



STAMP DUTY IMPLICATIONS OF MERGERS AND ACQUISITIONS

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STAMP DUTY LAW IN INDIA- CONSTITUTIONAL PROVISIONS

○ **Entry 91** of List I of Schedule 7 (“Union List”) of the Indian Constitution of gives the power to the Union Legislature to prescribe the rates of stamp duty in respect of-

- bills of exchange,
- cheques,
- promissory notes,
- bill of lading
- letters of credit,
- policies of insurance,
- transfer of shares debentures,
- proxies and receipts.




STAMP DUTY LAW IN INDIA- CONSTITUTIONAL PROVISIONS...CONTD

- **Entry 63** of List II of Schedule 7 (“State List”) of the Constitution vests the power to prescribe the rates of duties on instruments other than those specified in the Union List in the state legislature.
- All matters apart from the rates of stamp duties in respect of both classes of instruments are the subject of **Entry 44** of the List III of Schedule 7 (“Concurrent List”) of the Constitution.




STAMP DUTY LAW IN INDIA-LEGISLATIVE PROVISIONS

- Thus, the Indian Stamp Act, 1899 (“Main Act”) is in force in whole of India with respect to the rate of stamp duties on instruments of commercial character and rates of duties on other instruments are subject to State legislation.
 - Various states have added separate schedules to the Main Act. (For example- Delhi, Andhra Pradesh, Madhya Pradesh, Punjab)
 - Tamil Nadu, Assam and North Eastern States have made changes in the Schedule 1 of the Main Act.
 - Gujarat, Maharashtra, Tamil Nadu, Karnataka and Rajasthan have enacted separate laws relating to stamp duty.
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STAMP ACT- FISCAL STATUTE

- In Hameed Joharan v. Abdul Salam,(2001) 7 SCC 573, the Supreme Court of India has held that-
- “...*the Indian Stamp Act, 1899 (Act 2 of 1899) has been engrafted in the Statute Book to consolidate and amend the law relating to stamps. Its applicability thus stands restricted to the scheme of the Act. **It is a true fiscal statute in nature, as such strict construction is required to be effected and no liberal interpretation.**”*
- *It is a well-settled principle of statutory interpretation of a taxing statute that a subject will be liable to tax and will be entitled to exemption from tax according to the strict language of the taxing statute.*
- The stamp laws shall be construed strictly and if an instrument is not mentioned in the law, no stamp duty is payable.

STAMP DUTY LEVIED ON INSTRUMENT

- **The general principle with regard to stamp duty is that duty has to be determined with reference to instrument and not to transaction.**
 - **In the case of *Inland Revenue vs Angus* [23 QBD 579] referred to and followed in *Swadeshi Cotton mills Co, in Re*, [AIR 1932 All 29] it was held that the first thing to be noticed is that the thing which is made liable to duty is an instrument.**
 - **Section 2 (14) of the Main Act defines instrument as –**
"Instrument" includes every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded;"
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WHEN DOES THE LIABILITY TO PAY STAMP DUTY ARISE?

- The liability to pay Stamp Duty arises if the Instrument is mentioned in the Schedule of the Stamp Act of the State in which-
 - a. The instrument is executed ; or
 - b. If the instrument is executed outside the State, then the instrument relates to property situated in the State or relates to something which is done or has to be done in the State



STAMP DUTY ASPECTS OF MERGERS AND ACQUISITIONS- STATUTORY PROVISIONS

- ❑ Maharashtra Stamp Act, 1958
- ❑ Karnataka Stamp Act

MAHARASHTRA STAMP ACT, 1958

- 1. Definition of Conveyance-section 2(g) of the Maharashtra Stamp Act, 1958 defines conveyance as-
- “Conveyance” includes,-
 - (i) a conveyance on sale
 - (ii) every instrument
 - (iii) every decree or final order
 - (iv) every order made by the High Court under section 394 of the Companies Act, 1956 in respect of amalgamation or reconstruction of companies : and every order made by the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949 in respect of amalgamation or reconstruction of Banking Companies.
by which property, whether movable or immovable, or any estate or interest in any property is transferred to or vested in, any other person, inter vivos, and which is not otherwise provided for by Schedule 1”



