IN THE HIGH COURT OF PUNJAB & HARYANA, AT CHANDIGARH

CP No. 128 of 2014(O&M)
Date of decision: May 19 , 2015

In the matter of

Scheme of Amalgamation between :

Mercurio Pallia Autoworks Private Ltd.

....First Petitioner Company

And

M/s Mercurio Pallia Logistics Private Ltd.

Second Petitioner Company

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

Present:- Mr. Ashish Chaudhary, Advocate with
Mr. Rajat Arora, Advocate
for the petitioner-Companies.

Mr. M. Jayakumar, Official Liquidator.

****

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

AMIT RAWAL, J (ORAL).

The present petition has been filed under Sections

391 to 394 of the Companies Act, 1956 for sanction of the Scheme of Amalgamation(Annexure P-1) of First Petitioner Company with Second Petitioner Company.

Main objects of the First Petitioner Company and Second Petitioner Company are detailed in their respective Memorandum and Articles of Association which are annexed as Annexure P-3 and Annexure P-5 respectively.

Similarly copy of the resolution of the Board of Directors dated 7.2.2014 of First Petitioner Company and Second Petitioner Company have been annexed as Annexure P-2.

Previously, the First Petitioner Company and Second Petitioner Company approached this Court by filing first motion petition i.e. CP No. 98 of 2014, wherein vide order dated 26.5.2014 the meetings of Equity Shareholders and Creditors of both the Companies was dispensed with and liberty was granted to move second motion petition.

The notice of the present petition was issued to the Official Liquidator and Regional Director, Ministry of Corporate Affairs, Noida vide order dated 4.8.2014, and it was further directed to cause publication in the newspapers namely 'Times of India' (English), 'Dainik Bhaskar' (Hindi) as well as in the official Gazette of Haryana.

During the interregnum on 27.3.2015 the permission of this Court was sought to cause publication of the petition in the aforementioned newspapers on the premise that the Company, did not cause the publication in the newspapers and Official Gazette of

Haryana in view of the order dated 4.8.2014.

An affidavit of service causing the publication in the aforementioned newspapers as well as in the Official Gazette has been filed on 15.5.2015 whereby copy of the publications caused in the newspapers and the Gazette notification have been annexed as Annexure A-1 to A-3 respectively.

The Regional Director, in response to the notice has filed a report dated 09.2.2015 and has raised the following points in para 5 and 6 for determination:-

> *"5. That the deponent craves leave to submit that as per clause 4.2.2 of Part-IV of the Scheme it has been stated that the amalgamated company shall follow the method of accounting as prescribed for the pooling of interest method under Accounting Standard 14 as notified under the Companies Accounting Rules, 2006 and also to state that as per clause 4.2.8 of Part-IV of the Scheme it has been stated that the amalgamated company shall comply with the Accounting treatment as prescribed under Accounting Standard-14 i.e. Accounting for Amalgamation issued by the Institute of Chartered Accountants of India.*
>
> *6. That the Deponent craves leave to submit that report of the Registrar of Companies, Delhi & Haryana has been received vide dated 17.9.2014 (copy enclosed as Exhibit-A) and Registrar of Companies in his report vide para 19 has stated that the Transferor Company has not appointed Whole Time Company Secretary, thus there is a prima facie violation under section 203 of the Companies Act, 2013 and as per observations of*

Registrar of Companies vide para 31 has stated that in the petition and annexures thereto that the Transferor Company is a wholly owned subsidiary of the Transferee Company and Sh. Vipul Nanda is holding 1 share of the Transferor Company as nominee of the Transferee Company whereas as per e-records maintained under MCA-21, Transferor Company has not filed e-form 22B in compliance of the provisions of Section 187 C of the Companies Act, 1956 (corresponding to section 89) of the Companies Act, 2013) so far which is prima facie violation of section 187C of the Act. The said matter is being taken up separately, with the Registrar of Companies, Delhi & Haryana."

In response to the aforementioned report, Mr. Vipul Nanda, Director of the Second Petitioner Company has filed reply by way of an affidavit dated 20.3.2015 and attempted to meet the points of determination raised by the Regional Director. The relevant portion of the affidavit reads thus:-

"3. xx xx xx

In response to the above said observation I submit that on December 5, 2014 Company has already filed a compounding application/petition to the (Registrar of Companies, NCT of Delhi & Haryana & Company Law Board) Hon'ble Central Government for the aforesid non-compliance as per the provisions of Section 203 of the Companies Act, 2013 (hereinafter referred to as the Act), which is presently pending adjudication. The copy of the petition for compounding is attached herewith as Annexure A-1".

(b) xx xx xx

In response to the aforesaid observation I say and submit that the Company has filed the requisite Form No. MGT-6 to the Registrar of Companies, NCT of Delhi & Haryana for rectifying the aforesaid non-compliance as per the provisions of section 187-C of the Companies Act, 1956 (corresponding to section 89 of Companies Act, 2013). The copy of Form No. MGT-6 is attached herewith as "Annexure A-2.

