(2023) 03 NCLT CK 0019

In the National Company Law Tribunal

Case No : CP (CAA) No.33/Chd/Pb/2022

Pivotal Laboratories Private Limited Vs

Date of Decision : 02-03-2023

Acts Referred:

Companies Act, 2013 — Section 129, 133, 148, 148(8), 230, 232
Income Tax Act, 1961 — Section 72A, 79, 170(2A), 276CC

Citation : (2023) 03 NCLT CK 0019

Hon'ble Judges : Harnam Singh Thakur, Member (J);Subrata Kumar Dash, Member (T)

Bench : Division Bench

Advocate : GS Sarin, Yogesh Putney, Yatin Chadha

Final Decision : Disposed Of

Judgement

Harnam Singh Thakur, Member (Judicial)

1. This is a joint second motion company petition filed by the Petitioner-Companies, namely, Pivotal Laboratories Private Limited (Petitioner Company No.1/ Transferor Company No.1, Gupta Clinics Pvt. Ltd. (Petitioner Company No.2/ Transferor Company No.2), Candid Labs Private Limited (Petitioner Company No.3/ Transferor Company No.3), Excel Motors Pvt. Ltd. (Petitioner Company No.4/ Transferor Company No.4), Justin Pharmaceuticals Private Limited (Petitioner Company No.5/ Transferor Company No.5), Zenith Mediwell Private Limited (Petitioner Company No.6/ Transferor Company No.6), Magnanimous Pharmaceuticals Private Limited (Petitioner Company No.7/ Transferor Company No.7), Vintage Life Sciences Private Limited (Petitioner Company No.8/ Transferor Company No.8) with Conquer Investments and Finance Pvt. Ltd. (Petitioner Company No.9/ Transferor Company No.9) under Section 230-232 of the Companies Act, 2013 (the Act) read with Companies (compromises, Arrangements and Amalgamations) Rules, 2016 (the Rules) in relation to the Scheme of Amalgamation between the petitioner companies.

2. The Petitioner Companies have prayed for sanctioning of the Scheme of Amalgamation between the respective companies. The said Scheme is attached

as Annexure P-11 of the petition.

3. The first motion application seeking directions for dispensing/convening with the meetings of the Equity Shareholders, Secured Creditors and Unsecured Creditors of all applicant companies and of Debenture Holders of Applicant Company No. 2 was filed before this Tribunal vide CA (CAA) No.50/Chd/Hry/2020 and based on such an application necessary directions were issued on 04.03.2022. As per the order dated 04.03.2022, wherein the meetings of Equity Shareholders of Applicant Company Nos.1 to 3, 5 to 8 and of Secured and Unsecured Creditors of all the Applicant Companies, and of Debenture Holders of Applicant Company No.2 were dispensed with for the reasons recorded in the aforesaid order. The meeting of Equity Shareholders of Applicant Company No.4 & Applicant Company No.9 were to be convened on 23.4.2022.

4. In compliance of the directions issued by this Tribunal, the Chairperson, Alternate Chairperson and Scrutinizer were also appointed and they have filed their reports which is as under:-

Sr, No

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Meeting of

Chairpersons/ Alternate

Chairperson/ Scrutinizer

Chairperson's Report

Date of meeting

Date of filing

Date of Report

1.

Equity shareholders of Applicant

Company

No.4/Transferor company No.4

Justice (Retd). Arvind Kumar, Chairperson

Mr. Viren Sharma, Advocate, Alternate Chairperson

Mr. Nitin Kumar, Practising Company Secretary

Diary

No.02065/5

dated 26.04.2022

25.04.2022

23.04.2022

2.

Equity shareholders of Applicant Company No.9/Transferee company

Diary

No.02065/6

dated 26.04.2022

25.04.2022

23.04.2022

As per Chairperson's Report dated 25.04.2022, the Scheme was approved unanimously passed by Equity Shareholders present and voting in case of Applicant Company Nos.4 & 9.

5. It is submitted that the registered offices of the Applicant Companies are situated in the State of Punjab and Chandigarh, therefore, all the Applicant Companies are under the territorial jurisdiction of this Bench.

6. The main objects, date of incorporation, authorized and paid-up share capital and the rationale of the Scheme have been discussed in detail in the order dated 04.03.2022

7. In the second motion proceedings, certain directions were issued by this Tribunal by order dated 25.05.2022 and the same were compiled by filing affidavit vide Diary No.00834/01 dated 22.06.2022. The notice of hearing was published by Petitioner Companies in "Financial Express" (English) in Chandigarh and Punjab Edition and "Jansatta" (Hindi) in Chandigarh Edition (in case of Company Nos.1 to 8) and in Rozana Spokesman (Punjabi) Edition (in case of Applicant No.9) on 09.06.2022 and the original copies of the newspapers are attached as Annexure-A1 of the aforesaid affidavits. It has also stated in the affidavits that copies of notices were served upon the (1) Central Government through Regional Director (Northern Region), Ministry of Corporate Affairs; (2) The Concerned Registrar of Companies (3) the Official Liquidator (4) the jurisdictional Income Tax Authorities through the Nodal Officer-Principal Commissioner of Income Tax, NWR, Aayakar Bhawan, Sector 17-E, Chandigarh along with copy of this petition by way of speed post. Speed Postal Receipts along with tracking reports evidencing service of notices are attached as Annexure-2 and Annexure-3 of the aforesaid affidavit.

