

Dispute Resolution Hotline

April 25, 2016

BOMBAY HIGH COURT: NO SET OFF ON STAMP DUTY FOR INTER-STATE AMALGAMATIONS

- A full judge bench of the Bombay High Court holds that a scheme settled by two companies is not a document chargeable to stamp duty. Rather, an order passed by the Court sanctioning such a scheme under Section 394 of the Companies Act, 1956 which effects such a transfer is a document chargeable to stamp duty.
- If the registered offices of two companies are situated in two different states, then the order of the High Court which sanctions the scheme passed under Section 394 of the Companies Act, 1956 will be the instrument chargeable to stamp duty and a set off cannot be claimed against stamp duty paid pursuant to the order of the High Court in another state.
- Orders of two different High Courts may be pertaining to same scheme but they are independently different instruments and cannot be said to be same document especially when the two orders of different High Courts are upon two different petitions by two different companies.

INTRODUCTION

A full bench of the Bombay High Court in its recent decision in *Chief Controlling Revenue Authority v. M/s Reliance Industries Limited¹* has clarified the stamp duty applicable to inter-state amalgamations. The Court speaking through K.R. Shriram J. has observed that a scheme settled by two companies is not a document chargeable to stamp duty. Rather, an order passed by the Court sanctioning a scheme of amalgamation under Section 394 of the Companies Act, 1956 which effects transfer is a document chargeable to stamp duty. Further, it has been held that in instances of the registered offices of the two Companies being in two different States, the order of the Court which sanctions the scheme to be passed under Section 394 of the Companies Act, 1956 will be the instrument chargeable to stamp duty.

FACTS

Reliance Industries Ltd ('**RIL**') having its registered office in Mumbai and Reliance Petroleum Ltd ('**RPL**') having its registered office in Gujarat entered into a scheme of amalgamation under Sections 391 to 394 of the Companies Act, 1956 ('**the Scheme**'). Therefore, both filed a company petition before respective High Courts i.e. Bombay High Court and Gujarat High Court for getting the Scheme sanctioned. The Bombay High Court sanctioned the Scheme *vide* order dated June 7, 2002 whereas the Gujarat High Court did so *vide* order dated September 13, 2002. Pursuant to the orders passed by both the High Courts, RIL paid a stamp duty of INR 10 crores (Rupees Ten Crores) in Gujarat based on the order passed by the Gujarat High Court. Given that the stamp duty of a maximum of INR 25 crores (Rupees Twenty Five Crores) was payable in Maharashtra on the amalgamation, it was contended by RIL that it only needed to pay INR 15 crores (Rupees Fifteen Crores). The revenue authorities in Maharashtra refused to provide the set off sought by RIL. After series of appeals, the matter was referred by the revenue authorities in Maharashtra to the Bombay High Court to decide on the questions of law.

ISSUES

1. Whether a scheme sanctioned between two companies under Section 391 and 394 of the Companies Act, 1956 is one and same document chargeable to stamp duty regardless of the fact that the order sanctioning the scheme may have been passed by two different High Courts by virtue of the fact that the registered offices of the two Companies are situated in two different states?
2. Whether the instrument in respect of amalgamation or compromise or scheme between the two companies is such a scheme, compromise or arrangement and the orders sanctioning the same are incidental as the computation of stamp duty and valuation is solely based on the scheme and scheme alone?
3. Whether in a scheme, compromise or arrangement sanctioned under Section 391 and 394 of the Companies Act, 1956 where registered office of the two companies are situated in two different states, the company in the state of Maharashtra is entitled for rebate under Section 19 in respect of the stamp duty paid on the said scheme in another state?
4. Whether for the purpose of Section 19 of the Bombay Stamp Duty Act, 1958 ('**the Act**') the scheme/compromise/arrangement between the two Companies must be construed as document executed outside the state on which the stamp duty is legally levied, demanded and paid in another state?

