(2020) 06 NCLT CK 0026

In the National Company Law Appellate Tribunal

Case No : Company Petition No. (CAA)-7(ND)2020 In Company Application (CAA) 178(ND) Of 2019

Open Technologies India Pvt. Ltd — APPELLANT

Vs

ESQ Management Solutions India Pvt. Ltd — RESPONDENT

Date of Decision : 22-06-2020

Acts Referred:
Income-Tax Act, 1961 — Section 72(A)
Companies Act, 2013 — Section 230, 231, 232, 232(4)

Citation : (2020) 06 NCLT CK 0026

Hon'ble Judges : P.S.N. Prasad, J;Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Rajeev Goel, Sunil Agarwal, Tania Sharma

Final Decision : Disposed Of

Judgement

P.S.N. Prasad, J

1. The present Petition has been preferred by the Transferor and Transferee Companies under Section 230-232 of Companies Act, 2013 for the purpose of the approval of the scheme of amalgamation, as contemplated between the companies and its shareholders and creditors by way of Amalgamation between Open Technologies India Pvt. Ltd, (hereinafter referred to as the Transferor Company) with ESQ Management Solutions India Pvt. Ltd (hereinafter referred to as the Transferee Company).

2. The Transferor Company namely, Open Technologies India Pvt. Ltd is a Company incorporated on 12.03.1997 under the provisions of Companies Act, 1956 with CIN No. U72200DL1997PTC085772, having its registered Office at 33/11, Old Rajendar Nagar, New Delhi-110060.

3. The Transferee Company namely, M/s. Fontal ESQ Management Solutions India Pvt. Ltd., is a Company incorporated on 28.04.2010 under the provisions of Companies Act, 1956 with CIN No. U72200DL2010PTC202096, having its

registered Office at 33/11, Old Rajendar Nagar, New Delhi-110060.

4. The registered offices of both Transferor and Transferee Companies are situated at New Delhi. Therefore, the jurisdiction lies with this Bench of the Tribunal.

5. The Authorized, Subscribed and Paid-up Share Capital of the Transferor Company as per the Audited Balance Sheet as at 31st March, 2019 is as under:

Particulars

Amount in INR

Authorised Share Capital

50,000 equity share of INR 10/- each

5,00,000/-

Total

5,00,000/-

Issued, Subscribed and Paid-up Share Capita

5,000 equity shares INR 10/- each

5,00,000/-

Total

5,00,000

6. The Authorized, Subscribed and Paid-up Share Capital of the Transferee Company as per the Audited Balance Sheet as at 31st March, 2019 is given below.

Particulars

Amount in INR

Authorised Share Capital

1,00,000 equity share of INR 10/- each

10,00,000/-

Total

10,00,000/-

Issued, Subscribed and Paid-up Share Capita

1,00,000 equity shares INR 10/- each

10,00,000/-

Total

10,00,000/-

7. From the records, it is seen that the First Motion was filed by the Petitioner Companies for seeking directions for dispensing the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors of both the companies. This Tribunal, in the First Motion bearing No. CA (CAA)-178/ND/2019, vide Order dated 17.12.2019, dispensed with the requirement of convening the meetings of the equity shareholders, secured creditors and unsecured creditors of both the companies. It is submitted by the Petitioners that the Transferor Company is not having any secured or Un-secured Creditor.

8. The Appointed date as fixed for the Proposed Scheme of amalgamation is fixed is 1st April, 2019.

9. Subsequent to the order of dispensation of meetings in relation to both the Transferor Company and Transferee Company, the Second Motion petition was moved by the Petitioner Companies in connection with the scheme of Amalgamation, for issuance of notices to the Central Government, Registrar of Companies, NCT of Delhi & Haryana, Regional Director (Northern Region) MCA, Income Tax Authorities, Official Liquidator, and to such other Objector(s), if any and also for publication of the said scheme. The directions were issued vide order dated 03.01.2020 requiring both the companies to serve notices to the Central Government, Registrar of Companies, NCT of Delhi & Haryana, Regional Director (Northern Region) MCA, Income Tax Authorities, Official Liquidator, and also to carry out necessary publication in English and Hindi newspapers, with respect to the said scheme.

10. It is submitted by the Petitioners that In compliance, of the above stated directions, the Director of Petitioner No. 2 Company duly filed an affidavit of service dated 15.01.2020 by confirming that the aforesaid notices of the present Company Petition were published on 08.01.2020 in both Business Standard (English) and Business Standard (Hindi). It is further submitted that the Petitioner Companies also served the notices of the present company petition to all the statutory authorities.

11. It is stated by the Petitioners that the Official Liquidator has filed his report wherein he has stated that he has not received any complaint against the proposed Scheme of Amalgamation from any person/party interested in the Scheme in any manner and that the affairs of the Transferor Company do not appear to have been conducted in a manner prejudicial to the interest of its members, creditors or to public interest.