Article	Description of Instrument	Proper Stamp Duty
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25(da)	<p>Conveyance- On the true market value of the property which is the subject matter of conveyance- → If relating to the order of High Court in respect of the amalgamation or reconstruction of companies under Section 394 of the Companies Act, 1956 or under the order of the Reserve Bank of India under section 44A of the Banking Regulation Act, 1949</p>	<p>10% of the aggregate of the market value of the shares issued or allotted in exchange or otherwise and the amount paid for such amalgamation. Provided that the amount of duty chargeable under this clause shall not exceed -</p> <ul style="list-style-type: none">(i) Amount equal to 5% of the true market value of the immovable property situated in Maharashtra of the transferor company; or(ii) Amount equal to 0.7% of the aggregate market value of the shares issued or allotted and the amount of consideration paid whichever is higher. <p>Provided that in case of demerger or reconstruction the duty chargeable shall not exceed-</p> <ul style="list-style-type: none">(i) Amount equal to 5% of the true market value of the immovable property situated in Maharashtra transferred by the Demerged Company to the Resulting Company; or(ii) Amount equal to 0.7% of the aggregate market value of the shares issued or allotted and the amount of consideration paid whichever is higher
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EXPLANATION III-ARTICLE 25- CALCULATION OF THE 'MARKET VALUE OF SHARES'

- For the purpose of Clause (da) the market value of shares,-
 - (a) In relation to the transferee company, whose shares are listed and quoted for trading on a stock exchange means the market value of shares on the appointed day mentioned in the Scheme of Amalgamation or when the appointed date is not fixed, the date of the order of the High Court,
 - (b) In relation to the transferee company whose shares are not listed on the stock exchange, means the market value of the shares issued or allotted with reference to the market value of the shares of the transferor company or as determined by the Collector after giving the transferee company an opportunity of being heard.
 - (c) For the purposes of clause (da), the number of shares issued or allotted in exchange or otherwise shall mean, the number of shares of the transferor company accounted as per exchange ratio as on the appointed date.



ISSUE OF SHARES PURSUANT TO AN AMALGAMATION OR A DEMERGER

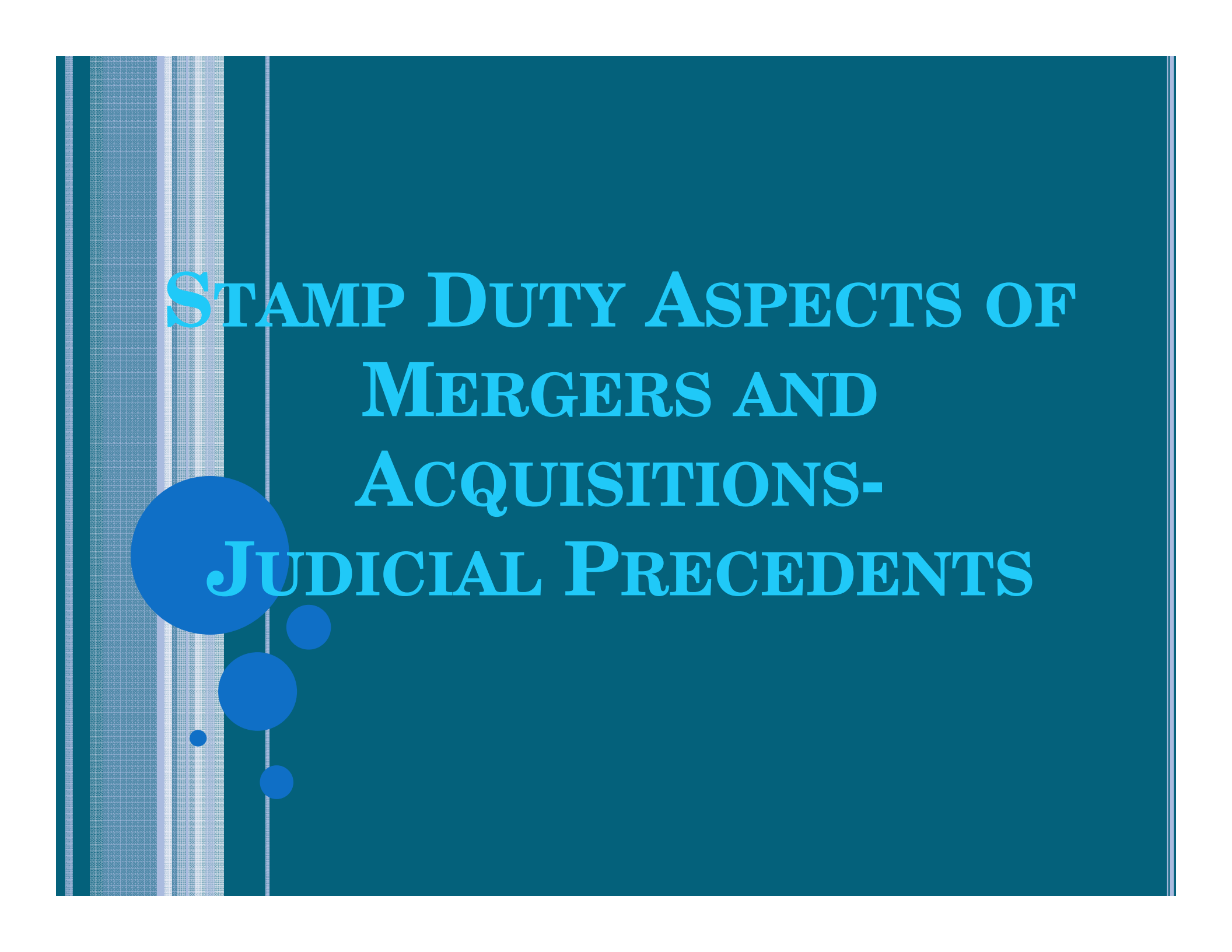
- With the introduction of DEMAT mode under Depositories Act, 1996 a new section 8A was incorporated in the Main Act granting exemption from payment of stamp duty under certain circumstances.
- Section 8A of the Main Act inter-alia provides that **notwithstanding anything contained in the ISA**, an issuer, by the issue of securities to one or more Depositories shall, in respect of such issue, be chargeable with duty on the total amount of security issued by it and such shares / securities need not be stamped individually.
- It is also provided in this section that where an issuer issues certificate of security under section 14(3) of Depositories Act, 1996 on such certificate duty shall be payable as is payable on the issue of duplicate certificates under ISA.
- Moreover, transfer of registered ownership of shares of a company dealt with by a Depository is also exempt from stamp duty under Article 62 of Schedule I of the Main Act.
- It is, therefore, made clear under section 8A of the ISA that at the time of issue of shares, the issuer shall pay the stamp duty on the total amount of the shares issued by it whether through a Depository or direct to investors even though there will be no physical shares (instrument) which can be stamped (executed) and such securities / shares shall not be required to be individually stamped.

