(2023) 01 NCLT CK 0042

In the National Company Law Tribunal

Case No : CSP NO. 1035/MB-I/2020 Connected With CSA NO. 636/MB-I/2020

Omni Wellness and Nutrition Limited Vs

Date of Decision : 20-01-2023

Acts Referred:
Companies Act, 2013 — Section 230, 230(1), 230(3), 230(5), 230(6), 232, 232(3)(i), 232(6)

Citation : (2023) 01 NCLT CK 0042

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

Bench : Division Bench

Advocate : Hemant Sethi, Vidisha Poonja, Devanshi Sethi, Rupa Sutar

Final Decision : Disposed Of

Judgement

Shyam Babu Gautam, Member (Technical)

1. The Court is convened by videoconference today.

2. Heard Learned Counsel for Petitioner Companies. No objector has come before the Tribunal to oppose the Petition and nor has any party controverted any averments made in the Petition.

3. The sanction of this Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 ("Act"), to the Scheme of Amalgamation (Merger by Absorption) of Omni Wellness and Nutrition Limited ("Transferor Company 1") and Paeon Wellness and Nutrition Limited ("Transferor Company 2") into OmniActive Health Technologies Limited ("Transferee Company") and their re-spective shareholders (the "Scheme").

4. The Learned Counsel for the Petitioner Companies submits that OWN was formed with an objective of carrying on the business of manufac-turers, producers, buyers, sellers, traders, exporters, importers, whole-salers, retailers, agents, dealers and distributors in nutraceuticals, food supplements, ayurvedic, herbal formulations, pharmaceuticals and cosmetics and provide all related services in the above areas in India and abroad. PAEON was formed with an

objective of carrying the business of manufacturers, producers, buyers, sellers, traders, export-ers, importers, wholesalers, retailers, agents, offline and online dealers and distributors in nutraceuticals, food supplements, ayurvedic, herbal formulations, pharmaceuticals, cosmetics and all related services in the above areas in India and abroad both offline and online/e-commerce mode. OAHTL is formed with an objective of carrying out business of buying, selling, producing, import, export, manufacturing and carry-ing on business in phytochemicals, plant actives, plant based medicinal extracts, nutritional products, herbal isolates and actives, plant-based chemicals ingredients.

5. The Learned Counsel for the Petitioner Companies submits that the rationale mentioned in the Scheme is as under:

a. Greater integration and greater financial strength and flexibility for the Transferee Company, which would result in maximising the overall shareholder value, and will improve the competitive position of the combined entity.

b. Greater efficiency in cash management of the Transferee Company, and unfettered access to cash flow which can be deployed more effi-ciently to fund organic and inorganic growth opportunities in order to maximise shareholder value.

c. Improved organisational capacity and leadership, arising from pooling of human capital who have the diverse skills, talent and vast experi-ence to compete successfully in a competitive industry.

d. Cost savings expected to flow from more focused operational efforts, rationalization, standardization and simplification of business pro-cesses, and elimination of duplication and rationalization of compli-ance costs and administrative expenses.

6. All the Petitioner Companies have approved the said Scheme by passing their respective Board Resolutions dated 5th February 2020 and subsequently on 1st September 2020 and 14th September 2020 and have approached the Tribunal for sanction of the Scheme.

7. Learned Counsel for the Petitioner Companies submits that the Petition has been filed in consonance with the order dated 4th May 2020 passed by this Tribunal in CA(CAA) No. 636/MB/IV/2020.

8. Learned Counsel for the Petitioner Companies states that the Peti-tioner Companies have complied with all the requirements as per the directions of this Tribunal.

9. The Learned Counsel for the Petitioner Companies states that the shares of the Petitioner Companies are not listed on any stock ex-changes.

