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NCLT WIDENS ITS NET FOR APPROVING SCHEMES UNDER PROVISIONS OF THE COMPANIES ACT 2013

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The Chennai Bench of the National Company Law Tribunal (NCLT) has recently approved the merger of a Limited Liability Partnership (LLP) with a private limited company (Scheme). This newsflash analyses key aspects of the NCLT order permitting the aforesaid merger.

Background

Under a joint company petition filed before the Chennai Bench of the NCLT (NCLT Chennai Bench), Real Image LLP (Transferor LLP) comprising its entire business, including all assets and liabilities, all rights, title and interest in the immovable properties, was proposed to be merged with Qube Cinema Technologies Private Limited (Transferee Company) on a going concern basis. The Transferor LLP was incorporated under the provisions of the Limited Liability Partnership Act, 2008 (LLP Act) and the Transferee Company, under the provisions of the Companies Act, 2013 (2013 Act).

Question before the NCLT Chennai Bench for its consideration

Whether amalgamation of an LLP with a company was permissible under the provisions of section 230 to 232 of the 2013 Act?

Applicable law

Sections 230 to 232 of Chapter XV to the 2013 Act, relates to compromises, arrangements and amalgamations between 'companies' and its creditors and/or members. Section 234 of the 2013 Act relates to merger or amalgamation of company with 'foreign company'. The expression 'foreign company' is defined to mean *any company or body corporate incorporated outside India whether having a place of business in India or not*. Therefore, in essence, only a foreign LLP is permitted to merge or amalgamate with an Indian transferee company under the 2013 Act.

Under the previous regime, sections 391 to 394 of the Companies Act, 1956 (1956 Act) provided for compromises, arrangements and amalgamations between companies and its creditors and/ or members. Section 394(4)(b) provided an inclusive definition of 'transferor company'. The expression 'transferor company' was defined to include any

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body corporate, whether a company within the meaning of the 1956 Act or not and could thus be said to include merger of an LLP with a company.

Further, sections 60 to 62 of Chapter XII of the Limited Liability Partnership Act, 2008 (LLP Act) are identical to the provisions of sections 230 to 232 of the 2013 Act, relating to compromise, arrangement or reconstruction of LLPs.

Decision of the NCLT Chennai Bench

The NCLT Chennai Bench held that the legislative intent behind enacting both, the LLP Act and the 2013 Act was to facilitate ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both the LLP Act and the 2013 Act provided for merger or amalgamation of two or more LLPs or companies. The absence of specific provision corresponding to section 394(4)(b) of the 1956 Act in the 2013 Act was a clear case of *casus omissus* (omission in law).

Moreover, the NCLT Chennai Bench observed that since section 234 of the 2013 Act permitted merger of foreign LLP with Indian company, it would be wrong to presume that the 2013 Act prohibited merger of an Indian LLP with an Indian transferee company. There did not seem to be any express statutory bar to prohibit such a merger.

On facts, the Scheme appeared to be fair, reasonable, not in contrary to public policy and did not violate any provisions of law. Taking into consideration the facts of the case, the NCLT Chennai Bench permitted the proposed scheme of merger of the Transferor LLP with Transferee Company.

Comment

In the past the Mumbai Bench of the NCLT permitted a scheme of amalgamation for merger of Vertis Microsystems LLP with Forgeahead Solutions Private Limited. The aforesaid scheme was initially filed before the Hon'ble High Court of Bombay under sections 391 to 394 of the 1956 Act and was subsequently transferred to the Mumbai Bench of the NCLT once sections 230 to 232 of the 2013 Act were notified.

Further, a scheme for amalgamation of a registered Indian partnership firm, with an Indian company was placed before the Ahmedabad Bench of the NCLT for its approval. The Ahmedabad Bench of the NCLT held that since a registered partnership firm did not fall within the ambit of the term 'company' as per the 2013 Act, it should not be permitted to be merged with another company. The Ahmedabad Bench of the NCLT further observed that if the legislative intent of the parliament was to provide for a specific provision for a 'body corporate' to participate in the scheme of amalgamation the same would have been incorporated under the provisions of sections 230 to 234 of the 2013 Act (as available under section 234 of the 2013 Act). The Ahmedabad Bench of the NCLT held that the transferor entity, being a registered partnership firm and a body corporate, was not a 'company' within the meaning of the 2013 Act and, therefore, could not participate in the amalgamation proceedings that were initiated under the provisions of sections 230 to 232 of the 2013 Act.

In our view, the NCLT Chennai Bench has rightly applied the principle of *casus omissus* as a matter of clear necessity and since it found the reason to be within the four corners of the statute itself. The NCLT Chennai Bench has adopted the principle of purposive interpretation and construed the provisions of 2013 Act with reference to the context and consistent with the overall scheme of the enactment. The decision of the NCLT Chennai Bench is a welcome step towards creating desirable business atmosphere for companies and has provided for ease of doing business in India and removes the uncertainty of transaction structures caused by literal interpretation of the statutes. It widens the horizon for mergers / arrangements /

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reconstruction amongst the companies, limited liability partnership / partnership firms, etc. The signs of pragmatic implementation of law are indeed comforting. Recently, the Kolkata Bench of the NCLT has admitted an application for merger between two LLPs. However, the taxability of transactions involving merger of an LLP (whether with another LLP or with another company) under the Income-tax Act, 1961 (IT Act) would have to be analysed keeping in mind the existing legislative framework, as currently there are no exemptions for mergers involving LLP(s), as available under section 47 read with section 2(1B) of the IT Act for amalgamation between two or more companies.

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