(2023) 01 NCLT CK 0011

In the National Company Law Tribunal

Case No : CP (CAA)/11/MB-IV/2022 In CA (CAA)/97/MB-IV/2021

Tech Mahindra Business Services Private Limited Vs

Date of Decision : 05-01-2023

Acts Referred:

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

Citation : (2023) 01 NCLT CK 0011

Hon'ble Judges : Kishore Vemulapalli, Member (J);Shyam Babu Gautam, Member (T)

Bench : Division Bench

Advocate : Ajit Singh Tawar, Rupa Sutar

Final Decision : Disposed Of

Judgement

Kishore Vemulapalli, Member (Judicial)

1. The Court is convened through video conferencing today.

2. Heard the learned Counsel for the Petitioner 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 and other applicable provisions of the Company Act, 2013 read with the Company (Compromises, Arrangements and Amalgamations) Rules, 2016, to the Scheme of Merger by Absorption of Tech Mahindra Business Services Limited ('TMBSL' or 'Transferor Company 1') and Born Commerce Private Limited ('Born' or 'Transferor Company 2') with Tech Mahindra Limited ('TML' or 'Transferee Company') and their respective Shareholders.

4. The Counsel for the Petitioner Companies further submits that the First Petitioner Company is a leading Business Process Outsourcing ('BPO') Company which provides voice-based call centre services to its clients for their specific

customer activities and provides a number of customer related functions like customer care, billing related queries, Mobile Number Portability (MNP), hand set related queries, network related queries, price plan related queries, channel support, collection and value added services.

5. The Counsel for the Petitioner Companies further submits that the Second Petitioner Company, part of the Mahindra Group, is an Indian multinational, offering a full range of Information Technology (IT) services and Industry Specific Solutions to help clients to take advantage of opportunities which includes convergence, digital, design, experience, innovation platform, telecom services, consulting, application outsourcing, infrastructure outsourcing, engineering and Business Process Outsourcing (BPO).

6. The Petitioner Companies have approved the said Scheme by passing the resolution in their respective Board Meetings held on 29th day of January 2021, which is annexed to the Company Scheme Petition with Appointed date as 1st day of April, 2021.

7. The Counsel appearing on behalf of the Petitioner Companies states that the Petition has been filed in consonance with the order dated 16th day of August, 2021, passed by this Tribunal in the connected Company Scheme Application bearing CA (CAA)/97/MB/2021.

8. The Learned Counsel appearing on behalf of the Petitioner Companies states that the Petitioner Companies have complied with all the requirements as per directions of this Tribunal and 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, the Rationale for the proposed Scheme of Merger by Absorption is as under:

In order to consolidate and effectively manage the business of the Transferor Companies and Transferee Company in a single entity, which will provide several benefits including synergy, economies of scale, attain efficiencies and cost competitiveness, it is intended that the Transferor Companies be merged with Transferee Company, which would interalia have following benefits:

a. The Transferor Companies are wholly-owned subsidiaries of the Transferee Company, so merger will help to consolidate the entities.

b. The merger will lead to greater efficiency in the overall combined business including economies of scale, efficiency of operations, operational rationalization, organizational efficiency, cash flow management and unfettered access to cash flow generated by the combined business which can be deployed more effectively for the purpose of development of businesses of combined entity and their growth opportunities, eliminate inter corporate dependencies, minimize administrative compliances and to maximise shareholder value.

c. The merger will result in reduction in overheads including administrative, managerial and other expenditure, and optimal utilization of resources by elimination if unnecessary duplication of activities and related costs. It will also result in a reduction in the multiplicity of legal and regulatory compliances required at present to be separately carried out by the Transferor Companies and the Transferee Company.

d. The merger would motivate employees of the Transferor Companies by providing better opportunities to scale up their performance with a larger corporate entity having large revenue base, resources, assets base etc. which will boost employee morale and provide to better corporate performance ultimately enhancing shareholder value.

10. The Counsel for the Petitioner Companies states that the Transferor Company 1 and Transferor Company 2 are wholly-owned subsidiaries of the Transferee Company, no consideration shall be payable pursuant to the Merger by Absorption of the Transferor Company 1 and Transferor Company 2 with the Transferee Company, and the shares held by the Transferee Company in the Transferor Company 1 and Transferor Company 2 shall stand cancelled without any further act, application or deed.

11. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai has filed its Report dated 18th day of May, 2022 inter alia stating that, save and except the observations as stated in paragraph IV (a) to (i) of the report, this Tribunal may pass such order or orders as deemed fit and proper in the facts and circumstance of the case. The observations made by the Regional Director and the clarifications/undertakings given by the Petitioner Companies are summarized in the table below:

Sr.

RD Report/Observations

Response of the Petitioner

No.

Companies

Para

(IV)

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 IV (a) of the Report of Regional Director is concerned, the Transferee Company undertakes that, it shall pass necessary accounting entries in connection with the Scheme as per AS -14 (IND AS-103) as well as comply with other applicable Accounting Standards to the extent applicable.

b)

As per Definition of the Scheme, '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.

