(2022) 04 NCLT CK 0014

In the National Company Law Tribunal

Case No : C.P(CAA) No.152/(KB)/2021 Connected with C.A(CAA) No. 46/KB/2021

Helios Infrapro Private Limited Vs

Date of Decision : 04-04-2022

Acts Referred:

Companies Act, 2013 — Section 133, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230(1), 230(2)(a), 230(3), 230(4), 230(5), 230(6), 232(3), 232(3)(i), 232(4)
Income Tax Act, 1961 — Section 2(1B)

Citation : (2022) 04 NCLT CK 0014

Hon'ble Judges : Rohit Kapoor, Member (J);Harish Chander Suri, Member (T)

Bench : Division Bench

Advocate : Nimisha Agarwal, Sanjay Sardar

Final Decision : Disposed Of

Judgement

Rohit Kapoor, Member (Judicial);

1. The court convened by video conference on 02.03.2022.

2. The instant petition has been filed under Section 232(3) and other applicable provisions of the Companies Act, 2013 ("Act") for sanction of the Scheme of Amalgamation of Tapasvi Engineering Private Limited, being the Applicant No. 2 abovenamed ("Transferor Company" or "Applicant No. 2") with Helios Infrapro Private Limited, being the Applicant No. 1 abovenamed ("Transferee Company" or "Applicant No. 1") whereby and whereunder the Transferor Company are proposed to be amalgamated with the Transferee Company from the Appointed Date, viz 1st Day of April,2020 in the manner and on the terms and conditions stated in the said Scheme of Amalgamation ("Scheme").

3. The Petition has now come up for a final hearing. Counsel for the Petitioners submits as follows:-

(a) The Scheme was approved unanimously by the respective Board of Directors of the Petitioner Companies at their meetings held on 10/12/2020 respectively.

(b) The circumstances which justify and/or have necessitated the Scheme and the benefits of the same are, inter alia, as follows:-

(i) For the purposes of better, efficient and economical management, control and running of the business of the undertakings concerned and also for administrative convenience and to obtain advantage of economy of large scale and to broad base the present business, the present Scheme is proposed to amalgamate the Transferor Company with the Transferee Company.

(ii) Simplification of corporate structure by reducing the number of legal entities and reorganizing the legal entities in the group structure;

(iii) Significant reduction in the multiplicity of legal and regulatory compliances required at present to be carried out;

(iv) Elimination of duplication in administrative costs and multiple record-keeping, thus resulting in cost savings;

(v) Concentrated effort and focus by the senior management to grow the business by eliminating duplicative communication and burdensome coordination efforts across multiple entities.

(c) The Statutory Auditors of respective Petitioner Companies have by their certificates dated 01/02/2021 confirmed that the accounting treatment in the Scheme is in conformity with the accounting standards prescribed under Section 133 of the Companies Act, 2013.

(d) No proceedings are pending under Sections 210 to 227 of the Companies Act, 2013 against the Petitioner(s).

(e) The exchange ratio of shares in consideration of the Amalgamation has been fixed on a fair and reasonable basis and on the basis of the Report thereon of Abhijit Negee, Chartered Accountant.

(f) The shares of the all Petitioner Companies are not listed in any Stock exchange.

(g) By an order dated 7th July,2021 in Company Application (CAA) No. 46/KB/2021, this Tribunal made the following directions with regard to meeting(s) of shareholders and creditors under Section 230(1): -

Meeting(s) dispensed: Meeting(s) of the Equity Shareholders, secured creditors and unsecured creditors of the Petitioner Companies as applicable for considering the Scheme were dispensed with in view of all such shareholders, secured creditors and unsecured creditors as applicable having given their consent to the Scheme by way of affidavits. And further, as Petitioner Company No. 2 had no secured creditors and no unsecured creditors, no meeting of secured creditors and unsecured creditors of Petitioner Company No. 2 was required to be held.

(h) Consequently, the Petitioner(s) presented the instant petition for sanction of the Scheme. By an order dated 29/11/2021 the instant petition was admitted by this Tribunal and fixed for hearing on 24/01/2022 upon issuance of notices to the Statutory / Sectoral Authorities and advertisement of date of hearing. In compliance with the said order dated 29/11/2021, the Petitioner(s) have duly served such notices on the Regional Director, MCA on 13/12/2021, Registrar of Companies on 13/12/2021, Official Liquidator on 14/12/2021 Income Tax officer on 13/12/2021. The Petitioner(s) have also published such advertisements once each in the "Financial Express" and "Aajkaal" in their respective issues dated 04/01/2022. An affidavit of compliance duly affirmed on 28/07/2021 in this regard has also been filed by them.