10. The Regional Director has filed its Report dated 31st March 2021 (“Re-port”) praying that this Tribunal may pass such orders as it thinks fit, save and except as stated in Paragraphs IV (a) to (j), the Petitioner Companies have filed an

Affidavit in Rejoinder dated April 30, 2021 and have clarified as follows.:

Sr. No. Para

Regional Direc- tor Report / Ob- servation Dated 31st March 2021

Response from the Pe- titioner Companies

Supplemantary Re- port of the Regional Director dated 26th October 2021

IV (a)

'In addition to compliance of AS-14 (IND AS-

103), the Trans- feree Company shall pass such accounting en- tries which are necessary in con- nection with the scheme to comply with other appli- cable Accounting Standards such as AS-5 (IND AS-8) etc.'

As regards the observa- tion made in Para- graph IV (a) of the said Report, the Petitioner Company 3 / Trans- feree Company under- takes that in addition to compliance of AS-14 (IND AS-103), the Petitioner Company 3 / Transferee Company shall pass such Ac- counting entries which are necessary in con- nection with the Scheme to comply with all applicable Account- ing Standards such as AS-5 (IND AS-8), to the extent applicable.

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IV (b)

As per Part-A- Definitions, Clause 1(c) & 1(j) of the Scheme,

"Appointed Date" means the 1st day of Janu- ary 2020 or such other date as the Appropriate Au- thority may di- rect or fix as the date on which the Scheme shall

come into opera- tion;

"Effective Date" means the date on which the cer- tified copy of the Order of Na- tional Company Law Tribunal sanctioning the Scheme is filed by the Transferor Companies and Transferee Com- pany with the Registrar of Com- panies, Mumbai, Maharashtra.

Any references in this Scheme to the "date of com- ing into effect of this Scheme" or "effectiveness of the Scheme" or "Scheme taking effect" shall mean the Effective Date.

In this regard, it is submitted that Section 232(6) of the Companies Act, 2013 that the scheme under this section shall clearly indicate an appointed date from which

it shall be effec- tive, and the scheme shall be deemed to be ef- fective from such date and not at a date subsequent to the appointed date. However, this aspect may be decided by the Hon'ble Tribu- nal taking into account its inher- ent powers.

Further, the Peti- tioners may be asked to comply with the require- ments and clari- fied vide circular no. F. No. 7/12/2019/CL-

1 dated

21.08.2019 is-

sued by the Min- istry of Corporate Affairs.'

As regards the observa- tion made in Para- graph IV (b) of the said Report, the Petitioner Companies seek to clarify as under:

i. Clause 1(c) of the Scheme provides that the Appointed Date means the 1st day of January 2020 or such other date as the Appropriate Authority may direct or fix as the

date on which the Scheme shall come into operation, which is in compliance with the provisions of Section 232(6) of the Compa- nies Act,2013 and the Scheme shall take into effect from that date;

ii. Clause 1(j) of the Scheme provides that the Effective Date means the date on which the certified copy of the Order of National Company Law Tribunal, sanc- tioning the Scheme is filed by the Transferor Companies and Trans- feree Company with the Registrar of Com- panies, Mumbai, Ma- harashtra. Any refer- ences in this Scheme to the "date of coming into effect of this Scheme" or "effective- ness of the Scheme" or "Scheme taking effect" shall mean the Effec- tive Date.

iii. Clause 1(c) read with Clause 4 of the Scheme provides that the transfer and vesting shall take place with ef- fect from the Ap- pointed Date and upon

this Scheme coming into effect.

iv. The Petitioner Companies undertake that they have duly complied with the pro- visions and require- ments set out vide cir- cular no. F. No 7/12/2019/CL-I dated 21-08-2019 is- sued by the Ministry of Corporate Affairs.

Basis the above, the Pe- titioner Companies confirm that the obser- vations made in Para IV(b) of the Report have been duly com- plied by it.

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IV (c)

The Hon'ble Tri- bunal may kindly seek the understanding that this Scheme is approved by the requisite ma- jority of members and creditors as per Section 230(6) of the Act in meetings duly held in terms of Section 230(1) read with sub-sec- tions (3) to (5) of Section 230 of the Act and the Minutes thereof are duly placed before the Tribu- nal.

