IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
COMPANY SCHEME PETITION NO. 404 OF 2015
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 345 OF 2015

Regus Century Business Centre Private Limited
……….Petitioner/Transferor Company

AND

COMPANY SCHEME PETITION NO. 405 OF 2015
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 346 OF 2015

Regus Citygold Business Centre Private Limited
…………Petitioner / Transferee Company

In the matter of the Companies Act, 1956 (or re-enactment thereof upon effectiveness of Companies Act, 2013);

AND

In the matter of Sections 391 to 394 read with Sections 100 to 103 of the Companies Act, 1956 (or any corresponding provisions of the Companies Act, 2013 as may be notified);

AND

In the matter of Scheme of Amalgamation and Arrangement between Regus Century Business Centre Private Limited and Regus Citygold Business Centre Private Limited and their Respective Shareholders and Creditors

Called for Hearing

Mr. Hemant Sethi i/b M/s Hemant Sethi & Co., Advocates for the Petitioner.

Mr. A.R Varma , i/b Mr. A. A. Ansari for Regional Director.

Mr. S. Ramakantha, Official Liquidator, present

CORAM: K.R. Shriram, J.

DATE: 12th February, 2016

1. Heard the learned counsel for the Petitioner Companies. No objector has come before the court to oppose the Scheme and nor any party has controverted any averments made in the petition.

2. The sanction of the Court is sought under Sections 391 to 394 read with Sections 100 to 103 of the Companies Act, 1956 or any corresponding provisions of the Companies Act, 2013 to the Scheme of Amalgamation and Arrangement between Regus Century Business Centre Private Limited and between Regus Citygold Business Centre Private Limited and their respective shareholders and creditors.

3. Learned Counsel for the Petitioner states that both the Transferor and Transferee Company are presently engaged into running and operating business centres which include staffed and equipped, serviced offices, commercial offices including one or more individual offices, and offering ancillary business services.

4. The management proposes to merge Transferor Company with Petitioner Company in view of the following benefits:

    - Reduction in in overheads, administrative, managerial and other expenditure to create operational rationalization, organizational efficiency, and optimal utilization of various resources; and

- Consolidation of managerial expertise of the companies involved thereby giving additional strength to the operations and management of Transferee Company.

5. The Petitioner Companies approved the said Scheme by passing Board Resolution which are annexed to the respective Company Scheme Petition.

6. The learned Advocate for the Petitioner states that Petitioner Companies have complied with all directions passed in Company Summons for Directions and that the Petition has been filed in consonance with the orders passed in the Company Summons for Directions.

7. The learned Advocate appearing on behalf of the Petitioner has stated that it has complied with all requirements as per directions of this Court and they have filed necessary affidavits of compliance in the Court. Moreover, the Petitioner Companies undertakes to comply with all statutory requirements if any, as required under the Companies Act, 1956 / the Companies Act, 2013 and the Rules made there under. The said undertakings given by the Petitioner Companies are accepted.

8. The Regional Director has filed an Affidavit dated 2nd day of November, 2015 stating therein that in view of paragraphs 6(a) to 6(i) of the said affidavit, it appears that the Scheme is prejudicial to the interest of public and revenue.

   In paragraph 6(a) to 6(i) of the said affidavit, it is stated that:

a) *The Shares of the Transferor Company are held by Foreign Body Corporate. Hence, while giving effect to the Scheme, by issuing new shares by the Transferee Company to the shareholders of Transferor Company and cancellation of such shares issued to foreign body corporate, the Transferee Company has to comply with the provisions of FEMA/RBI regulations as applicable in this regard. In this case, if the reduction of capital is allowed as against the shares suspense account it would mean that without existence of share capital, the loss of the Transferee Company will be cancelled. The net effect is that the transferee company is avoiding allotment of new shares which will lead to violation of provisions of FEMA/RBI Regulations.*

b) *It is respectfully submitted that the tax implication, if any, arising out of the Scheme is subject to final decision of Income Tax Authority. The approval of the Scheme by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax returns filed by the Transferee Company after giving effect to the Scheme. The decision of the Income Tax Authority is binding on the Petitioner Companies.*

