

(2020) 03 NCLT CK 0096

In the National Company Law Appellate Tribunal, Principal Bench, New Delhi

Case No : Company Petition No. (CAA) 118/PB Of 2019, Company Application No. CA (CAA) 56/PB Of 2019

Virstra I-Technology Services Limited And Ors.

APPELLANT

Vs

Nucleus Software Exports Limited

RESPONDENT

Date of Decision : 18-03-2020

Acts Referred:

Companies (Compromises, Arrangements And Amalgamations) Rules, 2016 — Rule 15, 3(2)
Income-Tax Act, 1961 — Section 72A, 72A(a), 72A(2)(a)(i), 72A(2)(a)(ii), 72A(2)(b)
Companies Act, 2013 — Section 92, 230, 231, 232, 232(i), 232(3)(i)
Income Tax Rules, 1962 — Rule 9C

Citation : (2020) 03 NCLT CK 0096

Hon'ble Judges : B.S.V. Prakash Kumar, J; Sumita Purkayastha, Member (Technical)

Bench : Division Bench

Advocate : Tania Sharma, Bhawna Singh, Lakshmi Gurung

Judgement

B.S.V. Prakash Kumar, J

1. This is a Second Motion Application jointly filed under Sections 230 to 232 of the Companies Act, 2013, read with Rule 15 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 (hereinafter referred to as the "Rules") for the sanction and approval of the Scheme of Amalgamation ("Scheme") whereby the entire businesses and undertakings of Virstra I-Technology Services Limited ("Petitioner Transferor Company-1") and Avon Mobility Solutions Private Limited ("Petitioner Transferor Company-2") would be transferred to and vested in Nucleus Software Exports Limited ("Petitioner Transferee Company"), as going concerns, on occurrence of the Effective Date, with effect from the Appointed Date (both as defined in the Scheme) on the terms and conditions set forth in the Scheme. The Petitioner Transferor Company-1 and Petitioner Transferor Company-2 are hereinafter together

referred to as "Petitioner Transferor Companies". The Petitioner Transferor Companies and Petitioner Transferee Company are hereinafter together referred to as "Petitioner Companies". In terms of Rule 3(2) of the Rules, the joint petition filed by the Petitioner Companies is maintainable.

2. A perusal of the petition shows that initially the First Motion application seeking directions for convening/dispensing with the meetings of Shareholders and Creditors was filed before this bench and based on such joint application moved under Sections 230-232 of the Companies Act, 2013, this Tribunal vide its first motion order issued directions with respect to the same. On 01.11.2018 the Petitioners were directed to carry out publication in the newspapers English Daily 'Business Standard' (Delhi Edition) as well as in Hindi Daily 'Business Standard' (Delhi Edition). In addition thereto notices were directed to be served on the Regional Director (Northern Region), Registrar of Companies, NCT of Delhi and Haryana, Official Liquidator, the Income Tax Department and to the other relevant sectoral regulators.

3. In compliance with Order dated 08th August 2019, the Petitioner Companies have filed an affidavit of service dated 17th September 2019. In the said affidavit, the Petitioner Companies filed details of newspaper publication in English Daily Newspaper "Business Standard" and Hindi Daily Newspaper "Business Standard", both issues dated 27th 1 August 2019 regarding the date of hearing of the Second Motion Petition. Further, the affidavit of service also discloses that notices have been issued to the mentioned regulatory authorities.

4. It has also been submitted that the Petitioner Transferor Companies are the wholly owned subsidiaries of the Petitioner Transferee Company since the Petitioner Transferee Company (along with its nominees) holds 100% share capital of each of the Petitioner Transferor Companies, the Petitioner Transferee Company shall not issue any shares under the proposed Scheme. The existing shareholding of the Petitioner Transferee Company in each of the Petitioner Transferor Companies shall get cancelled and extinguish, pursuant to the proposed Scheme, hence there is no requirement of a valuation report for determining the share entitlement ratio in that regard. Further, it has been submitted that pursuant to Paragraph 7 of the Circular bearing no. CFD/DIL3/CIR/2017/21 : dated 10th March 2017 issued by Securities and Exchange Board of India, there is no requirement to obtain a valuation report from an independent chartered accountant, among others. In this regard, a certificate from Chartered Accountant dated 20th March 2019 regarding no requirement of a valuation report has been placed on record by the Petitioner Companies.