As regards the observa- tion made in Para- graph IV (c) of the said Report, it is stated that the in view of the affi- davits of consent ob- tained from all the shareholders of the Transferor Compa- nies, Hon'ble Tribunal vide its order dated 4th May 2020 in CA

(CAA) No.636/MB.IV/2020

was pleased to grant dispensation of the meetings of the share- holders of the Trans- feror Companies. The Hon'ble Tribunal was also pleased to grant dispensation of the meetings of the share- holders and creditors on the ground that the Scheme did not entail any reconstructions or arrangement with ei- ther the creditors of the Petitioner Companies or shareholders of the Transferee Company.

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IV (d)

Hon'ble Tribunal may kindly direct the petitioners to file an affidavit to the extent that the Scheme enclosed to Company Ap- plication & Com- pany Petition, are one and the same and there is no discrepancy

/any change/changes are made, for changes if any, liberty be given to Central Govern- ment to file fur- ther report if any required.

As regards the observa- tion made in Para- graph IV (d) of this Re- port, the Petitioner Companies undertake and confirm that that the Scheme attached to the Company Petition is the Updated Scheme of Amalgamation and the change as com- pared to the Scheme of Amalgamation at- tached to the Company Application was to only update the changes in the Author- ised and Issued Share Capital of the Peti- tioner Companies (Clause 3 and Clause

14 of the Scheme), which had occurred during the intervening period i.e. between the date of filing of the Company Application and of the Company Petition . Save and ex- cept for the abovemen- tioned change, the Pe- titioner Companies un- dertakes and confirm that the Scheme en- closed to Company Ap- plication and Com- pany Petition, are one and the same.

On the basis of obser- vations made by the Regional Director and reply submitted by the Petitioner Company thereon, Hon'ble Tribunal may pass appropri- ate order/orders as deem fit on merit.

IV (e)

The Petitioners under the provi- sions of Section 230(5) of the Companies Act, 2013 have to serve notices to concerned authorities which are likely to be af- fected by Amal- gamation. Fur- ther, the approval to the scheme by this Hon'ble Tri- bunal may not deter such au- thorities to deal with any of the is- sues arising after giving effect to this scheme. The decision of such Authorities is

binding on the Petitioner Com- pany(s).

As regards to the obser- vation made in Para- graph IV (e) of this Re- port, the Petitioner Companies confirm that as per the provi- sions of section 230(5) of the Companies Act, 2013, the Petitioner Companies have served notices to all the con- cerned authorities; Re- gional Director, Regis- trar of Companies, Of- ficial Liquidator, In- come Tax Department and Goods and Ser- vices Tax Department and the observations made by the concerned authorities have been duly responded and

dealt with by the Peti- tioner Companies, wherever required.

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IV (f)

Petitioner com- pany have to un- dertake to comply with section 232(3)(i) of Com- panies Act, 2013, where the trans- feror company is dissolved, the fee, if any paid by the transferee com- pany on its au- thorised capital shall be set-off against any fees payable by the transferee com- pany on its au- thorised capital subsequent to the amalgamation and therefore, pe- titioners to affirm that they comply the provisions of the section.

As regards to the obser- vation made in Para- graph IV (f) of this Re- port, the Petitioner Company 3 / Trans- feree Company under- take that the setting-off of the fees paid by the Transferor Companies on its Authorised Share Capital shall be in accordance with the provisions of Section 232(3)(i) of the Com- panies Act, 2013.

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IV (g)

As per part B clause 5(5.5) of the Scheme (Ac- counting Treat- ment in the books and financial statements of the Transferee Com- pany), The sur- plus/deficit, if any arising after taking the effect

of clause 5.1, 5.2

and clause 5.4, after giving the ef- fect of the adjust- ments referred to in clause 5.3 shall be adjusted in "Capital Re- serve" in the fi- nancial state- ments of the transferee Com- pany: In this re- gard, it is submit- ted that the sur- plus so credited to "Capital Reserve arising out of Amalgamation" shall not be avail- able for distribu- tion of dividend and other similar purposes.

