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Stamp Duty Aspects in Mergers & Acquisitions

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Celebrating a Century

Bangalore

Kolkata

Mumbai

New Delhi



Presentation Outline

Overview

Governing legislature

Basic principles

Instruments liable to stamp duty

Important judicial precedents

Case studies



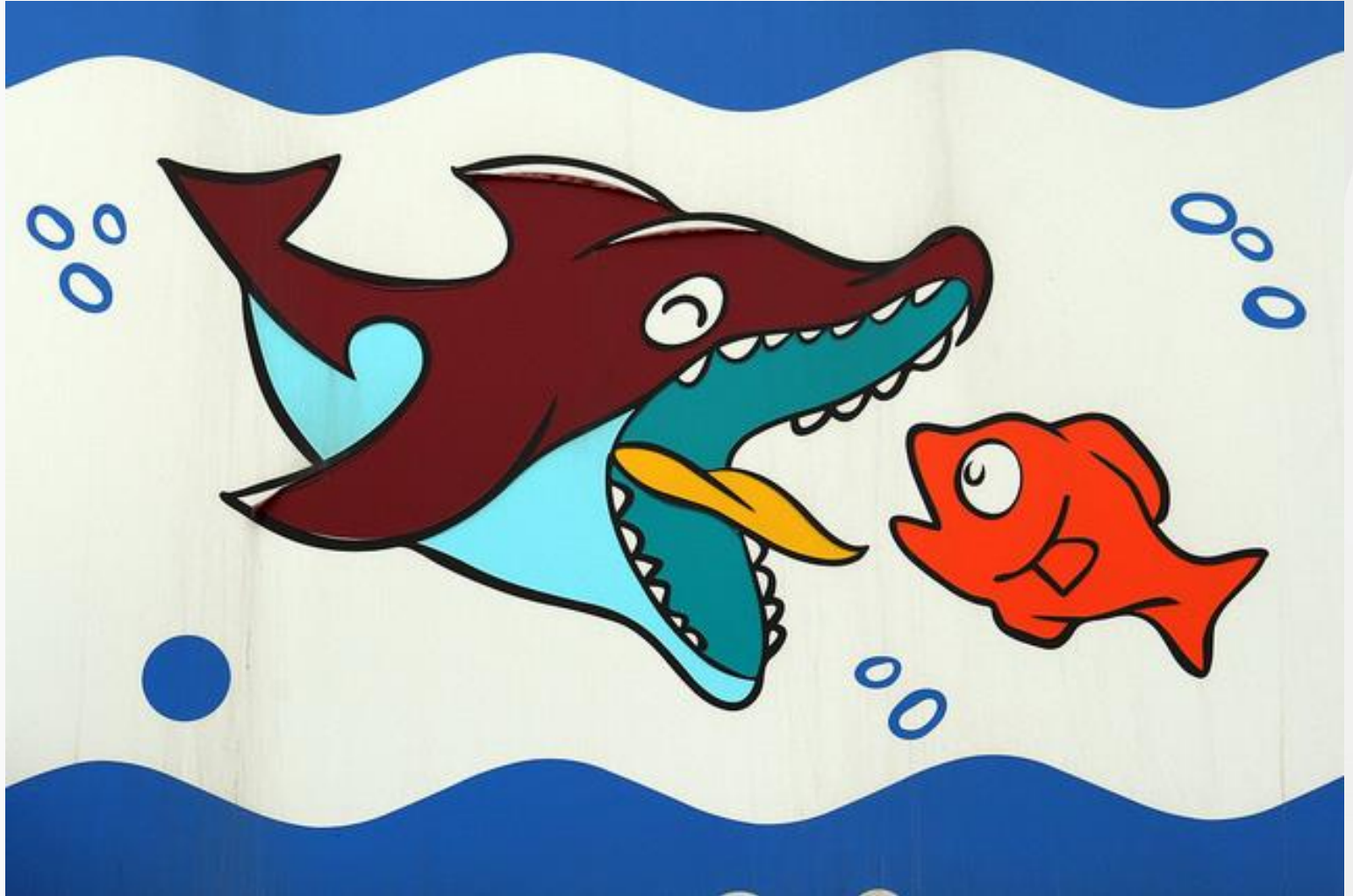


Perspective View!



