IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CP No.35 of 2015 (O&M)
connected with CP No.28 of 2015
Date of Decision:- 06.07.2015

In the matter of:-
Sections 391 to 394 of the Companies Act, 1956

AND

In the matter of:-
Scheme of Amalgamation between:

Olympus Imaging India Pvt. Ltd.
...Transferor Company/Petitioner Company-I

AND

Olympus Medical Systems India Pvt. Ltd.
...Transferee Company/Petitioner Company-II

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL.

1. Whether reporters of local newspapers may be allowed to see judgment ?
2. To be referred to reporters or not ?
3. Whether the judgment should be reported in the Digest ?

Present: Mr. Atul V. Sood, Advocate,
for the Petitioner-Companies.

Mr. Deepak Aggarwal, Advocate with
Mr. Manjit Singh, Assistant Official Liquidator.

AMIT RAWAL, J. (ORAL)

The present company petition has been filed under Sections 391 to 394 of the Companies Act, 1956 on behalf of petitioner Transferor and Transferee companies, for sanctioning of the Scheme of Amalgamation (Annexure P-1).

The registered offices of the Transferor and Transferee

Companies is at 102B, First Floor, Time Tower, M.G.Road, Gurgaon, are located within the jurisdiction of this Court.

The Memorandum and Articles of Association of the Transferor and Transferee Companies have been annexed with the petition at Annexures P-2(Colly) and P-4 (Colly), respectively.

The Board of Directors of both the Transferor and Transferee Companies vide resolutions annexed at Annexures P-6 and P-7 have approved the Scheme of Amalgamation in their respective meetings held on 17.12.2014.

The petitioners have earlier approached this Court by Company Petition No.28 of 2015 and vide order dated 10.03.2015, this Court had dispensed with the convening of the meetings of the Equity Shareholders and Unsecured Creditors of the petitioner-companies. Since there was no secured creditors, there was no necessity of holding their meeting, accordingly first motion petition was disposed of.

On presentation of this second motion petition, this Court vide order dated 27.03.2015 issued a notice to the Regional Director, Ministry of Corporate Affairs, Noida and the Official Liquidator and also ordered the publication of the notice in the newspapers namely 'Indian Express' (English) and 'Jansatta' (Hindi) both Delhi/NCR Edition as well as in the Official Gazette of State of Haryana. The compliance affidavit of the said order has been filed and is taken on record.

Report of the Official Liquidator and the Regional Director has been filed in the Court today. Same are taken on record and a copy thereof has been given to the counsel for the petitioner-companies.

In the report dated 27.05.2015 filed by way of affidavit, Mr.

A.K. Chaturvedi, Regional Director, Northern Region, Ministry of Corporate Affairs in para No.8 & 9 has pointed out that:-

> *"8. That the Registrar of Companies vide para 31(1) with reference to the Companies Act, has stated that the Transferee Company has prima facie violated the provisions of Section 383 A(1) of the Companies Act, 1956 for non-appointment of Whole Time Company Secretary. That the deponent most respectfully submits that since the observations relates to the Transferee Company which will be in existence and therefore the observation of Registrar of Companies regarding non appointment of Company Secretary will not affect the present scheme. Registrar of Companies has not opposed the scheme.*
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> *9. That the Registrar of Companies vide para 31(1) with reference to the proposed scheme, has inter alia stated that from the scheme that the petitioner companies have not fixed the appointed date for the proposed scheme of amalgamation and submitted that the appointed date indicates the date of amalgamation i.e. the date from which the undertaking including assets and liabilities of the Transferor Company vest in Transferee Company. It is also relevant for the purpose of assessment of Income of the Transferor and Transferee Companies to form the basis for valuation of shares and determination of share exchange ratio. That the Deponent most respectfully submits that the petitioners may be advised to fix the appointed date in the present scheme as 01.04.2014 based upon which the valuation has been done."*

In response to the queries raised by the Regional Director in his affidavit, Masahiro Shinkai, Authorized Representative of petitioner-companies has filed reply by way of affidavit dated 29.06.2015 in Court today. Same is taken on record. Para Nos.2, 4, 5 & 6 of the same are reproduced herein as under:-

