

STAMP DUTY IMPLICATIONS OF MERGER & ACQUISITION

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Introduction

Stamp Duty is a type of a tax paid to the government when there is a sale of an immovable property situated in India. Stamp duty is charged under provisions of Section 3 of Indian Stamp Act, 1899. It is required to be paid to the state government in full and in due time. In a case where there happens to be any interruption in such stamp duty being paid a penalty will be imposed on the wrongdoer. Any instrument or a document has stamp duty which is already paid on it, such instrument can be considered as a true legal instrument which has certain amount of evidentiary value attached to it and is very much admissible as an evidence in court of law. Any document which has not been stamped properly cannot be acknowledged as evidence in the court of law. Stamp Duty is required to be paid prior to the execution of the document/ instrument or it must be paid on the day on which a particular instrument is executed or at the latest by the very next working day of such instrument being executed. Execution of this instrument implies signing of the instrument in question by the parties to the agreement. Excluding any transfer by means of a Will, all instruments of transfer including agreement to sell, gift deed, exchange deed, deed of partition, power of attorney, leave and license agreement, agreement of tenancy along with lease deeds are required to be duly stamped prior to registration¹.

In India, the term ‘merger’ has not been properly explained under the provisions of the Companies Act, 1956 or under the provisions of Income Tax Act, 1961. Nevertheless, the Companies Act, 2013 just falls short of exactly defining the term, does elucidates on the concept of merger. A ‘merger’ is nothing but a unification of two or more companies into

¹ Stamp Duty Intricacies in India, Sandhya Iyer (11 June, 2013)

one to create a new company; whereby the anticipated outcome is not just simply limited to the accrual of assets and liabilities of the separate companies, but in-fact it deals with the unification of such companies into a singular form of business. There are various reasons for undertaking a merger- these are economies of scale, obtaining of modern technology, access to new markets etc. Commonly when there is a merger, the merging companies would stop existing and would exist as one surviving company. The Income Tax Act explains the corresponding term 'amalgamation'. It means the merger of one or more than one company with one or more than one new companies to form one single unified company. The Income Tax Act further specifies some other situations which are required to be fulfilled for an 'amalgamation' to reap benefits under the beneficial tax treatment².

Constitutional Provisions Related to Stamp Duty in India

As per Union List of the Indian Constitution of power has been bestowed in the Union Legislature to set rates of stamp duty in relation to of bills of exchange, banking cheques, promissory note, bills of lading, letters of credit, insurance policies and transfer of shares/debentures along with all types of proxies and receipts³. According to State List of the Constitution the power to set rates of duties on all such instruments apart from those stated in the Union List in the hands of the state legislature⁴. All other issues other than the rates of stamp duty in relation to the two classes of instruments are to be dealt with Concurrent List of the Constitution⁵.

Stamp Duty Applicable on Court Order for Mergers/Demergers

The universal principle in relation to stamp duty is that duty is required to be ascertained keeping in mind the instrument and not merely the transaction. In the landmark cases of *Inland Revenue vs Angus*⁶ mentioned and later on shadowed in *Swadeshi Cotton mills Co, in Re*⁷ that

² Mergers & Acquisitions in India, Nishith Desai Associates
(http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Mergers___Acquisitions_in_India.pdf)

³ Entry 91 of the List I of Schedule 7, Constitution of India

⁴ Entry 63 of List II of Schedule 7, Constitution of India

⁵ Entry 44 of the List III of Schedule 7, Constitution of India

⁶ 23 QBD 579

⁷ AIR 1932 All 29

the very first thing to be questions is whether the subject matter on which duty has been made levied is an instrument or not.

When there is a transfer of assets belonging to a particular company to another company by means of a scheme of merger approved by a High Court, then such a transfer is an 'operation of law' and therefore the particular order of High Court was not be considered as an instrument. Thus it was decided that no liability for stamp duty to be paid arises in such cases as held in *Sailandra Kumar Ray v. Bank of Calcutta Ltd*⁸. The decision was reversed in many subsequent judgments of various high courts and supreme court.

