those which are explicitly excluded by the government notification. In India, many states have amended the definition of conveyance to include the entire scheme of merger. While no such change has been incorporated into the main Act this has led to problems while such transfers occurred. **Cases of Entire Scheme of merger** In the Case of *Li Taka Pharmaceuticals* (1997)[3] the Maharashtra Stamp Act, 1958 which was amended to provide that Conveyance would include every order made under Section 394 of Companies Act, 1956, was held to be declaratory and not remedial. The High Court held that an order under the Section 394 of the Companies Act is founded on compromise between two companies and since the order transfers the assets and liabilities, it considered it an instrument. However, this judgement was challenged in the Hindustan Lever case.[4] In the case of Hindustan Lever v State of Maharashtra (2004)[5] the Supreme Court held that if a scheme is sanctioned by court, then it would be an instrument and hence the legislature has the power to impose stamp duty on the order of stamp duty on the order of amalgamation which is passed by the court. In another case of Delhi High Court, Delhi Towers LTD v GNCT of Delhi[6], 15 (fifteen) companies, all engaged in real estate business planned a merger with the Delhi Towers Limited which was sanctioned by the Hon'ble High Court, but the authorities were not accepting the merger without payment of the stamp duty. It was held that an approved amalgamation scheme amounts to a transfer between two companies who at the time of passing of the order were juristic persons and sanctioning of the scheme whereby right, title and interest in the immovable property of a transferor company are transferred to the transferee company. The transfer takes place in the present and is not postponed to any later date and is covered under the definition of conveyance under Sub Section 10 of Section 2 of the Stamp Act. The Calcutta High Court in the case of *Gemini Silk Limited* (2002)[7] held that an order sanctioning a scheme of reconstruction or amalgamation has its basis in an agreement between the shareholders of the transferor and the transferee company; the intended transfer is a completely voluntary act of the contracting parties and the transfer has all the trappings of a sale: the transfer is effected by an order of court and that the order of court is an instrument by which the transfer is brought into effect. Once the order is held to be an instrument the irresistible conclusion is that it is a conveyance. Another division bench of the Calcutta High Court in *Madhu Intra Limited* (2004)[8] while setting aside the Gemini Silk case held that transfer of assets effected by an order under Section 394 of the Companies Act,1956 is purely by operation of law. The High Court held that stamp duty is not payable on such an order and further the transfer of assets and liabilities from the transferor company to the transferee company takes place by virtue of Sub-Section (2) of Section 394, without any further act or deed. In the Bombay High Court decision of *Chief Controlling Revenue Authority v. Reliance Industries* Limited[9], it was held that where the amalgamation scheme is being approved by two different High Courts, each such approved scheme would be termed as an instrument on which stamp duty would be payable. Moreover, it was also held that the stamp duty is payable as per the instrument and does not depend upon the value of the transaction being executed. **Payment and Calculation of Stamp Duty in Transfer of Shares** In India, the transfer of share comes under the definition of instrument in Section 2(14) of The Stamp Act and hence, that in transfer of shares stamp duty has to be paid. It is regulated by the Section 56 of the Companies Act 2013. which states "*A company shall not register a transfer of securities of the company, or the interest of a member in the company in the case of a company having no share capital, other than the transfer between persons both of whose names are entered as holders of beneficial interest in the records of a depository, unless a proper instrument of transfer, in such form as may be prescribed, duly stamped, dated and executed by or on behalf of the transferor and the transferee and specifying the name, address and occupation, if any, of the transferee has been delivered to the company by the transferor or the transferee within a period of sixty days from the date of execution, along with the certificate relating to the securities, or if no such certificate is in existence, along with the letter of allotment of securities:*" Moreover, transfers are valid only once documents are stamped according to the amount given under the Schedule I of the Indian Stamp Act 1889. In the case of shares which are dematerialised responsibility of collecting stamp duty are on the stock exchange, clearing corporation or as the case may be. Different states require different ways of the payment of the stamp duty for example. - A state may mandate online payment of the stamp duty. The stamp duty will depend on the value of the transaction or on the fair value of such shares being transferred by the Adjudicating Authority (Department of Revenue). The rate of stamp duty in the case of transfer of shares is of two types: delivery and non-delivery based, earlier there was different stamp duty payment requirement for both, 0.015% for the delivery based and 0.003% for non-delivery based, but the after the new stamp rules 2019 came out the rate of stamp duty is 0.015% irrespective of the mode in which the shares exist (physical or dematerialised). **Conclusion** Hence, a scheme of merger/amalgamation is stamped differently from an independent transfer of shares. While a scheme of merger/amalgamation, assumes the status of an instrument, if approved by the courts (in the absence of express law designating it as such), a share transfer is mandated to be stamped under law. **About the Authors: Safir Anand** is the Senior Partner and Head of Department (Trademarks, Contractual and Commercial IP). **Ruchi Madan** is a senior associate in Anand and Anand's corporate practice. [1] *Hameed Joharan v Abdul Salam* (2001) 7 SCC 573. [2]

Swadeshi Cotton mills Co in Re AIR 1932 All 29. [3] *Li Taka Pharmaceuticals Ltd vs State of Maharashtra and Other* AIR 1997 Bom 7. [4] *Hindustan Lever & Anr vs State Of Maharashtra & Anr (2004) 9 SCC 438.* [5] *Ibid.* [6] *Delhi Towers Limited vs Gnct Of Delhi [2009] Comp Cas 129 (Delhi).* [7] *Gemini Silk Limited vs Gemini Overseas Limited (2003) 53 CLA 328 Cal.* [8] *Madhu Intra ltd vs Registrar of Companies [2006] 130 Comp Cas 510 Cal.* [9] *Bombay High Court Judgment (Writ Petition no.1293 of 2007 in Reference Application no.8 of 2005)*

KEY CONTACT

Safir Anand

Senior Partner

View Bio of Safir Anand

RELATED INDUSTRIES

ARTIFICIAL INTELLIGENCE