
Stamp duty paid under the order of one High court cannot be set-off against stamp duty payable on the order passed by the other High court for the same Scheme of Arrangement

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**Background:**

Stamp duty, which is a State subject is chargeable on conveyance of properties. The definition of conveyance in certain States specifically includes High Court orders under section 391-394 of the Companies Act, 1956 ('the Companies Act'). Maharashtra and Gujarat are two such states which have separate clauses under the conveyance article in respect of Scheme of Amalgamation/Arrangement with overall cap on stamp duty of Rs. 25 crores and Rs. 10¹ crores respectively. In cases where the registered office of the transferor and transferee company(s) are located in different states, the question of set-off/remission/deduction of stamp duty paid under an order passed by one High Court against stamp duty payable on another order passed

by different High Court for the same Scheme, has been a matter of intense debate and interpretation with experts/authorities holding different views.

A full bench of the Bombay High Court in the case of Reliance Industries Ltd. and Reliance Petroleum Ltd v. The Chief Controlling Revenue Authority, Maharashtra State, Pune and Superintendent of Stamp (Headquarters) Mumbai² delivered an important judgement recently in this context.

The Bombay High Court held that in cases where the Registered Offices of the transferor and transferee company(s) are situated in different States which requires sanctioning of the Scheme by different jurisdictional High Courts u/s 394 of the Companies Act, the order passed by each High Court which

¹ Limit enhanced to Rs. 25 crores by Gujarat Stamp (Amendment) Act, 2013

² LSI-1021-HC-2016-(BOM)

sanctions the Scheme will be a separate instrument chargeable to stamp duty. Hence, stamp duty paid pursuant to an order passed by one High Court cannot be claimed as set-off/remission/ deduction against stamp duty payable on order passed by the second High Court. A summary of the decision is provided below.

Facts

Reliance Industries Ltd ('Respondent No. 1' or 'RIL') having its registered office in Mumbai and Reliance Petroleum Ltd ('Respondent No. 2' or 'RPL') having registered office in Gujarat entered into a Scheme of Amalgamation under Sections 391 to 394 of the Companies Act ('the Scheme'). RIL and RPL filed a Company Petition before respective High Court i.e. Bombay High Court and Gujarat High Court for sanctioning the Scheme.

The Bombay High Court passed an order sanctioning the Scheme on 7th June, 2002 while the Gujarat High Court sanctioned the same on 13th September, 2002. On 16th October, 2002, RIL submitted the orders passed by both the Courts for adjudication of stamp duty with Superintendent of Stamp (Head Quarters) Mumbai. During the hearing of adjudication proceedings, RIL urged that the maximum stamp duty payable under Article 25(da) of the Bombay Stamp Act, 1958 ('the Act') was Rs. 25 crores and the same should be reduced by the amount of stamp duty already paid in the State of Gujarat on the order of sanction of Scheme passed by the Gujarat High Court. Accordingly, net liability towards stamp duty was Rs. 15 crores only.

The stamp duty authorities of Maharashtra rejected the claim of set-off made by RIL and sought payment of entire Rs. 25 crores being the stamp duty payable on the order passed by the Bombay High Court.

Respondents' arguments

The gist of the arguments put forth by the Respondents are as under:

- Under section 2(l) of the Act only a document which creates right or obligation constitutes an 'instrument'. Hence, the Scheme sanctioned by

the Court is an instrument within meaning of section 2(l) of the Act.

- In order to make the Scheme effective, it is imperative that Scheme is approved by respective High Court(s). Accordingly, order of the Bombay High Court sanctioning the Scheme would not constitute an instrument or a conveyance, unless and until the Gujarat High Court had sanctioned the Scheme. Accordingly, only on approval of the Scheme by the Gujarat High Court, the parties were liable to pay stamp duty on the sanctioned Scheme (read with the two orders) in Gujarat and subsequently to pay stamp duty in Maharashtra subject to a rebate of duty already paid in Gujarat. Therefore, it is the Scheme that is the instrument and not the orders.
- Even in a scenario where each order was treated as a separate instrument, as per section 4(2) of the Act where several instruments are used for a single transaction, the parties have the discretion to deem any one instrument as the principal instrument. Accordingly, the parties had the discretion to deem the order passed by the Gujarat High Court as the principal instrument in relation to which stamp duty had to be computed.

Revenue's arguments

- The Revenue contended that as per section 17 of the Act, every document chargeable with duty is required to be adjudicated for stamp duty at the time of execution. Therefore, the order passed by the Bombay High Court is required to be stamped with duty as per the situation and circumstances on the day of its execution i.e. 7th June, 2002 as per the Stamp Act.
- It was also submitted that the stamp duty payable was on the instrument and not on the underlying transaction.
- The Revenue also argued that for adjudication in Maharashtra, relevant order is order passed by Bombay High Court dated 7th June, 2002 which was executed in the State prior to payment of stamp duty of Rs. 10 crores in Gujarat. Accordingly, the question of the Bombay High Court order being brought into the State for the

purpose of section 19 of the Act i.e. set-off did not arise.

High Court's decision

The Bombay High Court held that the Scheme of Amalgamation has no effect or force unless or until it is sanctioned by the Court and hence it is the order sanctioning the Scheme that would be an instrument under section 2(l) of the Act. Hence, the order passed by the Bombay High Court approving the Scheme on 7th June, 2002 was an instrument. In this regard, the Bombay High Court relied upon the decision of the Supreme Court³ and divisional bench of Bombay High Court⁴.

The taxable event is the execution of the instrument and not the transactions. If a transaction is not supported by execution of an instrument, there will not be any liability to pay duty.

It also noted that the purpose of obtaining orders from the respective jurisdictional Courts by both the transferor and transferee company(s) is to have binding effect on dissenting members and all the creditors of both the companies.

The Bombay High Court also observed that the order passed by the Bombay High Court on 7th June, 2002 sanctioning the Scheme was not conditional in nature as the Bombay High Court directed the Transferee Company to deliver order to Registrar of Companies for registration within 30 days of said order, without waiting appropriate order being passed by Gujarat High Court.

Further, with regards to the Respondents' contention that provisions of section 4 of the Act enables the Respondent to treat order passed by Gujarat High Court as principal instrument, the High Court held that provisions of the section 4 applies only on transactions related to development agreement, sale, mortgage or settlement. The order sanctioning the Scheme does not fall under any one of these categories.

It was also held that remission/deduction/set-off under the provisions of section 19 of the Act was not available as the pre-condition of instrument being executed outside the Maharashtra state was not fulfilled as the order was present and executed in Maharashtra.

Dhruva comments

This judgement has put to rest the ambiguity surrounding set-off/deduction of stamp duty paid under an order passed by one High Court against stamp duty payable on another order passed by different High Court for the same Scheme.

Unless this judgement is challenged and the Supreme Court decides otherwise, this judgement will have a significant impact in terms of stamp duty cost on restructuring and M&A activities involving Scheme of Arrangement/Amalgamation where the transferor and transferee company(s) have their registered offices in different States.

The impact of stamp duty payment obligations in cases where schemes are sanctioned by the respective High Courts at different times may also need to be evaluated in the light of this judgment. This problem could typically arise in situations where liability may arise in one State, even though it is uncertain as to whether the Scheme will at all be sanctioned by the High Court in the other state.

³ Hindustan Lever Vs. State of Maharashtra 9 SCC 438 SC (2004)

⁴ Li Taka Pharmaceuticals Ltd & Anr. Vs. State of Maharashtra Mah. LJ 156 (1996)

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