(i) All statutory formalities requisite for obtaining the sanction of the Scheme have been duly complied with by the Petitioners. The Scheme has been made bona fide and is in the interest of all concerned.

4. Pursuant to the said advertisements and notices the Regional Director, Ministry of Corporate Affairs, Kolkata ("RD"), Official Liquidator, High Court, Calcutta have filed their representations before this Tribunal.

5. The Official Liquidator has filed his report dated 7th February,2022 and concluded as under: -

That the Official Liquidator on the basis of information submitted by the Petitioner Companies is of the view that the affairs of the aforesaid Transferor Company do not appear to have been conducted in a manner prejudicial to the interest of its members or to the public interest as per the provisions of the Companies Act, 1956/the Companies Act, 2013 whichever is applicable.

6. The RD has filed his reply affidavit dated 21/01/2022 ("RD affidavit") which has been dealt with by the Petitioner(s). The observations of the RD and responses of the Petitioner(s) are summarized as under: -

(A) Paragraph No. 2 of RD affidavit dated 21/01/2022 inter alia as follows: -

a) That it is submitted that on examination of the report of the Registrar of Companies, West Bengal it appears that no complaint and/or representation has been received against the proposed Scheme of Amalgamation. The petitioner companies are also up-dated in filing their statutory returns.

b) Appointed Date is 1st April 2019. In terms of the Circular no.09/2019 dated 21.08.2019 of the Ministry of Corporate Affairs, "where the 'appointed date' is chosen as a specific calendar date, it may precede the date of filing of the application for scheme of merger/ amalgamation in NCLT. However if the 'appointed date' is significantly antedated beyond a year from the date of filing, the justification for the same would have to be specifically brought out in the scheme and it should not be against public interest". It is not ascertainable from the documents provided by the Applicant whether the application for the scheme was filed before Hon'ble Tribunal within a year from 1st April 2019. If the application for the scheme was filed with Hon'ble Tribunal after more than one year from the appointed date, Hon'ble Tribunal may kindly direct the Applicant to bring out the justification for the appointed date being more than one year before date of filing of the application for the scheme, in the scheme according to the Circular.

c) Petitioner company should undertake to comply with the provisions of section 232(3)(i) of the Companies Act, 2013 through appropriate affirmation.

d) That the Transferee Company should be directed to pay applicable stamp duty on thetransfer of the immovable properties from the Transferor Companies to it.

e) In compliance of Accounting Standard-14 or IND-AS 103, as may be applicable, the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 or IND AS-8 etc.

f) The Hon'ble Tribunal may kindly seek the undertaking that this scheme is approved by the requisite majority of members and creditors as per +section 230(6) of the Companies Act 2013 in meeting duly held in terms of section 230(1) read with sub-sections (3) to (5) of section 230 of the said Act and the Minutes thereof are duly placed on record.

g) The Hon'ble Tribunal may kindly direct the Petitioners to file an affidavit to the extent that the Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy or no change is made.

h) The Petitioners under provisions of section 230(5) of the Companies Act 2013 have to serve notices to concerned authorities which are likely to be affected by the Amalgamation or arrangement. Further, the approval of the scheme by the Hon'ble Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such authorities shall be binding on the Petitioner Company (s) concerned.

i) The Transferor Company, Tapasvi Engineering P Ltd, is a Non-Banking Financial Company. Its financial statement as at 31.03.2020 exhibits that more than 50% of its total assets were financial assets and more than 50% of its income was financial income as follows: -

Total

Assets

Financial

Assets

Total

Income

Financial

Income

Rs. 159.52

Lakhs

Rs. 151.29

Lakhs (Short Term

Loans given)

Rs. 8.49

Lakhs

Rs. 8.49

Lakhs

(Interest Income)

Therefore, the company is an NBFC, but apparently functioning without Registration Certificate from the Reserve Bank of India under section 451A of the Reserve Bank of India Act 1934. The said material fact that the company is an NBFC functioning without necessary registration with RBI has not been also disclosed in the scheme, contrary to the provisions of section 230(2)(a) the Companies Act 2013. The company may also be liable for penal actions under section 58B or other provisions of the Reserve Bank of India Act 1934 on which aspect the views of the RBI shall be relevant.

