

STAMP DUTY SAGA

As the banking system continues to deal with the increase in defaults, it becomes imperative and puts the spotlight back on the underlying documentation to be used for enforcement. It is common knowledge that bank and financial institutions are mindful as to whether a document through which their rights flow are adequately stamped or not. Stamp duty (or stamp tax) plays a significant role in determining the structuring of a transaction and therefore the nature of document to be executed. Being a state subject, significant time also gets expended in evaluating the stamp friendly jurisdiction and establishing nexus for execution in that state. Even at the time of recovery and enforcement, the issue of enforceability and admissibility of a particular document hinges, *inter alia*, on whether the document has been properly and adequately stamped.

Insertion of Section 30-A to the Maharashtra Stamp Act (“**Mah Stamp Act**”) vide an amendment in May 2013 created a lot of noise in the industry. Section 30-A makes banks, non-banking financial companies, housing finance companies and such other financial institutions (“**Banks/FIs**”) liable to:

- (a) pay proper stamp duty on instruments mentioned under Section 30 (a) to (g) of the Mah Stamp Act executed by it or in its favour;
- (b) verify that adequate stamp duty has been paid on instruments executed prior to the amendment;
- (c) impound the instruments falling under a) and b) on which proper stamp duty has not been paid and send the same to the relevant Collector of Stamps (“**Collector**”) for recovery; and
- (d) pay penalty for failure to impound the instruments as mentioned under c) above.

The financing industry in general relied on the challenge made by some of the Banks/FIs to this provision *inter alia* on the grounds of it being arbitrary, unreasonable in nature and onerous to implement. An interim relief in the form of a stay was granted and the bank and financial institutions heaved a sigh of relief (albeit temporarily and short lived!). A Division Bench of the Bombay High Court, vide its judgment dated 22nd March 2016 in the case of *State Bank of India & Ors. Vs. State of Maharashtra & Ors.*¹ dismissed the challenge to the validity of Section 30-A of the Mah Stamp Act and upheld the same as legal and valid.

The principal effect of the judgment is that the stay granted by the Bombay High Court has been vacated and Banks/FIs have to ensure compliance with Section 30-A by 1st July 2016.

What are the obligations under Section 30-A of the Mah Stamp Act?

- (a) Section 30-A(1) imposes a liability on the Banks/FIs to pay proper stamp duty on instruments mentioned under Section 30 (a) to (g), which are executed on or after the amendment.

¹ Writ Petition No. 308 of 2014

Such instruments should be executed by it or in its favour and should create any right in favour of such Banks/FIs. An instrument in favour of an agent/trustee for the benefit of the bank/FIs would also fall within the purview of this provision.

The rights of the Banks/FIs to contractually claim the stamp duty paid from the other party (if any) remains unaffected.

- (b) Section 30-A(2) stipulates that Banks/FIs are required to impound and send to the Collector for recovery of stamp duty on those instruments (executed by Banks/FI's of the nature mentioned above) which have been executed prior to the amendment are still 'effective' and found to be inadequately stamped.

Banks/FIs would have to conduct a documentation audit of all their entire suite to ensure compliance with this provision.

- (c) Section 30-A(3) stipulates that if the respective Banks/FIs fails to impound any such inadequately stamped instrument mentioned above, then such Banks/FIs shall be liable to pay a penalty equal to the amount of stamp duty payable on such instrument.

The onus being on the Banks/FIs would ensure that stringent documentation audit is conducted to avoid any negative scrutiny by the stamp authorities and to ensure that the reputation of the Banks/FIs remain intact. This penalty is also in addition to the generic penalty provisions under the Mah Stamp Act.

Key findings from the Bombay High Court Judgement

The Bombay High Court while, *inter alia*, analysing the issue of challenge to the validity of Section 30-A, declared the said provision to be valid and observed as below:

- (a) the intention of the amendment is not to single out Banks/FIs as compared to other commercial entities but to target the instruments of a particular category or class;
- (b) the liability imposed on the Banks/FIs is restricted to those instruments which are mentioned in Section 30 (a) to (g) of the Mah Stamp Act;
- (c) the State to smoothen the process of collection and recovery of stamp duty has placed a burden on such Banks/FIs for payment of adequate stamp duty for instruments being executed in favour of or creating a right in their favour; and
- (d) the provisions is a benefit for the Banks/FIs to ensure that such instruments are and remain admissible and enforceable in legal proceedings.

Various grounds based on constitutional rights enshrined as basic tenets have also been discussed at length.

Mumbai is the commercial capital of the country. While the industry is still coming to terms with the full impact of the Supreme Court judgement in Coastal Gujarat², the Bombay High Court judgement putting this onus on the Banks/FIs raises more questions especially as regards its

² Civil Appeal No. 6054 of 2015

practical implementation and operational viability. It is apparent that there would be an appeal and this issue will be discussed till the final level of resolution. Various constitutional rights such as the right to carry on business, right of equality and generally the power of a state to impose such a provision on banks, which is other the subject matter for the centre would invariably be dissected, as has also been done in the Bombay High Court judgement. This is probably one of those issues which the finance industry would eagerly monitor, especially from the perspective of Maharashtra being the hub of the financial activities and the generic sense of ease of doing business in India.

Operational strategy for execution and choice of jurisdiction could see a change based on the outcome of the appeals. CHALLENGING times ahead!

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