'Effective Date' means the last of the dates on which certified copies of the orders of the Hon'ble National Company Law Tribunal, Mumbai and Chennai are filed with the Registrar of Companies (RoC), Mumbai and Chennai respectively.

In this regard, it is submitted that Section 232(6) of the Companies Act, 2013 states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. However, this aspect may be decided by the Hon'ble Tribunal taking into account its inherent powers.

Further, the Petitioners may be asked to comply with the requirements as clarified vide circular no. F. No. 7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs.

As far as observations made in paragraph IV (b) of the Report of Regional Director is concerned, the Petitioner Companies clarifies that, the Scheme of Merger by Absorption (Scheme) shall be effective from the Appointed Date which is a specific date i.e., 01 April, 2021. 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 affirm that the transferee company shall pay the difference of fees and stamp duty.

As far as observations made in paragraph IV (c) of the Report of Regional

Director is concerned, the Petitioner Companies undertakes to comply with section 232(3)(i) of the Companies Act, 2013, wherein pursuant to the dissolution of the Transferor Companies, 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.

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 IV (d) of the Report of Regional Director is concerned, the Petitioner Companies clarifies that, the Scheme is a Merger of wholly owned subsidiaries with its holding Company. Further, the Transferor Companies have obtained consent from all its shareholders for the approval of the Scheme in the form of Affidavit. There were no Secured Creditors in any of the Transferor Companies as on 31st December 2020 while filing of Application. Further, the

meeting of unsecured creditors of the Transferor Companies were dispensed with based on the issue of individual notice to all of its unsecured Creditors of the Transferor Company 1.

Also, since no reconstruction or arrangement is proposed with the shareholders or creditors of the Transferee Company, it is not required to hold either shareholder's meeting or creditor's meeting or send notices to its shareholders and creditors for approval of the proposed Scheme and the Transferee Company was further directed to place on record Affidavit confirming percentage of Unsecured Creditors owed to group companies / subsidiaries as per the list attached to Application and the same was submitted as Exhibit G to the Petition.

In view of the above, the

Tribunal via order C.A.(CAA)/97/MB/2021 dated 16th August 2021 had dispensed with the meeting of shareholders and creditors of the Petitioner

Companies.

e)

Clause-18(b)(i) of Accounting Treatment of the Scheme; stated that the

Transferor Companies and Transferee Company both being entities under common control, the merger will be accounted by applying the principles as set out in Appendix C of IND AS 103 'Business Combinations'.

In this regard it is submitted that as per Accounting Standard 14 and IND AS 103, such surplus/deficit if any arising out of the scheme should be adjusted to the Capital Reserve arising out of amalgamation of the Transferee Company. Such Capital Reserve, arising out of the amalgamation shall not be considered as free reserve and not available for distribution of

dividend.

As far as observations made in paragraph IV (e) of the Report of Regional Director is concerned, the Petitioner Companies undertakes that, pursuant to approval of the Scheme, the surplus arising out of amalgamation shall be credited to Capital Reserve Account and deficits if any shall be debited to Capital Reserve Account as set out in Appendix C of IND AS

103. Further Petitioner Companies also undertakes that, such reserves shall not be considered as free reserve and will not be available for distribution of dividend.

f)

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 this 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 IV (f) of the Report of Regional Director is concerned, the Petitioner Companies clarifies 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.

g)

It is observed that the Transferee Company is a listed company, therefore, the petitioner company may be directed to place on record whether the prior notice was served to NSE, BSE and SEBI and objection received thereon if any

As far as observations made in paragraph IV (g) of the Report of Regional Director is concerned, the Petitioner Companies Clarifies that, the Scheme is a Merger between wholly owned subsidiaries into its Holding Company.

Further, in compliance of SEBI Circular CFD/DIL3/CIR/2017/21dated 10th March 2017 as amended by Circular CFD/DIL3/CIR/2018/2 dated 3rd January 2018, the Transferee Company has by its letter dated 5th February 2021 forwarded a copy of Scheme to BSE Limited and National Stock Exchange of India Limited. Copies of said letters are attached with the Company Application and Company Petition filed with this Tribunal.

h)

It is observed that the Transferee Company is having non residential Shareholders/foreign shareholders, therefore, petitioner company may be directed to comply with the provision of FEMA and RBI guidelines.

As far as observations made in paragraph IV (h) of the Report of Regional Director is concerned, the Transferee Company clarifies that, the Scheme is a Merger of wholly owned subsidiaries with its Holding Company, Accordingly, upon the Scheme becoming effective, no shares of the Transferee Company shall be allotted to the shareholders of the Transferor Companies. Further, the Transferee Company states that, it will comply with provisions of FEMA and RBI guidelines as applicable.

i)

The Hon'ble Tribunal may hereby kindly consider the report of ROC as narrated in Para III(12) above and pass appropriate order.