STAMPING OF SHARE CERTIFICATES

- Stamp Duty payable on Share Certificates is a State subject and consequently falls under the State List in the Seventh Schedule to the Constitution of India. Every issue of shares under a letter of allotment or certificate or other document evidencing title thereto is required to be stamped in accordance with the provisions of law prevailing in the State in which it is issued.
- In the State of Maharashtra stamp duty on issue of share certificates is 0.1 per cent on the value of the share certificate inclusive of premium, if any, under Article 17 of Schedule I to Maharashtra Stamp Act, 1958. On the other hand, under Article 37 of Schedule I to Maharashtra Stamp Act, 1958, a letter of allotment of shares in any company requires to be stamped at one rupee if executed in the State of Maharashtra. The stamp duty is much lower (only on the face value of the shares) in some other States in India.

STAMPING OF SHARE CERTIFICATES...CONTD

- In the State of Karnataka, stamp duty payable on a share certificate is Rs 1 for every one thousand rupees or a part thereof of the value of the share, scrip or stock (Article 16 of the Karnataka Stamp Act). Stamp duty payable letter of allotment of shares is Rs. 1.
- As per the Depositories Act, the investors have been granted an option of holding shares and other securities in a physical or DEMAT form. All rights with respect to the shares held in the Depository lie with the investor who is the ultimate beneficial owner, the Depository acts as a registered owner only. When transacting through a Depository, the investor will not be required to pay stamp duty on transfer of shares.



STAMP DUTY ASPECTS OF MERGERS AND ACQUISITIONS- JUDICIAL PRECEDENTS

CONTROVERSY

- Whether stamp duty is payable on an order of a High Court sanctioning a Scheme of Amalgamation/merger under section 394 of the Companies Act, 1956?
- Many states have amended the definition of conveyance in their respective stamp laws so as to include an order of amalgamation or reconstruction under Section 394 of the Companies Act, 1956. Also, these states have accordingly amended the Schedules to their respective stamp law.
- However, the Main Act is still unamended and there are a few states which have not amended the definition of conveyance.

LI TAKA PHARMACEUTICALS VS STATE OF MAHARASHTRA (1997)

- This is one of the earliest cases on this subject.
- Background- Section 2(g) of the Maharashtra Stamp Act, 1958 was amended in 1993 to provide that “conveyance” would include every order made by Section 394 for the amalgamation of companies.
- This amendment was challenged in the Bombay High Court.
- The Court held that an order under Section 394 is founded upon a compromise between the two companies and since the order transfers the assets and liabilities, it is an “instrument”.
- This judgment was challenged by Hindustan Lever in the Supreme Court.

HINDUSTAN LEVER VS. STATE OF MAHARASHTRA (2004)

- The Supreme Court of India held that a scheme sanctioned by 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.
- The Supreme Court further held that
 - A. The foundation or the basis for passing an order of amalgamation is agreement between two or more companies.
 - B. Under the Scheme of amalgamation, the whole or any part of the undertaking, properties or liability of any company concerned in the scheme is to be transferred to the other company.
 - C. The scheme of amalgamation 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.
 - D. **The intended transfer is a voluntary act of the contracting parties. The transfer has all the trappings of a sale. The transfer is effected by an order of the Court.**

DELHI TOWERS LTD V GNCT OF DELHI (2009)

- Background-15 transferor companies, engaged in the business of real estate, proposed to merge with the "Delhi Towers Limited". These transferor companies were stated to be hundred per cent subsidiaries of Delhi Towers Limited, the transferee company.
- Delhi High Court sanctioned the said scheme of merger on 19th March 2003
- The stamping authorities were not accepting the scheme of amalgamation without payment of stamp duty thereon.