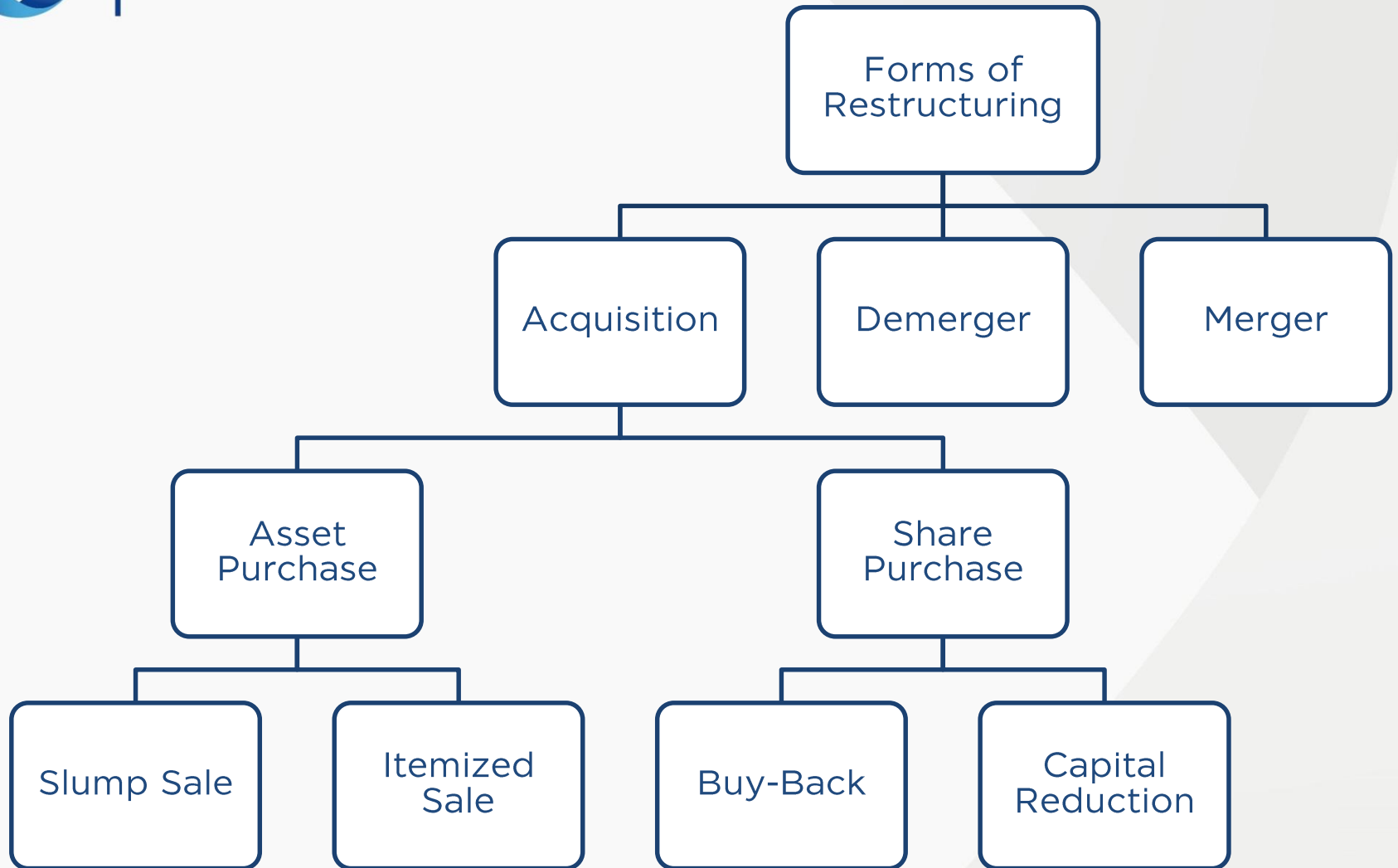


Acquisitions.....





Overview





Governing legislature

What is stamp duty?