J) The Transferor Company, Tapasvi Engineering Private Limited, in its balance sheet as at 31.3.2020 showed short term loans given as Rs.151.29 lakhs which comprises about 95% of total assets of the company. But the company did not make the statutorily required disclosures in respect of the said loans, i.e.- amount of loans given to related parties with details and amount of loans given to others. The nature of the loan and its bearing on the company's state of affairs is not ascertainable.

K) It is submitted that the Income Tax Department vide letter No Ward-10(2)/Kol/ Amalgamation / 2021-22/321 dated 06.09.2021 stated that the outstanding demand is pending for Rs. 17,49,470/- for the Asstt Year 2015-16 against the Transferee Company namely M/s Helios Infrapro Private Limited and also commented that in absence of any details, valuation certificate, Auditors, Certificate etc., it is not possible to offer any comments whether the arrangement/ amalgamation is in accordance with the provision of section 2(1B) of the I.T. Act, 1961.

B) The averments made in the Petition and the submissions made by the Learned Counsel and the petitioners have also filed affidavit of rejoinder dated 25th

February, 2022/undertaking to the reply filed by the RD are follows: -

(a) With reference to paragraph 2(a) of the said reply, since the statements made in the said paragraphs are general statements hence no comments is required to the said statements.

(b) With reference to para 2 (b), it is stated that Appointed Date is 1st April,2020 and the said company application was filed within 31st March, 2021. Hence the date of filing of company application was within one year from the appointed date. However, it is stated that the Scheme of Amalgamation with appointed date as 01/04/2020 is not against the public interest. Further, if required the appointed date may be changed to 01/04/2021 or any such date as may be deem fit and proper by Hon’ble National Company Law Tribunal, Kolkata Bench.

(c) With reference to para 2 (c), it is stated that the petitioners' companies undertake to comply with the provisions of section 232(3) (i) of the Companies Act 2013. Further, Part-III of Clause 25 of the Scheme relating to authorised capital is in accordance with section 232(3)(i) of the Companies Act 2013.

(d). With reference to para 2 (d), it is stated that the transferor company has no immovable assets. However, Transferee Company undertakes to pay applicable stamp duty. However, Petitioner Companies undertakes that stamp duty will be paid after sanction of scheme and the said Scheme becomes effective.

(e) With reference to para 2 (e), it is stated that Part-III of Clause 33 of the Scheme it is stated inter alia, that accounting entries by the Transferee Company shall be made in accordance with the applicable Accounting Standards/ Indian Accounting Standard-14 under “Pooling of Interest Method”. It is stated that the petitioners companies undertakes to comply with Accounting Standard- 14 and/ or AS-5 as applicable.

(f) With reference to para 2 (f), it is stated that meeting of shareholders and secured creditors as applicable was dispensed by Hon’ble National Company Tribunal vide order dated 07/07/2021 as shareholders, secured creditors and unsecured creditors of respective petitioner companies have given consent in writing by ways of affidavit. However, the Petitioner Companies undertake to comply with any further direction /or order of the Hon’ble NCLT, Kolkata Bench in terms of section 230(1) read with sub-sections (3) to (5) of section 230 of the said Act.

(g) With reference to para 2 (g), it is stated that the Scheme enclosed to the Company Application and Company Petition are one and same and there is no discrepancy and no change.

(h) With reference to para 2 (h), it is stated that under provisions of section 230(5) of the Companies Act 2013 and in terms of the order of Hon’ble NCLT twice notices to all concerned statutories authorities which are likely to be affected by the Amalgamation has been served and till have received no communication. Further the Transferee Company undertakes that even after the sanction of scheme, the Transferee Company will be liable for all liabilities including of all Transferor Companies. The Petitioner Companies undertakes that concerned statutory authorities decision shall be binding upon the petitioner Company concerned and Transferee Company will comply with the said statutory authority.

(i) With reference to para 2 (i), save what are matters of record, it is stated that the Tapasvi Engineering Private Limited is not Non-Banking Financial Company and accordingly not registered as NBFC with Reserve Bank of India. Further it is group company of promoters of transferee company. Temporary surplus fund as available with Tapasvi Engineering Private Limited was given as Loan with interest to known person so that it is not prejudicial to the interest of public and for the said fact the Statutory Auditor has also stated that the said transferor company is not required to be registered as NBFC. Further, the Transferee Company is into engineering and construction business and after the scheme is sanctioned resources/fund of the said transferor company will be used for expansion of business activities of transferee company.