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Firstly, the Court relied on decision of the Supreme Court in *Hindustan Lever v. State of Maharashtra*², wherein the Apex Court had observed that the order passed under Section 394 of the Companies Act, 1956 is passed on the basis of consent and is considered to be an instrument under Section 2 (1) of the Act.³ The rationale for this was that the order of the court is liable to stamp duty as it results in transferring the property and that the order of the court which results in transfer of the property would be an instrument as it includes every document.⁴ This is so as the scheme of amalgamation has no effect unless it is sanctioned by the court.

Secondly, the court opined that, *“Although the two orders of two different high courts are pertaining to same scheme they are independently different instruments and cannot be said to be same document especially when the two orders of different high courts are upon two different petitions by two different companies. When the scheme of the said Act is based on chargeability on instrument and not on transactions, it is immaterial whether it is pertaining to one and the same transaction. The duty is attracted on the instrument and not on transaction.”*

Thirdly, it was held that Section 19 of the Act does not apply as the order is already in Mumbai and executed in Mumbai. As per Section 19 of the Act, where a document is executed outside a state and is subsequently brought into the state, stamp duty would have to be paid on that instrument after giving setting off duty that has already been paid in another state. Therefore, in this particular instance, the rebate cannot be claimed by RIL for having paid certain amount of stamp duty in the State of Gujarat.

ANALYSIS

A division bench of the Bombay High Court in *Li Taka Pharmaceuticals Ltd. v. State of Maharashtra*⁵ had held in the year 1997 that, a conveyance would include every instrument by which the property is transferred to or vested in another person *inter vivos*. Post that, by an amendment to the Act, Section 2(g) (iii) was introduced which made it clear that it is made clear that instrument would include a consent decree or final order of any civil court.

Similarly, a single judge of the Calcutta High Court in *Gemini Silk Limited v. Gemini Overseas Limited*⁶, was dealing with the issue of whether an order of Court sanctioning a scheme which effectuates the transfer a conveyance? The Court speaking through GC Gupta J similarly held that conveyance includes every instrument by which property whether moveable or immovable is transferred inter vivos since a company is a living person within the meaning of Section 5 of the Transfer of Property Act, 1988 and clearly a document creating or transferring a right is an instrument.

Thereafter, a Division Bench of the Calcutta High Court dissented from the view laid down by the single judge and adopted a different view in *Madhu Intra Limited v. Registrar of Companies*⁷ wherein it was held that the transfer of assets and liabilities from the transferor company to the transferee company takes place by virtue of subsection(2) of Section 394 of the Companies Act, 1956 without any further act or deed and hence the order of the court sanctioning the scheme would not qualify to be an instrument as the transfer is purely through operation of law.

The full bench decision of the Bombay High Court by clearly observing that the order passed under Section 394 of the Companies Act, 1956 is considered to be an instrument under Section 2 (1) of the Act has hopefully put to rest the issue regarding the chargeability of stamp duty of a scheme sanctioned by the Court. However, the same principle has been further extended in case of inter-state amalgamations, and it has been stated that each order of a court involved in a scheme of arrangement is chargeable to stamp duty. The Court has also expressly held that no deduction of stamp duty paid can be claimed for order passed by one High Court against stamp duty payable on another order passed by different High Court for the same scheme as both are two different instruments. This decision will have huge stamp duty cost implications in the case of amalgamations involving group companies as in a single amalgamation, the stamp duty payment may have to be done twice or thrice depending on where the group companies are located.

— **Satish Padhi & Vyapak Desai**

You can direct your queries or comments to the authors

¹ Civil Reference No. 1 of 2007 in Writ Petition No. 1293 of 2007 in Reference Application No. 8 of 2005.

² (2004) 9 SCC 438

³ Section 2 (1) of the Bombay Stamp Act, 1968 defines instrument to include, *“every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded, but does not include a bill of exchange, cheque, promissory note, bill of lading, letter of credit, policy of insurance, transfer of share, debenture proxy and receipt.”*

⁴ See *Sun Alliance Insurance Ltd. vs. Inland Revenue Commissioners*, (1971) 1 ALL ER 135

⁵ AIR 1997 Bom 7

⁶ (2003) 53 CLA 328

⁷ (2006) 130 Comp. Cas. 510

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