(2023) 01 NCLT CK 0024

In the National Company Law Tribunal

Case No : C.P.(CAA)/172(MB)2022 IN C.A.(CAA)/67(MB)/2022

Mahindra Electric Mobility Limited Vs

Date of Decision : 13-01-2023

Acts Referred:

Companies Act, 2013 — Section 230, 230(1), 230(1)(a), 230(1)(b), 230(3), 230(4), 230(5), 230(6), 232, 232(3)(i)
Income Tax Act, 1961 — Section 2(1B)

Citation : (2023) 01 NCLT CK 0024

Hon'ble Judges : P. N. Deshmukh, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Hemant Sethi, Devanshi Sethi, Tanaya Sethi, Tanaya Sethi

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member Technical

1. The Court is convened by videoconference today.

2. Heard the learned Counsel for the Petitioners and the representative of the Regional Director Western Region, Ministry of Corporate Affairs, Mumbai. No objector has come before this Tribunal to oppose the Scheme and nor has any party controverted any averments made in the Petition.

3. The sanction of the Tribunal is sought under sections 230 to 232 other applicable provisions of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, to the Scheme of Merger by Absorption of Mahindra Electric Mobility Limited ("MEML" or "Transferor Company") with Mahindra and Mahindra Limited ("M&M" or "Transferee Company") and their respective shareholders ('Scheme').

4. The Counsel for the Petitioner Companies further submits that, the Petitioner Company 1 is currently engaged in designing and manufacturing of electrically powered vehicles along with designing and development of related technology for end use vehicles and the Petitioner Company 2 is inter alia, engaged in the

business of manufacture and sale of tractors, general purpose utility vehicles, light commercial vehicles, three-wheelers and trucks and buses.

5. The Counsel for the Petitioner Companies submits that the proposed Merger by Absorption was approved unanimously by the Board of Directors of the respective Petitioner Companies on 28th May, 2021. A certified true copy of Board Resolution of respective Petitioner Companies approving the Scheme are annexed with Company Scheme Petition. The Board of Directors of the respective Petitioner Company believe that the Scheme is in the best interests of the respective entities and their respective stakeholders including its shareholders, employees, and creditors.

6. The Appointed Date for the Scheme of Merger by Absorption is 1st day of April 2021.

7. The Learned Counsel appearing on behalf of the Petitioner Companies states that the joint Company Petition have been filed in consonance with the order dated 10th June 2022, passed by this Tribunal in the connected Company Scheme Application bearing C.A.(CAA)/67/(MB)/2022.

8. The Learned Counsel appearing on behalf of the Petitioner Companies states that the Petitioner Companies have complied with all requirements as per directions of this Tribunal and they have filed necessary Affidavits of compliance with this Tribunal. Moreover, the Petitioner Companies undertake to comply with all the statutory requirements, if any, as may be required under the Companies Act, 2013 and the Rules made there under. The said undertaking is accepted by the Petitioner Companies.

9. The Learned Counsel for the Petitioner Companies states that, by sanction of this Scheme of Merger by Absorption the Petitioner Companies will be able to achieve the following rationale:

• Global automobile industry is accelerating the adoption of Electric Vehicles ("EV") and its share to total Automobile market is expected to increase rapidly. The Indian Government has also been encouraging this migration with various timeline linked incentives. Future readiness will require increased investment, reconfiguration of value chain, faster launch of new EV products and remapping of managerial skill sets.

• MEML has expertise in EV technology while M&M has expertise in automotive design, engineering and manufacturing, sourcing network and sales, marketing & service channels. Thus, the value chain required for end to end EV development, manufacturing and sales is currently spread between M&M and MEML. The proposed consolidation will bring this entire value chain under one umbrella driving sharper focus for smooth and efficient management of the value chain requirements with scale and agility required to meet the increasing focus on EVs.

• M&M also envisages significant investments in the EV business to scale up the business and develop a robust EV product pipeline for which the proposed consolidation will be critical. Further, M&M's better credit rating will also provide significant savings in finance costs for funding the investment.