c) *Clause 5.2 of the scheme provides for reduction of paid up equity share capital of Transferee Company by reducing 14,40,000 equity shares of Rs. 10/- each on proportionate basis to adjust the debit balance in the profit and loss account of Transferee company. It is observed that as on the appointed date, prescribed in the scheme i.e. on 1.4.2014, the paid up share capital of the transferee company is only Rs. 1,00,000/- and is not sufficient to adjust the debit balance of Rs. 1,44,00,000/- from the profit and loss account of transferee company as provided in Clause 6.3 of the Scheme.*
Thus, the scheme provides for adjusting huge loss of the Transferee Company, not only from the existing paid up capital of

the transferee company but also from the proposed issue of new shares in future towards consideration for amalgamation of Transferor Company with Transferee Company. It is, therefore, evident that the adjustment of debit balance is from the proposed new capital of Transferee Company and the same is a separate cause of action that too it is a future event likely to happen. As the adjustment of set off of loss is not possible on the appointed date, that part of the scheme pertaining to reduction of paid up capital of the new shares cannot form part of the scheme and the petitioner cannot seek this relief as an integral part of the scheme.

d) Clause 5.2. of the scheme also states that "the equity shares to be issued pursuant to clause 5.1 of the scheme may be recorded as share suspense account". In this regard, it is submitted that if share application money is actually received by the company then before allotment of shares it can be accounted against 'share suspense account' or if allotment of shares is crystalized but issue of shares is postponed for obvious reasons, then also the share suspense account can be created. But in this case, the question of creation of share suspense account may not arise in as much as neither share application money will be received nor allotment of share will get crystalized, as the same is yet to come into existence for want of approval of the scheme of amalgamation by this Court. Hence, this clause deals with creation of share suspense account is only an accounting jugglery with a malafide motive of exhibiting misleading state of affairs of the Transferee Company in the post financial statement of Transferee Company. By adopting this process, the Petitioner Companies are seeking to show a lesser loss in the Amalgamated Company's Balance Sheet. Hence, this clause shall be removed from the scheme itself.

e) *Similarly, Clause 5.3 of the scheme states that "for the purpose of comply with clause 5.1 of the scheme only such number of equity shares would be issued to the shareholders of Transferor Company, as may be required after giving effect to clause 5.2 of the scheme". It further states that "it is hereby clarified that new share certificate shall be issued to the equity shareholder evidencing shares held by such equity shareholder after giving effect to clause 5.2 of the scheme".*

From the above foregoing, the Petitioner companies are with a malafide intention attempting to achieve what they could not achieve legally otherwise. In this process, the transferee company proposes to adjust the losses by way of reduction of shares even before the new shares are coming into existence which is unknown to law and the same is therefore to be declared as void and be deleted from the scheme. In this regard, it is submitted at the first instance, the company has to allot shares and the shares has to be recorded in the register of member to be maintained by the company to satisfy the requirement of provision of section 88 of Companies Act 2013 corresponding to sections 41 and 150 of the Companies Act, 1956. Without entering such number of shares in the register of member, the question of cancelling that shares does not arise and consequentially the cancellation of share capital by adjusting the loss of the transferee company is bad in law and hence, that clause is void. In this regard, it is suggested that without prejudice to the above submission if this Hon'ble Court is pleased to allow the arrangement forming part of amalgamation between transferor company and transferee company, then after completing the allotment of shares and entered new shares in the register of member, thereafter by following the due process of law the transferee company may approach this Hon'ble Court independently for reduction of share capital of the company to adjust the loss of the transferee company. In this regard, it is more *pertinent to consider the provision of section 66 of Companies Act, 2013 corresponding to section 100 of the Companies Act, 1956 which reads as follows:-*

"(b) either with or without extinguishing or reducing liability on any of the shares-

i) Cancel any paid up share capital which is lost or is unrepresented by available assets; or"

From the foregoing, it is amply clear that the loss of the company can be adjusted by canceling any paid up share capital which is lost and there is no provision for adjusting the loss as against "share suspense account" which has never come into existence. Hence, the Scheme is clearly violative of Section 66 of the Companies Act, 2013. It is, therefore, respectfully submitted that the creation of share suspense account as well as adjusting the loss of the company as against the share suspense account is unknown to law and if the scheme is allowed which will create a bad precedent and hence the scheme shall be rejected.