- Stamp duty is duty levied on **specified instruments** creating/transferring right/ liability
- It is **duty on the instrument and NOT on the transaction**





Governing legislature

Constitution of India

Just like the power to make laws is segregated between Central and State Legislatures (Article 246), the power to levy stamp duty is divided between Union and State

Powers of the Parliament

Exclusive powers with respect to any matters enumerated in the Union List Eg:
Prescribing rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts

Powers of the State Government

Prescribing rates of stamp duty in respect of documents specified in the State List and other than those specified in the Union List





Governing legislature

Union Legislation

The Indian Stamp Act 1899 ("**ISA**") is applicable to whole of India except Jammu & Kashmir and other States which have enacted State-wise Stamp Acts for instruments mentioned therein

State Legislation

State	Separate Stamp Acts enacted	Changes made in the Articles of Schedule 1 of ISA itself	Separate Schedule 1-A added to the ISA by State amendments
<ul style="list-style-type: none">• Maharashtra• Gujarat• Jammu & Kashmir• Karnataka• Kerala• Rajasthan• Uttar Pradesh and• West Bengal	<ul style="list-style-type: none">• Tamil Nadu• Pondicherry• Assam and• North Eastern States	<ul style="list-style-type: none">• Andhra Pradesh• Arunachal Pradesh• Chhattisgarh• Goa• Delhi, Haryana & Punjab• Madhya Pradesh• Bihar• Orissa• Himachal Pradesh and• Daman & Diu, Nagaland	

Rate and incidence of Stamp duty varies from State to State





Basic principles of stamp duty

It is duty on the instrument, covered under the provisions of the respective state Stamp Acts or under the ISA and not on the transaction

Some of the relevant definitions

'instrument' *"includes 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"*

Explanation. - The term "document" also includes any electronic record as defined in clause (t) of sub-section (1) of section 2 of the Information Technology Act, 2000

'Conveyance' *"Includes a conveyance on sale and every instrument by which property, whether movable or immovable, is transferred inter vivos and which is not otherwise specifically provided for by Schedule I"*





Basic principles of stamp duty

Some of the relevant definitions

'Executed' and **'Execution'** *"used with reference to instruments, mean "signed" and "signature""*