5. The Income Tax Department has filed its report for all the three Petitioner Companies. The IT Dept. in the Report had made, inter alia, the following observations:

(a) The IT Dept. has given its no objection to the Scheme in relation to Petitioner Transferor Company-1;

(b) The applicability of Section 72A of Income Tax Act, 1961 ("IT Act") 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 IT Act;

(c) The amalgamating companies i.e. the Petitioner Transferor Companies shall have held atleast 3/4th of book value of the fixed assets held by it, 2 years prior to the proposed date of amalgamation, as laid down under Section 72A(2)(a)(ii) of the IT Act;

(d) The amalgamating companies i.e. the Petitioner Transferor Companies are required to prove that they are engaged in their respective business, in which the accumulated loss occurred or depreciation remains unabsorbed, for 3 or more years prior to the proposed date of amalgamation, as laid down under Section 72A(2)(a)(i) of the IT Act;

(e) That the Petitioner Transferee Company shall have to maintain separate details of the assets acquired from the Petitioner Transferor Companies;

(f) That the genuineness of the merger is satisfied through (i) the satisfaction of Section 72A(2)(b) read with Rule 9C of the Income Tax Rules, 1962 ("IT Rules") post the merger has been approved; (ii) examination of the proposed merger in light of earlier mergers/demergers (if any) involving the Petitioner Companies.

6. The Petitioner Companies vide affidavit in response to the Reports of IT Dept. dated 08th November 2019 provided the following undertakings:

(a) The amalgamating companies i.e. the Petitioner Transferor Companies have (i) engaged in their respective business prior to the date from which the proposed Scheme is to come into effect, in which the accumulated loss occurred or depreciation remains unabsorbed, for 3 or more years; and (ii) held atleast 3/4th of book value of the fixed assets held by it, 2 years prior to the date from which the proposed Scheme is to come into effect and hence, the conditions laid down under Section 72A(a) of the IT Act are satisfied by the Petitioner Transferor Companies. The Petitioner Companies have also filed the financial statements of the Petitioner Transferor Companies for the financial years 2016-2017, 2017-18 and 2018-19 to evidence the mentioned statements;

(b) The Petitioner Transferee Company shall extend full assistance and cooperation to the IT Dept. re. such claims in relation to carry forward of losses and unabsorbed depreciation allowance in respect of the Petitioner Companies;

(c) The Petitioner Transferee Company shall maintain separate details of the assets acquired from the Petitioner Transferor Companies;

(d) The Petitioner shall comply with the conditions prescribed in Section 72A(2)(b) of the IT Act read with Rule 9C of the Income Tax Rules, 1962 once the proposed Scheme has been approved and comes into effect;

Post the sanctioning of the Scheme, the Petitioner Transferee Company shall assume all and defray the liabilities of the Petitioner Transferor Companies and the rights of the IT Dept. will not be prejudiced, and they shall be entitled to proceed against the Petitioner Transferee Company qua any liability in relation to the Petitioner Transferor Companies for the relevant AYs.

7. Additionally, the affidavit in response filed by the Petitioner Companies to the observations of the IT Dept. also discloses that the net worth of the Petitioner Transferee Company, pursuant to the proposed amalgamation of Petitioner Transferor Companies with the Petitioner Transferee Company, shall continue to be positive. The Petitioner Transferee Company has specifically undertaken that it is in a condition to discharge its liabilities. including the liabilities of the Petitioner Transferor Companies after the sanction of the Scheme.

8. The Regional Director has submitted a representation vide affidavit dated 06th November 2019, whereby he has made, inter alia, the following observations:

(a) "The Transferee Company may kindly be directed to comply with the provision of section 232(3)(i) of the Companies Act, 2013 in regard to fee payable on its revised authorized share capital.

(b) As per petition, there are no secured creditors in the Transferee Company, however, as per MCA-21 portal, it is observed that there are an active secured charge of Rs. 15.00 crore in the Transferee Company. The Hon'ble Tribunal may direct the Transferee Company to clarify the same and obtain NOC from charge holder.

