

Legal Updates

Vinod Kothari & Company

Incidence of stamp duty on
mergers-demerger – ruling of the
Delhi High Court in Delhi Towers
Ltd v. G.N.C.T. of Delhi

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Whether an order under section 394 of the Companies Act, 1956 would attract payment of stamp duty was an issue in dispute for a considerable period of time. The Delhi High Court has added to the controversy by delivering its judgment in the matter of *Delhi Towers Ltd v. G.N.C.T. Of Delhi* (Date of decision: December 2009).

Facts of the case:

In a scheme of amalgamation filed before the Delhi High Court, 15 companies engaged in the business of real estate (hereinafter referred to as the “Transferor Companies”), being the wholly owned subsidiaries of Delhi Towers Limited (hereinafter referred to as the “DTL”), proposed to merge with the DTL.

The scheme was approved by the Delhi High Court and an order was passed in this regard. Subsequently, DHL, being aggrieved by refusal of the authorities of the Government of NCT of Delhi to accept the scheme of amalgamation approved by this court in exercise of jurisdiction under section 394 of the Companies Act, 1956 without payment of stamp duty preferred an application before the Delhi High Court which ruled that stamp duty is payable on a court order approving the scheme of arrangement irrespective of a specific entry in the State’s stamp duty schedule for such orders.

Decision of the Delhi High Court

The Delhi High Court relying on the judgment of the Apex Court in *Hindustan Lever & Anr. vs. State of Maharashtra & Anr.* (2004) 9 SCC 438 held that the foundation or the basis for passing an order of amalgamation is 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. The Court held that 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 Act. It is therefore subject to payment of stamp duty.***

If further concluded that the pronouncement of the Apex Court in *Hindustan Lever & Anr. vs. State of Maharashtra & Anr.* (supra) was not placed before the Calcutta High Court which considered *Madhu Intra Limited & Anr. Vs. Registrar of Companies & Ors.* (2006) 130 Com Cas 510 (Cal). In addition thereto, the discussion of the impact of the amendment to the definition of the term 'conveyance' in the Bombay Stamp Act in *Hindustan Lever & Anr. vs. State of Maharashtra & Anr.; Li Taka Pharmaceutical Ltd. and Ruby Sales & Services Pvt. Ltd.* (supra) was also not brought to the notice of the court. The Apex Court has held that amendment to the Bombay Stamp Act was merely on account of abundant caution.

Other issues discussed by the Delhi High Court

- **Nature of the Scheme:-** On amalgamation the transferor-company merges into the transferee- company shedding its corporate shell, but for all purposes remaining alive and thriving as part of the larger whole. In that sense the transferor- company does not die either on amalgamation or on dissolution without winding-up under sub-s. (1) of s. 394.
- **Jurisdiction of company court:-** Relying upon the pronouncement of the Apex Court in *Miheer. H. Mafatlal vs. Mafatlal Industries Ltd.* (1997) 1 SCC 579 : (1996) 4 Com.L.J. 124 (SC), this Court held that the court merely discharges a supervisory role in approving the scheme. Once the broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed.
- **Valuation of scheme of amalgamation:-** This Court reiterated the authoritative decision of Bombay High Court in *Li Taka Pharmaceuticals Ltd. v. State of Maharashtra & Ors.* (supra). which placed reliance on a pronouncement of the Bombay High Court reported at *Hanuman Vitamin Foods Pvt. Ltd. vs. State of Maharashtra*, 1992 (1) Bom CR 568 and held that in the transactions for merger involving the transfer of assets as well as liabilities, only the value of net assets (i.e. assets less liabilities) should be considered for the purpose of levy of stamp duty payment.
- **Notification no. 13 dated 25th of December, 1937:-** With respect to the notification no. 13 dated 25 December 1937, that provides for stamp duty

exemption on certain transactions among holding and subsidiary companies, the Court held that this notification is still applicable in Delhi even if these notifications are not specifically adopted by Legislative Assembly of Delhi. Therefore, no stamp duty is payable if the transaction is covered under the said Notification.

Conclusion

The present ruling of the Delhi High Court is no doubt an important judgment and will change the face of mergers and acquisitions in times to come. So far as the legislation in Delhi is concerned, there is no special enactment relating to stamp duty. The Indian Stamp Act, 1899 continues to hold the field. Interestingly, unlike the states which have adopted separate stamp legislation having special rate of duty on court orders under section 394, the Delhi High Court has simply included the court order under the definition of “conveyance” which implies that the court order under section 394 shall be charged to duty at the same rate as any other conveyance deed. Nonetheless, the ruling of Delhi High Court assumes great importance in deciding the stampability of mergers in states which have not enacted their separate stamp legislation. Thus, its possible impact upon such states cannot be over-emphasized.