• The consolidation of MEML with M&M will also result in:

i. Optimizing capital investments for manufacturing EVs by leveraging manufacturing and R&D infrastructure of M&M and hence lower EV costs.

ii. Leveraging M&M Sales & Marketing channel to increase EV penetration, optimize price points for customers and improve dealer viability.

iii. Rationalization of number of identified operating entities thereby reducing the legal and regulatory compliances.

• The proposed scheme will be beneficial, advantageous and not prejudicial to the interests of the shareholders, creditors and other stakeholders of MEML and M&M.

10. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai has filed its Report dated 11th November 2022, inter alia stating that, save and except the observations as stated in paragraph 2 of the report, this Tribunal may pass such order or orders as deemed fit and proper in the facts and merits of the case. The Petitioner Companies have filed an Affidavit in rejoinder to the report filed by the Regional Director with this Tribunal on 17th November 2022 providing clarification/undertakings to the observations made by the Regional Director. The clarifications and undertakings given by the Petitioner Companies are accepted.

11. The observations made by the Regional Director and the clarifications/ undertakings given by the Petitioner Companies are summarized in the table below:

Para (IV)

RD Report/Observations dated 12th April 2022

Response of the Petitioner Companies.

(a)

In compliance of AS-14 (IND AS-103), the Petitioner Companies shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5(IND AS-8) etc.

As far as observations made in paragraph 2(a) of the Report of the Regional Director are concerned, the Transferee Company undertakes that it shall pass necessary accounting entries in connection with the Scheme as per IND AS-103 as well as comply with other applicable Accounting Standards such as IND AS 8, IND AS 10, IND AS 102, etc. The relevant accounting treatment has also been provided in Para 18(b) of the Scheme.

(a)

As per Definition of the Scheme, ‘The Appointed Date’ means the 1st day of April, 2021 or such other date as may be directed or approved by the National Company Law Tribunal or any other appropriate authority.

‘The Effective Date’ means the last of the dates on which the conditions mentioned in Clause 22(a) are satisfied.

The Petitioners may be asked to comply with the requirements as clarified vide circular no. F.No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs.

As far as observations made in paragraph 2(b) of the Report of the Regional Director are concerned, the Petitioner Companies clarify that, the Scheme shall be effective from the Appointed Date which is a specific date i.e., 01 April, 2021. Further, the merger application was filed with the NCLT on 2 nd February, 2022. Accordingly, the Scheme is in conformity with the circular no. F. No.7/12/2019/ CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs.

(c)

Petitioner Company have to undertake to comply with section 232(3)(i) of Companies Act, 2013, where the transferor company is dissolved, the fee and stamp duty paid by the transferor company on its authorised capital shall be set-off against fees and stamp duty payable by the transferee company on its authorised capital subsequent to the amalgamation and therefore, petitioners to undertake that the transferee company shall pay the difference of fees and stamp duty..

As far as observations made in paragraph 2(c) of the Report of the Regional Director are concerned, the Transferee Company undertakes to comply with section 232(3)(i) of the Companies Act, 2013, wherein pursuant to the dissolution of the Transferor Company, the fees, if any, paid by the Transferor Company on its Authorized Capital shall be set-off against any fees payable by the Transferee Company on its Authorized Capital subsequent to the Scheme of Merger.

(d)

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 Act in meetings duly held in terms of Section 230(1) read with subsection (3) to (5) of Section 230 of the Act and the Minutes thereof are duly placed before the Tribunal.