> *"2. That the Ld. Regional Director in his report dated May 27, 2015 has made certain observations in para no.9 with regard to the Petitioner Companies having not fixed an Appointed Date for the proposed Scheme of Amalgamation (i.e. the date from which the entire undertaking including assets and liabilities of the Transferor Company shall vest in the Transferee Company). Further it has been stated in the said para No.9 that the Petitioner Companies may be advised to fix 1.4.2014 as the Appointed Date since the said date has been the basis of Valuation.*
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> *4. That it is further stated the proposed scheme has been unamiously approved by the shareholders and creditors of the Petitioner Companies and further the provisions of the Companies Act, 1956 ("Act") do not specify as to which date a company may choose as its Appointed Date. It is well settled through various Judicial precedents that a company has the freedom to choose its Appointed Date as per its discretion, particularly when the shareholders and the creditors have approved the scheme as per the requirements of Section 391 of the Companies Act, 1956.*
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> *5. That Clause 3(b) of the proposed scheme of amalgamation clearly states that:* ***"Appointed Date" means the date when this Scheme <u>is approved by the High Court</u> or such other date as may be approved by the High Court.*** *Hence, the Scheme is clear about the Appointed Date.*
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> *6. That with regard to para 8 of the Report, it has been submitted that the Registrar of Companies has not opposed the Scheme. It is hereby submitted that the Transferee Company has already appointed a Whole Time Company Secretary. The copies of consent letter, Board Resolution for appointment dated 17.12.2014 and Form No.DIR-12 and Form No.MGT-14 has already been filed*

> *with the Office of the Registrar of Companies on 30.01.2015, copies whereof are annexed hereto as **Annexure A-1 (Colly).**"*

The above-stated explanations submitted by the authorized representative of the petitioner-companies sufficiently meets with the queries raised by the Regional Director.

The Official Liquidator has also submitted his report dated 06.07.2015 stating therein that in view of the observations of M/s Tarsem Garg & Co., Chartered Accountant, the affairs of the Transferor Company had not been conducted in a manner prejudicial to the interest of its members, creditors or to the public interest, however in para Nos.4 & 5 has extracted the report of Chartered Accountant. Same reads thus as under:-

> *"4 That M/s PRA & Associates, Chartered Accountant has verified the Accounts of Transferor Company and submitted his report to this office on 25.06.2015. The copy of report is enclosed and annexed as Annexure R-2. The learned Chartered Accountant has made following observations:-*
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> ***From April 2014, the Company has changed its business model. Earlier the Company was into trading activities but from 2014 it has started providing sales related support services in India against sales made by its parent Company Olympus Imaging Corporation, Japan. The Company has also entered into service agreement with its parent Company.***
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> *5 That from the Auditor's Report of M/s S.R. Batiliboi and Co. LLP as on 25 June, 2014 it was observed that:*
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> *(a) Without qualifying our opinion, we draw attention to Note 2 of the financial statements, whereby these accounts*

have been prepared on the basis that the Company does not continue to be a going concern. Accordingly, all assets and liabilities have been measured and stated at the values they expect to be settled/transferred at and provisions have been made in the books of account for the losses arising or likely to arise on account of such closure, to the extent ascertained by management at the time of preparation of these accounts. (page 2)

(b) Undisputed statutory dues including provident fund, income tax, sale-tax, service tax, custom duty, cess and other material statutory dues have generally been regularly deposited with the appropriate authorities though there has been a slight delay in a few cases. As informed to us, the provisions relating to investor education and protection fund, employees state insurance, wealth tax, excise duty are not applicable to the company. (Page 4)

(c) Contingent liabilities:

The company does not recognize a contingent liability but discloses its existence in the financial statements. (Page 6)

(d) ***Short-term provisions***

	March 31, 2014	*March 31, 2013*
	Rs.	***Rs.***
Provision for employee benefits		
Leave benefits (refer note 24)	*420,859*	*285,106*
Gratuity provision (refer note 24)	*355,807*	*---*
Others		
*Provision for warranties**	*---*	*3,000,000*
	776,666	*3,285,106*