8. It is deposed by the authorized signatories of the applicant companies that no objection has been received from any person till the date of affidavit in response to the publications held in the Newspapers. The aforesaid affidavit has been filed vide Diary No. 00834/1 dated 22.06.2022.

9. In response to the abovementioned notices, the statutory authorities have furnished their responses.

9.1 Registrar of Companies (RoC)/Regional Director (RD)

9.1.1 The Registrar of Companies (RoC) has filed its report along with the report of the Regional Director (RD), by Diary No.00834/6 dated 29.12.2022. Para 10 of the report of the Regional Director, sets out certain observations based on Clause 30 of the report of Registrar of Companies and the petitioner Companies have replied by letters dated 06.09.2022 and 15.11.2022. After receiving the reply, Regional Director has stated that all the observations raised by the Regional Director and ROC stands clarified in view of the letters dated 06.09.2022 and 15.11.2022 except the following observations:-

(i) A complaint under Section 148(8) of the Companies Act, 2013 was filed against the Transferor Company no.5 by the Registrar of Companies before the Court of Chief Judicial Magistrate, Chandigarh, for non-compliance of Section 148 of the Companies Act, 2013 regarding non-filing of Cost Audit Report. The next date of the hearing is 06.01.2023.

(ii) The copy of the Board Resolutions passed by the respective Petitioner Companies for the adoption of the amended scheme including the share exchange ratio being finalized by the Independent Valuer namely Ashima Banoda. In reply, the Petitioner Companies have stated that after the finalisation of the valuation of the report dated 07.12.2020 and necessary amendments were made in the scheme, the amendment made in this regard was required to adopt by the Board of Directors in their meeting and the Petitioner Companies are silent about the amended scheme and failed to convened the Board Meetings in this regard.

(iii) The Transferor Company No.7 (Magnanimous Pharmaceuticals Private Limited) has accepted that the amount as shown as Advance from customer amounting to Rs.68,66,446/- is wrongly stated as “Advance from customer” further such advance is Trade creditors. Therefore, due to wrongly shown under “Advance from Customer” the Petitioner Company No.7 has made contravention of the provisions of Section 129 r/w Schedule III of the Act.

9.1.2 The petitioner companies have replied to the report of RD by filing its joint response vide Diary no. 00834/7 dated 06.01.2023. to RoC wherein it has been undertaken that the Transferee Company will comply with the direction of the Hon'ble Chief Judicial Magistrate at District Courts Chandigarh in terms of the para No:- 11 of the Scheme. It is further submitted by the petitioner companies that after the finalisation of the valuation report on 07.12.2020 necessary amendments were made in the scheme and the application has been filed after making all compliances. It is further clarified and submitted that there is no requirement of again to place the scheme. before the Board for making amendments after the issuance of the valuation report on 07.12.2020 as the Board has already approved the scheme in principal and already authorised their representative to make the necessary changes as per the Board Resolutions. Hence, express powers have been delegated by the Board of Directors of the petitioner Companies to their authorised representatives to finalize the Scheme and execute all such documents/writings /undertakings from time to time, on behalf of the Company. Therefore, the observation raised by the Regional Director is unsustainable and there is no procedural lapse on the part of the petitioner Companies. With regard to the point No. 3 it is undertaken that the Transferee Company will comply with all the provisions and directions of the Companies Act, 2013 and to any subsequent compliance, if any required by the ROC/RD office even after the approval of the merger and even to the provisions of the Income Tax Act, 1961.

9.1.3 Thus, we hold that the observations raised in the Regional Director's Report have been adequately addressed by the petitioners.

9.2 Official Liquidator

9.2.1 The Official Liquidator has filed his report vide Diary No.00834/2 dated 03.08.2022. The Official Liquidator in its report has reproduced the information on the incorporation of the Petitioner Companies, their capital structure, financial highlights, shareholding, etc. The Official Liquidator has also reproduced the extracts of Reports of the Statutory Auditors of the Petitioner Companies on the Financial Statements. It is also stated that pursuant to the Scheme of Amalgamation becoming effective, the Transferor Companies shall stand dissolved without being wound up or liquidated.

9.2.2 Thus, no adverse observations can be inferred from the report of the Official Liquidator against the petitioner companies.

