De Jure

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IMPLICATIONS FOR STAMP DUTY ON SCHEME APPROVED BY DIFFERENT HIGH COURTS

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INTRODUCTION

It is a settled position in law that stamp duty is charged on 'the instrument' and not on 'the transaction' effected by 'the instrument. Further, the Hon'ble Bombay High Court (the "**BHC**") in one of the landmark cases (*Li Taka Pharmaceuticals Ltd. vs. State of Maharashtra and other 1996(4)BomCR100*) held that "*the amalgamation Scheme sanctioned by the Court would be an instrument within the meaning of Sec 2(l) of the Bombay Stamp Act*".

Considering the fact that the stamp duty in India is a state subject, it has always been interesting to understand the implications of stamp duty on the order sanctioning a Scheme of Arrangement/ Amalgamation where such order has been passed by different courts, based on the registered office of the companies involved as part of the scheme.

Recently, (*The Chief Controlling Revenue Authority, Maharashtra State, Pune, & others v/s. Reliance Industries Limited, Mumbai and others – Civil Reference no.1 of 2007 in Writ Petition no.1293 of 2007 in Reference Application no.8 of 2005*), by way of an order dated March 31, 2016 (the "**RIL Case**"), the BHC noted that the Scheme of Amalgamation, being one transaction, shall not have any effect unless sanctioned by the court and in this case, there were two High Courts – one being BHC and the other being the Gujarat High Court. Since the implications of stamp duty are on an instrument and not on transaction, there would be separate stamp duty implications, both in the state of Maharashtra and State of Gujarat, where the registered offices of transferor and transferee companies were situated. However, the BHC, *inter alia* held that stamp duty paid in another state (read Gujarat in this case) would not be available for remission/ reduction/ set-off under Section 19 of the Maharashtra Stamp Act, 1958 (the "**MSA**").

PREMISE

One of the questions before the BHC in the RIL case was whether the stamp duty paid in another state was available for remission under the MSA, to which the BHC responded in negative.

The companies in the RIL case, amongst others relied on the judgments of the Hon'ble Supreme Court in Hindustan Lever vs. State of Maharashtra (*Hindustan Lever and Anr. vs. State of Maharashtra and Anr. 2004(106(1))BOMLR557*) and of the BHC in Li taka Pharmaceutical case wherein it was held that the scheme sanctioned by the High Court would be an instrument within the meaning of section 2(i) as by such 'instrument' the properties are transferred from the transferor company to the transferee company.

However, in the RIL case, the BHC drew a line between an order and the Scheme, making the order an instrument of conveyance, despite the transaction between the companies being comprised in the same Scheme. The judgment clarified that the taxable event is the execution of the instrument (read as orders of the two High Courts) and not the transaction (read as the Scheme). If any transaction is not supported by execution of an instrument, there cannot be any liability to pay duty. It is immaterial whether it is pertaining to one and the same transaction if the scheme is given effect by a document signed in State of Maharashtra it is chargeable to duty as per rates provided in Schedule I of the MSA. Thus, the instrument under Section 2(l) of the MSA which effects transfer is the order of the High Court, issued under Section 394(1) of the Companies Act, 1956 that sanctions the Scheme and not the Scheme of amalgamation itself.

The companies were also not allowed to take recourse (for claiming rebate on stamp duty paid in Gujarat) under Section 19 of the MSA which provides that the amount of duty chargeable on any instrument executed outside State and which is subsequently brought in the State of Maharashtra shall be the amount of duty chargeable on a document of the like description executed in this State less the amount of duty, if any, already paid under any law in force in India.

The BHC upheld the contention of the CCRA and the Superintendent of Stamps, Mumbai that as the order was passed by the Hon'ble Bombay High Court dated June 07, 2002, i.e. in the State of Maharashtra itself, the question of instrument being brought in the State of Maharashtra does not arise.

It was held that although the two orders of two different high courts are pertaining to the 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.

OUR VIEW

Although the judgment provides clarity with respect to stamp duty obligations in cases where the registered office of the companies fall in two different states, it opens a pandora's box with respect to the Scheme and the order of the High Court being treated separately.

The Scheme and the Order both are interdependent and are indispensible to effect the transaction. The view taken by the BHC in the RIL case which distinguishes between the two is a merely a literal interpretation of the letter of law than a rationale one which fails to acknowledge that the Order or the Scheme cannot exist independently as the Order gives approval to the transaction which is embodied in the Scheme.

The judgment comes as great dismay to companies who up till last month, believing the Scheme to be the instrument of conveyance, have been paying the stamp duty in one state and seeking set-off/ deduction of stamp duty in another under Section 19 of the MSA. It has created a situation of double jeopardy wherein the transferor company as well as the transferee company both have to independently bear the burden of payment of stamp duty for the same Scheme without claiming any set off or deduction.

It would not be wrong to state that the present judgment would have certain impact on the M&A transactions of like nature in India unless the verdict in the RIL Case is challenged successfully or where the state legislature provides a clarificatory relief. Also, it would be interesting to see the fate of different schemes, involving the same subject matter which have already been approved by the Courts.

In light of the said RIL judgment, the prospective M&A transactions, especially the scheme matters would have to be restructured in different manner so as to address the stamp duty implications favourably.

We, at Rajani Associates, have carried out quite a few merger and acquisition transactions (*both domestic and cross border*) including external commercial borrowings, structured financing and convertible bonds/securities. We have extensive experience in investment and funding projects, merger and acquisition including overseas acquisition, structured deals, private equity funding, collaboration (financial and technical) including, joint ventures, strategic alliances and negotiation on commercial documentation.

We have advised various companies, investors including funds in connection with the successful structuring, documentation and guidance through the process of due diligence.

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