Stamp Duty is a subject placed under the State List in India. Whereas a few Indian States have implemented their own indigenous Stamp Acts, a few others incorporated the Indian Stamp Act, 1899 along with certain state-specific amendments to the same. Stamp Duty is charged on an instrument like all such document which create or give rise to a right or liability. Also all such instruments as included in Schedule I of the Indian Stamp Act. These instruments broadly consist of signed affidavits, memorandum and articles of association of companies, bills of exchange, registered bonds, mortgage deeds, documents pertaining to conveyance, financial receipts, debenture/share certificates, insurance policy documents and partnership deeds among others. As the court order passed by the Court while merging together two or more companies or approving a demerger, has the effect of transferring assets and liabilities to the transferee company, such order passed the Court may be subject to payment of stamp duty. The stamp duty laws of almost all the states need the stamping of orders passed for merger and acquisition. The quantum of the stamp duty to be charged would vary as per the state specific stamp law.

According to the provisions of Section 394(2) of Companies Act, 1956 in a situation where any order given by any of the High Courts in-keeping with the provisions laid down under Section 394(1) of the Companies Act 1956 gives a framework regarding the handing over of a property or any other liability attached to the property, therefore due to passing of such an order, the property in question shall be handed over and lie with the transferee company along with any such liability that exists on such a property. Moreover, in the case where any property by the virtue of court order is liberated from an existing charge via any compromise or

⁸ AIR 1948 Cal 131

arrangement, the said liability will cease to have effect from thereon in. There remains no precise indication as to whether the order passed by a High Court under section 394(1) of the Companies Act is subject to be stamped. The High Courts had power to authorize any scheme involving merger and a foremost role was played by them regarding authorizing any arrangement for merger. Thus, questions were raised in relation to whether any such order is required to be subjected to a stamp duty. High Courts in India have given divergent opinions with respect to payment of Stamp Duty on such orders of mergers, till the Supreme Court of India brought clarity on the subject by stating that any order given under Section 394(1) shall be liable for Stamp Duty to be paid on the same.

In the landmark judgment given by the Bombay High Court, *Li Taka Pharmaceuticals Ltd. Vs State of Maharashtra & Others*⁹, the court further clarified the issue of stamp duty in case of merger and acquisition. The honorable court said that any order when passed under the ambit of section 394, the said order originates or is constructed upon a compromise and/or arrangement between the companies coming together for such an agreement of merger or amalgamation. In such a case, the company which is transferring its assets and liabilities to another company is called as the transferor-company. The company which is acquiring the assets in question for a consideration is called the transferee-company and the order by which the whole agreement for merger is authorized is to be termed as an 'instrument' which is very well defined under section 2(1) of the Bombay Stamp Act which includes all such documents due to which any right or liability is created or transferred.

In another pertinent judgment of *Madhu Intra Ltd v. Registrar of Companies*¹⁰, it was held by the Division Bench of Hon'ble Kolkata High Court that even in a situation where an order passed under the purview of Section 394 is to be considered to be an instrument or a conveyance, the assets and liabilities which are transferred in such a case is totally by an act of law which in terms of Section 2(d) of the Transfer of Property Act discounts the provisions of Section 6(e). In any case the explanation of instrument as given under Section 2(14) of the Indian Stamp Act, the meaning of the terms conveyance and/ or instrument will not hold meaning with respect to an order passed under Section 394 of the Companies Act with regards to payment of stamp-duty. The assets and liabilities of the transferor company are transferred to the transferee

⁹ AIR 1997 Bom 7

¹⁰ 2006 130 CompCas 510 Cal

company only after an order has been made under the provisions of Section 394(1) read with provisions of Sub-section (2).

The Hon'ble High Court of Calcutta in the case of *Emami Biotech Limited & Other*¹¹ held that by approving a scheme of amalgamation, the entire property (assets) of the transferor along with the liabilities are transferred to the transferee as per provisions of Section 394 of the Companies Act and stamp duty must be charged on that transfer instrument. Court further held that it found it difficult to understand the reasoning as to why the State Legislature should not have jurisdiction to charge such stamp duty.