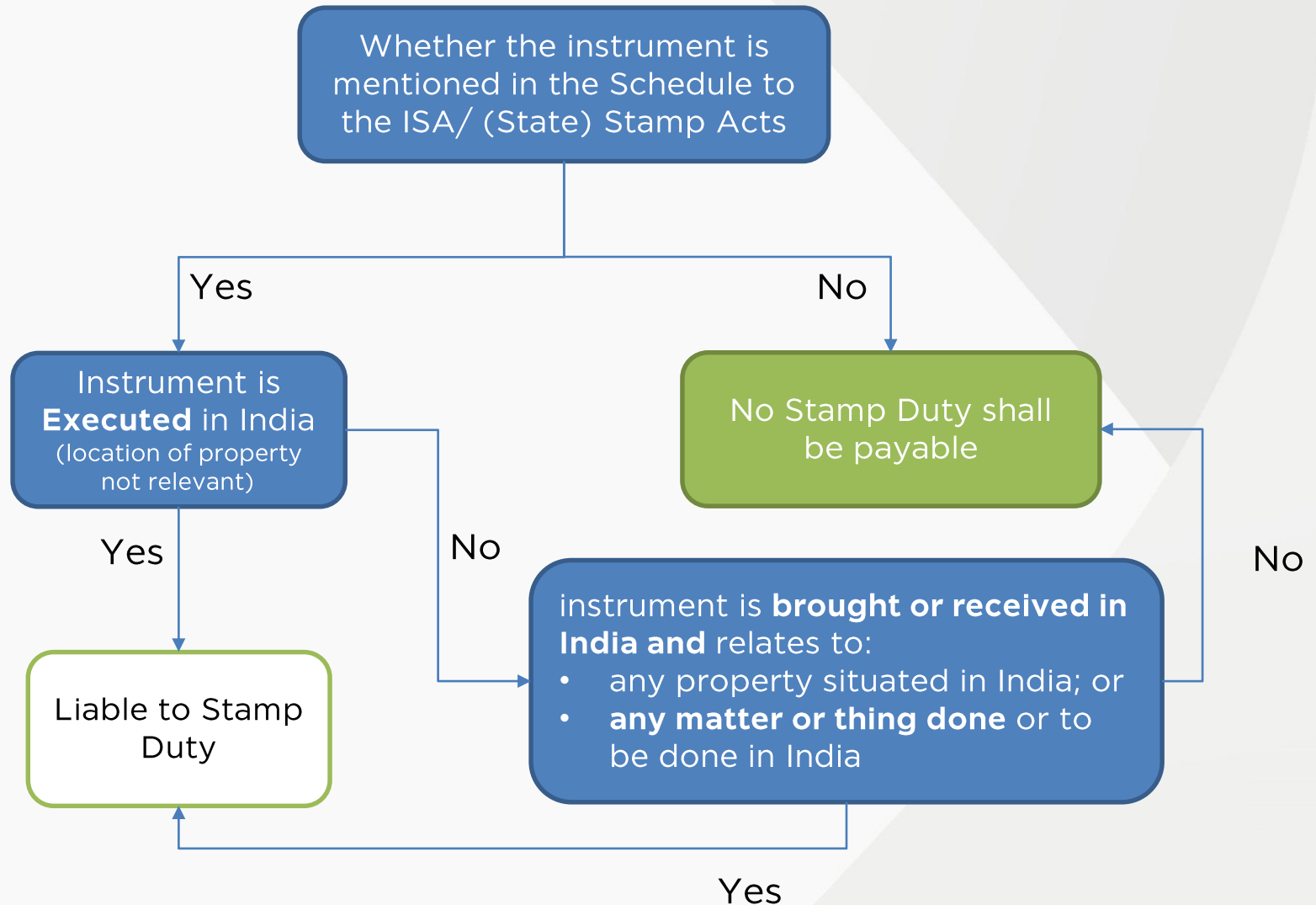
'Marketable security' *"means a security of such a description as to be capable of being sold in any stock market in India or in the United Kingdom"*

'Market Value' *"in relation to any property which is the subject matter of an instrument, means the price which such property would have fetched if sold in open market on the date of execution of such instrument for the consideration stated in the instrument whichever is higher"*





Basic principles of stamp duty





Basic principles of stamp duty

Why to pay stamp duty ?

- Revenue to the Government
- evidentiary value; therefore admitted as evidence in courts

When to pay stamp duty ?

- Instrument executed in the India - to be stamped before or at the time of first execution (Section 17 of the ISA)
- Instrument executed outside India - to be stamped within three months after it has been first received in the state (Section 18 of the ISA)

Who should pay stamp duty ?

- Stamp duty can be paid by any party to the instrument as provided in the Agreement
 - If not provided; stamp duty shall be paid by the purchaser or executor
 - Otherwise, can be paid by the parties in equal share

How to pay stamp duty ?

- Stamp Duty can be paid by purchase of stamp papers / adhesive stamps
- By franking
- E-stamping





Basic principles of stamp duty

Section 29 of ISA applies only in the absence of an agreement between the parties

In case of any instrument described in any of the following articles of Schedule I, the stamp duty shall be borne by the person drawing, making or executing such instrument

No 2 Administration Bonds	No 26 Customs Bond	No 55 Release
No 6 Agreement relating to deposit of Title deeds, Pawn or Pledge	No 27 Debenture	No 56 Respondentia Bond
No 6 Agreement relating to deposit of Title deeds, Pawn or Pledge	No 32 Further Charge	No 57 Security Bond or Mortgage Deed
No 13 Bills of Exchange	No 34 Indemnity Bond	No 58 Settlement
No 15 Bonds	No 40 Mortgage Deed	No 62 (a) Transfer of shares in an incorporated company or other body corporate
No 16 Bottomry Bond	No 49 Promissory Note	No 62 (b) Transfer of debentures, being marketable securities, whether the debenture is liable to duty or not, except debentures provided for by Section 8
No 62 (c) Transfer of any interest secured by a bond, mortgage deed or policy of insurance		





