(2020) 06 NCLT CK 0024

In the National Company Law Appellate Tribunal, Pricipal Bench, New Delhi

Case No : Company Petition No. (CAA)- 138/ND Of 2019, Company Application No. CA(CAA) - 136/ND Of 2019

Bhavyam Fabtrading Limited And Ors APPELLANT

Vs

Thermocool Home Appliances Limited RESPONDENT

Date of Decision : 22-06-2020

Acts Referred:
Income-Tax Act, 1961 — Section 153(C)
Companies Act, 2013 — Section 133, 230, 231, 232, 232(3)(i), 232(3)(B)(i)

Citation : (2020) 06 NCLT CK 0024

Hon'ble Judges : P.S.N. Prasad, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Abhishek Nahta, Sameer Gupta, Tania Sharma, Vibhooti Malhotra

Final Decision : Disposed Of

Judgement

Sumita Purkayastha, Member (T)

1) This Joint petition has been filed by the Petitioner Companies under Sections 230 to 232 of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and the National Company Law Tribunal Rules, 2016, for the purpose of the approval of the Scheme of Amalgamation of between the Applicant Companies. The copy of the Scheme has been placed on record.

2) All the Transferor Companies as well as Transferee Company have their registered offices which lie within the jurisdiction of this Tribunal.

3) A persual of the petition discloses in relation to the First motion joint application filed by the petitioner companies involved in the Scheme of Amalgamation in Company Application No. CA(CAA) No. 138(ND) of 2019 that based on the representations made in the joint application and also taking into consideration the provisions of Section 230-232 of the Companies Act, 2013, the

requirements of meetings of equity shareholders, secured creditor(s) and unsecured creditor(s) in relation to Petitioner Companies got dispensed with vide order dated 01.10.2019.

4) The applicant companies have now initiated the Second Motion. An affidavit dated 06.11.2019 discloses that the petitioners have effected publication in the daily newspapers "Business Standard" in English and Hindi, both dated 04.11.2019 and having circulation in Delhi inviting objections if any to the proposed Scheme of Amalgamation. The affidavit further discloses that due notice of the proposed scheme had been served on the Registrar of Companies, Regional Director, Northern Region, Income Tax Dept. and the Official Liquidator in compliance with the order of the Tribunal.

Pursuant to the Publication in the daily newspapers, for listing of the matter before this Bench, no objector has appeared before us.

Additionally, it has been deposed that no objection to the proposed Scheme has been received by the applicant companies or their counsel.

5) We have heard the counsels for the petitioners and also considered the representation dated 03.12.2019 made by the Regional Director, Northern Region. It is submitted that basis report from Registrar of Companies, no prosecution has been filed nor any inspection or investigation has been conducted in respect of petitioner companies. Further the Regional Director has stated that "Refer to clause 11 of the scheme, the Transferee company may kindly be directed to comply with the provisions of Section 232(3)(i) of the Companies Act, 2013 in regard to fee payable on its revised authorized share capital". The Transferee Company vide diary no 071012134472019/3 have submitted an undertaking of affidavit with respect to compliance of Section 232(3) (B) (i) of the Companies Act, 2013.

6) The Official Liquidator, NCT of Delhi has filed his report in relation to Transferor Companies wherein no specific observation has been raised against the approval of the scheme. It is submitted in the report that the official liquidator has not received any complaint against the proposed Scheme from any person/party interested in the Scheme in any manner and that the affairs of the Transferor Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest.

7) The Income Tax Department has made certain observations which have been replied by the applicant companies. The Income Tax Department has observed that:-

i. The rationale of the scheme is false and incorrect. The reasons for the present application seeking amalgamation of the companies is to evade tax.

ii. Both the transferor companies are shell companies. The statement of Mr. Himanshu Verma has been annexed along with the Income Tax Report.

iii. Furthermore, that assessment under 153C of the Income Tax Act, 1961 is pending in the case of Transferor Company No. 2 for the A.Y. 2012-13 to 2017-2018.

iv. The share swap ratio provided in the scheme is denied and the real value of the shares of the companies can only be ascertained post enquiry and assessment.

v. The purpose of the present scheme is to evade tax and hinder the ongoing proceedings. The Transferor Companies have failed to maintain proper books of accounts, and the purpose of the present application is to complicate the identification and trace of accommodation entries in their books.

8) The aforesaid observations of the IT Dept. have been duly replied to as follows:-

i. That the reason for the present application seeking amalgamation is not to evade tax. The rationale of the scheme has been reproduced in the rejoinder filed by the applicant companies which is as follows:

"With the intent of consolidating the business operations undertaken by the Transferor Companies and the Transferee Company, the said Companies now propose, by way of this Scheme to merge the Transferor Companies with the Transferee Company in accordance with the terms hereof. The Amalgamation of the Transferor Companies with the Transferee Company would inter-alia have the following benefits.

(a) It would enable optimum utilization of the funds and resources.

(b) It will provide the benefit of operational synergies to the combined entity, which can be put to the best advantage of the stakeholders.

(c) Improved organizational capabilities and leadership, arising from the pooling of human capital that has the diverse skills, talent and vast experience to compete successfully in an increasingly competitive industry.

(d) Greater efficiency in cash management of the Transferee Company and access to cash flow generated by the combined business, which can be deployed more efficiently to maximize shareholder value;

(e) Cost savings are expected to flow from more focused operational efforts, rationalization, standardization and improvements, improved procurement, and the elimination of duplication, and rationalization of administrative expenses.

(f) The merged entity will have the ability to leverage on its assets base, to enhance shareholders value.