The Delhi High Court further fueled the debate by passing its judgment in the case of *Delhi Towers Ltd v. G.N.C.T. Of Delhi*¹². In this case it was seen that fifteen transferor companies which were already involved in the real estate business made a decision to merge with Delhi Towers Limited. The fifteen companies were said to be the hundred per cent subsidiaries of Delhi Towers Limited or the transferee company. The arrangement of amalgamation finds its origin in a covenant between the given majority of shareholders along with the creditors of the transferor company with the given majority of shareholders along with the creditors of the transferee company. The proposed transfer is very much a voluntary act entered into by the contracting parties. This type of a transfer of assets and liabilities has all the characteristics of a sale. The Court felt that meaning of 'conveyance' happens to be a broad definition which embraces within itself the domain of an order of the High court under section 394 of the Companies Act. It is thereby required to be brought under the ambit of payment of stamp duty. The Delhi High Court further decided that any sanctioned arrangement of merger can be termed as a transfer in between two or more companies which can be deemed to be existing as juristic persons when such order for merger has been approved by which all concerned rights, title along with interests in all immoveable properties belonging to the transferor are to be transferred to the transferee.

The landmark exception to the levy of stamp duty in case of mergers, that was laid down in this case talked about remission that was to be provided in the form of no levy of stamp duty in a case involving the transfer of assets of the transferor to the transferee company, whereby the transferor company happened to be a one hundred percent subsidiary of the transferee

¹¹ *Emami Biotech Limited & Other Vs State of West Bengal (Comp. Application 777 of 2011)*

¹² *CA No. 466/2008 in Company Petition No. 50/2003*

which should be the parent company The court relied on the notification of 16.1.1937 which was made available in the Gazette of India 1937 as Part I on Page 78. As part of the notification, it was clearly reported that by using the powers bestowed via Section 9(a) of the Indian Stamp Act, the Governor General in Council had decided to spare the stamp duty that was to be imposed under the provisions of Articles 23 along with 62 of Schedule I of the said Act on all such instruments demonstrating any property transfer amongst companies that are limited by shares as explained by the Indian Companies Act involving those where a transfer is undertaken in between a holding company and its subsidiary company, where one of the companies is the beneficial owner of at least ninety percent of the total issued share capital of the other company¹³.

In a landmark judgment of *Hindustan Lever & Anr vs State of Maharashtra & Anr*¹⁴, commonly referred to as the *Hindustan Lever Case*, the Hon'ble Supreme Court of India made some crucial observations. It was held that the term "Instrument" was coined to imply each and every document on pretext of which a right or liability of any sort gets either created or transferred or limited or extended along with extinguished and recorded. However, the term will not cover items mentioned under Entry 91 of List of Schedule 7 of the Constitution of India. The reading of the scheme of merger along with the order of the High Court under provisions of Section 394 of the Companies Act asserts that when the high court passes such an order, the assets and liabilities of the transferor will have to be handed over to the transferee along with all movable as well as immovable and tangible assets, even without the need for any additional deed. Therefore, the scheme of merger approved by the Court will have to be treated as an "instrument" under the provisions of Section 2(14) of Indian Stamp Act, 1899. Supreme Court further held that any scheme approved by the Court would fall under the definition of the term 'instrument' and only the state legislature will have the authority to levy stamp duty on such order of merger sanctioned by the Court.

In the case of *Gemini Silk Limited v/s Gemini Overseas Limited*¹⁵, the Calcutta High Court gave a truly landmark judgment. It was held that in an order, approving a scheme of merger or amalgamation, finds its origin in a covenant taking place in between shareholders of the transferor and transferee companies. Such a planned transfer is very much of a voluntary action

¹³ Stamp Duty On High Court Orders In Case Of Mergers In India, Pradhumna Didwania (30 January 2013)

¹⁴(2004) 9 SCC 438

¹⁵ 2003 53 CLA 328

taken up by the contracting parties and shows all the characteristics of a sale. The transfer is achieved via a Court order and this order of the court is to be deemed as an instrument through which the whole transfer is undertaken. Only after the order has been considered as an instrument can it be decisively said to be a conveyance.

In a recent judgment of Chief Controlling Revenue Authority v. Reliance Industries Limited¹⁶, the full Bench of Bombay High Court has held that orders of the High Court approving scheme of merger under provisions of Section 391-394 of the Companies Act, 1956 says that it is the instrument on which stamp duty has to be charged under the Bombay Stamp Act, 1958. The scheme of merger which is to be decided in between two companies cannot simply be an instrument as it lacks any effectiveness as long as it is does not get approved by the court of law. To be more precise the court said that in a case where the registered offices of two companies entering in a scheme of merger are located in two separate states and the said scheme is subject to be sanctioned by two separate high courts, then in all such cases the judgment given by each high court would be the instrument on which stamp duty is to be paid in the corresponding states.