As far as observations made in paragraph 2(d) of the Report of the Regional Director are concerned, the Petitioner Companies clarify that, the Scheme is a Merger of subsidiary with its holding company. Further, the Transferor Company has obtained consent from all its shareholders for the approval of the Scheme in the form of an Affidavit and annexed with the Company Application. The Transferor Company has obtained the consent Affidavit from its sole Secured Creditor as on 31st October, 2021 and annexed with the Company Application. In view of the above, the NCLT, vide its order dated 10th June, 2022 ("Order"), had dispensed with the meeting of shareholders and secured creditors of the Transferor Company. As directed by the NCLT in the Order, a meeting of Equity Shareholders of the Transferee Company was convened on 19th August, 2022. The Equity Shareholders of the Transferee Company representing 81.3256% of the total value of the Equity Shareholders voted on the Scheme, and 99.9988% of such Equity Shareholders who voted, had voted in favour of the Scheme of Merger by Absorption at the meeting. The Transferee Company had no Secured Creditor as on 31st October, 2021 and therefore, the question of convening and holding of the meeting of Secured Creditors of the Transferee Company did not arise. The Transferor Company had 846 Unsecured Creditors of the value of Rs. 4,85,79,62,474 and the Transferee Company had 43,596 Unsecured Creditors of the value of Rs. 165,350,995,308 as on 31st October, 2021. Further, the Scheme is a Scheme of Merger by Absorption of the Petitioner Companies and their respective Shareholders as contemplated under Section 230(1)(b) of the Companies Act, 2013 and not in accordance with the provisions of Section 230(1)(a) of the Companies Act, 2013 as there is no compromise and/or arrangements with the creditors as no sacrifice is called for. Therefore, the meetings of the Unsecured Creditors of the Petitioner Companies were dispensed with as per the Order. However, by the Order, the NCLT directed the Transferor Company to issue notice to its Unsecured Creditors having an outstanding amount of more than Rs. 25,00,000 constituting more than 95% in value and the Transferee Company to issue notice to its Unsecured Creditors having outstanding amount of more than Rs. 1,00,00,000 constituting more than 95% in value by Air Mail or Registered Post or Registered Post Acknowledgement Due (RPAD) or Speed Post or Courier or Hand Delivery or through E-mail (to those creditors whose email addresses are duly registered with the respective Petitioner Companies), at their last known addresses as per the records of the respective Companies. In view of the above, the Petitioner Companies have issued notice to their concerned Unsecured Creditors as directed by the NCLT as per the Order

(e

)The Petitioner Company states that the Transferee Company shall be in compliance with provisions of Section 2(1B) of the Income Tax Act, 1961. In these regards, the petitioner company shall ensure compliance of all the provisions of Income Tax Act and Rules thereunder.

As far as observations made in paragraph 2(e) of the Report of the Regional Director are concerned, the Petitioner Companies clarify that the Scheme is in compliance with provisions of Section 2(1B) of the Income Tax Act, 1961 and undertakes that all the relevant provisions of Income Tax Act and Rules thereunder will be complied with.

(f)

The observations in ROC report and the clarifications/undertakings given by the Petitioner Companies are as under:

(i)

As per MCA Master data the Authorized and paid up Share Capital of the Transferee Company is Rs. 10,00,00,00,000/- and Rs. 3,59,78,62,520/- respectively. However the paid-up Share Capital of the Transferee Company is Rs. 358,41,63,450/- is mentioned at Para No. 3.1 does not match with MCA master data.

The amounts highlighted in the ROC observation are in relation to the Transferor Company and not the Transferee Company. It may be noted that the amount of Rs. 358,41,63,450/- as mentioned in Para 3.1 of the application is the paid-up share capital of the Transferor Company as on 31st March 2021. Further, the amount of Rs. 3,59,78,62,250/- is the paidup share capital of the Transferor Company as on 16th July, 2022 as submitted in the letter filed with the office of the Regional Director. The difference is on account of additional shares allotted by the Transferor Company pursuant to exercise of ESOPs by its employees under the Company ESOP Scheme. A copy of the capital evolution of the Transferor Company from 31st March 2021 till date along with the relevant Form PAS-3 is annexed herewith as "Annexure A". Further, it is clarified that valuation of the Transferor Company was arrived on a fully diluted basis i.e. including shares proposed to be issued under ESOP Scheme, and hence, issue of any additional shares by the Transferor Company pursuant to the exercise of ESOPs does not have any impact on the Share Exchange Ratio and the Scheme.

ii.

Interest of Creditors should be protected

The present Scheme is an Arrangement between the Petitioner Companies and their respective shareholders and there is no Compromise and/or Arrangement with the creditors and no sacrifice is called for. Further, pursuant to the Scheme, all assets and liabilities of the Transferor Company would be transferred to the Transferee Company. Also, the net worth of the Transferee Company is positive and the assets of the Transferee Company are more than sufficient to discharge its liabilities. Accordingly, post- merger, the interest of the creditors should be protected.

iii.