DELHI TOWERS LTD V GNCT OF DELHI (2009)

- The Delhi High Court held that that an approved scheme of amalgamation amounts to a transfer inter-vivos between two companies who were 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. The transfer takes place in the present and is not postponed to any later date and is covered under the definition of conveyance under sub section 10 of section 2 of the Stamp Act



GEMINI SILK LIMITED V GEMINI OVERSEAS LIMITED (2002)

- An order sanctioning a scheme of reconstruction or amalgamation has its genesis in an agreement between the shareholders of the transferor and the transferee company; the intended transfer is a voluntary act of the contracting parties the transfer has all the trappings of a sale: the transfer is effected by an order of Court and that the order of court is an instrument by which the transfer is effected. Once the order is held to be an instrument the irresistible conclusion is that it is a conveyance.

MADHU INTRA LTD VS. REGISTRAR OF COMPANIES (2004)

- The Division Bench of the Calcutta High Court held that the transfer of assets effected by an order under Section 394 of the Companies Act, 1956 is purely by operation of law. The hon'ble Court held that stamp duty is not payable on such an order. This judgement set aside the Gemini Silk Case.
- The Court further held that the transfer of assets and liabilities from the transferor company to the transferee company takes place by virtue of subsection(2) of Section 394, without any further act or deed.
- However, the judgment in this case does not hold good since it has not considered the judgment in the Hindustan Lever Case which is a Supreme Court judgment.



Business and Share Acquisition

- The acquisition of the Business, assets, liabilities and shares can be effected either through:
 - (a) slump sale process, in which the undertaking as a going concern will be transferred for a lump sum consideration under Business Transfer or Asset Purchase Agreement, or
 - (b) through a court approved scheme of reconstruction under section 394 of the Companies Act under which all the assets and liabilities will be transferred from the Seller to the Purchaser, or
 - (c) individual transfer of assets and liabilities by the Seller to the Purchaser.
 - (d) Acquisition of shares under share Purchase Agreement



Business and Share Acquisition

- assets which will be transferred under all of the abovementioned processes will comprise of:
 - (i) Movable Property
 - (ii) Immovable Property
 - (iii) Unsecured loans
 - (iv) Advances/deposits
 - (v) Contracts with suppliers; and
 - (vi) Interests under secured loans



Business and Share Acquisition

- transfer of tangible movable property can be made by handing over/physical delivery of such movable property by obtaining a suitable receipt to that effect recording and/or acknowledging the passage of title in movables from one party to the other. Such a transfer of movables physical delivery does not require registration or stamping.
- sale and transfer of intangible movable property such as Trade Marks, Goodwill, Book Debts can be made by signing separate instrument in the nature of Deed of Assignment of Trade marks and/or Deed of Assignment of Book Debts for the purposes of payment of stamp duty at 3 per cent.



SALE OF BUSINESS UNDERTAKING ON SLUMP SALE BASIS:

- Section 2(42C) of the IT Act “Slump Sale” to mean “the transfer of one or more undertakings as a result of the sale for a lump sum consideration without values being assigned to the individual assets and liabilities in such sales. Explanation 2. For the removal of doubts, it is hereby declared that the determination of the value of an asset or liability for the sole purpose of payment of stamp duty, registration fees or other similar taxes or fees shall not be regarded as assignment of values to individual assets or liabilities.”



- an “instrument” in the nature of “Business Transfer Agreement” (“BTA”) is executed in the State of Maharashtra in respect of immovable properties situated and/or located in the State of Maharashtra, then BTA would operate as a “Conveyance” and shall be chargeable with a Stamp Duty at the rate of 5 percent on the true market value of the immovable property.



Controversy on stamping of BTA / SPA

- Article 5(h)(A) contained in Schedule I to the BSA. Article 5(h)(A) (I) to (V). This Article generally seeks to bring in all instruments/ contracts relating to advertisements on mass media including Agreements, contracts where specific performance is sought for in case of value of such contract exceeds Rs.1 Lakh as also a contract which creates any obligation, right or interest having monetary value and assignment of copyrights, is liable to be stamped in accordance with the New Article 5(h) (A).
- In conclusion, any kind of agreement or a memorandum which will create a right, title or interest in a person and has a monetary value will attract stamp duty under Article 5(h)(A).



Thank You!

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