In the aforementioned case, the respondents i.e. Reliance Industries Limited and Reliance Petroleum Limited were set up in Maharashtra and Gujarat respectively. The arrangement of merger between them was approved by both the Bombay High Court as well as the Gujarat High Court correspondingly. At the same time, stamp duty had been paid off in Gujarat as per orders of the Gujarat High Court. When stamp duty was being paid in Maharashtra, the respondents requested that they were authorized to receive credit for that stamp duty which had already been paid in Gujarat.

The Bombay High Court decided that according to the scheme of Bombay Stamp Act, 1958, duty is to be charged on the instrument and not on the transaction. Therefore, in a situation where the arrangement is the same and the scheme is to be enacted by a document undertaken in Maharashtra duty on it is to be charged as per the rates provided in Schedule I of the Bombay Stamp Act. The Court also opine that even if orders of two different high courts are relating to same arrangement, even then they are autonomously diverse instruments which cannot be deemed to be one document particularly when the orders of these high courts are relying upon

¹⁶Bombay High Court Judgment (Writ Petition no.1293 of 2007 in Reference Application no.8 of 2005)

two different petitions by two different companies. When the arrangement under the act is built on charge being levied on the instrument instead of the transactions, it is irrelevant whether it is affecting the same transaction. The obligation arises upon the instrument and not on the transaction.

The Court said that it is by the Order of the Court that approves any scheme of merger which leads to the handing over of the property and assets and that order by itself would be an instrument on which stamp duty is chargeable. Further, in respect of the companies situated in Maharashtra, pursuant to the aforesaid order, in a scheme, compromise or arrangement sanctioned under Section 391-394 of the Companies Act, 1956, no rebate will be available to the company in the State of Maharashtra, as the essential ingredients of Section 19 of the Bombay Stamp Act, 1958 are not fulfilled which is a pre-requisite to claim a rebate. The above judgement reinforces the principle that stamp duty is payable on the instrument and not on the transaction per se. Hence, it is advisable for companies opting for a court approved merger to ensure that the registered office of the transferor and transferee company is situate at one jurisdiction.

Share Acquisition

The acquiring of a business or its assets along with shares and liabilities can be accomplished in any of the following ways:

- slump sale process whereby the company as a going concern will be handed over for a nominal consideration as per Business Transfer/Asset Purchase Agreement.

Any transfer of assets when carried out by means of a slump-sale will invite levy of stamp duty. Such stamp duty implications vary from one state to another state. These rates normally vary from 5-10 percent in case of immovable property while ranging from 3-5 percent in case of movable property. These rates are generally dependent on the consideration that comes in return of the transfer or depend upon the total market value of that property which was transferred, whichever is higher out of the two.

- by a court sanctioned arrangement of under section 394 of the Companies Act under which all the assets and liabilities will be transferred from the Seller to the Purchaser
- individual transfer of assets and liabilities by the Seller to the Purchaser.

- Acquisition of shares under share Purchase Agreement

When shares of a company are transferred apart from those shares that are in de-materialized form which are usually traded beyond the trading structure of stock exchanges, on such shares the acquirer is required pay stamp duty. The rate at which stamp duty is to be paid is around 0.25% of the market value of these shares in question¹⁷.

Assets which will be transferred under all of the abovementioned processes will comprise of:

- (i) Movable Property
- (ii) Immovable Property
- (iii) Unsecured loans
- (iv) Advances/deposits
- (v) Contracts with suppliers; and
- (vi) Interests under secured loans

RATE OF STAMP DUTY ON MERGERS IN DIFFERENT STATES IN INDIA¹⁸

State	Relevant Articles from Stamp Act	Rate of Stamp Duty to Be Charged
Maharashtra	25(da) (Merger or reconstruction or demerger)	10% of aggregate of market value (MV) of shares issued or allotted in exchange or otherwise and the amount paid for such amalgamation, shall be the higher out of the two: -

¹⁷ Taxation Of Cross Border Mergers & Acquisitions, KPMG (2014)

¹⁸ Stamp Duty on Restructuring, CA Sanjeev Shah (11th January, 2016)