Transferee Company is listed. In this regard it is observed that NOC from NSE & BSE has been received vide their letters no. NSE/LIST/27766_III DATED 14/01/2022 AND dcs/amal/pb/r37/2191/2020-21 dated 13/01/2022

Observation of ROC in relation to NOC from NSE & BSE is a factual statement. Petitioner Companies undertake to comply with the NOC received from NSE & BSE.

iv.

Complaints received vide SRN I00030463, J00037220, I00060575 including one compliant related to non receipt of mature amount of FDR & interest thereon are pending including are complaint against Transferee company i.e. Mahindra and Mahindra Limited, and no complaint against the Transferor company as per information received from Complaint section.

The Transferee have filed the detailed reply with respect to each complaint in the rejoinder filed with the RD. The Transferee Company has filed its reply against all the Complaints and the same should be addressed as per the due process of law. Further, the above complaints are not related to this proposed Scheme in any manner, and nor would these be affected by this merger in any manner. Accordingly, the proposed Scheme does not have any bearing on complaints in any manner whatsoever, and in lieu thereof does not place any impediment on the rights of the complainants and obligations of the Transferee Company to address / defend the claims raised against the Transferee Company.

v.

It is submitted that as per the provisions of Section 232(3)(i) of the Companies Act,2013, where the transferor Company is dissolved, the fee, if any paid by the transferor company on its authorised capital shall be setoff against any fees payable by the Transferee company on its authorised capital subsequent to the amalgamation. Therefore, remaining fee, if any after setting-off the fees already paid by the transferor company on its authorized capital, has to be paid by the transferee company on the increased authorized capital subsequent to the amalgamation.

The Transferee Company undertakes to comply with section 232(3)(i) of the Companies Act, 2013, wherein pursuant to the dissolution of the Transferor Company, the fees, if any, paid by the respective Transferor Company on its Authorized Capital shall be set-off against any fees payable by the Transferee Company on its Authorized Capital subsequent to the Scheme of Merger

12. The Official Liquidator has filed his report on 31st October 2022, inter alia stating therein that the affairs of the Transferor Company have been conducted in a proper manner. Accordingly, the Transferor Company may be ordered to be dissolved without winding up.

13. Upon this Scheme becoming effective and upon Merger of MEML with M&M in terms of this Scheme, M&M shall, following such transfer and vesting of the Undertaking of MEML into M&M without any application or deed, issue and allot Equity shares, credited as fully paid up, to the extent indicated below, to the equity shareholders of Transferor Company whose names appear in the register

of members of Transferor Company (except Transferee Company or its subsidiaries held directly or jointly with its nominee shareholders), on the Record Date or to such of their respective heirs, executors, administrators or other legal representatives or other successors in title in the following proportion viz.:

"480 (Four Hundred Eighty) Ordinary (Equity) Shares of the face value of Rs. 5 each of M&M shall be issued and allotted as fully paid up for every 10,000 (Ten Thousand) Equity share of the face value of Rs. 10 each fully paid up held in MEML"

14. From the material on record, the Scheme appears to be fair and reasonable and is not in violation of any provisions of law and is not contrary to public policy.

15. Since all the requisite statutory compliances have been fulfilled, Company Petition bearing C.P.(CAA)/172(MB)2022 filed by the Petitioner Companies are made absolute in terms of prayers clause of the said Company Scheme Petition.

16. The Scheme of Merger by Absorption is hereby sanctioned, and the appointed date of the Scheme is fixed as 1st day of April 2021.

17. The Petitioner Companies are directed to file a certified copy of this order along with a copy of the Scheme with the concerned Registrar of Companies, electronically, along with e-Form INC-28 in addition to physical copy, within 30 days from the date of receipt of order, duly certified by the Designated Registrar of this Tribunal.

18. The Petitioner Companies to lodge a certified copy of this order and the Scheme duly authenticated by the Designated Registrar of this Tribunal, with the concerned Superintendent of Stamps, for the purpose of adjudication of stamp duty payable, if any, on the same within 60 days from the date of receipt of the certified copy of order.

19. All concerned regulatory authorities to act on a copy of this Order duly certified by the Registry of this Tribunal, along with a copy of the Scheme.