(c) As per MCA portal, the Transferee Company has not uploaded list of shareholder/investor in Annual Return i.e. e-form MGT-7 filed for the F.Y. 2017-18 in terms of section 92 of the Companies Act, 2013. The Transferee company may be directed to upload the same on the same on MCA Portal. "

9. The Petitioner Companies submitted their response to the observations of the RD and ROC vide affidavits dated 13th November 2019 and 15th January 2020 and 16th January 2020. Reference the observations made by the RD, the Petitioner Companies made the following submissions/undertakings for clarifying the issues raised in the report of the RD :

(a) That the Petitioner Transferee Company shall comply with the conditions prescribed in Section 232(i) of the Companies Act, 2013 and has undertaken to pay the prescribed fee, as may be determined, on its increased authorized share capital once the proposed Scheme has been approved and comes into effect;

(b) That Petitioner Transferee Company has obtained working capital facility of Rs. 15 Crore from Citi Bank. This facility has the following sub-limits:

Sight Letter of credit Rs. 15 Crores;

Bank Guarantee sublimit Rs. 15 Crores;

Cash credit Rs. 2 Crores.

The Petitioner Transferee Company confirms that as on 14th March 2019 (for which a CA Certificate confirming that there are no secured creditors has been submitted to this Tribunal), no credit in the nature of Sight Letter of credit and cash credit was availed by the Petitioner Transferee Company from Citi Bank. Accordingly, Citi Bank has not been reflected as a secured creditor in the list of secured creditors as filed with the Second Motion. In this regard, the current financial statements (Financial Statements for FY 2018-19) of the Petitioner Transferee Company wherein there are no pending dues outstanding to be paid to Citi Bank has been placed on record. Furthermore, a letter dated 11th November 2019 from Citi Bank confirming that utilization of limits in the account of Petitioner Transferee Company has been Nil as on 14th March 2019 (i.e. the cut off date for the preparation of the list of secured creditor's) and as on 31st October 2019 along with a No Objection Certificate issued by the Bank have also been placed on record;

The Petitioner Transferee Company has filed the required list of shareholders for the financial year 2017-18 with SRN H05713227. In this regard, a copy of Form MGT-7 for FY 2017-18 alongwith the screenshot evidencing the filing of the list of shareholders for FY 2017-18 have been placed on record.

10. The Report of Official Liquidator issued in November 2019 has also been placed before us. An examination of the said Report of the Official Liquidator discloses that the Official Liquidator has not received any complaint against the proposed Scheme from any person/party interested in the Scheme in any manner till the date of the Report. Also, per the said Report, it is disclosed that the affairs of the Petitioner Companies have not been conducted in a manner prejudicial to the interests of its members or the public per the provisions of the Companies Act, 2013. Therefore, in effect a no objection to the Scheme has been granted by the office of Official Liquidator.

11. We have heard the counsels for the Petitioner Companies and also considered the representations made by the Regional Director, Northern Region, by the Official Liquidator and by the IT Department, in their reports. From the material on record, the Scheme appears to be fair and reasonable and is not contrary to public policy. All the observations raised by the concerned departments have been adequately addressed.

12. For the reasons stated above and considering all the relevant facts, procedural requirements of the Act and the Rules made thereunder and considering the report of the RD, OL and the concerned Income Tax Department(s), the Company Petition is made absolute in terms of prayer clause said petition. The Scheme of Amalgamation is hereby sanctioned and it is declared that the same shall be binding on the Petitioner Transferor Companies and Petitioner Transferee Company, their respective shareholders, creditors and all others concerned under Section 230-232 of Companies Act, 2013.

13. While approving the Scheme as above, we further clarify 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, and payment in accordance with law or in respect to any pending tax liability or in respect to any permission/compliance with any other requirement which may be specifically required under any law.

14. In light of the above, this Tribunal hereby orders as under:

THIS TRIBUNAL DO FURTHER ORDER:

(1) The Transferor Companies shall stand dissolved without being wound-up.

(2) 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 section 232 of the Act, be transferred to and vest in the Transferee Company for all the estate and interest of the Transferor Companies therein but subject nevertheless to all charges now affecting the same; and

(3) 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 section 232 of the Act, be transferred to and become the liabilities and duties of the Transferee Company; and

(4) That all proceedings now pending by or against the Transferor Companies including the liability to pay income tax or any other tax, be continued by or against the Transferee Company; and

(5) All employees of the Transferor Companies will become employees of the Transferee Company without any break or interruption of service;

(6) That Transferor 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 Companies shall 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 three Petitioner Companies shall be consolidated accordingly; and

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