(2020) 08 NCLT CK 0073

In the National Company Law Tribunal

Case No : Company Petition (CAA) No. 3835/MB.IV Of 2019, Company Appeal (CAA) No. 1162, 1163/MB.IV Of 2018

Rosche Trading Private Limited — APPELLANT

Vs

Fine Tech Corporation Private Limited — RESPONDENT

Date of Decision : 04-08-2020

Acts Referred:
Companies Act, 2013 — Section 230, 230(5), 231, 232, 232(3)(i)

Citation : (2020) 08 NCLT CK 0073

Hon'ble Judges : Rajasekhar V.K., J;Ravikumar Duraisamy, Member (Technical)

Bench : Division Bench

Advocate : Arif Doctor, Sandeep Junnarkar, Junnarkar, Rupa Sutar

Judgement

Ravikumar Duraisamy, Member (T)

1. Heard Learned Counsel for the petitioners, and the representative of the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai.

2. The sanction of this Tribunal is sought under sections 230 to 232 of the Companies Act, 2013 to the Scheme of Amalgamation of Rosche Trading Private Limited with Fine Tech Corporation Private Limited.

3. Rosche Trading Private Limited (Transferor Company) and Fine Tech Corporation Private Limited (Transferee Company) have approved the said Scheme unanimously at their respective Board meetings by passing Board Resolutions dated 10th September 2018 and thereafter, they have approached the Tribunal for sanction of the Scheme.

4. The Transferor Company is presently carrying on the business of trading in goods and commodities. The Transferee Company is presently carrying on the business of Logistics & Warehousing Services and Business & Infrastructure Support Services.

5. The Rationale for the Scheme of Merger is -

The Transferor Company is a wholly owned subsidiary of the Transferee Company. The amalgamation will help to reduce administrative costs, avoid duplication of processes and result in internal economies and optimize profitability. The integration proposed would enable cost savings, optimum utilization of available resources, will make management control systems more efficient and effective which will enhance the management focus thereby not only leading to higher profitability but will also increase the shareholders' value of both companies. The business of the Transferor Company can be conveniently combined with the business of the Transferee Company and the amalgamation will reduce multiple companies by consolidation of company having holding and subsidiary relationship into a single larger entity. The merged Company will be in a better position to avail financial managerial, technical and other capital resources available to both the Transferor Company and the Transferee Company, which will enable the merged Company to expand business operations with minimum additional cost and in the shortest possible time. In furtherance of its aforesaid objects and in view of existence of business synergies between Transferee Company and Transferor Company and to enhance shareholders value, it is proposed to merge the Transferor Company with the Transferee Company in accordance with the provisions of this Scheme of Amalgamation.

6. The authorized share capital of the Transferor Company is Rs. 1,20,00,000/- divided into (i) 2,00,000 Equity shares of Rs. 10/-each; and (ii) 1,00,000 - 12% Cumulative Redeemable Preference Shares of Rs. 100/- each. The issued, subscribed and paid-up share capital of the Transferor Company is Rs. 59,50,000/- divided into (i) 1,00,000 Equity shares of Rs. 10/- each fully paid-up; and (ii) 90,000 - 12% Cumulative Redeemable Preference Shares of Rs. 100/- each partly paid (Paid-up to the extent of Rs. 55 per share).

7. The authorized share capital of the Transferee Company is Rs. 9,62,70,000/- divided into 96,27,000 Equity Shares of Rs. 10/-each. The issued, subscribed and paid-up share capital of the Transferee Company is Rs. 44,67,000/- divided into 4,46,700 Equity Shares of Rs. 10/- each fully paid-up.

8. Upon the amalgamation of the Transferor Company with the Transferee Company in terms of the Scheme, the entire issued, subscribed and paid-up equity and preference share capital of the Transferor Company shall ipso facto without any further application, act, deed, matter or instrument stand extinguished and cancelled and no shares shall be issued or allotted by the Transferee Company to the equity or preference shareholders of the Transferor Company.

