

**(2010) 09 P&H CK 0133**  
**In the Punjab And Haryana At Chandigarh**  
**Case No : Company Petition No. 59 of 2010**  
**In Re: D.S.M. Anti Infectives India Ltd.**

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**Date of Decision :** 17-09-2010

**Acts Referred:**

Companies Act, 1956 — Section 100, 106, 211(3A), 211(3B), 211(3C)

**Citation :** (2011) 100 CLA 228

**Hon'ble Judges :** Hemant Gupta, J

**Bench :** Single Bench

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## Judgement

Hemant Gupta, J.—The present is a petition u/s 391 - 394 of the Companies Act, 1956 ("the Act") for seeking approval of the scheme of arrangement.

2. The Petitioner-company is incorporated and registered under the Act as "DSM Anti Infectives India Ltd." on 19th November, 1999. The Petitioner-Company has the authorised share capital of Rs. 1,70,00,00,000 divided into 17,00,00,000 equity shares of Rs. 10 each and issued, subscribed and paid-up capital of Rs. 1,56,26,71,440 divided into 15,62,67,144 equity shares of Rs. 10 each.

3. The objective of the Petitioner-company, as contained in Clause (3) of the memorandum of association, includes to carry on business relating to manufacture, formulation, processing, conversion, marketing, distribution, dealership, representation, agency, purchase, sale export and import of all kinds of pharmaceutical substances, drug, intermediates, bulk drugs, pharmaceutical formulations, diagnose kits, medical equipments, raw materials, obtain and provide technical, commercial research, to carry on the business of providing specialised after sales and customer support services for all types of pharmaceutical substances, drug intermediates, etc., to conduct research work in the field of pharmaceutical substances and to establish, provide, maintain and conduct or otherwise subsidise research laboratories, institutions and experimental workshops for the purpose of medical, scientific, technical research and experiments.

4. It has been pointed out that the Board of directors of the Petitioner-company have approved the scheme of arrangement in its meeting held on 12th April,

2010 vide resolution annexure P3. The proposed scheme of arrangement is to the following effect:

(a) The scheme proposes that the company would realign its existing reserves including securities premium account to business reconstruction reserve ("BRR").

(b) Further, the scheme envisages that the company would revalue its immovable property to its current realisable value and reinstate the same at the revalued figures in the balance sheet of the company. Such a revaluation shall be carried out on the basis of the report of competent independent valuer appointed by the company and would be at the discretion of the Board of the company. Any such revaluation adjustment in full or part, as may be determined by the Board, shall also be credited to the BRR account.

This would help the company to show its assets at their true inherent strength.

(c) The amounts credited to the BRR shall be utilised by DSM to adjust accumulated losses as appearing in the books of account of DSM as on 31st March, 2009 and as prescribed in other parts of the scheme on an ongoing basis from 1st April, 2009 and thereafter for the subsequent financial years. This adjustment of losses against the BRR would enable the company to write off its accumulated losses and present a positive balance sheet of the company.

(d) It is estimated that for the financial year ending 31st March, 2010, the company would incur losses of approximately Rs. 32 crore and thereafter accumulated losses at 31st March, 2010 are expected to be approximately Rs. 140 crore. In this regard, the company is undertaking the proposed scheme of arrangement to present its true inherent strength in the balance sheet and adjust the accumulated losses with the reserves.

5. Earlier, this Court vide order dated 20th May, 2010 passed in CP No. 54 of 2010 had dispensed with the meeting of the equity shareholders of the company and that of secured creditors as there was no amount due towards the secured creditors. It is the categorical case of the Petitioner that the present scheme is in no way a compromise or arrangement with the creditors, but merely a scheme of financial restructuring of the company in which the company would create a BRR reserve account from its securities premium account to adjust the accumulated losses as appearing in the books of account as on 31st March, 2009.

6. Primarily, the scheme of arrangement proposed by the Petitioner-company is in respect of two aspects: (i) to realign its existing reserves including securities premium account to business account reserve, and (ii) to revalue its immovable property to its current realisable value.

7. Learned Counsel for the Petitioner, in respect of the first aspect of the scheme, has pointed out that the securities premium account, as envisaged u/s 78 of the Act, can be applied by a company in terms of Sub-section (2) of Section 78 of the Act for the purposes specified therein. The said securities premium account can be applied for creation of business reserve account after following the

procedure relating to reduction of securities capital of the company. To appreciate the said argument, it would be necessary to extract Section 78 of the Act hereunder:

78. Application of premium received on issue of securities. - (1) Where a company issues securities at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those securities shall be transferred to an account, to be called "the securities premium account"; and the provisions of this Act relating to the reduction of the securities capital of a company shall, except as provided in this section, apply as if the securities premium account were paid-up securities capital of the company.

(2) The securities premium account may, notwithstanding anything in Sub-section (1), be applied by the company -

(a) in paying up unissued securities of the company to be issued to members of the company as fully paid bonus securities;

(b) in writing off the preliminary expenses of the company;

(c) in writing off the expenses of, or the commission paid or discount allowed on, any issue of securities or debentures of the company; or

(d) in providing for the premium payable on the redemption of any redeemable preference securities or of any debentures of the company.

(3) Where a company has, before the commencement of this Act, issued any securities at a premium, this section shall apply as if the securities had been issued after the commencement of this Act:

Provided that any part of the premiums which has been so applied that if does not at the commencement of this Act form an identifiable part of the company's reserves within the meaning of Schedule VI, shall be disregarded in determining the sum to be included in the securities premium account.

