

# *Analytical Speaking*

## **Puzzle of Stamp Duty on Amalgamation Orders- Will it ever be solved?**

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Stamp Duty on an order of scheme of arrangement has always been a knotty issue. Whether such an order amounts to a conveyance or not and whether it shall be chargeable to applicable stamp duty or not has always been in controversies and has led to uncertainties in cases involving amalgamation or restructuring of companies. Such ambiguity arises because many States do not have a specific clause for merger/demerger under section 391/394 of the Companies Act, 1956 in the conveyance entry in their respective Stamp Duty Schedule.

The question which has always been in debate that whether the transfer of property under a Scheme of Arrangement is by virtue of operation of law or it is vide an agreement between the parties.

Calcutta High Court in its recent judgment in *Emami Biotech and Others* (the ruling has been dealt in detail herein below) held that stamp duty is liable to be paid on schemes of arrangement involving transfers under section 3 of the Indian Stamp Act, 1889 even in the state of West Bengal and thereby has added one more star in the sky of perplexity on applicability of stamp laws on an amalgamation order. This judgment has set a new regime altogether but also uncertainty regarding the payment of stamp duty as the Division Bench of this High Court in *Madhu Intra Ltd vs. Registrar of Companies*<sup>1</sup> will continue to have its own apprehensions and anxiety.

### **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.

### **Whether an order approving merger a conveyance?**

The definition of ‘conveyance’ in stamp duty laws never seems to have included an order approving scheme of arrangement and therefore, there were no stamp duty imposed on such High Court Orders approving schemes of arrangement.

The following salutary principle enunciated by Rowlatt J. in *Cape Brandy Syndicate v. IRC*<sup>2</sup> and quoted with approval by Viscount Cimon in *Canadian Eagle Oil*

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<sup>1</sup> (2006) 130 Comp. Cas. 510

<sup>2</sup> [1921] 1 KB 64 p. 71

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*Co. Ltd. v. R<sup>3</sup>* and by the Supreme Court of India in *Gursahai Saigal v. CIT<sup>4</sup>* and also in several cases thereafter:

*"In a taxing Act one has to look merely at what is clearly said: There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."*

From the above, it can be depicted that the intention of the law maker is of no importance, what matters is the language of the provisions of any Act. An Act should have clear provisions on chargeability of tax on a transaction; otherwise, the same can be concluded by the expressed provisions of the Act only.

Hence, to avoid any ambiguity and confusion in this regard, with time, certain States began amending their Stamp Act and included Order of Court approving scheme of arrangement within the meaning of 'conveyance'. Maharashtra, Gujarat, Karnataka, Rajasthan, Chattisgarh, Madhya Pradesh and Andhra Pradesh are the states which have specifically included an amalgamation order of a High Court as "Conveyance".

However, the Indian Stamp Act, which is the mother of stamp laws in all the states of India (except the States of Maharashtra, Gujarat, Karnataka, Kerala and Rajasthan which have enacted their separate stamp legislation imposing special rates of duties) is silent on the same, so there were uncertainties and ambiguities every now and then as every court has interpreted the term "conveyance" in its own way.

As the Indian Stamp Act does not contain an express provision for inclusion of High Court orders sanctioning Scheme of Arrangement and therefore the amendments by the above mentioned States and the unclear definition of "conveyance" in Indian Stamp Act has lead to lot of complexities in States which is following the parent stamp act.

### Validity of Notification no. 13 dated 25<sup>th</sup> of December, 1937

The said notification was issued prior to enactment of the Constitution of India, which provided remission of stamp duty in case of transfer of assets between parent company and its subsidiaries under certain circumstances. The companies wishing to obtain relief from stamp duty must satisfy the authorities that the deal sought to be exempted evidences the transfer of properties between the two companies, one of which is the **beneficial owner** of at least 90% of the issued share capital of the

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<sup>3</sup> [1945] 2 All ER 499 (HL) p. 507

<sup>4</sup> AIR 1963 SC 1062 p. 1064



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other or if the transfer takes place between parent and its subsidiary. It is to be noted that “legal ownership” is not a pre-condition of the Notification.

Though the notification was issued in pre-independence era, under the provisions of the Constitution of India a pre- constitution law does not require a specific adoption. In light of this, one can say that the benefit of this notification can still be availed by the applicant companies fulfilling the prescribed conditions under the Indian Stamp Act.

### **Views of Apex Court of the Country**

#### ***Hindustan Lever v. State of Maharashtra***<sup>5</sup>

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. The Apex Court 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 Stamp Act was an inclusive definition and includes within its ambit an order of the High court under section 394 of the Companies Act. It is therefore subject to payment of stamp duty.

However, the above judgment is based on the definition of “conveyance” and “instrument” as appearing in the Bombay Stamp Act, hence, its applicability on the stamp laws of other States will be again a matter of dispute.