Basic principles of stamp duty

Section 29 (c) to (g) of ISA:

Instrument	Stamp duty to be paid by
conveyance (including a reconveyance of mortgaged property)	grantee
lease or agreement to lease	lessee or intended lessee
counterpart of a lease	lessor
instrument of exchange	the party in equal shares
Certificate of Sale	purchaser of the property to which the such certificate relates
instrument of partition	parties thereto in proportion to their respective shares in the whole property partitioned, or in such proportion as such authority, Court or arbitrator directs





Basic principles of stamp duty

Indian Stamp Act

Section 4: Several instruments in used single transaction of sale, mortgage or settlement

- Where several instruments are employed to complete a transaction

Section 5: Instruments relating to several distinct matters

- Where the instrument comprises more than one transaction and it is immaterial whether those transactions are of the same category or not

Section 6: Instrument within several descriptions in Schedule I

- Subject to the provisions of Section 5, where an instrument comes within two or more of the descriptions in Schedule I, such instrument shall be chargeable to highest of the duties mentioned in any description





Instruments liable to stamp duty

Issue and transfer of shares

Issue and transfer of debentures

Increase in authorised share capital of company

Gift

Power of Attorney

Conversion of entity

Itemised sale

Slump sale through business transfer agreement

Stamp duty on Tribunal order





Issue and transfer of shares

Issue of shares

- Stamp Duty as per the rates provided in the respective State Acts / schedules
 - Some states provide for *ad valorem* payment of stamp duty
 - Eg: Maharashtra
 - Some states provide for stamp duty on the basis of share certificate
 - Eg: Tamil Nadu

Transfer of shares

- Transfer of shares of a company – 0.25% of the value of shares (Article 62 of Union List)
 - Applies to transfer of shares in physical form
 - Transfer of dematerialised shares are exempt from stamp duty (Section 8A of the ISA)





Issue and transfer of debentures

Issue of debentures

- Whether mortgage debenture or not, being a **marketable security** transferable
- Duty: 0.05% **per year** of face value of debentures, subject to maximum 0.25%; or INR 25 lakhs; whichever is lower (Article 27 of the ISA)

Transfer of debentures

- Being marketable securities, except provided for by section 8
- Duty; $\frac{1}{2}$ of the duty payable on a conveyance
- Duty on share warrants: $1 \frac{1}{2}$ times duty payable on conveyance for a consideration equal to nominal amount of shares specified in the warrant

Please check for corresponding articles in respective State Acts, which shall override the Union List





Increase in Authorised Share Capital

- Amount of duty varies from State to State, depending on the place of registered office of the company
- No stamp duty payable in case authorized share capital is above the threshold limit
- In case of merger/ demerger, appropriate clauses can be drafted for combination of the authorized share capital
- Section 232 of the Companies Act 2013 provides that fees, if any, paid by transferor company on its authorized capital shall be allowed to be set-off against fees, if any, payable by the transferee company on its authorized capital subsequent to the amalgamation





Gift

- Amount of duty is the same duty as a conveyance for a consideration equal to the property as set forth in such instrument
- Certain States provide for exemption to stamp duty for Gift of property amongst family members

What if the gift is transferred without instrument ?





Power of Attorney

- In some states, power of attorney when given for sale of an immovable property to non-relatives, the duty shall be payable as per 'conveyance'
- Eg: Article 48 of the Maharashtra Stamp Act and Article 45 of the Gujarat Stamp Act





Conversion of entity

Conversion of entity

Partnership firm into a company

Possible to take a view that no stamp duty payable on conversion as there is no transfer of assets, based on judicial precedents

Any other conversion

Similar view can be taken for conversion of partnership firm into a LLP / LLP into a company





Itemised sale

- Sale of individual assets – '*cherry picking*' approach
- Duty chargeable at rates applicable to movable and immovable property on value of assets





Slump Sale through Business Transfer Agreement

- Stamp duty payable on the business transfer agreement on the value of consideration
- Separate conveyance deed may be executed for transfer of immovable properties
 - wherein consideration for transfer of such immovable property may be noted; and
 - stamp duty shall be payable on that amount only
- No benefit, if any, under Article for tribunal order, shall be available for slump sale through business transfer agreement