f) It is observed that the scheme is propounded for avoiding tax payment by profit making company viz. Transferor Company herein. The scheme has been framed by merging profit making company with loss making company. If, the intention of the profounder of the scheme is to achieve what has been stated in para 'B' of the preamble of the scheme, it could very well be done by merging loss making company with profit making company. In all fairness the company which has lost its substratum has to die. In other words, the transferee company has to be dissolved. In this case without undergoing the process of winding up proceedings, the transferee company can be dissolved by merging the loss making Transferee Company with profit making company. In this process, the object of the scheme can also be very well achieved. As stated herein above, the intention of the petitioner company is *only to defeat the payment of Income Tax to the Government It is also more pertinent to note that the share capital of both Transferor Company and Transferee Company are substantially held by a foreign body corporate viz. M/s. Regus International Holding Limited (Copies of the shareholders lists are annexed hereto and marked as Exhibit - 'E1' & 'E2'). The scheme is propounded only for giving undue benefit to a foreign body corporate by defeating various provisions of Companies Act/Income Tax Act/FEMA/RBI Regulations.*

g) *The scheme provides for amalgamation of Transferor Company with Transferee Company and also for reduction of paid up capital of Transferee Company for adjusting the debit balance in the profit and loss account of Transferee Company. As these reliefs are independent from each other, the Court fee paid by the petitioner is insufficient and therefore, the petition is not maintainable.*

h) *The deponent respectfully further submits that the scheme is designed to defeat the provisions of section 611 of the Companies Act, 1956 (corresponding Section 401/403 of the Companies Act, 2013). As per the share exchange ratio provided in clause 5.1 of the scheme, the transferee company has to allot 1530 equity share of Rs. 10/- each for every 10 equity share of Rs. 10/- each held in the transferor company. Presently, the transferor company is having 10000 equity share of Rs. 10/- each. Therefore, the transferee company is required to issue 15,30,000 number of equity shares. In that process, the transferee company has to increase its authorized capital from the existing capital of Rs. 10,00,000/- to minimum by Rs. 1,34,00,000/-. For this increase in authorized capital, the transferee company has to pay registration fees to ROC amounting to Rs. 1,80,500/- (approximately) which the petitioner company is attempting to avoid by dubious method* *of cancelling the shares which are required to be issued, much before its allotment, thereby keeping the number of shares required to be issued is within a meagre figure. As the intention of the framers of the scheme is not bonafide rather their intention is malafide, the scheme should not be allowed to. In addition to the payment of registration fees to the ROC, the transferee company has to pay stamp duty on the increased authorized share capital payable to Government of Maharashtra. This payment of fees also avoided and thereby there will be a huge loss to State Government also. For easy reference of existing authorized capital, the future capital needs if the scheme of amalgamation is allowed and registration lees payable to ROC are given in the table below-*

Company Scheme Petition No.	**404 & 405**
Present Authorized Equity Share Capital (in Rupees)	
Transferor	10,00,000
Transferee	10,00,000
Total (A)	**20,00,000**
Present Paid Up Equity Share Capital (in Rupees)	
Transferee	1,00,000
New shares proposed to be issued	1,53,00,000
Total (B)	**1,54,00,000**
Authorised Share Capital needs to be increased by Transferee Company (A – B)	**1,34,00,000**
Fees payable to ROC for increasing Authorised Share Capital of the Transferee Company	**1,80,500**

Without prejudice to the submissions stated herein above, if this Hon'ble Court is inclined to allow the scheme of arrangement pertaining to amalgamation then this Hon'ble Court may direct the transferee company to comply with the provisions of Section 61/64 r. w. section 401/403 of Companies Act, 2013 corresponding to Section 94/97 r. w. section 611 of Companies Act, 1956, in respect *of filing of necessary forms with the Registrar of Companies after payment of necessary filing fees and stamp duty as applicable on the said forms.*

i) *It has been noticed that the following scheme petitions are pending before the Hon'ble Court with identical reliefs:-*

Sr. No.	Company Scheme Petition Nos.	Name of the Petitioner Company
1	403	Regus Business Centre(Delhi) Pvt. Ltd.
2	404 & 405	Regus Century Business Centre Pvt. Ltd. And Regus Citygold Business Centre Pvt. Ltd.
3	441 & 442	Regus Office Centre (Mumbai) Pvt. Ltd. And Regus Business Centre Kolkata Pvt. Ltd.