5. I say and submit and undertake that as per the clause 4.2.2 of Part-IV of the Scehme, the amalgamated company shall follow the method of accounting as prescribed for the proceeding of merger method under Accounting Standard-14 as per the Companies Accounting Rules, 2006."

Similarly the Official Liquidator has filed report dated 6.2.2015 and has raised the following points of determination on the basis of the report of the Chartered Accountant. The relevant paras 4,5,6,7 and 8 reads thus:-

4 That M/s Anand Sabharwal & Associates, Chartered Accountant has verified the Accounts of Transferor Company and submitted his report to this office on 30.01.2015. The copy of report is enclosed and annexed as Annexure R-2. The learned Chartered Accountant has made following observations:-

- *That the company has contravened the provisions of Section 297 of the Companies Act, 1956 in respect to the approval given by the Central Government for certain transactions of goods and services with related parties. We noted that during the financial year 2012-2013 the company has entered into related party* *transaction covered under u/s 297 for Rs.1741.24 lacs against the approval granted by the Central Government for Rs. 294 lacs thereby the company has exceeded the aforesaid transaction by an amount of Rs. 1447.24 Lacs. In respect to this the auditors have also qualified their auditor report for the FY 2012-13 & 2013-14 respectively. In regard to this company is under non-compliance of the above provisions of the Section 297 of the Companies Act, 1956 and has not filed any condonation/compounding from the Central Government for the non-compliance.*

Auditors Qualification in Audit Report for FY 2013-14

The company has not complied with the provisions of Section 297 of the Companies Act, 1956 in connection with certain transaction for the sales of goods and services with a party covered under Section 297 as the value of such transaction has exceeded the amount approved by the Central Government.

Pending final determination on the non-compliance, no adjustments have been recorded in these financial statements. In the view of the above we are unable to comment on the adjustment, if any, that may be required to be made in the financial statements in this regard.

- *Non assessment of recoverable amount by the Company as required under Accounting Standard 28 on "Impairment of Assets" notified under Companies Act, 1956 read with General Circular 8/2014 dated 4th April, 2014 issued by Ministry of Corporate Affairs to assess impairment provisions, if any on.*

The fixed assets of net book value of Rs. 6,65,58,200/-which in our opinion is not in compliance with the said Accounting Standard. In absence of such assessment impairment losses, if any have not been accounted for in these financial assessment. We are unable to comment on the consequential adjustment, if any required to be made to the financial statements in this regard.

Emphasis of Matter:-

- *Without qualifying our opinion, we draw attention that the Company incurred a net loss of Rs. 17,069,081/- during the year ended March 31, 2014 and as of that date, the Company's its current assets by Rs.25,023,217/-. These conditions, alongwith other matters, indicate the existence of a material uncertainty that may cast significant concern about the company's ability to continue as a going concern.*

CARO REPORT

- *Undisputed statutory dues including Provident Fund, income-tax, sales-tax, wealth tax, service tax, excise duty, cess and other material statutory dues have not been regularly deposited with the appropriate authorities and there have been serious delays in large number of cases. The provisions relating to employee's state insurance, investor education and protection fund are not applicable to the company.*
- *That funds amounting to Rs. 13,014,285/- raised on short term basis mainly have been used for funding of fixed assets, long term loans and advances and losses.*

Auditors Qualification in Audit Report for FY 2012-13

Emphasis of matter:-

- *The company has not complied with the provisions of Section 297 of the Companies Act, 1956 in connection with certain transactions for the purchase of the goods and services with a party covered under Section 297 as the value of such transaction has exceeded the amount approved by the Central Government.*

As informed to us, the company is in the process of evaluating alternative courses of action including seeking a condonation from the Central Government for the non-compliance. Pending final determination on the non-compliance, no adjustments have been recorded in these financial statements. Our opinion is not qualified in respect of this matter.

CARO REPORT

- *Undisputed statutory dues including Provident Fund, income tax, sales tax, wealth tax, service tax, excise duty, cess and other material statutory dues have not been regularly deposited with the appropriate authorities and there have been serious delays in large number of cases. The provisions relating to employee's insurance, investor education and protection Fund is not applicable state to the company.*
- *That of the company, we report that funds amounting to Rs.13,014,285/- raised on short term basis mainly in the form of working capital have been used for funding of fixed assets, long term loans, and advances and losses.*

5. That from the Auditor's Report of M/s Mercurio Pallia Autoworks Pvt. Ltd. as on 2012-13, 2013-14 it was observed that :

(a) In accordance with the accounting standards 22 "accounting for taxes on income", in view of the large amount of accumulated losses carried forward at the close of the year, deferred tax assets on timing differences, on carry forward losses and unabsorbed depreciation have not been accounted for in the books since it is not virtually certain whether the company will be able to take advantages of such losses/depreciation.