As regards to the obser- vation made in Para- graph IV (g) of this Re- port, the Petitioner Company 3/ Trans- feree Company under- takes that the sur- plus/deficit, if any arising after taking the effect of clause 5.1, 5.2 and clause 5.4, after giving the effect of the

adjustments referred to in clause 5.3 shall be adjusted in “Capital Reserve” and shall be treated as Capital Re- serve arising out of Amalgamation which shall not be available for distribution of divi- dend and other similar purposes.

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IV (h)

As Part C Clause- A14(14.1 to 14.5)

& Clause-B) of the Scheme (Con- sideration Of Au- thorised Share

Capital and Amendments in Memorandum, of Association of the Transferee Company) In this regard it is sub- mitted that the fee payable by the Transferee Com- pany shall be in

accordance with the provisions of Section 13, Sec-

tion 14, Section

61, and Section 232(3)(i) of the Companies Act 2013, further if any stamp duty is payable then the same should be paid in accord- ance with appli- cable laws of the State;

As regards to the obser- vation as stated in Par- agraph IV (h) of this Report, the Petitioner Company 3/ Trans- feree Company sub- mits that as per Clause 14 of the Scheme, upon the Scheme becoming effective, the Author- ised Capital of the Transferor Companies shall get merged with that of the Petitioner Company 3/ Trans- feree Company with-

out payment of addi- tional fees and stamp duties as the said fees/ duties have al- ready been paid by the Transferor Companies and the Authorised Capital of the Peti- tioner Company 3 / Transferee Company will be increased to that effect and that no separate procedure is required to be followed as per the provisions of Section 13, Section 14, Section 61 and Section 232(i) or any other ap- plicable provisions of the Companies Act, 2013.

On the basis of obser- vations made by the Regional Director and reply submitted by the Petitioner Company thereon, Hon’ble Tribunal may pass appropri- ate order/orders as deem fit on merit.

IV (i)

Since the Peti- tioner Com- pany/ Transferee Company have nonresident shareholders, therefore, it is subject to the compliance of Section 55 of the Companies Act, 2013 the FEMA

Regula- tions/RBI Guidelines by the Transferee Com- pany.

As regards to the obser- vation as stated in par- agraph IV (i) of this Report, the Petitioner Company 3/ Trans- feree Company sub- mits that the Scheme does not provide for any issue or redemp- tion of preference shares and accord- ingly, the provisions of Section 55 of the Com- panies Act, 2013 shall not apply to the Peti- tioner Company 3/ Transferee Company. Further, the Scheme does not provide for any issue/transfer of

any equity instruments to/from the non-resi- dent shareholders of the Petitioner Com- pany 3/Transferee Company and thus no compliance is required under FEMA Regula- tions / RBI Guide- lines.

On the basis of obser- vations made by the Regional Director and reply submitted by the Petitioner Company thereon, Hon'ble Tribunal may pass appropri- ate order/orders as deem fit on merit.

IV (j)

In view of the ob- servation raised by the ROC Mumbai, men- tioned in para 16 above the

Hon'ble NCLT may pass appro- priate order/or- ders as deem fit;

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The Petitioner Com- panies has not men- tioned anything re- garding observation made in Paragraph IV (j) of the Re- gional Director in their reply. Peti- tioner Company may be directed to submit undertaking regarding observa- tion raised by the ROC Mumbai, mentioned in Para 16 of the report and on the basis of obser- vations made by Re- gional Director Hon'ble Tribunal may pass appropri- ate orders/ order as deem fit on merit.