That the rationale for the scheme as provided in the preamble of the all schemes reads as follows:-

i) Reduction in overheads, administrative, managerial and other expenditure to create operational, rationalizational, efficiency and optimal utilization of various resources and;

ii) Consolidation of managerial expertise of the companies involved thereby giving additional strength to the operations and management of Transferee Company.

If the above benefits are likely to be derived by the petitioner companies then it would be more appropriate to combine all the companies in a single scheme itself instead of filing different petitions. The ulterior motive of the petitioner companies are only to defeat the Revenue and hence, these schemes are not bonafide and bad in law. No apparent understandable purpose or object behind the Scheme is discernible. The scheme lacks commercial reasoning and therefore the scheme may not be allowed. If the real motive is to consolidate the companies then in that case all the group companies should be consolidated into single company.

9. In so far as observations made in above paragraphs of the Affidavit of Regional Director are concerned, the Petitioner has filed a Rejoinder dated 17th December 2015 in this Court and has stated as under.

10. In so far as observations made in paragraph 6(a) of the Affidavit of Regional Director is concerned, the Petitioner through its Counsel undertakes that the Transferee Company shall issue shares to the shareholders of Transferor Company upon the Scheme becoming effective and after complying with FEMA / RBI regulations as may be applicable with regards to issue of shares and reduction of shares independently.

11. In so far as observations made in paragraph 6(b) of the Affidavit of Regional Director is concerned, the Petitioner through its Counsel submits that the Petitioner is bound to comply with all applicable provisions of Income Tax Act, and all tax issues arising out of Scheme will be met and answered in accordance with applicable income tax provisions.

12. In so far as observations made in paragraph 6(c) of the Affidavit of Regional Director is concerned, the Petitioner through its Counsel submits that the Transferee Company undertakes to issue and allot equity shares based on the exchange ratio as per Clause 5.1 of the Scheme and therefore upon the Scheme becoming effective, the total Issued, Subscribed and Paid-up Share Capital of the Transferee Company shall be Rs. 1,54,00,000 (15,40,000 shares of Rs. 10/- each) which shall be adequate for cancellation of 14,40,000 equity shares of Rs. 10/- each as provided in Clause 5.2 of the Scheme. The Transferee Company further undertakes that reduction of capital as provided in Clause 5.2 of the Scheme shall take effect only after

shares have been issued and allotted to the shareholders of the Transferor Company by the Transferee Company.

13. In so far as observations made in paragraph 6(d) of the Affidavit of Regional Director is concerned, the Petitioner through its Counsel submits that the application for Scheme of Amalgamation and Arrangement was filed with the Hon'ble High Court on bonafide belief that the Scheme would be approved before September 30, 2015 and the effect of merger could be reflected in financial statements for the year ended March 31, 2015 since Appointed Date for merger is 01.04.2014. While giving effect to accounts for the year ended March 31, 2015, the accounting entry for issuance of shares would have to be recorded as share suspense account since the shares would not have been issued before March 31, 2015. However, given the change in circumstances and the Scheme not being approved before September 30, 2015, the Transferee Company undertakes to this Hon'ble Court that the Transferee Company will not be required to create Share Suspense Account as envisaged. Further, only upon recording of share capital pursuant to issue of shares as per Clause 5.1 of the Scheme, reduction of capital shall take effect as per Clause 5.2 of the Scheme by adjusting the debit balance of profit and loss account in view of the fact that the post-merger share capital shall be represented by unavailable assets. The Petitioner further submits that there is no cash outflow from the Petitioner Company upon reduction of capital and the adjustment of losses against the share capital is a mere accounting entry which reflects the true and correct position of the financial statements since the share capital would no longer be represented by available assets.