8. It is further contended that Section 100 of the Act contemplates that a company limited by share or a company limited by guarantee and having a share capital, may, if so authorised, by articles or special resolution reduce its share capital in any way. Clause (3) of the articles of association of the company authorises the Petitioner to increase, reduce or sub-divide its share capital subject to the provisions of Section 106 of the Act. The provisions of Section 100 of the Act read as under:

100. Special resolution for reduction of share capital. - (1) Subject to confirmation by the Tribunal, a company limited by shares or a company limited by guarantee and having a share capital, may, if so authorised by its articles, by special resolution, reduce its share capital in any way; and in particular and without prejudice to the generality of the foregoing power, may -

(a) extinguish or reduce the liability on any of its shares in respect of share

capital not paid-up;

(b) either with or without extinguishing or reducing liability on any of its shares, cancel any paid-up share capital which is lost, or is unrepresented by available assets; or

(c) either with or without extinguishing or reducing liability on any of its shares, pay-off any paid-up share capital which is in excess of the wants of the company;

and may, if and so far as is necessary, alter its memorandum by reducing the amount of its share capital and of its shares accordingly.

(2) A special resolution under this section is in this Act referred to as a resolution for reducing share capital.

9. Learned Counsel for the Petitioner relies upon the judgment of Bombay High Court in the case of Hindalco Industries Ltd., In re. [2009] 93 CLA 58/[2009] 151 Comp Cas. 446, to contend that the adjustment of the securities premium account is permissible to the business reconstruction reserve. It is further pointed out that in terms of Section 78 and Section 100 of the Act, the provisions of the Act relating to the reduction of the securities capital of the company are applicable. Since there is a provision in articles of association for reduction of the share capital, therefore, the Petitioner can transfer its securities premium account to business reconstruction reserve account with the permission of this Court.

10. Since all the shareholders have consented for utilisation of the securities premium account towards the BRR account, therefore, the securities premium account, which is the account of the shareholders alone, can be applied for a purpose other than those specified in Sub-section (2) of Section 78 of the Act with the permission of the company court. Such is the view of the Calcutta High Court in the case of Ushacomm India (P.) Ltd., In re. [2006] 2 CHN 473. Therefore, the scheme to seek transfer of securities premium account to the business reconstruction amount is approved.

11. In respect of revaluation of the assets of the company, the learned Counsel for the Petitioner-company referred to para 4.1 and para 4.2 of the scheme and argued that such scheme is an arrangement within the scope of Section 391 of the Act. It is contended that the revaluation of assets is in terms of Section 211(3A), (3B) and (3C) of the Act and as per the deviations permitted under the Accounting Standards specified by the Institute of Chartered Accountants of India, therefore, the approval of this Court is sought on such aspect, which is part of the scheme approved by the shareholders of the company. Learned Counsel for the Petitioner relies upon paras 4.1 and 4.2 of the scheme, which read as under:

4.1 Upon the scheme being effective and with effect from the appointed date, the securities premium account of DSM without any further act, instrument or deed shall stand realigned to the extent as may be determined by the Board of DSM to the business reconstruction reserve account from the securities premium account

as appearing in books of account of DSM as on 31st March, 2009.

4.2 Further, upon the scheme becoming effective, fixed assets of the company may be reinstated at their respective fair values as on 1st April, 2009 as may be determined by the Board of the company. Such a revaluation shall be carried out on the basis of the report of a competent valuer appointed by the company. Any such revaluation adjustment in full or part, as may be determined by the Board, shall also be credited to the business reconstruction reserve account.

12. On the basis of the aforesaid provisions in the scheme, it is argued that the improvement in the financial status of the company is expected with creation of business reconstruction reserve account, to which the funds from the securities premium account and by revaluation of the assets will be transferred. It is argued that in terms of the accounting standards framed by the Institute of Chartered Accountants of India, the increase in the net book value arising on revaluation of the fixed assets, is normally credited directly to owner's interests under the heading of revaluation reserves and is regarded as not available for distribution. The amount added over the net book value should be credited directly to the owners' interests under a separate heading revaluation reserve and, thus, the revaluation reserve can be included in shareholders' funds. It is pointed out that the proposed treatment is a deviation from the treatment of reserve created on revaluation of fixed assets as provided in the Accounting Standard 10 issued by the Institute of Chartered Accountants of India which provides that only the amount of additional depreciation as a result of revaluation can be adjusted against the revaluation reserve.

13. In the present case, there would be no additional depreciation as a result of revaluation as the company intends to revalue its land. The BSR account would comprise securities premium account and amount of increase in value of the immovable property, both of which are part of the shareholders funds. Such scheme of arrangement has been approved by the shareholders of the company and such process will benefit not only the shareholders but also the creditors, employees and all other stakeholders.

14. In view of the fact that revaluation of assets is bilateral in nature as per the scheme; in the interest of shareholders and is part of a scheme contemplating transfer of the security premium account to the BSR account and the fact that there is no objection from the Regional Director, Northern Region, Ministry of Corporate Affairs, Noida, the scheme as proposed is approved. The scheme shall be binding on the Petitioner-company, its shareholders, secured and unsecured creditors and all concerned.

15. A certified copy of the order shall be filed with the Registrar of Companies within 14 days from the date of receipt of certified copy of this order, in Form 41.

16. A notice of the orders be published in the newspapers, i.e., Indian Express (English); Dainik Bhaskar (Hindi) and the Official Gazette of the Punjab Government.

17. Any person interested shall be at liberty to apply to the court for any direction as per law.