9. With effect from the Appointed Date, the authorized share capital of the Transferee Company shall, without any further application, act, instrument or deed, stand increased from Rs. 9,62,70,000/- (Rupees Nine Crore Sixty Two Lakhs Seventy Thousand only) divided into 96,27,000 (Ninety Six Lakhs Twenty Seven Thousand) Equity Shares of Rs. 10/- (Rupees Ten only) each to Rs. 10,82,70,000/-(Rupees Ten Crores Eighty Two Lakhs Seventy Thousand only)

comprising of 98,27,000 (Ninety Eight Lakhs Twenty Seven Thousand) Equity Shares of Rs. 10/- (Rupees Ten only) each and 100,000 - 12% Cumulative Redeemable Preference Shares of Rs. 100/- each which is within the combined authorized share capitals of the Transferee Company and the Transferor Company.

10. Learned Counsel for the Petitioner Companies further states that the Petitioner Companies have complied with all the directions passed by this Tribunal in the Company Scheme Application Nos. 1162 and 1163 of 2018 and the Company Scheme Petition Nos. 3835 and 3865 of 2019 filed in this Tribunal are in consonance with the Orders passed in the said Company Scheme Applications and Company Scheme Petitions.

11. Learned Counsel for the Petitioner Companies has stated that the Petitioner Companies have complied with all the requirements as per the directions of this Tribunal and the Petitioner Companies have filed necessary affidavits of compliance in this Tribunal.

12. The Official Liquidator has filed before this Tribunal his Report dated 8th January 2020 stating that the affairs of the Transferor Company have been conducted in a proper manner.

13. The Regional Director has filed before this Tribunal his Representation dated 10th January 2020 stating therein that save and except as stated in paragraph IV (a) to (f), this Tribunal may take the said Representation on record, consider the observations made in paragraph IV (a) to (f) and pass such other order or orders as deemed fit and proper in the facts and circumstances of the case. The observations of the Regional Director in paragraph IV (a) to (f) of the said Representation are reproduced below:

(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.

b) As per Definition of the Scheme,

"Appointed Date" means 1st April 2018; And

"Operation of the Scheme" On the sanction of the Scheme by the Tribunal and on the last of the dates on which the Transferor Company and the Transferee Company file a copy of the Order of the Tribunal sanctioning the Scheme with the Registrar of Companies, Mumbai, Maharashtra, the Scheme alongwith the transfer and vesting of the Undertaking of the Transferor Company shall take effect and be deemed to be effective from the Appointed Date.. However, the Petitioners may be asked to comply with the requirements as clarified vide circular No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs.

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

d) The Petitioners under provisions of section 230(5) of the Companies Act, 2013 have to serve notices to concerned authorities which are likely to be affected by Amalgamation. Further, the approval of the scheme by this Hon'ble Tribunal may not deter such authorities to deal with any of the issues arising after giving effect to the scheme. The decision of such Authorities is binding on the Petitioner Company(s).

e) That the Hon'ble NCLT may kindly direct the petitioners to file an affidavit to the extent that the Scheme enclosed to Company Application & Company Petition, are same and there is no discrepancy/any change/changes are made.

(f) As regards the complaints indicated in para 9 of Clause III above, under the head - Report of the Income tax Department, the Hon'ble Bench may direct to the Petitioner Company to undertake in this regard."

14. In response to the above observations of the Regional Director, the Petitioner Companies have filed Affidavit in Reply dated 22nd January 2020. The Petitioner Companies clarify and undertake as under:

(i) As far as the observation made in paragraph IV (a) of the Representation of the Regional Director is concerned, the Transferee Company undertakes that in addition to compliance of AS-14 (IND AS-103), in case applicable, the Transferee Company 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.;

(ii) As far as the observation made in paragraph IV (b) of the Representation of the Regional Director is concerned, the Petitioner Companies state that as per the Circular No. F. No. 7/12/2019/CL-I dated 21st August 2019, the 'appointed date' may be a specific calendar date. In the Scheme, the Appointed Date is a specific calendar date i.e. 1st April 2018. The Circular requires that the date would be the date from which the Scheme would become effective. Clause 3 of the Scheme accordingly clarifies that on the sanction of the Scheme by the Tribunal, the Scheme will take effect from the said specific calendar date i.e. 1st April 2018. It is submitted that the Appointed Date is not anti-dated beyond one year from the date of filing of the Scheme with the Tribunal, which was 9th October 2018. Thus, the Petitioner Companies submit that the Appointed Date and the provisions of the Scheme are in compliance with the requirements of Circular No. 7/12/2019/CL-I dated 21st August 2019;