9.3 Income Tax Department

9.3.1 The Income Tax Department filed its reports by Diary No.00834/4 dated 14.10.2022, 00834/8 dated 20.01.2023 and 00834/3 dated 12.09.2022 stating that a demand of Rs.64,160/- for the A.Y. 2012-13, in respect of the Transferor Company No.1; a demand of Rs.72,860/- for the A.Y. 2012-13 in respect of the Transferor Company No. 6; a demand of Rs.3,180/- for the A.Y. 2009-10, Rs.34,270/- for the A.Y. 2013-14 in respect of the Transferor Company No.7 and a demand of Rs.5,000/- for the A.Y. 2010-11, Rs.8,520/- for the A.Y. 2014-15 in respect of the Transferor Company No.8 The transferor Company No.5 has not filed Income Tax Return for the A.Y. 1991-92 to 2006-07 and 2011-12 and they are liable for the prosecution under Section 276CC of the Income Tax Act, 1961. It is further stated that Transfer Companies are loss making companies and after amalgamation the same is adjusted toward income of the transferee Company. The brought forward losses shall affect the revenue adversely.

9.3.2 In this context, we are of the view that this Tribunal is not shutting out the legitimate interest of the income-tax authorities to recover the lawful dues payable by the petitioner companies, and the scheme provides the savings in relation to the liabilities as well, the rights of the tax authorities remain intact, and they can proceed against the companies in accordance with the law, if any amount is found due and payable against the petitioner companies.

9.3.3 Thus, no adverse observation can be inferred from the report of the Income Tax Department.

10. The certificate of the Statutory Auditors with respect to the Scheme between Petitioner Companies to the effect that the accounting treatment proposed in the Scheme is in compliance with applicable Indian Accounting Standards (Ind AS) as specified in Section 133 of the Act, read with rules thereunder and other Generally Accepted Accounting Principles is attached as Annexure P-10 of the petition.

11. We have heard the learned counsel for petitioner companies and learned counsel for the Income Tax Department and have perused the record carefully.

12. In the context of the above discussion, the Scheme contemplated between the petitioner companies appears to be prima facie in compliance with all the requirements stipulated under the relevant Sections of the Companies Act, 2013. As the observations from the Statutory Authorities have been duly addressed by the Petitioner Companies and since all the requisite statutory compliances have been fulfilled, this Tribunal sanctions the Scheme of Amalgamation attached as Annexure P-11 with the petition.

13. Notwithstanding the submission that no investigation is pending against the petitioner companies, if there is any deficiency found or, the violation committed qua any enactment, statutory rule or regulation, the sanction granted by this Tribunal will not come in the way of action being taken, albeit, in accordance with the law, against the concerned persons, directors and officials of the petitioners.

14. 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 is due or required 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:

i. That all the property, rights and powers of the Transferor Companies be transferred, without further act or deed, to the Transferee Company and accordingly, the same shall pursuant to Sections 230 & 232 of the Act, be transferred to and vested in the Transferee Company for all the estate and interest of the Transferor Companies but subject nevertheless to all charges now affecting the same; and

ii. That all the liabilities and duties of the Transferor Companies be transferred, without further act or deed, to the Transferee Company and accordingly the same shall pursuant to Sections 230 to 232 of the Act, be transferred to and become the liabilities and duties of the Transferee Company;

iii. All benefits, entitlements, incentives and concessions under incentive schemes and policies that the Transferor Companies are entitled to include 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;

iv. 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 favour 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;

v. 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 the terms 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;

vi. That the Appointed Date for the Scheme shall be 01.04.2020 as specified in the Scheme;

vii. That the proceedings, if any, now pending by or against the Transferor Companies be continued by or against the Transferee Company;

viii. That the Transferee Company shall, without further application, allot to the existing members of the Transferor Companies shares of Transferee Company to which they are entitled under the said Scheme;

ix. That the fee, if any, paid by the Transferor Companies on their authorized capital shall be set off against any fees payable by the Transferee Company on its authorized capital subsequent to the sanction of the ‘Scheme’;

x. That the carry forward and set off of accumulated losses and unabsorbed depreciation allowance in the Petitioner Companies, if any, shall be subject to applicable provisions of Income Tax including Section 72A and Section 79 of the Income Tax Act, 1961;

xi. That the assessment under the Income Tax Act will be in accordance with the provisions of the Section 170 (2A) of the Income Tax Act, 1961;

xii. That the Transferee Company shall file the revised memorandum and articles of association with the concerned Registrar of Companies and further make the requisite payments of the differential fee (if any) for the enhancement of authorized capital of the Transferee Company; after setting off the fees paid by the Transferor Companies;

xiii. That the Petitioner Companies shall, within 30 days after the date of receipt of this order, cause a certified copy of this order to be delivered to the concerned Registrar of Companies for registration and on such certified copy being so delivered, the Transferor Companies shall be dissolved without undergoing the process of winding up. The concerned Registrar of Companies shall place all documents relating to the Transferor Companies registered with him on the file relating to the said Transferee Company, and the files relating to the Companies and Transferee Company shall be consolidated accordingly, as the case may be; and

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

15. As per the aforesaid directions, formal orders in Form No. CAA-7 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 be issued after the filing of the Schedule of Properties within three weeks from the date of receiving a certified copy of this order by the petitioners.

16. All the concerned Regulatory Authorities are to act on a copy of this order annexed with the Scheme duly authenticated by the Registrar of this Bench.

17. The Company Petition CP (CAA) No.33/Chd/Pb/2022 is allowed and disposed of accordingly.