(j) With reference to para 2 (j), save what are matters of record, it is stated as that as the surplus fund was available, the said was given as short term and loan to outsider on interest. Accordingly, no segregation was made as short term and loan term loan was not given to related party. Hence, no segregation as stated by the Ld. Regional Director was made/stated. Further, the whole amount is good and recoverable, due to which company state of affairs will not be effected.

(k) With reference to para 2 (k), it is stated that the said tax amount is not payable as on date as an Appeal for the said assessment year 2015-16 has been filed and it is pending as on date. Further, it related to Transferee Company and the transferee company will pay the outstanding amount as and when payable if any after appeal is disposed off.

6. It is further stated and submitted that the petitioners' companies undertakes that if there is any deficiencies found, or violation committed relating any enactment, statutory rules or regulation, the sanction granted by this Tribunal to the scheme will not come in the way of action being taken in accordance with law, against the concerned persons, directors and official of the petitioners and Transferee Company.

7. After hearing submissions made by the Ld Counsel appearing for the Petitioners, it is ordered that in case of any default including any Provisions of Income Tax Act in this respect of the Transferor Company the Income Tax department , the ROC, West Bengal and all other Statutory Department shall be at liberty to initiate appropriate proceedings against the Transferee Company, which after the sanction of the scheme by this Tribunal is in any case responsible for the liabilities/non-compliance of the Transferor Company also.

8. Further, heard submissions made by the Ld Counsel appearing for the Petitioner, Mr. Sanjay Sardar, Deputy Director for and on behalf of RD, who

appeared and were heard. Upon perusing the records and documents in the instant proceedings and considering the submissions, we allow the petition and make the following orders: -

(a) the Scheme of Amalgamation mentioned in paragraph 1 of the petition, being Annexure "A" hereto, be and is hereby sanctioned by this Tribunal to be binding with effect from 1st Day of April,2020 ("Appointed Date") on Transferor Company and Transferee Company, their respective shareholders and creditors and all concerned;

(b) all the property, rights and powers of the Transferor Company , including those described in the Schedule of Assets herein, be transferred from the said Appointed Date, without further act or deed, to the Transferee Company and, accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013, be transferred to and vest in the Transferee Company for all the estate and interest of the Transferor Company therein but subject nevertheless to all charges now affecting the same, as provided in the Scheme;

(c) all the debts, liabilities, duties and obligations of the Transferor Company be transferred from the said Appointed Date, without further act or deed to the Transferee Company and, accordingly, the same shall pursuant to Section 232(4) of the Companies Act, 2013, be transferred to and become the debts, liabilities, duties and obligations of the Transferee Company;

(d) the employees of the Transferor Company shall be engaged by the Transferee Company, as provided in the Scheme;

(e) all proceedings and/or suits and/or appeals now pending by or against the Transferor Company be continued by or against the Transferee Company, as provided in the Scheme;

(f) The Transferee Company do without further application issue and allot to the shareholders of the Transferor Company , the shares in the Transferee Company to which they are entitled in terms of the Scheme;

(g) leave is granted to the Petitioner(s) to file the Schedule of Assets of the Transferor Company in the form as prescribed in the Schedule to Form No.CAA7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 within three weeks from the date of receiving a copy of this order;

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

(i) The Transferor Company and the Transferee Company shall each within thirty days of the date of the receipt of this order, cause a certified copy thereof to be delivered to the Registrar of Companies for registration and on such certified copies being so delivered, the Transferor Company shall be dissolved with effect from the date or last of the dates of filing of the certified copies of the order, as aforesaid (Effective Date) and the Registrar of Companies shall place all documents relating to the Transferor Company and registered with him on the file kept by him in relation to the Transferee Company and the files relating to the said companies shall be consolidated accordingly.

9. The Petitioner(s) shall supply legible print out of the scheme and schedule of assets in acceptable form to the Registry and the Registry will append such printout, upon verification to the certified copy of the order.

10. Company Petition (CAA) No. 152/(KB)/2021 is disposed accordingly.

11. Urgent certified copy of this order, if applied or, be supplied to the parties, subject to compliance with all requisite formalities.