(b) According to the transfer pricing norms under the Income Tax Act, 1961, the company is required to compute arm's length prices and maintain adequate documentation in respect of domestic transactions with associated enterprises. The company is in the process of completing a study to ascertain whether such domestic transaction with associated enterprises are in compliance with the transfer pricing norms.

6 That M/s Anand Sabharwal & Associates, Chartered Accountant has stated in his report that affair of the Company has not been conducted in a manner prejudicial to the interest of its members or to public interest subject to our observation on scrutiny of books and accounts at point XI of the report.

7 That in view of the observations of the Chartered Accountant and Auditor the Official Liquidator most respectfully submits that subject to para 4 to 6 of this report and para XI of Chartered Accountant report that the affair of the Company has not been conducted in a manner prejudicial to the interest of its members or to public interest.

8 That this office has received a letter from Mr. Rajeev Sunaria Practicing Company Secretary *along with Copy of Covering Letter of Compounding application under Section 297 of Companies Act and newspaper. The said letter is enclosed and marked as **Annexure R-3.”***

In response to the aforementioned report, Mr. Vipul Nanda, Director of the Second Petitioner Company has filed reply by way of an affidavit dated 20.3.2015 and attempted to meet the points of determination raised by the Official Liquidator. The relevant portion of the affidavit reads thus:-

“3. (i) xx xx xx

It is submitted in reply to the aforesaid observation being made by the OL that the Company has filed a compounding application/petition bearing no.___on January 30,2015 under Section 621 A of the Companies Act,1956 before the Hon'ble Central Government for the non-compliance as per the provisions of Section 297 of the Companies Act, 1956 (hereinafter referred to as the Act). The copy of Compounding application filed before the Central Government is annexed herewith as Annexure A-1.

ii. xx xx xx

It is submitted in reply to the aforesaid observation that Transferor Company is a 100% subsidiary of Transferee Company and has been catering services exclusively to its holding company. It is further submitted that all day to day activities of Mercurio Pallia Autoworks Private Limited (Transferor Company) is financially supported by its 100% holding company, Mercurio Pallia Logistics Private Limited (Transferee

Company). Even during the gestation period of 3 years, Mercurio Pallia Autoworks Private Limited suffered losses (in the F.Y.2009-10 Rs.(2,53,098), in F.Y. 2010-11 Rs. (36,07,968) & in F.Y. 2011-12 Rs. (1,66,28478) and in the 4th year of its operation it had generated taxable profits (PBT Rs. 21,14,687). However, in the very next year it could not generate taxable profit due to recessed market. Further, considering indicators of impairment, proper assessment by considering other requirement as prescribed under Accounting Standard 28 on "Impairment of Asset" notified under the Companies (Accounting Standard) Rules, 2006 (as amended) was not possible at the time of finalisation of Financial Statement. Accordingly, no provision had made on the fixed asset (net book value as at March 31, 2014 Rs.(6,65,58,199/-) towards impairment in these financial statements. It is further submitted that Transferor Company is 100% subsidiary of Transferee Company thereby all obligations and financial difficulties are not to be borne by public at large accordingly shareholders will also not be affected by the present obligations of the Transferor Company. Finally the impact of impairment if any occur will be passed on to its 100% holding company only in any condition. Upon merger with its 100% holding company, impairment losses if any will not impact interest of any other person.

iii. xx xx xx

In response of the aforesaid submissions I say and submit that as on date all obligations, dues have been cleared along with interest, penalties and the company is not in non-

compliance of any of the aforesaid provisions, I also hereby undertake that company will comply with all the statutory requirements in near future also.

iv xx xx xx

In reply to the aforesaid observation it is submitted that due to losses in Mercurio Pallia Autoworks Private Limited, the working capital has been negative whereby short term loan has been deployed to finance losses incurred by the company. It may be noted that in the FY-2013-14 amount of Rs. 2,023,217 have been utilized for long term purposes. However, inadvertently it was mentioned as amount of Rs.113,014,285/- (This amount relates to FY 2012-13)

v. xx xx xx

In response to the aforesaid observation, I submit that the Company has already filed a compounding application/petition to the Hon'ble Central Government for the non-compliance as per the provisions of Section 297 of The Act as on January 30, 2015.

vi. xx xx xx

In response of the aforesaid submissions I say and submit that as on date all obligations, dues have been cleared along with interest, penalties and the company is not in non-compliance of any of the aforesaid provisions. I also hereby undertake that company will comply with all the statutory requirements in near future also.

vii, It has been observed in the report that the funds amounting to Rs. 13,014,285/- raised on short term basis mainly have been used for funding of fixed assets, long term loan & advances and losses.

