Stamp duty implications pursuant to amendment in Finance Act, 2019 – Simplification at the cost of Constitutional powers?

1. Background

Article 246 of the Constitution of India empowers the Central Government and State Governments to levy stamp duty as follows:

List	Power to	Provisions
Entry 90 of Union List	Central Government	Taxes other than stamp duties on transactions in stock exchanges and futures markets.
Entry 91 of Union List	Central Government	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.
Entry 63 of State List	State Government	Rates of stamp duty in respect of documents **other than** those specified in the provisions of Union list with regard to rates of stamp duty.

From the above, it can be inferred that, the power to levy stamp duty was distributed between the Central Government and State Governments depending on the nature of transaction / security involved.

Since the power was decentralized depending on the nature of transaction, different Governments imposed different stamp duty rates for the same instrument. For example, some states like Rajasthan and Maharashtra levied stamp duty on transfer of listed shares whereas Tamil Nadu did not levy any stamp duty. The Finance Act, 2019 ('FA 2019'), has prescribed certain amendments in the Indian Stamp Act, 1899 ("the ISA") with the intent to create a mechanism which would enable state to collect stamp duty on securities at "**One place**" & "**One agency**" on "**One instrument**".

Moreover, the stamp duty on securities in dematerialized form, was exempt as per the extant regime. The said amendment seeks to end the distinction between shares in physical form and dematerialized form and remove the benefit available on dematerialization of any security.

The ISA would come into force from the date it is notified by the Central Government. Accordingly, the Government issued **Notification No. S.O 4419(E)** dated 10th December 2019 stating that the effective date for implementation of amendments to ISA was **9th January 2020**. However, **Notification No. S.O 115(E)** dated 8th January 2020 deferred the effective date of applicability from 9th January 2020 to **1st April 2020.**

2. Key highlights of the amendment

2.1 Summary of changes relating to stamp duty provisions

2.1.1 Transfer of securities held in dematerialized form

- Under the extant regime, the transfer of securities held in dematerialized form were exempt from stamp duty as per **Section 8A** of the ISA. However, the exemption has now been withdrawn through the amendment and accordingly, transfer of securities dealt in dematerialized form will be subject to stamp duty. The rates for transfer of securities as specified in para 2.2 below will apply.

2.1.2 Transfer of shares held in physical form

- Transfer of unlisted shares (in physical form) was subject to stamp duty at a uniform rate of **0.25%** of the value of shares vide **Article 62 of Schedule I** of the ISA across all states in India. However, the stamp duty payable on such transfer after 1st April 2020 shall be **0.015%** of the sale consideration, resulting in reduction by 94% of the existing stamp duty cost.

2.1.3 Issue / transfer of listed securities

- The power to levy the stamp duty on issue and transfer of **listed securities** was a subject matter of the State Government in the extant regime. Accordingly, different states adopted different rates for issue and transfer of listed securities. The proposed amendment seeks to levy a uniform rate vide **Section 9A** of the ISA. The new rates has been specified in para 2.2 below.

2.1.4 Issue of unlisted shares

- The power to levy the stamp duty on **issue** of **unlisted shares** was a subject matter of the State Government in the extant regime. Accordingly, different states adopted different rates for issue of unlisted shares. The proposed amendment seeks to levy a uniform rate vide **Section 9B** of the ISA. The new rates has been specified in para 2.2 below.

2.1.5 Issue / transfer of Debentures

- Prior to the amendment, issue and transfer of debentures were governed under **Article 27 and Article 62 of Schedule I** of the ISA, respectively with a pre-condition that the debentures should be 'marketable securities'.

- **Section 2(16A)** of the ISA defined "marketable security" as a security of such a description as to be capable of being sold in any **stock market in India or United Kingdom**.

- Given the above, only debentures which were listed in the stock market in India or UK fell under the purview of stamp duty.

- In the FA 2019, the words "being marketable securities" have been omitted, thus bringing all debentures into the scope of stamp duty. Further, the FA 2019 amended the rates for stamp duty on issue and transfer of debentures in **Article 27 of Schedule I** of the ISA.

2.2 New rates prescribed in relation to shares and debentures in FA 2019

- The amended rates prescribed in the Schedule I of the ISA are as follows:

S No	Nature of transaction	Reference	Rate
1	Issue of security other than debenture	Article 56A of Schedule I of the ISA	0.005%
2	Transfer of security other than debenture on delivery basis	Article 56A of Schedule I of the ISA	0.015%
3	Transfer of security other than debenture on non-delivery basis	Article 56A of Schedule I of the ISA	0.003%

S No	Nature of transaction	Reference	Rate
4	Derivatives - Futures (Equity and Commodity) - Options (Equity and Commodity) - Currency and interest rate derivatives - Other derivatives	Article 56A of Schedule I of the ISA	 0.002% 0.003% 0.001% 0.002%
5	Government securities	Article 56A of Schedule I of the ISA	0%
6	Repo on corporate bonds	Article 56A of Schedule I of the ISA	0.00001%
7	Issue of debenture	Article 27 of Schedule I of the ISA	0.005%
8	Transfer and re-issue of debenture	Article 27 of Schedule I of the ISA	0.0001%