The ROC Mumbai observations are-Transferee Company having Two number of open Charges.

Interest of Creditors should be protected.

May be decided in its merits

As far as observations made in paragraph IV (i) of the Report of Regional Director, with respect to observation raised by ROC is concerned, the Petitioner Companies clarifies that,

Any open charges standing against the Transferee Company as per MCA index of charge will be discharged by the Transferee Company in the due course of time.

The present Scheme is an Arrangement between the Petitioner Companies and their respective shareholders as contemplated under Section 230(1)(b) and not in accordance with the provisions of Section 230(1)(a) of the Companies Act, 2013 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 Companies would be transferred to the Transferee Company. Also, the net worth of the Transferee Company is highly positive. The assets of the Transferee Company are more than sufficient to discharge its liabilities. Accordingly, post- merger, the creditors of the Transferee Company are not likely to be affected by the

Scheme being approved.

12. The Petitioner Companies have filed an Affidavit in Re-joinder to the report filed by the Regional Director with this Tribunal on 3rd June 2022 and a copy of the same is filed with the office of Regional Director on 6th June 2022, providing clarification/undertakings to the observations made by the Regional Director. Further, the Petitioner Companies have reproduced the said clarification/ undertakings to the observations made by the Regional Director in Para 11 above. The clarifications and undertakings given by the Petitioner Companies are accepted.

13. The Official Liquidator has filed his report on 28th day of February, 2022 inter alia stating therein that the affairs of the Transferor Company 1 have been conducted in a proper manner and the Scheme is not prejudicial to the interest of public and the Shareholders of the Transferor Company 1. Accordingly, the Transferor Company 1 may be ordered to be dissolved without winding up.

14. The Learned Counsel for the Petitioner Companies states that pursuant to the order dated 16th day of August, 2021 passed by this Tribunal in CA (CAA)/97/ MB/2021, the meeting of Equity Shareholders of the First Petitioner Company was dispensed with in view of the Consent Affidavits annexed to the Company Scheme Application, inter-alia stating therein that the consents of all the Equity Shareholders have been obtained. The meeting of Equity Shareholders of the Second Petitioner Company was dispensed with in view of ratio laid down by Tribunal in CSA No 243 of 2017 in the matter of Housing Development Finance Corporation Limited and by the Hon’ble NCLAT in Ambuja Cements Ltd.

15. The Learned Counsel for the Petitioner Companies states that pursuant to the order dated 16th day of August, 2021 passed by this Tribunal in CA(CAA)/97/ MB/2021 meeting of the Secured Creditors of the Petitioner Companies was not required to be held as there were no Secured Creditors in the Petitioner Companies and the meeting of the Unsecured Creditors of the First Petitioner Company was dispensed with as the present Scheme is an arrangement between the Petitioner Companies and its shareholders as contemplated under Section 230(1) (b) and not in accordance with the provisions of Section 230(1) (a) of the Companies Act, 2013 and there is no compromise or arrangement with any of the Unsecured Creditors as their rights are not affected. Further, the meeting of unsecured creditors of the Second Petitioner Company was dispensed with in view of ratio laid down by Hon’ble Tribunal in CSA No 243 of 2017 in the matter of Housing Development Finance Corporation Limited and by the Hon’ble NCLAT

in Ambuja Cements Ltd.

16. The Learned Counsel for the Petitioner Companies states that pursuant to the order dated 18th day of October, 2022 passed by this Tribunal in CP(CAA)/11/MB/2022, the Petitioner Companies were directed to submit the details of Corporate Guarantee, Performance Guarantee, Bank Guarantee and Contingent Liabilities; if any along with details of pending litigations against the Petitioner Companies and the details of all Letters of Credit sanctioned and utilized as well as Margin Money details; if any. The said directions have been duly complied with, by the Petitioner Companies through an Affidavit dated 17th November, 2022 filed with this Tribunal.

17. 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.

18. Further, Ms. Rupa Sutar, Authorised representative of Regional Director, MCA (WR) Mumbai, was present and reported no objections for allowing the above Company Scheme Petition.

19. All the assets and liabilities including taxes and charges, if any and duties of the Transferor Companies, shall pursuant to Section 232 of the Company Act, 2013, be transferred to and become the liabilities and duties of the Transferee Company.

20. Since all the requisite statutory compliances have been fulfilled, Company Petition bearing CP (CAA)/11/MB/2022 filed by the Petitioner Companies is made absolute in terms of prayers clause of the said Company Scheme Petition.

21. 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 Company, 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 Deputy Registrar or the Assistant Registrar, as the case may be, of this Tribunal.

22. The Petitioner Companies to lodge a certified copy of this order and the Scheme duly authenticated by the Deputy Registrar or the Assistant Registrar, as the case may be, 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.

23. 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.

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

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

26. Any concerned Authorities are at liberty to approach this Tribunal for any

further clarification as may be necessary.

27. Ordered Accordingly. Files to be consigned to records.