		<p>a. 5% of the MV of immovable property located in Maharashtra of the transferor company</p> <p>b. 0.7% of the MV of shares issued or allotted and the amount of consideration paid</p>
Gujarat	20(d) (Merger or Amalgamation)	<p>Stamp duty to be paid will be higher of the two:</p> <p>-</p> <p>a.1% of the market value of shares which have been issued/allotted for exchange of or otherwise, or the face value of those shares whichever is higher and amount of consideration if any, paid for such amalgamation</p> <p>b.1% of true market value of immovable property located in the Gujarat belonging to the transferor company.</p>
Delhi	23	3% of the consideration amount decided in the instrument of merger.
Andhra Pradesh	20(d) (Amalgamation or Merger)	2% market value of the property which is in question by means of such agreement of merger.
West Bengal	23(A)	Stamp duty to be paid on arrangement of amalgamation, merger, demerger or reconstruction except that between two banking

	(Amalgamation, Merger, Demerger or Reconstruction)	companies or between a banking and an NBFC, will be higher of the following: - a.2% of the MV of immovable property located in West Bengal of the transferor company, or b.0.5% of MV of shares issued or allotted in exchange, or otherwise, and consideration paid by the transferor company for such amalgamation
Karnataka	20(4)(i) (Amalgamation)	Stamp duty will be paid which will be higher of the two:- a.2% of the MV of the property of the transferor company, located in Karnataka, b.1% of the aggregate value of shares issued or allotted and the amount of consideration if any, paid for such amalgamation

Stamp Duty Implication for Sick Company

As per the SEBI Takeover Code, which lays down steps dealing with all acts relating to takeover of a company having shares listed on any one of the recognized stock exchange of India. Regulations 10, 11, and 12 of the Takeover Code regulate public offers and are not applicable to any arrangement drafted under the SICA, 1985 or to any scheme of merger under any Indian or foreign law¹⁹.

¹⁹ Regulation 3 (1) (j), SEBI Takeover Code

- Usually no stamp duty is required to be paid on any order passed by the Board for Industrial and Financial Reconstruction (BIFR), approving scheme of merger.
- This is for the simple reason that all orders passed by the BIFR are targeted towards rehabilitation of a business and helping a sick industrial company recover from its losses.
- BIFR has greater powers and all of its order usually convey that no stamp duty is required to be charged on merger.

CONCLUSION

In countries like Singapore, Stamp duty is calculated on the basis of the sum total of the consideration or the Net Asset Value of the unlisted ordinary shares of the transferor company which has been acquired, depending upon which one is higher. This consideration can be in terms of cash or in form of shares of the transferee company as well as a combination of the two. Where such consideration is fulfilled through the transferee's shares, the total worth of the shares offered a consideration will be deemed as the Net Asset Value of the transferee company's shares²⁰.

The law relating to payment of Stamp Duty in India, on the Order of High Court in case of Merger lacks uniformity in India and imposition of Stamp Duty will be based upon the Stamp Duty Law of the state in question. Also in few cases where the Transfer has its assets in two or more states things may get murkier and hard to deal with financially and logistically. The method of arriving at the figure of Stamp Duty also varies from State to another. Nonpayment of Stamp Duty can cause legal hurdles at the time of registration of properties in the name of Transferee Company. Payment of Stamp Duty is a crucial feature that needs to be taken into account prior to going in for a merger particularly in those cases where the asset of the Transferor Company poses a significant value. Some of the States like Maharashtra, Gujarat, Karnataka, Rajasthan etc which have drafted their own separate stamp acts have made definite provisions with respect to payment of Stamp Duty on Order passed by the High Court under provisions of section 394 in their acts, while some other states like Madhya Pradesh, Andhra Pradesh etc which have adopted the Indian Stamp Act, 1899 have made state amendments to

²⁰ Mergers and Acquisitions Scheme, Inland Revenue Authority of Singapore

impose Stamp duty on the High Court Order. The remaining states which neither have their own Stamp Act nor have they made any State Amendment in the adopted Indian Stamp Act, 1899, impose Stamp duty as per the order passed by the High Court or adhere to the judgment of Supreme Court as put in place in the judgment of Hindustan Lever.

In my honest opinion, India would do well to have a uniform law on stamp duty with set rates of stamp duty like in countries like England and Singapore that can be made applicable on levy of stamp duty throughout the country to make the process of mergers simpler and more feasible for all concerned parties to these transactions.