**With effect from April 1, 2014, the holding company (Olympus Imaging Corporation, Japan) has agreed to undertake all warranty and non-warranty repairs through its Authorised Service partners in India. Pursuant to such an arrangement, the Company is discharged of its warranty liability/obligation and acccordingly no provision has been* *recorded during the current year. (Page 9)*

(e) ***Contingent liabilities***

	March 31, 2014	March 31, 2013
	Rs.	Rs.
Custom duty paid under protest*	5,018,045	4,815,958
Revenue deposit with Customs#	2,697,111	1,772,122
	7,715,156	6,588,080

- *On 17 March, 2012, the Department of Revenue for Customs has issued a Notification withdrawing the exemption of Basic Customs Duty on Camera's which meet the specifications mentioned in such Notification. The Company is contesting the duty paid on Camera's Imported subsequent to the aforesaid notification on the basis that the camera's Imported by the Company do not meet the specification prescribed in the notification and accordingly, continue to be covered under exempted goods. The Management does not expect any liability to arise on such duty which has already been paid under protest at the time of clearance of imported goods and accordingly no provision for liability has been recognised in the financial statements.*

  # The said amout represents the provisional assessment of duty already paid as per Section 18 of the Customs Act 1962 against import of goods from its related party (Olympus Imaging Corp, Japan). The amount paid shall be adjusted against the duty finally assessed and if the amount so paid falls short of, or is in excess of the duty finally assessed, the Company shall pay the deficiency or be entitled to a refund, as the case may be. (Page 16)

(f) ***Value of Imports calculated on C.I.F. basis****

	March 31, 2014	March 31, 2013
	Rs.	Rs.

Trade goods	*88,633,652*	*153,395,177*
Capital goods	*---*	*2,168,247*
	88,633,652	*155,563,424*

- *The above disclosure has been made on F.O.B. basis because of practical difficulties in disclosing the value of Imports on C.I.F. basis since the Company has standing arrangement with a shipping line and all Imports are covered under such a standing arrangement where it is difficult to allocate the Insurance or freight to each specific shipment. (Page 16)"*

It is averred by the counsel for the petitioner that the change of business plan has no effect on the Scheme of Amalgamation. Moreover, the change of business plan is within the main objects clause of the MOA of the Transferor Company.

The rest of the two observations are extracts of the auditors report. Moreover, all the liabilities of the Transferor Company are being taken over by the Transferee Company as per the Scheme of Amalgamation. Hence, none of these observations are hindrance to the sanctioning of the Scheme. Moreover, it is a categorical finding of the Chartered Accountant that the scheme is not prejudicial to the interest of the members, creditors on public interest.

The petitioner-companies have confirmed that there are no investigations or proceedings pending against them under Sections 235 to 251 of the Companies Act, 1956.

For the reasons afore-stated and on consideration of all the relevant facts and the prodecural requirements contemplated under Sections 391 to 394 of the Companies Act, 1956 and the relevant Rules and on due consideration of the reports of Regional Director, Northern Region, Ministry of Corporate Affairs, Noida and the Official Liquidator, the

Scheme of Amalgamation is hereby sanctioned and as a result thereto, all the assets and liabilities of the Transferor company shall stand vested in the Transferee Company and the Transferor Company shall be dissolved without being wound up. It is made clear that the appointed date of the Scheme of Amalgamation shall be 06.07.2015.

The Scheme shall be binding on the Transferor and Transferee Companies, their respective Shareholders, Creditors and all concerned.

Let the formal order of sanction of Scheme of Amalgamation be drawn in accordance with law and certified copy of the same be filed with the Registrar of Companies within 30 days from the receipt of the same.

A notice of the orders be published in the daily newspapers namely 'Indian Express' (English) and 'Jansatta' (Hindi) both Delhi/NCR Edition as well as in the Official Gazette of State of Haryana.

Any person interested shall be at liberty to apply to the court for any direction(s) as per law.

Learned counsel for the petitioner-companies states that the Transferee company would voluntarily deposit a sum of Rs.30,000/- in the Common Pool Fund Account of the Official Liquidator within one month. Statement is accepted.

Company petition is disposed of accordingly.

(AMIT RAWAL)
JUDGE

July 06, 2015
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