### **Picture in different states of India**

#### ***In the State of Maharashtra***

Clause 25 (da) of Schedule 1 to Bombay Stamp Act was enacted w.e.f. January 1, 2000 specifically includes the high court order approving a scheme of amalgamation, hence, there is no confusion/ambiguity here in this state.

Even before such insertion, the High Court had accepted that an order of amalgamation is liable to stamp duty as the same is in nature of a “conveyance”. The

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<sup>5</sup> (2004) 9 SCC 438



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views of the said High Court can be seen in *Hanuman Vitamin Foods Pvt. Ltd. vs. State of Maharashtra*<sup>6</sup> and *Li Taka Pharmaceuticals Ltd. v. State of Maharashtra & Ors*<sup>7</sup>. Thus, the insertion of the new clause regarding the amalgamation order in the Schedule was to avoid the confusion prevailing at that time and lay down the law of the land.

### ***In the State of Delhi***

Delhi Stamp Act has the definition of “conveyance” as defined in the Indian Stamp Act. One needs to depend on the interpretations given by the High Court in Delhi to see the applicability of stamp duty on orders approving the mergers.

#### ***Delhi Towers Ltd vs. GNCT of Delhi (date of decision: December 2009)***

The Delhi High Court in this judgment relied on *Hindustan Lever & Anr. vs. State of Maharashtra & Anr*<sup>8</sup> and in analyzing the nature of a scheme of amalgamation, held that an order of the High Court approving a scheme of amalgamation would be liable to stamp duty even in the absence of an express inclusion of such orders within the definition of “conveyance”.

It observed that 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 Delhi High Court held that definition of 'conveyance' in the Stamp Act is an inclusive definition and includes within its ambit an order of a High Court under section 394 of the Companies Act. An order approving the scheme is, therefore, subject to payment of applicable stamp duty.

### ***In West Bengal***

Indian Stamp Act has been adopted by this State, hence, invites controversies with regard to applicability of stamp duty.

#### ***Calcutta High Court's verdict in Gemini Silk Limited vs Gemini Overseas Limited on 8 August, 2002***<sup>9</sup>

It was in 2002 when the Single Company Judge of Calcutta High Court took a view that the transfer of property pursuant to any scheme of amalgamation or demerger

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<sup>6</sup> 1992 (1) Bom CR 568

<sup>7</sup> AIR 1997 Bom

<sup>8</sup> (2004) 9 SCC 438

<sup>9</sup> 114 Comp Case 92

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would attract stamp duty as in any other ordinary case of transfer affected without the intervention of court. The judgment held that an order sanctioning a scheme would amount to an instrument and conveyance that would be the subject to the charge under the Stamp Act as applicable in this State. That matter was heard upon notice to the State but the State's submission was recorded in two lines almost as a footnote to the judgment. The judgment reasoned that since an order of court or a decree could be regarded as an instrument within the meaning of the definition of "conveyance" appearing in the Stamp Act, that the transfer of properties was pursuant to an order of court and any document inter parties mattered little. The judgment referred to the Supreme Court pronouncements, inter alia, in *Haji Sk. Subhan v. Madhorao*<sup>10</sup> and *Ruby Sales and Services (P) Ltd v. State of Maharashtra*<sup>11</sup>.

The judgment rendered in *Gemini Silk Ltd* (Supra) was carried in appeal and set aside in the judgment reported at 130 Comp Case 510. The Division Bench of the Calcutta High Court adopted a contrary view and held that an order of amalgamation was not subject to stamp duty, because it did not fall within the definition of a "conveyance"; moreover even if such an order were to be taken as a "conveyance" or an "instrument" the transfer of assets and liabilities effected thereby is purely by operation of law.

### ***Madhu Intra Ltd vs Registrar of Companies*<sup>12</sup> in 2006**

In its pronouncement in this case, the Division Bench of Calcutta High Court took a converse view and had expressed that an order of the court approving a scheme of merger or demerger cannot be regarded as a "conveyance" and hence, no stamp duty is required to be paid and even if such an order were to be taken as a "conveyance" or an "instrument" the transfer of assets and liabilities effected thereby is *purely by operation of law*. The Division Bench even went to the extent of expressly setting aside the order and judgment of the single judge in the *Gemini Silk* case.

It transpires that prior to the judgment being delivered in *Madhu Intra*, the Supreme Court had spoken on the issue in *Hindustan Lever* (supra). Though the primary issue before the Supreme Court in that matter was as to whether stamp duty would be payable upon an order sanctioning a scheme of amalgamation by the Bombay High Court being regarded as an instrument chargeable under the amended provision of the Stamp Act in that State, the Supreme Court opined in the clearest terms that the transfer of any property upon the sanction of a scheme of amalgamation or demerger had all the trappings of a sale.

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<sup>10</sup> AIR 1962 SC 1230

<sup>11</sup> (1994) 1 SCC 531

<sup>12</sup> (2006) 130 Comp. Cas. 510



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### ***Emami Biotech and Others decided in February, 2012***

The petitioners in this case, canvassed two principal points in support of their contention that an order sanctioning a scheme under the Companies Act would be exempted from stamp duty in this State.