Stamp duty on Tribunal order

Incidence of stamp duty on order of the Tribunal depends on the place of registered office address of the companies, involved in the Scheme and where the properties are situated

Registered Office

Location of the registered office of Companies

Immovable property

Location of immovable property of the Transferor Company/
Demerged Undertaking

No set-off available for inter-state
mergers/ demergers





Important judicial precedents

Li Taka Pharmaceuticals v State of Maharashtra (1997)

- Held that an order under Section 394 of the Companies Act 1956 is founded upon a compromise between the two companies and that the order is an 'instrument' which transfers the assets and liabilities on which stamp duty is payable
- **This judgment was challenged by Hindustan Lever in the Supreme Court**

Hindustan Lever v State of Maharashtra (2004)

- Supreme Court held that a order of the Court would be an 'instrument' and the state legislature has the competence to impose stamp duty on the order of amalgamation passed by the Court
- Further, held that:
 - an order of amalgamation is agreement between two or more companies
 - Scheme has its genesis in an agreement between the prescribed majority of shareholders and creditors of the transferor company with the prescribed majority of shareholders and creditors of the transferee company
- The transfer is effected by an order of the Court





Important judicial precedents

Delhi Towers Ltd v GNCT Of Delhi (2009)

- Merger of wholly owned subsidiaries, engaged in real estate business, with 100% parent transferee company
- Delhi High Court held that that an scheme of amalgamation once approved amounts to a transfer inter vivos between the companies (juristic persons in existence at the time of passing of the order and sanctioning of the scheme) whereby right, title and interest in the immovable property of the transferor company are transferred to the transferee company
- Please note withdrawal of Notification No. 1 of 16 January 1937

Coastal Gujarat Power Ltd (2015)

- Company took assistance of a consortium of 13 financial institutions, who formed a consortium trust and executed a security trustee agreement, appointing one banker as a lead trustee
- Supreme Court has held that the mortgage deed shall be regarded as 13 distinct transactions falling under Section 5 of the Gujarat Stamp Act, such that the borrower entered into separate loan agreements with 13 financial institutions
- Thus, Supreme Court set aside the order of Gujarat High court order and held that the Company is liable to pay deficit stamp duty together with interest as directed by the Revenue authorities.