(iii) As far as the observation made in paragraph IV (c) of the Representation of the Regional Director is concerned, the Petitioner Companies state that, the Transferee Company will be eligible for set-off of fees paid by the Transferor

Company on its authorized share capital against any fees payable by the Transferee Company on its authorized share capital subsequent to the amalgamation and the Scheme complies with the provisions of Section 232(3)(i) of the Companies Act, 2013;

(iv) As far as the observation made in paragraph IV (d) of the Representation of the Regional Director is concerned, the Petitioner Companies state that under Section 230(5) of the Companies Act, 2013 notices have been duly served on all concerned authorities likely to be affected by the amalgamation viz. the Regional Director, the Official Liquidator, the Registrar of Companies and the concerned Income Tax authorities. The Petitioner Companies confirm that the approval of the Scheme by the Tribunal shall not deter such authorities to deal with any of the issues which may arise after giving effect to the Scheme and the Petitioner Companies undertake to comply with the applicable provisions in accordance with law.

(v) As far as the observation made in paragraph IV (e) of the Representation of the Regional Director is concerned, the Petitioner Companies vide Affidavit in Rejoinder dated 22nd January 2020 filed before this Tribunal have confirmed that the Scheme annexed to the Company Scheme Applications and the Company Scheme Petitions is one and the same and no discrepancy or change or changes are made.

(vi) As far as the observation made in paragraph IV (f) of the Representation of the Regional Director is concerned, the Regional Director has referred to the observations of the Income Tax authority set out in Paragraph 9 of Clause III of the Representation which are as under:

9. Report of Income Tax Department:-

Income Tax Department report dated 26.12.2019 inter-alia mention the following:

1. Impact of exemption of capital gain tax:

"The Income Tax Department will be free to examine the aspect of any tax payable as a result of the Scheme and in case it is found that the Scheme of Amalgamation ultimately results in avoidance of capital gain tax, then the Department will be at liberty to initiate the appropriate course of action as per law. Any Scheme of Amalgamation under Section 230 to 232 of the Companies Act, 2013 should not adversely impact the rights of the Income Tax Department for any present or future proceedings. The Department should be at liberty to take appropriate action as per law in case of an event of any tax-avoidance or violation of Income Tax Law or any other similar issue."

2. Impact of exemption of dividend distribution tax:

"At the moment this scheme is not being examined with reference to the taxation aspect vis-a-vis the impact of exemption of dividend distribution tax, if any. In future, if it is discovered that this scheme or similar such scheme are in any way acting as a device for tax-avoidance, then the Department will be liberty to initiate the appropriate course of action as per law."

Petitioner Companies states that the Income Tax Department is at liberty to examine all aspects of the Scheme. It is submitted that the said Scheme is not a device for tax avoidance and there is no violation of Income Tax Law or any other similar issue by the Petitioner Companies. Without prejudice to the foregoing, it is submitted the Petitioner Companies that they are bound to comply with all applicable provisions of Income Tax Act, and the Transferee Company undertakes to comply with and deal with all tax matters arising out of the Scheme in accordance with law.

15. From the material on record, the Scheme of Amalgamation appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy.

16. Since all the requisite statutory compliances have been fulfilled, the Company Scheme Petitions are made absolute in terms of prayer clauses (a) to (c) of CP (CAA) No. 3835/2019 and prayer clauses (a) to (c) of CP (CAA) No. 3865/2019.

17. The Transferee Company to file a copy of this Order duly certified by the Deputy/Assistant Registrar of this Tribunal along with a copy of the Scheme with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty, if any, payable on the same, within 60 (sixty) days from the date of receipt of the Order.

18. The Petitioner Companies are directed to file a copy of this Order alongwith a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically in E-Form INC 28 in addition to the physical copy, as per relevant provisions of the Companies Act, 2013.

19. All concerned regulatory authorities to act on a copy of this Order duly certified by the Deputy/Assistant Registrar of this Tribunal along with Scheme of Amalgamation.

20. Any person interested in this Scheme, is at liberty to apply to the Tribunal in these matters for any directions or modification that may be necessary.

21. The Scheme is sanctioned and Appointed Date is fixed as 1st April 2018.

22. Ordered accordingly. File be consigned to the record.