12 In response to the above stated notice, the Regional Director, Northern Region, Ministry of Corporate Affairs, New Delhi has filed his report/affidavit dated 20th February, 2020, along with the report of the Registrar of Companies. No objection has been raised by the RD and ROC to the proposed Scheme of

Amalgamation.

13 That the Income Tax Department has filed its report dated 29.05.2020 wherein no outstanding dues were pointed out with respect to the Petitioner Companies. It is further submitted by the Income Tax Department that the applicability of Section 72A of the Income Tax Act, 1961 may be left open so that the claim of carry forward of losses and unabsorbed depreciation allowance in respect of the Petitioner Companies can be ascertained at the time of assessment/re-assessment proceedings as per the provisions of the Act.

14 That the Learned Counsel for the Petitioner Companies has submitted that Petitioner Companies are not seeking any exemption or relaxation from the applicability of the provisions of the Income Tax Act, 1961. He further clarified that the Scheme of Amalgamation is subject to the provisions of the Income Tax Act and the Petitioner Companies will comply with the provisions of the Income Tax Act 1961, including the provisions of Section 72A of the Income Tax Act.

15. In view of the foregoing, upon considering the approval accorded by the Members and Creditors of all Companies to the proposed Scheme, and no sustainable objections having been raised by the Office of the Regional Director, Income Tax Department or any other interested party, there does not appear to be any impediment in granting sanction to the Scheme. Accordingly, in sequel to the above, sanction is hereby granted to the Scheme of Amalgamation under section 230-232 of the Companies Act, 2013. The sanctioned Scheme of Amalgamation shall be binding on the Transferor and Transferee Company, and their Shareholders and Creditors. The Parties shall also be bound to comply with the requisite statutory requirements in accordance with law.

16. 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 to the scheme will not come in the way of action being taken, albeit, in accordance with law, against the concerned persons, Directors and officials of the Petitioner Company.

17. 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 statutory dues, if any, and payment in accordance with law or in respect to any permission/compliance with any other requirement which may be specifically required under any law. Further the approval of the scheme would in no manner affect the tax treatment of the transactions under Income Tax Act, 1961 or serve as any exemption or defense for the applicant companies against tax treatment in accordance with the provisions of Income Tax Act, 1961. It is further made clear that the rights of the Income Tax Department will not be prejudiced by way of sanction of this scheme

THIS TRIBUNAL FURTHER DIRECTS:

(1) Upon the sanction becoming effective from the appointed date of

amalgamation, i.e 1st April, 2019, the Transferor Company shall stand dissolved without undergoing the process of winding up.

(2) All benefits, entitlements, incentives and concessions under incentive schemes and policies that the Transferor Companies is entitled to, including under customs, excise, service tax, VAT, sales tax, GST and entry tax and income tax laws, subsidy receivables from Government, grant from any governmental authorities, direct tax benefit/exemptions/deductions, shall, to the extent statutorily available and along with associated obligations, stand transferred to and be available to the Transferee Company as if the Transferee Company was originally entitled to all such benefits, entitlements, incentives and concessions;

(3) All contracts of the Transferor Companies which are subsisting or having effect immediately before the Effective Date, shall stand transferred to and vested in the Transferee Company and be in full force and effect in favor of the Transferee Company and may be enforced by or against it as fully and effectually as if, instead of the Transferor Companies, the Transferee Company had been a party or beneficiary or obliged thereto;

(4) All the employees of the Transferor Companies shall be deemed to have become the employees and the staff of the Transferee Company with effect from the Appointed Date, and shall stand transferred to the Transferee Company without any interruption of service and on term and conditions no less favourable than those on which they are engaged by the Transferor Companies, as on the Effective Date, including in relation to the level of remuneration and contractual and statutory benefits, incentive plans, terminal benefits, gratuity plans, provident plans and any other retirement benefits;

(5) All liabilities of the Transferor Companies, shall, pursuant to the provisions of section 232(4) and other applicable provisions of the Companies Act, 2013, to the extent they are outstanding as on the Effective Date, without any further act, instrument or deed stand transferred to and be deemed to be the debts, liabilities, contingent liabilities, duties and obligations etc. as the case may be, of the Transferee Company and shall be exercised by or against the Transferee Company, as if it had incurred such liabilities.

18. That the Petitioner Companies shall within thirty days of the date of the receipt of this order cause a certified copy of this order to be delivered to the Registrar of Companies for registration and on such certified copy being so delivered the Transferor Company hall be dissolved and the Registrar of Companies shall place all documents relating to the Transferor Companies 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

19. The Company Petition is disposed of with aforesaid directions.