Important judicial precedents

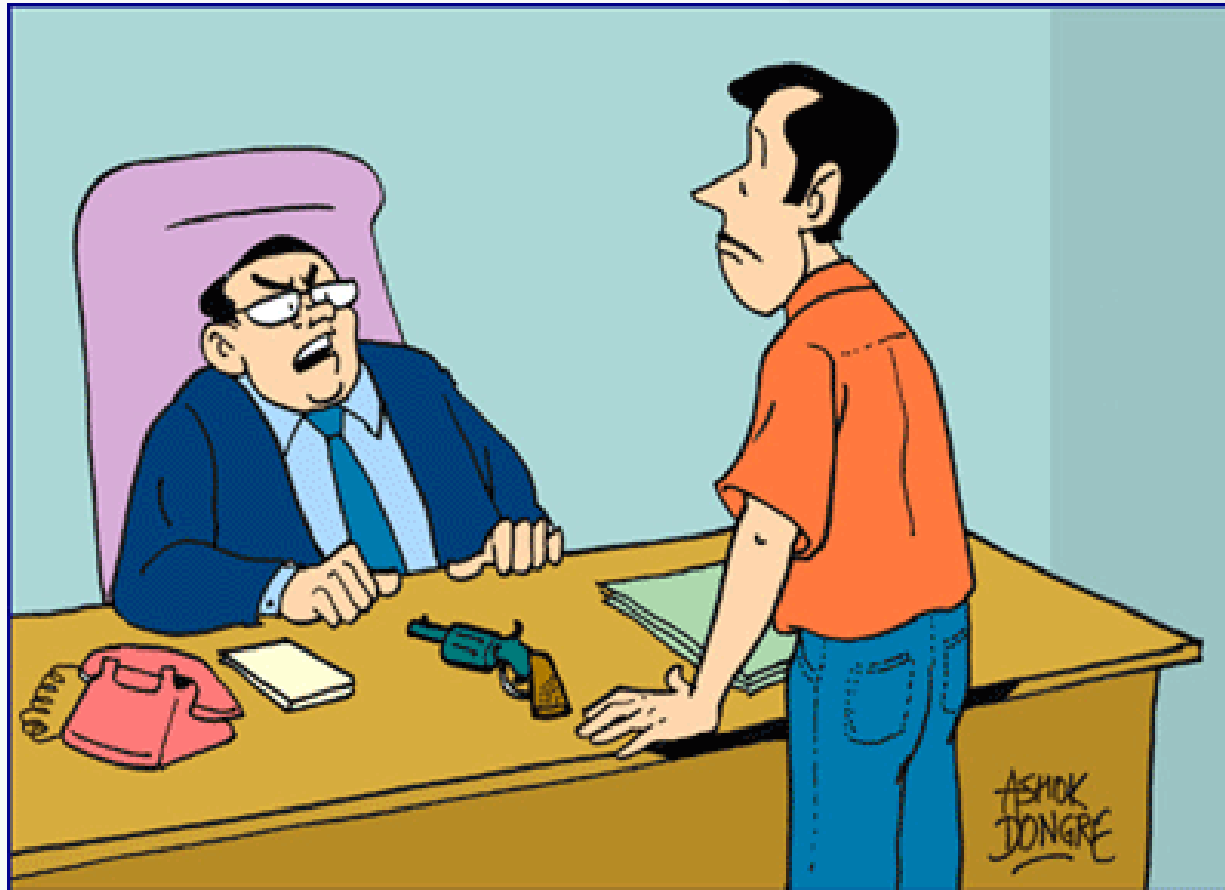
Chief Controlling Revenue Authority v Reliance Industries Limited (2016)

- 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





Transactions with no stamp duty!



**I SAID WE MUST EXPAND OUR COMPANY
THROUGH MERGERS AND ACQUISITIONS,
NOT MURDERS AND ACQUISITIONS...**





Case studies

Case study 1



- Registered office
 - A Ltd : Maharashtra
 - B Ltd : West Bengal

- Immovable properties of A Ltd
 - Maharashtra
 - Delhi

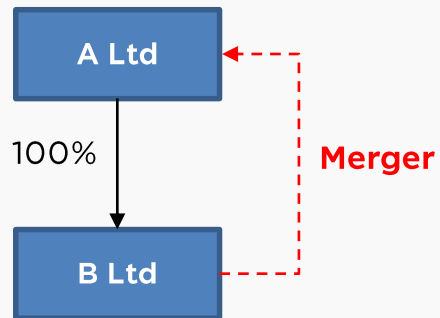
In which all states is stamp duty payable?





Case studies

Case study 2



- Registered office
 - A Ltd : Maharashtra
 - B Ltd : Maharashtra
- Immovable properties of B Ltd
 - None

What would be the stamp duty payable on court order for merger ?





Case studies

Decoding Article 25(da) of the Maharashtra Stamp Act

No.	Entry
A	10% of fair value of aggregate of the market value of the shares issued or allotted
	Provided that, the amount of duty chargeable under this clause shall not exceed
B	5% of the true market value of the immovable property located in Maharashtra, or
C	0.7% of the aggregate of the market value of the shares issued or allotted

Subject to maximum duty of INR 25 crores





Case studies

Decoding Article 25(da) of the Maharashtra Stamp Act

Particulars	Case I	Case II	Case III
Market value of shares issued on merger	1000.00	1000.00	600.00
True market value of immovable property located in Maharashtra	200.00	NIL	1500.00
10% of market value of shares issued on merger (A)	100.00	100.00	60.00
Restricted to higher of:			
5% of market value of immovable property located in Maharashtra (B)	10.00	NIL	75.00
0.7% of the market value of shares issued on merger (C)	7.00	7.00	4.20
Higher amongst (B) and (C) = (D)	10.00	7.00	75.00
Lower amongst (A) and (D)	10.00	7.00	60.00
Stamp duty payable	10.00	7.00	60.00





THANK
YOU

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