(2020) 03 NCLT CK 0097

In the National Company Law Appellate Tribunal

Case No : Company Petition CAA No. 104(PB) Of 2019, Company Application (CAA) No. 66(PB) Of 2019

Livguard Mobile Accessories Private Limited And Ors. APPELLANT

Vs

Livguard Batteries Private Limited RESPONDENT

Date of Decision : 16-03-2020

Acts Referred:

Income-Tax Act, 1961 — Section 72A, 72A(2), 72A(4), 72A(5)
Companies Act, 2013 — Section 61, 66, 230, 231, 232

Citation : (2020) 03 NCLT CK 0097

Hon'ble Judges : B.S.V. Prakash Kumar, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Lakshya, Amish Tandon, Ajit Sharma, Ashutosh Senger, Sanjeev Jain, Apoorva Agrawal, Tania Sharma

Final Decision : Allowed

Judgement

Sumita Purkayastha, Member (T)

1. The present petition has been filed by the companies above named under Section 230 to 232 and other applicable provisions of the Companies Act, 2013 (for brevity 'the Act') read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (for brevity 'the Rules') in relation to the Scheme of Arrangement (hereinafter referred to as the 'SCHEME') whereby in the first stage it is proposed (i) to demerge the 'Mobile Accessories Business Undertaking' (as defined in the Scheme) of Livguard Mobile Accessories Private Limited (hereinafter referred to as "Petitioner Transferor/Demerged Company-1") into Livguard Batteries Private Limited (hereinafter referred to as "Petitioner Transferee/Resulting Company") and immediately thereafter in the second stage, demerger of the 'Manufacturing Business Undertaking' (as defined in the Scheme) of Ncubate Logistic & Warehousing Private Limited (hereinafter referred to as "Petitioner Transferor/Demerged Company-2") into Petitioner Transferee/

Resulting Company (ii) reduction and consolidation of non-cumulative redeemable preference share capital of Petitioner Transferor/Demerged Company-1 and Petitioner Transferor/Demerged Company-2, simultaneously with the above demerger, on occurrence of the Effective Date, with effect from the Appointed Date pursuant to Sections 61, 66 and other applicable provisions of the of the Companies Act, 2013 and rules made there under.

2. From the records, it is seen that the First Motion Application seeking directions for dispensing with the meetings of the Shareholders, Secured Creditors and Unsecured Creditors was filed before this Tribunal vide (CAA) No. 66 (PB)/2019 and directions were issued by this Tribunal, wherein the meetings of the Shareholders of the all the Petitioner companies and Secured and Unsecured creditors of both the demerged companies were dispensed with vide order dated 11.04.2019. In respect of secured and unsecured creditors of the resulting company, directions were issued to convene their respective meetings in order to obtain their approval in favour of the Scheme.

3. Subsequently, the aforesaid meetings were duly held on 26.06.2019 and the Scheme was unanimously approved by the members participated in the said meetings, the reports of the chairperson and scrutinizer have been placed on record.

4. On 02.09.2019 (amended order) this Tribunal ordered Notice in the Second Motion petition moved by the Petitioner Companies in connection with the scheme of arrangement, to the (a) Central Government through Regional Director (Northern Region), Ministry of Corporate Affairs; (b) Registrar of Companies, NCT of Delhi & Haryana, Ministry of Corporate Affairs; (c) the Income Tax Department; (d) Official Liquidator and to other sectoral regulators and to such other Objector(s), if any.

5. It is seen from the records that the petitioners, have filed an affidavit on 09.09.2019 in relation to the compliance of the order passed by the Tribunal as noted above and a perusal of the same discloses that the petitioners have carried out the paper publication as directed by the Tribunal in one issue of the English Daily 'Business Standard' on 30.08.2019 and the Hindi Daily 'Business Standard' (Delhi Edition) on 05.09.2019.