14. In so far as observations made in paragraph 6(e) of the Affidavit of Regional Director is concerned, the Petitioners through its Counsel submits that the Transferee Company undertakes to issue shares to the shareholders of Transferor Company based on Clause 5.1 of the Scheme and issue the share certificates accordingly and not issue net share certificates as stated in Clause 5.3 of the Scheme. The Petitioner therefore seeks leave of this Court to modify the Scheme by deleting Clause 5.3 of the Scheme. The Petitioners state that since the reduction is integral part of the Scheme and that a composite scheme has been filed for amalgamation and reduction of capital, under single window clearance, the same is permissible under the provisions of Sections 391-394 of the Companies Act, 1956 and there is no need to file multiple proceedings in this regards.

15. In view of above, leave to amend Scheme by deleting clause 5.3 of the scheme and all consequential amendments are allowed. Amendment to be carried out within a period of 2 weeks.

16. In so far as observations made in paragraph 6(f) of the Affidavit of Regional Director is concerned, the Petitioners through its Counsel submits that the the tax implications, if any, arising out of this scheme is subject matter of assessment of the income tax return by the Income Tax Department and the Petitioner Companies are bound to comply with all applicable provisions of Income Tax Act, and all tax issues arising out of Scheme will be met and answered in accordance with law. The Petitioner further submits that there are common shareholders in the Transferor and Transferee Companies and the Scheme does not involve payment of money to its shareholders on account of reduction of capital and therefore, there is no benefit flowing to the shareholders of the Petitioner Company.

17. In so far as observations made in paragraph 6(g) of the Affidavit of Regional Director is concerned, the Petitioners clarifies that reduction is part of Scheme and Sections 391-394 of the Companies Act, 1956 are by itself complete code and is in nature of single window clearance.

18. In so far as observations made in paragraph 6(h) of the Affidavit of Regional Director is concerned, the Petitioners through its Counsel submits that, without prejudice to the calculations given by Regional Director, the Transferee Company undertakes to comply with provisions of section 61/64 r. w. section 401/403 of Companies Act, 2013 corresponding to Section 94/97 r. w. section 611 of Companies Act, 1956 in respect of filing of necessary forms with the Registrar of Companies after payment of necessary filing fees and stamp duty as applicable under law on the said forms for increase / alteration / modification of the authorised capital, if necessary and act in a bonafide manner.

19. In so far as observations made in paragraph 6(i) of the Affidavit of Regional Director is concerned, the Petitioners clarify that the proposed scheme has been approved by all the shareholders of the Company. The Petitioner further submits that it is the commercial decision of the management to amalgamate the Transferor Company with the Transferee Company.

20. In view of undertakings and clarifications given by the Petitioners, the Counsel for the Regional Director on instructions of Mr. M Chandanamuthu, Joint Director in the office of Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai, states that they are satisfied with the submissions given by the

Petitioner Company. The said undertakings given by the Petitioner are accepted.

21. The Official Liquidator has filed his report dated 23rd September, 2015 in Company Scheme Petition No. 404 of 2015 stating therein that the affairs of the Petitioner Company have been conducted in a proper manner and that the Petitioner Company may be ordered to be dissolved.

22. From the material on record, the Scheme appears to be fair and reasonable and is not violative of any provisions of law and is not contrary to public policy. None of the parties concerned has come forward to oppose the Scheme.

23. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 404 of 2015 is made absolute in terms of prayer clauses (a) and Company Scheme Petition No. 405 of 2015 is made absolute in terms of prayer clauses (a) to (c) of the Petition.

24. The Petitioner Company to lodge a copy of this order and the Scheme, duly authenticated by the Company Registrar, High Court (O.S.), Bombay 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 issuance of Order.

25. Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme with the concerned Registrar of Companies, electronically, along with E-Form 21 / E-Form INC 28 in addition to physical copy as per the provisions of the Companies Act 1956 / 2013.

26. The Petitioner Companies in the Company Scheme Petition to pay cost of Rs.10,000/- each to the Regional Director, Western Region, Mumbai and the Petitioner Company in the Company Scheme Petition Nos. 404 of 2015 to pay costs of Rs.10,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from today.

27. Filing and issuance of the drawn up order is dispensed with.

28. All concerned authorities to act on a copy of this order along with Scheme and Form of Minutes duly authenticated by the Company Registrar, High Court (O. S.), Bombay.

(K.R. Shriram, J.)

CERTIFICATE

I certify that this Order uploaded is a true and correct copy of original signed order.

Uploaded by: Shankar Gawde, Stenographer