In response to the said observation I say that Due to losses in Mercurio Pallia Autoworks Private Limited, the working capital has been negative whereby short term loan has been deployed to finance losses incurred by the company. However, post-merger it will be taken care by resulting company.

4. In response to the said observation I hereby reproduce part 17 of Accounting Standard, 22 as notified under Company (Accounting Standard) rules, 2006:-

i) Para 17 : Where an enterprise has unabsorbed depreciation or carry forward of losses under tax laws, deferred tax assets should be recognised only to the extent that there is virtual certainty supported by convincing evidence that sufficient future taxable income will be available against which such deferred tax assets can be realised.

ii) Also we wish to specify Para 15: "Except in the situations stated in paragraph 17, deferred tax assets should be recognized and carried forward only to the extent that there is a reasonable certainty that sufficient future taxable income will be available against which such deferred tax assets can be realised.

Para 17 specifically mention that if there exist virtual certainty supported by convincing evidence then only deferred tax asset is to be created on unabsorbed depreciation and accumulated losses. Virtual certainty has not been defined in the Accounting Standard, According to dictionary meaning virtual means almost, however, it is subject to judgment based on facts. Since, at the time of signing of balance sheet no other business *opportunities exist which can offset unabsorbed depreciation and accumulated losses to satisfy the requirement of convincing evidence as mentioned in para 17 of Accounting Standard 22. Accordingly, deferred tax created in previous year have been reversed in financial year 2012-13 and not created in financial year 2013-14 inconformity with said Accounting Standard.*

In response of the said observation, *I reproduce relevant part of Section 92B of Income Tax Act, 1961:-*

i) Section 92 BA. For the purposes of this section and sections 92,92C, 92 D, 92E, "specified domestic transaction" in case of an assessee means any of the following transactions, not being an international transaction, namely:-

a) any expenditure in respect of which payment has been made or is to be made to a person referred to in clause (b) of sub-section (2) of section 40A;

b) any transaction referred to in section 80A;

c) any transfer of goods or services referred to in sub-section (8) of section 80-IA;

d) any business transacted between the assessee and other person as referred to in sub-section (10) of section 80-IA;

e) any transaction, referred to in any other section under Chapter VI-A or section 10AA, to which provisions of sub section (8) of sub section (10) of section 80-IA are applicable; or

f) any other transaction as may be prescribed,

g) and where the aggregate of such transactions entered into by the assessee in the previous year *exceeds a sum of five crore rupees.*

ii) The Company has not incurred any expenses referred in section 92BA of Income Tax Act, 1961 as it is only providing services exclusively to Mercurio Pallia Logistics Private Limited which do not fall within the meaning of clause (i) of section 92BA. Accordingly provisions of Section 92 BA do not apply to Mercurio Pallia Autoworks Private Limited."

On going through the points of determination, both the Regional Director and the Official Liquidator and as well as replies filed, the objections/points of determination raised, it is evident that the First and Second Petitioner Companies have met with the queries raised and have also undertaken to rectify the discrepancies as pointed out by the Regional Director and the Official Liquidator.

It has also been stated that the first petitioner Company had not incurred any expenses referred to Section 92-BA of the Income Tax Act, 1961 as it also provide the services to M/s Mercurio Pallia Logistics Pvt. Ltd. as the same does not fall within clause (i) of Section 92-BA and thus it has been submitted that provisions of the aforementioned Section do not apply to M/s Mercurio Pallia Autoworks Private Ltd.

It has further been stated that no investigation proceedings have been initiated or pending viz-a-viz the First Petitioner Company and Second Petitioner Company under Section 235 to 250 of the Companies Act, 1956.

For the reasons aforementioned and keeping in view the procedural requirements under Section 391-394 of the Companies Act, 1956 and as well as relevant affidavit and rules and due consideration of the reports of the Regional Director, Ministry of Corporate Affairs, Noida, and the Official Liquidator and the affidavits filed by the Director of the Second Petitioner Company, the Scheme of Amalgamation of First Petitioner Company/Transferor Company with the Second Petitioner Company/Transferee Company is hereby sanctioned and be dissolved without being wound up subject to the compliance of undertakings given by the Second Petitioner Company.

The Scheme shall be binding on First Petitioner Company/Transferor Company and Second Petitioner Company/ Transferee Company, their respective Shareholders and 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.

Copy of this order be published in 'Times of India' (English)' and 'Dainik Bhaskar (Hindi)' and Official Gazette of Haryana.

Any interested person shall be at liberty to apply to this Court for any directions as per law.

Learned counsel for the petitioner Companies states that the Second Petitioner Company would voluntarily deposit a sum of ₹30,000/- in the Common Pool Fund Account of the Official

Liquidator within six weeks. Statement is accepted.

The Company Petition is disposed of accordingly.

(AMIT RAWAL)
JUDGE

May 19, 2015
archana