11. The Counsel for the Petitioner Companies submit that with regards to the observation of the Regional Director in its Supplementary Report in Para IV(j) mentioned in Para 10 above, the Counsel of the Petitioner Companies submitted that the Scheme of Amalgamation is an arrange-ment between the Petitioner Companies and its shareholders and that there is no compromise or arrangement with any of the creditors of any of the Petitioner Companies. The Counsel further submitted that the rights of the creditors are not affected and all the creditors of the Petitioner Companies would all be paid off in the ordinary course of business. Furthermore, this Tribunal vide Order dated 4th May 2020 was pleased to dispense the meeting of the unsecured creditors of Pe-titioner Company 1 and Petitioner Company 2. In accordance with the directions of the Hon'ble Tribunal, the Petitioner Company 1 and Pe-titioner Company 2 had given notices of

intimation to its unsecured creditors and no objection has been received thereof to the Scheme of Amalgamation. As far as Petitioner 3 is concerned this Tribunal vide Order dated 4th May 2020, was pleased to dispense the meeting of the creditors. The Counsel of the Petitioner Companies thus submits that an Affidavit dated 2 February 2022 undertaking protection of interests of Creditors is filed with this Tribunal.

12. The observations made by Regional Director have been explained by the Petitioner Companies in the above Para 10. The clarifications and undertaking given by the Petitioner Companies are hereby accepted by the Tribunal. Moreover, the Petitioner Companies undertake to com-ply with all statutory requirements as may be required under the Com-panies Act, 2013 and the Rules made thereunder. The said undertaking is accepted.

13. The Counsel for the Petitioner Companies submits that on issuance of notices to the regulatory authorities under Section 230 (5) the Income Tax Department issued a letter dated 5 February 2021 seeking clarifi-cations from the Transferee Company and in regard to the same the Petitioner Companies have duly responded vide letter dated 23 Febru-ary 2021 and the same is brought on record vide Affidavit dated 2 March 2021. Further, the Petitioner Companies clarify and undertake that as per clause 9 of the Scheme all legal proceedings of whatever nature shall be continued, prosecuted and enforced by or against the Transferee Company. The Income Tax Department shall be free to examine the aspect of any tax payable, if any, as a result of the Scheme and their rights remain intact to take out appropriate proceedings if required against the Transferee Company. Further, all tax issues aris-ing under the Scheme shall be dealt with in accordance with law.

14. The Official Liquidator, High Court, Bombay, has filed his report dated 11th August 2021, inter alia, stating therein that the affairs of the Petitioner Company 1 and Petitioner Company 2 have been conducted in a proper manner, not prejudicial to the interest of the shareholders of the Petitioner Company 1 and Petitioner Company 2 and that the Petitioner Company 1 and Petitioner Company 2 may be ordered to be dissolved without winding up by this Tribunal.

15. As the Petitioner Company 1 and Petitioner Company 2 are wholly owned subsidiaries of the Petitioner Company 3, no consideration shall be payable pursuant to the amalgamation of Petitioner Company 1 and Petitioner Company 2 into Petitioner Company 3.

16. Since all the requisite statutory compliances have been fulfilled CP(CAA)/1035/MB-IV/2020 is made absolute in terms of the prayer clauses of the said Company Scheme Petition.

17. The Scheme is hereby sanctioned with the Appointed Date of 1st Jan-uary 2020.

18. The Petitioner Companies are directed to file a copy of this Order along with

a copy of the Scheme with the concerned Registrar of Com-panies, electronically along with E-Form INC-28 within 30 days from the date of receipt of the certified copy of Order by the Petitioner Com-panies.

19. On filing of this Order with the Registrar of Companies as instructed in paragraph 18 above, the Petitioner Company 1 and Petitioner Com-pany 2 shall stand dissolved.

20. The Petitioner Company 3 to lodge a copy of this Order along with the Scheme duly authenticated/certified by the Deputy Director or the As-sistant Registrar, National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps for the purpose of adju-dication of stamp duty payable, if any, within 60 days from the date of receipt of the certified Order from the Registry of this Tribunal.

21. All concerned regulatory authorities to act on a copy of this Order along with Scheme duly certified by the Deputy Registrar or the Assis-tant Registrar, National Company Law Tribunal, Mumbai Bench.

22. Any person interested is at liberty to apply to this Tribunal in the above matters for any directions that may be necessary.

23. Any concerned Authorities are at liberty to approach this Tribunal for any further clarification as may be necessary.

24. Ordered accordingly.