They contended that in view of the clear pronouncement of a Division Bench of this court in *Madhu Intra* case, that stamp duty would not be payable on orders sanctioning schemes under the Companies Act, it is not open to the single company Judge of the same Court to hold otherwise. They maintained that the Supreme Court's judgment in *Hindustan Lever* should be read in the context of the issues that arose in that matter and against the backdrop of the added provisions of the Bombay Stamp Act that are absent in the Stamp Act applicable in this State.

The petitioners further suggested that in the appeal from *Gemini Silk* case being allowed and the State accepting such position by not challenging it before the Supreme Court and the State subsequently passing a Bill to incorporate provisions for orders sanctioning schemes under the Companies Act being exigible to stamp duty, the issue would have remained concluded as far as this court is concerned. The petitioners asserted that there is a distinction between the definition of "instrument" in Section 2(14) of the Stamp Act applicable in this state and the definition of "instrument of partition" in Section 2(15) of the Act and there is a clear indication in one definition including, inter alia, orders of court and the other not, that an order of court would not amount to an instrument unless specifically provided for, and, consequently, no order of court can amount to a conveyance.

However, the Court had gone to the extent observing that schemes of amalgamation or demerger were nothing more than agreements between consenting parties that depended on the volition of the parties and persons connected with them and there was nothing involuntary about them. It is to be observed that a transfer by operation of law would be where the parties to the transaction had no role to play and the transaction could have been completed without any of the parties seeking the court's imprimatur or doing any overt act like carrying a petition to court. It was further observed that the judgment in *Madhu Intra* did not notice the Supreme Court pronouncement in *Hindustan Lever*. If the Division Bench of this court had noticed *Hindustan Lever* and had still rendered the opinion in *Madhu Intra*, it would have been binding on the company Judge of this court. But in *Madhu Intra* not noticing *Hindustan Lever* and it being apparent that the question has been answered otherwise by the Supreme Court, it is the Supreme Court view that has to be followed.



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Although this judgment quite clearly lays down the legal position, the existence of a division bench ruling in *Madhu Intra* to the contrary will continue to cause anxiety to litigants in the state. Ultimately, it boils down to whether the transfer occurs by operation of law or through contract (as a transfer *inter vivos*); the prevailing wisdom suggests that it is the latter.

Though it was thought that Calcutta High Court has now surely set a precedent for future schemes of arrangements but the matter is still unresolved! The Petitioners have gone ahead for an appeal against the order of Hon'ble Calcutta High Court and therefore, there is no clear position as of now in West Bengal in relation to such schemes. The decision and the appeal have practically left the people stunned with a question yet unanswered and the issue in the State is still in dilemma. The schemes have practically come to a halt and the matters are only pending after the said appeal. Thus, this decision really does not seem to have set a precedent as of now in as much as the appeal is still pending. If at all the order of the Court is stayed and passed in favor of the Petitioners, the State will surely breathe atleast till there is specific amendment to the Act itself!

### ***In the State of Uttar Pradesh***

The Allahabad High Court has also accepted such position at paragraph 27 of a judgment delivered in 2006 on a clutch of writ petitions in *Hero Motors Ltd v. The State of U.P.*<sup>13</sup> that 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.

## **Conclusion**

The charging section in the Stamp Act operates on the instrument and the definition of an 'instruments' is an inclusive definition in the Act and can be of various kinds by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded. The moot question that arises is whether the transfer of any property upon the sanction of a scheme of amalgamation or demerger under the Companies Act is different from the transfer of a property by a company to any other party other than under such a scheme.

From the judgments dealt herein above and the explanations to all the precedents both for and against the imposition of stamp duty, it has been made quite clear that there need not be an explicit definition and/or inclusion in the relevant statute/Act

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<sup>13</sup> CMWP No. 41811 of 2006



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but what matters is the propriety of the transaction. However, since the legislations of few States leave no scope of doubt, for the States in which the law is still silent on such issues, arguments and debates will go on and on. As in case of *Emami Biotech*, the applicants have gone ahead with an appeal in the matter signifying that possibly even the judgments don't really lay down the law but is only the intellect of an individual. Therefore, in such a state it becomes very important that the laws are made specific so as to avoid such litigations and ongoing debates. Such debated are not confined to one particular state, country or law but surely exist in every corner and in every aspect.

In Indian Context, while there exist landmark decisions of the Apex Court of the Country in *Hindustan Lever* (supra), often cited in the context of applicability of stamp duty of amalgamation orders, most other decisions have been rendered by the High Courts in various states. The High Court decisions are limited in their applicability as they are susceptible to disagreements by other High Courts, thereby conferring limited precedential value and surely leave scope for debates and litigations and points a need towards change in the law so as to bring clarity and specifications in relation to matters which are debatable every day and night.