

# Dispute Resolution Hotline

February 23, 2010

## COURT APPROVED SCHEME OF AMALGAMATION IS AN INSTRUMENT LIABLE TO STAMP DUTY

The Delhi High Court in its recent Judgment has held that a Scheme of Amalgamation approved by High Court would be subject to stamp duty. The High Court further held that the stamp duty on the instrument would be calculated on the basis of the price of the shares allotted to the transferor company or other consideration, if paid, but not by separately valuing the assets and the liabilities.

The Delhi High Court ("**High Court**") in the matter of *Delhi Towers Ltd. Vs. G.N.C.T. of Delhi*<sup>1</sup> ("**Judgment**") has held that a Scheme of Amalgamation sanctioned under Section 394 of the Companies Act, 1956 ("**Companies Act**") for transfer of assets approved by Delhi High Court would be subject to stamp duty.

### BRIEF FACTS OF THE CASE

In a scheme of amalgamation ("**Scheme**") filed with the High Court, Eighteen wholly-owned subsidiaries ("**Transferor Companies**") engaged in the business of real estate, proposed to merge with their parent company 'Delhi Towers Limited' ("**Transferee Company/ Petitioner**"). The Scheme became effective after being approved by the High Court under the provisions of Section 394 of the Companies Act. Pursuant to the sanction of the Scheme by the High Court, the Petitioner made an application to the Local Authority of the Government of National Capital Territory of Delhi having jurisdiction over the properties of Transferor Companies to effect mutation of the same in its records in favour of the Petitioner. Despite repeated requests, the Local Authority of the Government of National Capital Territory of Delhi refused to effect the mutation of the properties in favour of the Petitioner under the Scheme, stating that the stamping authorities did not accept the Scheme without payment of stamp duty thereon.

Being aggrieved by refusal to effect the mutation for transfer of assets of the Transferor Company in favour of the Petitioner, the Petitioner filed an application before the High Court.

### ISSUES

1. Whether with the sanction of Scheme by High Court, the property is transferred by operations of law?
2. Whether the Scheme of amalgamation is not covered under the definition of "conveyance" under the Indian Stamp Act, 1899?
3. Whether the Petitioner is eligible for Relaxations under the Notification No. 1 dated 16th of January, 1937 and the Notification No. 13 dated the 25th of December, 1937 ("**Notifications**"), issued prior to enactment of the Constitution of India, which provide remission of Stamp Duty in case of transfer of assets between parent company and its subsidiaries under certain circumstances?

### JUDGMENT

Whether upon sanction of the Scheme by High Court, the property is transferred by operations of law?

While analysing the scope of the courts while sanctioning the scheme of amalgamation under Section 394 of Companies Act, the High Court observed that sanctioning a scheme of amalgamation is based on the consent of the parties and the transfer of property under the scheme of amalgamation is not an involuntary act of the parties.

The High Court further stated that, the role of the High Court is merely supervisory within the contours of the broad parameters as laid down under the Companies Act without ruling on the merits of the schemes placed before the court and its consideration is confined to the issue that the scheme presented before it is not violative of the principles of law, public policy and, was not opposed to public interest.

Whether a scheme of amalgamation is not covered under the definition of "conveyance" under the Indian Stamp Act, 1899?

It was submitted by the Petitioner that a scheme of amalgamation is not covered under the definition of "conveyance" under the Indian Stamp Act, 1899 and therefore is not exigible to stamp duty. To substantiate its argument, the Petitioner drew attention of the High Court to the specific amendments made by certain States legislatures (Maharashtra, Gujarat, Karnataka, Rajasthan, Chhattisgarh, Madhya Pradesh and Andhra Pradesh) to Stamp duty laws applicable in their States, which include the order approving a scheme of amalgamation passed under Section 394 of the Companies Act in the definition of "conveyance". The Petitioner stated that the legislative intent under the Indian Stamp Act, which is applicable to Delhi was therefore to exclude them from the purview of stamping.

Whereas, the Government drew a parallel between a court approved scheme of amalgamation and a consent decree and placed reliance on the Judgement of Supreme Court of India in the matter of *Hindustan Lever and Anr. v. State of Maharashtra and Anr*<sup>2</sup> and *Ruby Sales & Services Pvt. Ltd. and Anr. v. State of Maharashtra*<sup>3</sup>, wherein 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, 1958.

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It was observed by the High Court that though the definitions of 'conveyance' and 'instrument' does not specifically include order of court approving a scheme of amalgamation, the definition start with the expression "includes" which shows that the definitions are very wide and not restricted to the specific instruments mentioned under the Indian Stamp Act. The High Court also noted that the decision whether the documents can be regarded as an instrument would largely depends on the terms document transferring the assets and liabilities.

In view of the aforesaid observations, the High Court held that the Scheme would be regarded as an instrument within the definition of Indian Stamp Act and, the same would therefore be exigible to stamp duty under the Indian Stamp Act.

#### Basis for assessment and calculation of Stamp duty

In respect of the calculation of the stamp duty payable on the court approved scheme of arrangement, the High Court stated that in a scheme of amalgamation, a going concern is transferred and not assets and liabilities separately. Thus, the calculation of stamp duty should typically be based on the shares allotted to the shareholders of the transferor company and that valuation would be on the basis of share exchange ratio of shares and not by valuing the assets and liabilities separately.

Whether the Petitioner is eligible for Relaxations under the *Notification No. 1* dated 16th of January, 1937 and the notification No. 13 dated the 25th of December, 1937 ("**Notifications**"), issued prior to enactment of the Constitution of India, which provide remission of Stamp Duty in case of transfer of assets between Parent Company and its subsidiaries under certain circumstances?

The Petitioner also took cover under the Notifications, issued in the pre-independence era i.e., prior to enactment of the Constitution of India. The Notifications provide remission of Stamp Duty in certain circumstances, which *inter alia* included transfer of assets between Parent Company and its subsidiaries under certain circumstances. The Government challenged the contention of the Petitioner on grounds that that notifications not having been accepted by the legislative assembly of the Government of National Capital Territory of Delhi would stand repealed.

The said argument of the Government was considered untenable by the High Court as under the provisions of the Constitution of India a pre- constitution law also does not require a specific adoption as has been urged on behalf of the respondent herein and a specific repeal thereof is required.

#### ANALYSIS

The pronouncement of the High Court is in concurrence with the earlier precedents laid by the Supreme Court in *Hindustan Lever and Anr. v. State of Maharashtra and Anr.*<sup>2</sup> and the Calcutta High Court in *Gemini Silk Limited V/s Gemini Overseas Limited*<sup>4</sup> that a Scheme of Amalgamation transferring assets and liabilities in favour of the transferee company would be regarded as an instrument, which is subject to payment of stamp duty.

The Judgment would imply an additional stamp duty on the scheme of amalgamation/ merger, which is to be calculated on the basis of shares exchange ratio between transferor company and the transferee company and not solely on the basis of the assets and liabilities to be transferred under such scheme.

- **Shikhar Kacker & Vyapak Desai**

1 CA No. 466/2008 in Company Petition No. 50/2003

2 (2004) 9 SCC 438

3 (1994) 1 SCC 531

4 [2003] 53 CLA 328 (Cal)

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