6. Further, in compliance with the directions issued by this Tribunal, a notice of the petition has also been served on the following authorities/sectoral regulators:

i. The Central Government through the Regional Director (Northern Region), Ministry of Corporate Affairs;

ii. Office of the Registrar of Companies, Ministry of Corporate Affairs, NCT of Delhi & Haryana;

iii. Income Tax Department, New Delhi in the respective circle/wards, through DCIT (High Court Cell), Lawyer's Chamber, Block No. 1, Room No. 428 & 429, Delhi High Court, New Delhi,

iv. Office of the Official Liquidator, Ministry of Corporate Affairs;

A copy of the covering letter duly acknowledged by the Office of the Deputy Commissioner of Income Tax along with Postal receipt of India Post for service to the Regional Director and Registrar of Companies and a copy of Publication in the newspaper is attached with the affidavit.

7. That the Regional Director, Northern Region, MCA to whom notice was issued has filed an Affidavit on 25.09.2019 before this Tribunal, New Delhi and upon perusal of the same it is observed that the Regional Director has mentioned certain observation and does not have any objection/adverse remark against the Scheme of Arrangement.

8. That the report of the Official Liquidator filed on 17.09.2019 has been placed on record which states that the Official Liquidator has not received any complaint against the proposed scheme of Arrangement from any person/party interested in the scheme. The Official Liquidator is of the view that the affairs of the aforesaid Companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to public interest as per the provisions of the Companies Act, 1956 or 2013, whichever is applicable. Hence, no objection has been raised in the report submitted by the Official Liquidator.

9. The Income Tax Department ("IT Dept.") has filed its report for all the three Petitioner Companies. The IT Dept. through its counsel, has filed observations/ report in relation to Petitioner Transferor/Demerged Company-1 and Petitioner Transferee/Resulting Company on 11.10.2019 and for the Petitioner Transferor/ Demerged Company-2 on 07.10.2019. The IT Dept. in the above-mentioned Reports has made, inter alia, the following observations:

(a) That the Petition is silent regarding the aspect of carry forward of business losses and unabsorbed depreciation of the Petitioner Transferor/Demerged Company-1 under Section 72A of Income Tax Act, 1961 ("IT Act") and that treatment of carry forward of business losses and unabsorbed depreciation is not explained;

(b) That the amalgamating company i.e. the Petitioner Transferor/Demerged Company-1 shall have complied with the provisions of section 72A(2) of the IT Act;

(c) That the genuineness of the merger is satisfied through (i) the satisfaction of Section 72A(2) of the IT Act read with the applicable Income Tax Rules, 1962 ("IT Rules") post the merger has been approved; (ii) examination of the proposed merger in light of earlier mergers/demergers (if any) involving the Petitioner Companies.

10. The Petitioner Companies vide affidavit in response to the Reports of IT Dept. dated 19.11.2019 provided the following undertakings:

(a) that the Scheme amongst the Petitioner Companies is a scheme of demerger and that none of the Petitioner Transferor/Demerged Companies are being wound-up as part of the proposed Scheme. In this regard, provisions of Section 72A(2) of the IT Act are applicable only to a scheme whereby a company merges/ amalgamates with another company;

(b) that Sections 72A(4) and 72A(5) of IT Act specifically provide for conditions to be adhered to by the concerned companies in cases of demerger. The relevant extracts of the Sections are provided herein below for reference:

"(4) Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorhed depreciation of the demerged company shall--

(a) where such loss or unabsorhed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

(5) The Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes."

(c) that the Petitioner Companies have filed copy of the unaudited provisional statement as on 01st April, 2018 containing the details of assets and liabilities of (i) the Mobile Accessories Business Undertaking of the Petitioner Transferor/ Demerged Company-1; and (ii) Manufacturing Business Undertaking of the Petitioner Transferor/Demerged Company-2, proposed to be demerged into and with the Petitioner Transferee/Resulting Company which have been annexed as part of the Second Motion Petition (being Company Petition (CAA) No. 104/ PB/2019) Annexure P-5 and Annexure P-14, respectively. Any change in the such provisional statement of assets and liabilities of Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2 shall be taken into consideration upon the Scheme becoming effective;

(d) that as per the applicable provisions of section 72A(4) of the IT Act, the losses or unabsorbed depreciation which are relatable/apportioned to Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2 being transferred to the Petitioner Transferee/Resulting Company, shall be carried forward and set off in the hands of Petitioner Transferee/Resulting Company;

(e) that the conditions laid down under Section 72A(4) and 72A(5) of the IT Act are duly satisfied by Petitioner Transferor/Demerged Companies;

(f) that in case any of claim of carry forward of losses and unabsorbed depreciation allowance in respect of Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2 is ascertained at the time of assessment/re-assessment proceedings as per the provisions of the IT Act, the Petitioner Transferee/Resulting Company shall extend full assistance and cooperation to the IT Dept. re. such claims.