(g) Reduction in the number of companies leading to reduction in compliance requirements of both the companies.

ii. The applicant companies are not shell companies. That the affairs of the

Transferor Company No. 1 which is Bhavyam Fabtrading Limited are being managed & control by its Directors viz. Mr. Rishabh Goel, Mr. Tara Chand & Mr. Ashish, who were appointed on the board with effect from 30th July 2018. Whereas, the affairs of the Transferor Company No. 2 which is Elvina Real Estate Private Limited are being managed & control by its Directors viz. Mrs. Seema Gupta & Mr. Rajeev Gupta, who were appointed on the board with effect from 28th July 2018.

iii. That in case of Transferor Company No. 2, the assessment order under section 153(C) has been passed for the A.Y. 2012-13 to 2017-2018. The Income Tax Department have passed orders with NIL demand with respect to the A.Y. 2012-13 to 2017-2018.

iv. The valuation of shares has been done by Mr. Aayush Tibrewal(holding registration number IBBI/RV/02/2019/11356), a registered valuer under the Insolvency and Bankruptcy Board of India.

v. That the assessment orders having already been passed in the ongoing proceedings, there is no question of hindrance now. That the Transferor Companies have maintained proper books of accounts which have been duly audited by the statutory auditor every year. The same has been stated in the audit report annexed alongwith.

It is further stated in point 6 of part 2 of the scheme:- the Transferee Company undertakes that "all legal proceedings of whatsoever nature by or against the Transferor Companies pending and/or arising upto the Operative date and relating to the Transferor Companies shall not abate or be discontinued or be in any way prejudicially affected by reason of the Scheme or by anything contained in this Scheme but shall be continued and enforced by or against the Transferee Company in the manner and to the same extent as would or might have been continued and enforced by or against the Transferor Companies".

9) The Income tax department has further filed written submissions dated 11.06.2020. Apart from the above observations being reiterated, an order dated 15.03.2019 of the Hon'ble Income Tax Appellate Tribunal, New Delhi Bench in ITA 1627-1629/Del/2015, in the case titled Himanshu Verma vs. DCIT has been attached alongwith.

10) In the reply to the written submissions filed by the Income Tax Department, the petitioner companies have stated that the order of the Income Tax Appellate Tribunal has no mention of the applicant companies what so ever. The present ITAT order is that of Assessment Year 2010-11 to 2012-13. It is pertinent to mention here that the Transferor Company No. 1 which is Bhavyam Fabtrading Limited was incorporated on 12th February 2016 therefore this company cannot be a part of nor be associated with the present order of the ITAT.

That, in respect of Transferor Company No. 2 which is Elvina Real Estates Private Limited the Assessment Order for the year 2012-13 have been passed with NIL demand in November 2019 which has been attached in the rejoinder submitted by the petitioner companies. Therefore this company cannot be a part of nor be associated with the present order of the ITAT. The Transferor Company No. 2 which is Elvina Real Estates Private Limited was incorporated on 20th December 2011 when the company was new in business.

11) Certificates of respective Statutory auditors of the Petitioner Companies have been placed on record to the effect that Accounting Treatment proposed in the Scheme of Amalgamation is in conformity with the Accounting Standard notified by the Central Government as specified under the provisions of Section 133 of the Companies Act, 2013.

12) It has been also affirmed by the petitioner companies that the Scheme is in interest of the Transferor Companies, the Transferee Company, their shareholders, creditors, employees and all concerned.

13) In view of the foregoing, upon considering the approval accorded by the members and creditors of the Petitioner companies to the proposed Scheme, and the affidavit filed by the Ld. Regional Director, Northern Region, Ministry of Corporate Affairs, the Official Liquidator NCT of Delhi and the Income Tax Department, there appears to be no impediment in sanctioning the present Scheme.

14) Consequently, sanction is hereby accorded to the Scheme under Section 230 to 232 of the Companies Act, 2013.

15) The Petitioners shall however remain bound to comply with the statutory requirements in accordance with law.

16) Notwithstanding the above, if there is any deficiency found or, violation committed qua any enactment, statutory rule or regulation, the sanction granted by this court to the scheme will not come in the way of action being taken, albeit, in accordance with law, against the concerned persons, directors and officials of the petitioners.

17) While approving the Scheme as above, we further clarify that this order should not be construed as an order in any way granting exemption from payment of stamp duty, taxes or any other charges, if any, and payment in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law.

18) THIS TRIBUNAL DO FURTHER ORDER

? That the Transferor Companies shall stand dissolved without following the process of winding-up; and

? That all the property rights and powers of the Transferor Companies be transferred without further act or deed (to the Transferee Company and accordingly the same shall pursuant to Section 232 of the Companies Act) 2013) be transferred to and vest in the Transferee Company.

? That all the liabilities and duties of the Transferor Companies be transferred without further act or deed (to the Transferee Company and accordingly the same shall be in pursuant to Section 232 of the Act) be transferred to and become the liabilities and duties of the transferee company; and

? That all proceedings now pending by or against the Transferor Companies, be continued by or against the transferee company; and

? That all the employees of the Transferor Companies in service, on the date immediately preceding the date on which the scheme takes effect, i.e. the effective date shall become the employees of the Transferee Company on such date without any break or interruption in service and upon terms and condition not less favorable than those subsisting in the transferor companies on the said date.

? That any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

? That Petitioner companies shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Company for registration and on such certified copy being so delivered the Transferor Companies shall be dissolved and the Registrar of Company shall place all documents relating to the Transferor Companies registered with him on the file kept by him in relation to the Transferee Company and the files relating to all the petitioner companies shall be consolidated accordingly;

The petition stands disposed of in the above terms.

Let copy of the order be served to the parties.

