

Gujarat High Court rules on stamp duty levy in M&A transactions

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In a recent ruling, the Gujarat High Court (the “**GHC**”) has dealt with five different issues under the Gujarat Stamp Act, 1958 (the “**GSA**”) and has held that:

1. In a composite scheme of arrangement where undertakings are transferred by way of a merger, demerger or slump sale, the arrangement will have to be considered as a single instrument for levying stamp duty.
2. In view of the provisions of Explanation III(c) in Article 20(d) of Schedule I of the GSA, in a scheme where only unlisted companies are involved, the market value of the shares will be deemed to be their face value, irrespective of the shares being issued at a premium.
3. The stamp duty is applicable as on the Appointed Date of the scheme and not on the date of the order issued by the National Company Law Tribunal (the “**NCLT**”) sanctioning the scheme.
4. The stamp duty that has been paid on the same instrument in another Indian state shall be allowed to be set off against the stamp duty payable in the state of Gujarat.
5. Capital work in progress cannot be considered as immovable property and shall not be subject to stamp duty.

The GHC passed the order in eight different but connected matters because there were common questions involved.

Background

The Appellants (eight different parties) entered into a composite scheme of arrangement involving the transfer of undertakings by way of merger, demerger and slump sale that was sanctioned through an NCLT order. Under the provisions of the GSA, an instrument that contains several distinct transactions are chargeable with the aggregate amount of stamp duty that would have been chargeable had the instruments relating to each transaction been executed separately. The Chief Controlling Revenue Authority, Gujarat (the “**CCRA**”), construed the composite scheme as involving multiple distinct transactions and levied stamp duty separately for each arrangement, which resulted in more stamp duty being paid than the maximum amount prescribed under the GSA.

First issue before the GHC

The Appellants contended that the NCLT order sanctioned a single composite scheme which could not be treated as separate transactions while the CCRA contended to the contrary. The CCRA relied on India’s Supreme Court ruling in the *Coastal Gujarat Power* case to argue

that a composite scheme results in multiple and distinct transactions, and thus, the stamp duty should be separately charged for each transaction. After reviewing the *Coastal Gujarat Power* case, the GHC held that a composite scheme of arrangement cannot be segregated when the arrangement is pursuant to a single composite order.

Second issue before the GHC

The transferor and transferee in the composite scheme of arrangement were both unlisted companies, and as consideration, the transferee company issued shares under the scheme to the transferor company at a premium. As per the GSA, if both, the transferee and transferor companies are unlisted companies, the face value of shares issued is deemed to be the market value of the shares; however, the CCRA included the premium amount in determining the market value of the shares and computed the stamp duty on such higher value. The CCRA contended that a meaningful interpretation must be given to the GSA provision, and the term “consideration” should include the premium amount for calculating the stamp duty. The GHC upheld the principle that taxing statutes should be strictly interpreted when the language used by the legislature is clear and unambiguous. It emphasized that there is no scope for reading the term “premium” as part of the “market value” in the GSA.

Third issue before the GHC

The Appointed Date of the scheme was April 1, 2013, and the GHC sanctioned the scheme on March 18, 2014. The maximum amount of stamp duty payable under the GSA was increased from INR10 crores to INR25 crores by way of a notification dated May 15, 2013. The Appellant paid the stamp duty amount of INR10 crores, which was the maximum amount payable as on the Appointed Date, by way of a demand draft, which was accepted by the CCRA. However, the CCRA demanded additional stamp duty along with penalty thereon stating that the maximum amount of stamp duty applicable was INR25 crores. The CCRA contended that the stamp duty levy should be calculated on the date of sanction of the instrument and not on the Appointed Date mentioned in the scheme. The GHC accepted the Appellant’s contention and held that stamp duty prevailing on the Appointed Date should apply, and thus, the maximum stamp duty payable by Appellant is INR10 crores.

Fourth issue before the GHC

The issue was whether the stamp duty paid in another state for a scheme involving immovable property situated in Gujarat should be considered for set-off when calculating the stamp duty payable in Gujarat? In this case, the NCLT, Principal Bench, New Delhi, sanctioned the scheme of arrangement under which immovable properties situated in Gujarat stood transferred to the Appellant. The registered office of the Appellant was in the state of Rajasthan. On the NCLT order, which was an instrument, stamp duty of INR25 crores and surcharge of INR5 crores had already been paid in the state of Rajasthan. Notwithstanding Section 19 of the GSA which provides for a set off of stamp duty paid on the same instrument in another state against the stamp duty payable in Gujarat. the CCRA

demanded INR30.18 crores towards stamp duty not allowing a set off of the stamp duty paid by the Appellant in the state of Rajasthan.

The GHC held that the stamp duty paid on the same instrument in the state of Rajasthan should be allowed to be set off as per section 19 of the GSA. Further, the GHC held that only the differential amount of stamp duty will be payable in Gujarat (i.e., only the difference between the stamp duty chargeable in Gujarat and that paid in other state(s) will be required to be paid in Gujarat).

Fifth issue before the GHC

The issue was whether “capital work in progress” is included under the definition of “immovable property” under the GSA for the purpose of levying stamp duty. In this case, the assets that were transferred to the Appellant pursuant to the scheme included certain capital work in progress, but the bifurcation of capital work in progress was not provided to the CCRA. In the absence of a break-up, the CCRA treated the capital work in progress as immovable property and levied stamp duty at the rates prescribed for immovable property thereon. The GHC relied on the *Aarti Industries* case and held that capital work in progress cannot be considered as an asset to be in existence for the purpose of levying stamp duty, and therefore, capital work in progress cannot be included in the definition of immovable property.

Our comments

Stamp duty levy in mergers and amalgamations has been a litigious issue. The GHC ruling is noteworthy as it has adjudicated on different aspects regarding the applicability of stamp duty on a composite scheme of amalgamation. The GHC has reiterated the well settled principles of interpretation on taxing statutes, especially when the language used by the legislature is clear and unambiguous. Further, the clarification on set off of stamp duty paid in another state on the same instrument is welcome. The set-off provisions are there in most state stamp duty laws but claiming on them has been a challenge. The ruling will serve as a guiding principle on stamp duty implications while conceptualizing M&A transactions in a scheme of amalgamation.