2.3 Collection & Deposit Mechanism

- Prior to the amendment, there was a lack of clarity on who should collect the stamp duty and to which Government the stamp duty should be ultimately paid. The amendment chalks down the collection and deposit mechanism as follows:

Nature of transaction	Relevant Section of ISA	Responsibility to pay	Responsibility to collect	Paid to
1. Transfer of securities through a stock exchange	9A(1)(a)	Buyer (transferee)	Stock exchange or clearing corporation	State Government, where the residence of buyer is located[1]
2. Transfer of securities through a depository	9A(1)(b)	Transferor	Depository	State Government, where the residence of buyer is located[1]
3. Transfer of unlisted shares held in physical form (i.e. securities other than through stock exchange or depository)	9B(b)	Transferor	State Government, where the residence of the buyer is located	Directly collected by the State Government where the residence of buyer is located
4. Issue of securities by a depository (leading to any creation or change in the records of a depository)	9A(1)(c)	Issuer	Depository	State Government, where the residence of buyer is located[1]
5. Issue of securities other than through stock exchange or through depository	9B(a)	Issuer	State Government, where registered office of the issuer is situated	Directly collected by the State Government where the residence of the issuer is located

[1] If the buyer is located outside India & having trading member, the State Government where registered office of trading member is located. Where there is no trading member, the State Government where registered office of the participant is located.

2.4 Transfer value on which stamp duty is payable

The amendment has defined **"market value"** on which stamp duty is payable in **Section 2(16B)** of the ISA. The summary of the same is provided in the table below:

Mode of transfer	Market Value
Traded in a stock exchange	Trading price
Transferred through a depository	Price or consideration mentioned in the instrument
Transferred other than through depository or stock exchange	Price or consideration mentioned in the instrument

3. Comparison of impact on stamp duty rates in Tamil Nadu before and after amendment

- To understand the impact of the aforesaid amendment, we have compared the stamp duty applicable in Tamil Nadu before and after the amendment in FA 2019:

S No	Transaction	Rate (before amendment)	Rate (after amendment)	Cost / (Savings)
Part A – Shares				
1.	Transfer of listed shares through stock exchange on delivery basis	0 %	0.015 %	100%
2.	Transfer of listed shares through stock exchange on non-delivery basis	0 %	0.003 %	100%
3.	Transfer of unlisted shares held with depository in dematerialised form	0 %	0.015 %	100%
4.	Transfer of unlisted shares held in physical form (other than through stock exchange or depository)	0.25 %	0.015 %	(94%)
5.	Issue of shares	Re. 1 (regardless of amount)[2]	0.005 %	NQ
Part B – Debentures				
1.	Transfer of listed debentures through stock exchange	1.00 %	0.0001 %	(99%)
2.	Transfer of unlisted debentures (other than through stock exchange or depository)	0 %	0.0001 %	100%
3.	Issue of listed debentures	Different rates according to value	0.005 %	NQ
4.	Issue of unlisted debentures	0 %	0.005 %	100%

[2] The above rate does not include the stamp duty on increase in authorized share capital.

Our Comments

Though the amendments proposed in the ISA are expected to streamline the process of collection and disbursement of stamp duty on securities transactions, the following are the challenges that may be faced during implementation:

- Certain amendments fall under the jurisdictional powers of the State Governments, and thus, it is necessary to examine the acceptance and implementation of some of these amendments under the respective State laws.

- States which had higher stamp duty rates vis-a-vis the proposed rates on securities, might face a fall in their State revenue and consequently such States could oppose some of the changes. Further, the State Governments may charge stamp duty in addition to the duty prescribed by the Central Government which may result in dual stamp duty liability on a single transaction which would be against the objective of said amendment.

- With the removal of the exemption from stamp duty presently available for transfer of dematerialized securities, the securities may be dematerialized for commercial / administrative requirements, as against reducing the stamp duty incidence. This is also in line with the intention of the Government to have more and more shares in dematerialized forms to have greater accountability and transparency.

- It is unclear as to which State Government would receive the stamp duty in a case where there is a transfer of unlisted securities between two non-residents or where the buyer is non-resident.

- Since the onus to discharge stamp duty is put on the transferor (in case of transfer of unlisted securities) which is different from the prevailing practice of buyer / transferee discharging the stamp duty, adequate care needs to be taken while drafting the share purchase agreement or any other document to determine the person who would ultimately bear the stamp duty cost.

Food for thought

We have listed some thought provoking questions/ points in relation to the above amendments to get your intellectual juices flowing:

- Would gift of securities (listed or unlisted) be subject to stamp duty and if so at what value?

- Would buyback of shares or capital reduction by companies be regarded as transfer and be subjected to stamp duty?

- Is stamp duty leviable on share warrants or any other similar instruments issued by a company?

- Is transfer of LLP interest covered under the ISA?

- Would bonus issue of shares trigger stamp duty and if so at what value?

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