11. Thereafter, the IT Dept. filed a revised/updated report dated 20.11.2019 in relation to Petitioner Transferor/Demerged- Company-1 and Petitioner Transferee/ Resulting Company. In response to the Revised Report of IT Department, In relation to Petitioner Transferor/Demerged Company-1 and Petitioner Transferee/ Resulting Company, the Petitioner Companies vide affidavit filed on 04.12.2019, submitted that the proposed Scheme is a scheme of demerger and that none of the Petitioner Transferor/Demerged Companies are being wound-up as part of the proposed Scheme. Hence, Section 72A(2) of the IT Act is not applicable, as the same is applicable only in respect of a scheme of arrangement of a company with another company. Furthermore, the Petitioner Companies submitted that Petitioner Companies have duly complied with the conditions laid down under Section 72A(4) and 72A(5) of the IT Act and the Petitioner Companies undertakes to comply with the requirement of Section 72A(4) and 72A(5) of the IT Act, as may be applicable. Further, the Petitioner Transferee/Resulting Company also undertook to discharge and honour all pending and existing tax demands (if any) relatable to the Demerged Undertaking (being Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2) proposed to be demerged and merged with the Petitioner Transferee/ Resulting Company, as raised by the Income Tax Department in accordance with law, subject to such demand attaining finality.

12. 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 affidavits filed by the Regional Director, Northern region, Ministry of Corporate Affairs, Official liquidator and submissions made by the Standing Counsel for the Income Tax Department, whereby no objections have been raised to the proposed Scheme or if raised has been met by filing undertaking, there appears no impediment to grant sanction to the Scheme. However, the Companies shall remain bound by the undertaking filed by either of them. Consequently, sanction is hereby granted under Sections 230-232 of the Companies Act, 2013. The Petitioners shall however remain bound to comply with the statutory requirements in accordance with law.

13. In view of absence of any other objections having been placed on record before this Tribunal and since all the requisite statutory compliances having been

fulfilled, this Tribunal sanctions the Scheme of Arrangement annexed as (Annexure P-1) with the Company Petition as well as the prayer made therein.

14. 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 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.

15. While approving the Scheme as above, it is clarified 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 payment in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law.

THIS TRIBUNAL DO FURTHER ORDER:

That in terms of the Scheme:

A. All the property, rights and powers relatable to Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2 be transferred without further act or deed to the Petitioner Transferee/Resulting Company and accordingly the same shall pursuant to section 232 of the Act, be transferred to and vest in the Petitioner Transferee/Resulting Company for all the estate and interest of Demerged Business Undertaking-1 of Petitioner Transferor/ Demerged Company-land Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company 2 therein but subject nevertheless to all charges now affecting the same;

B. All the liabilities and duties relatable to Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of the Petitioner Transferor/Demerged Company-2 be transferred without further act or deed to the Petitioner Transferee/Resulting Company and accordingly the same shall pursuant to section 232 of the Act, be transferred to and become the liabilities and duties of the Petitioner Transferee/Resulting Company;

C. All proceedings now pending by or against the Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2 be continued by or against the Petitioner Transferee/Resulting Company;

D. All the employees of the Demerged Business Undertaking-1 of Petitioner Transferor/Demerged Company-1 and Demerged Business Undertaking-2 of Petitioner Transferor/Demerged Company-2 in service on date immediately preceding the date on which the Scheme finally take effect shall become the employees of the Petitioner Transferee/Resulting Company without any break or interruption in their service;

E. The Petitioner Companies are directed to file a copy of this Order along with a copy of the Scheme of Arrangement with the concerned Registrar of Companies, electronically, along with E-Form INC-28, in addition to the physical copy within 30 days from the date of receipt of copy of the Order from the Registry;

F. The Order of sanction to this Scheme shall be prepared by the Registry as per the relevant format provided under the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 notified on 14th December, 2016.

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

H. Accordingly, the Scheme stands sanctioned and CAA -104(PB)/2019 is allowed.

