

# Article

## West Bengal stamp amendment makes mergers easier:

Difficulties arising of Division Bench ruling in Emami Biotech removed



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The State has a reason to cheer now! It was always an unclear position in West Bengal when it came to payment of stamp duties on conveyance under a scheme of arrangement due to absence of specific entry in State's schedule and as such there were always two schools of thoughts. In States like Maharashtra, Karnataka, Madhya Pradesh there was no complexity at all as the States' schedule gave place to duty on scheme of arrangements. However, position in West Bengal was always perplexed more so after the decision rendered by the Division Bench in *Emami Biotech & Others*<sup>1</sup>, wherein a scheme of arrangement u/s 394 of the Companies Act, 1956 (the Act) was stampable as a conveyance inspite of absence of specific entry in the Schedule applicable in West Bengal under the Indian Stamp Act, 1899. Surely enough a scheme of arrangement transferring assets and liabilities in favour of the transferee company would be regarded as an instrument, which is subject to payment of stamp duty; however, the concerning part is the applicable rate of stamp duty.

The West Bengal Government has vide its notification no. 42L. dated January 8, 2013, effective from February 01, 2013, has put the concern to rest by including an order u/s 394 of the Act under the definition of conveyance and prescribing a differential rate of duty for the same.

The amendments made by the said notification along with their implications are discussed in this article.

### ***Indian Stamp (West Bengal Amendment) Act, 2012:***

#### **Definition of conveyance:**

Now substituted to include the order by Court in respect of scheme of arrangements and reads as<sup>1</sup>:

"conveyance" includes a conveyance on sale and every instrument ***and every decree of final order of any Civil Court or every order made by the High Court under section 394 of the Companies Act, 1956 in respect of amalgamation, merger, reconstruction or demerger of companies other than amalgamation, merger, reconstruction or demerger of two banking companies or a banking company with a non-banking financial company***, by which property, whether movable or immovable, is transferred *inter vivos* and which is not otherwise specifically

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<sup>1</sup>Section [2 (10)] of the Indian Stamp Act, 1899



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provided for by Schedule I or by Schedule I-A, as the case may be;” [emphasis supplied]

### **Amendment to Schedule IA:**

Specific entry made so as to include scheme of arrangements under conveyance as Article 23A specifying that where there is a transfer of the immoveable property from the State of West Bengal under any scheme of amalgamation, merger, demerger or reconstruction except that between two banking companies or between a banking and an non-banking financial company, the rate of duty in such transfer will be higher of the following:

1. An amount equal to 2% of the true market value of the immoveable property located in the state of West Bengal of the transferor company; or
2. An amount equal to 0.5% of the aggregate of the market value of the shares issued or allotted, in exchange or otherwise, and the amount of consideration paid by such transferor company for such amalgamation.

### **Position in other States:**

#### **Maharashtra**

The Apex Court in *Hindustan Lever v. State of Maharashtra*<sup>ii</sup> (referred to as “**Hindustan Lever Case**”) held that the foundation or the basis for passing an order of amalgamation is agreement between two or more companies. 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 are always a matter of dispute.

Clause 25 (da) of Schedule 1 to Bombay Stamp Act enacted w.e.f. January 1, 2000 specifically includes the high court order approving a scheme of amalgamation, hence, there is no doubt in this State having differential rate of duty.

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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views of the said High Court can be seen in *Hanuman Vitamin Foods Pvt. Ltd. v. State of Maharashtra*<sup>iii</sup> and *Li Taka Pharmaceuticals Ltd. v. State of Maharashtra & Ors*<sup>iv</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.

### Delhi

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

The Delhi High Court in this judgment relied on *Hindustan Lever & Anr. v. State of Maharashtra & Anr*<sup>v</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. Delhi High Court relied on the judgment and views of the Apex Court in Hindustan Lever Case and held that conveyance has within its ambit “order u/s 394 by High court”.

Since, there is no differential rate of duty; hence, the duty as applicable on conveyance becomes applicable.

### 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>vi</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. Since, there is no differential rate of duty; hence, the duty as applicable on conveyance becomes applicable.

A comparison chart on the rate of duties in few States:

Maharashtra <sup>vii</sup>	25 (da): 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.
Gujarat <sup>viii</sup>	20 (d): Subject to maximum of ten crores rupees ,

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	<p>(i) an amount equal to 1%, of the aggregate amount comprising of the market value of share issued or allotted in exchange of or otherwise, or the face value of such shares, whichever is higher and the amount of consideration, if any, paid for such amalgamation, or</p> <p>(ii) an amount equal to 1%, of the true market value of the immovable property situated in the State of Gujarat of the transferor company.</p> <p>Whichever is higher;</p>
Karnataka <sup>ix</sup> (on amalgamation)	<p>20 (4) (i):</p> <p>two percent on the market value of the property of the transferor company, located within the State of Karnataka and transferred to the transferee company; or An amount equal to one percent of the aggregate value of shares issued or allotted in exchange, or otherwise and in case of a subsidiary company, shares merged (or cancelled) with parent company and in addition, the amount of consideration if any, paid for such amalgamation; -whichever is higher</p>
Karnataka (on demerger)	<p>20 (4) (ii):</p> <p>two percent on the market value of the property of the transferor company, located within the State of Karnataka, and transferred to the resulting company; or An amount equal to one percent of the aggregate value of shares issued or allotted to the resulting company and in addition, the amount of consideration if any, paid for such demerger or reconstruction; whichever is higher</p>

### **Impact of the amendment:**

The much baffling issue in light of the judicial pronouncements in the State has now been settled and colonized. The controversies due to the decisions rendered in *Gemini Silk Limited v. Gemini Overseas Limited on 8 August, 2002<sup>x</sup>* and *Madhu Intra Ltd v. Registrar of Companies<sup>xi</sup> in 2006* wherein the Courts had held that the scheme of arrangement is by operation of law and therefore not liable to stamp duty, are no more relevant and the situation now comes to a mend.

Specification of the rate of duty on schemes of arrangements now comes as a big relief as not only will the stamp duty be lesser than that applicable on a conveyance (presently 7%), but also the settlement of the issue on the applicable / applicability of stamp duty settles the ambiguity and ongoing litigations in relation to the same.



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Therefore, there is no further need to wait for judicial pronouncements to determine the stamping issues.

After various conflict and controversies, it seems that once again the halt position of mergers in the State will begin due to the clarity brought in by the Government.

You may also read this article in Moneylife at the below link:

<http://www.moneylife.in/article/west-bengal-st-amendment-makes-mergers-easier/31643.html>

For other write ups and analysis on merger, incidence of stamp duty on scheme of arrangements, please see the link below:

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

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

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

<sup>iv</sup> AIR 1997 Bom

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

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

<sup>vii</sup> [Clause (da) was substituted by Mah. 1 of 2002, (w.e.f. 1-1-2000.)] available at <http://www.sadhan.net/adls/legal/company/act/priact/bombaystampact1958sch-1.pdf>

<sup>viii</sup> Substituted by the Bom. Stamp (Gujrat. Amendment) Act, 2006 Sec. 5 (14) w.e.f. 01.04.2006 for the words "0.75 per cent" at [http://www.legalpundits.com/Content\\_folder/Schedule1Gujarat250909.pdf](http://www.legalpundits.com/Content_folder/Schedule1Gujarat250909.pdf)

<sup>ix</sup> [http://dpal.kar.nic.in/pdf\\_files/34%20of%201957%20\(E\).pdf](http://dpal.kar.nic.in/pdf_files/34%20of%201957%20(E).pdf)

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

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