

# Article

## Stamp Duty on Scheme of Arrangements in West Bengal- Mystery Solved!!

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September 13, 2012

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It was already under debate as to whether a scheme of arrangement is a “conveyance” or not and therefore, whether liable to stamp duty or not. In the absence of the specific entry in the States’ Stamp Schedule judicial pronouncements have played role in determining whether the transfer pursuant to scheme of arrangement is liable to stamp duty. In States where the provisions have been made clear like Maharashtra, Gujarat, Karnataka, Madhya Pradesh leave no scope of doubt for imposition of stamp duty. However, the perplexity continues in other states. The question as to whether the transfer of property is by operation of law or by consent of parties is important to determine whether the same is under the Transfer of Property Act.

On February 2012, a Single Judge at Calcutta High Court in *Emami Biotech & Others*<sup>i</sup> held that stamp duty is payable on scheme of arrangements and that there is no suspense in the same at all. Stamp duty on scheme of arrangements is the law of land laid down by the Supreme Court in the year 2003 in its judgment rendered in *Hindustan Lever vs. State of Maharashtra* (2004) 9 SCC 438. The judgment was thereafter appealed against by the appellants Emami Biotech Limited. Division Bench of the Calcutta High Court on September 12, 2012 upheld the decision of the Single Bench that a scheme of arrangement u/s 391 of the Companies Act tantamount to being a conveyance and thus liable to stamp duty.

### Brief background of the case

The scheme was filed by Emami Biotech Ltd (Emami) involving a transfer of the business of Oriental Sales Agencies (India) Private Limited (Oriental) to Emami. Emami held 90% of the paid - up share capital of Oriental so the scheme provided that the vesting of properties of Oriental in Emami would be exempt from payment of the prescribed stamp duty as per the Notification dated 16 January 1937<sup>ii</sup> issued by the then Governor of Bengal (Notification); As per Clause 15 of the scheme, since Emami would control ninety per cent of paid up capital of Oriental such vesting of properties including lease-hold land would exempt from payment of Stamp Duty as per the notification dated January 16, 1937 issued by the then Governor of Bengal applicable to the State.

The single Judge, taking note of the decision of the Supreme Court of India (SC) in *Hindustan Lever & another v State of Maharashtra & another* (*Hindustan Lever*) (2004) (9) SCC 438, held that the sanction of the schemes in both cases would require payment of the appropriate stamp duties and the Notification would have no application. The Appellants appealed against the order of the single Judge.

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### Main issues concerned

- Whether with the sanction of Scheme by High Court, the property is transferred by operations of law?
- Whether the Petitioner is eligible for Relaxations under the Notification No. 1 dated 16th of January, 1937 which provides remission of stamp duties in case of transfer of assets between parent company and its subsidiary in certain cases?
- Whether the scheme of amalgamation is covered under the definition of “conveyance” under the Indian Stamp Act, 1899 in absence of express entry in the stamp duty schedule?

### Decision rendered

#### **Whether with the sanction of Scheme by High Court, the property is transferred by operation of law?**

The Apex Court in Hindustan Lever had clearly held that the scheme of amalgamation was not involuntary and that it had all the trappings of a sale. The transfer of property pursuant to the scheme is by voluntary consent of the shareholders and that the order passed by the High Court under section 394 is on the basis of consent of the parties. The role of High Court is only supervisory without ruling on the merits of the scheme as the scheme is the result of the consent between the parties.

It was contended by the Appellants that the transfer was not “inter-vivos” as the transaction was not between two “living beings” which was defended by the state saying that the transfer is surely falling within the meaning of section 5 of the Transfer of Property Act, 1882. Company or association or body of individuals have been include in the meaning of “living persons” under the said section and therefore the transfer was very much inter-vivos. Further the words “inter-vivos” in context of section 394 would mean to include the transfer between two juristic persons. Therefore, section 5 of the Transfer of Property Act, 1882 shall be applicable in a scheme of amalgamation or demerger.



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### **Whether the Petitioner is eligible for Relaxations under the Notification No. 1 dated 16th of January, 1937 which provides remission of stamp duties in case of transfer of assets between parent company and its subsidiary in certain cases?**

The Appellants held that the notification was applicable hence the transfer was exempted from the stamp duty on transfer of property. It was contended that Hindusthan Lever did not consider the holding-subsiidiary relationship that would attract no duty.

It was contended by the state that the 1937 notification spoke about Schedule-I that would not be applicable in the State as Schedule 1(A) was in force at the time of issuance of the notification. Such notification would be applicable in case of Article 23 of Schedule 1. It was unknown as to under what circumstance it was issued, particularly, when Schedule 1 was replaced by Schedule 1(A) in 1922. Therefore the notification became inapplicable. The State further contended that on the question of “holding subsidiary” that it is of the view that corporate entities are having distinctive features. Shareholders do not own the corporate entity. Lifting of the corporate veil might suggest otherwise. In the eye of law, corporate entities are distinct. Hence, transfer from Oriental to Emami would definitely be a “transfer” to come within the scope of discussion in Hindusthan Lever attracting appropriate duty.

### **Whether the scheme of amalgamation is covered under the definition of “conveyance” under the Indian Stamp Act, 1899 in absence of express entry in the stamp duty schedule?**

#### **Meaning of ‘conveyance’**

The Indian Stamp Act, 1899 define “conveyance” as including “*a conveyance on sale and every instrument by which property, whether movable or immovable is transferred inter vivos ...*” It does not expressly include a scheme of arrangement within its ambit.

The argument of the Appellants is that the specific amendments made by certain State legislatures to include scheme of arrangements under the definition of conveyance implies that the intention of the legislation could have been to only include such orders u/s 394 for those states and to keep the others excluded from the applicability of the stamp duty. The State instead placed reliance on the

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judgment of Apex Court in the matter of *Hindustan Lever and Anr Vs. State of Maharashtra and Anr and Ruby Sales & Services Pvt. Ltd. and Anr vs. State of Maharashtra*, wherein it was stated that the consent decree which purports to convey the title in the property was an instrument liable for stamp duty at all times and it was only by way of abundant caution that the legislature had included the consent decree in the definition of the word 'conveyance' under the Bombay Stamp Act, 1958. It was contended that the scheme was nothing but sanction of the wishes of the shareholders that would have no binding effect on the persons outside the scope and purview.

Also, reiterating that the transfer falls within section 5 of the Transfer of property Act, 1882 as discussed above. Therefore, a scheme of arrangement would very well come within the meaning of conveyance.

### Conclusion

The Appeal was therefore set aside and the position in West Bengal also now seems to be very clear that inspite of absence of specific entry in the schedule an order u/s 394 would attract applicable stamp duty. A Scheme of Amalgamation transferring assets and liabilities in favour of the transferee company would be regarded as an instrument, which is subject to payment of stamp duty. Under the circumstances where the state has also held the meaning of holding-subsidiary and the applicability of the notification it seems practically that the notification therefore holds no relevance at all.

Question now is the rate of duty applicable. In the present scenario where the proposed law involving two percent stamp duty on scheme of arrangement is pending, the rate as on date, i.e. seven percent as applicable on conveyance shall become applicable. Therefore, as long as the state does not fix the rate the existing law would prevail.

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<sup>i</sup> <http://www.indiankanoon.org/doc/25587253/>

<sup>ii</sup> Governor General in Council shall remit the Stamp Duty in cases:

- (i) 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,
- (ii) 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
- (iii) 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.