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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CO.PET. 23/2015**

**IN THE MATTER OF BEEHIVE TECHNOLOGIES
PRIVATE LIMITED**

.... Transferor / Petitioner Company No.1

WITH

BEEHIVE SYSTEMS PRIVATE LIMITED

.... Transferee / Petitioner Company No.2

Through: Mr Rajat Sehgal, Adv. for petitioners
Ms Aparna Mudiam, Asstt. ROC for Regional
Director.

Mr Rajiv Bahl, Adv. for the OL.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

ORDER

% **13.01.2016**

1. This is a second motion petition filed jointly by Beehive Technologies Private Limited (i.e. the transferor company /petitioner no.1) and Beehive Systems Private Limited (i.e. the transferee company / petitioner no.2) under Section 391 and 394 of the Companies Act, 1956 (hereafter referred to as the Act).

1.1 The transferor and transferee companies, as referred to above, will be collectively referred to as the petitioners hereafter.

1.2 The registered office of the petitioners are located within the territorial jurisdiction of this court.

1.3 The details with respect to incorporation and the petitioners' authorised issued, subscribed and paid up capital have been set out in the

petition.

1.4 The copies of memorandum and articles of association as well as the profit and loss account and the balance sheet as on 31.03.2014 have been filed by the petitioners.

1.5 Copies of Board of Directors' resolution of even date i.e. 24.11.2014, concerning the petitioners, whereby, the scheme of amalgamation has been approved, are filed with the petition.

1.6 The petitioners have averred that there are no proceedings pending against them, under Sections 235 to 251 of the Act.

1.7 The petitioners had in the earlier round had filed a petition (i.e. the first motion), being: CA(M) No.175/2014, whereby, a prayer had been made for dispensing with, the requirement of convening meeting of shareholders and creditors. This court vide order dated 22.12.2014, having regard to the fact that all shareholders of the transferor and the transferee company had given their consent to the proposed scheme, dispensed with the requirement of convening meetings, as prayed. The court, also noted, that since, both the transferor and the transferee company did not have any unsecured and secured creditors, and therefore, quite obviously, there was no requirement to convene a meeting with respect to that class of persons / entities.

2. The petitioners, thereafter, filed the instant petition (i.e. second motion). Notice in this petition was issued on 28.01.2015. Notice was accepted on behalf of the Official Liquidator (OL) and the Regional Director (RD). Furthermore, citations were ordered to be published.

2.1 Pursuant thereto, reply/ representation has been filed by the Regional Director (in short RD). Citations were published in Delhi Editions of newspapers Pioneer (English) and Amar Ujala (Hindi), on 16.04.2015 and

17.04.2015, respectively. The copy of the letter dated 09.02.2015, demonstrating service of the petition on the OL and an affidavit dated 06.07.2015 establishing publication of citation alongwith the newspaper extracts, was filed by the petitioners.

3. Pursuant thereto, the RD filed its affidavit under Section 394 A of the Act. In the affidavit, the RD relied upon the general circular bearing no. 53/2011, dated 26.07.2011 and, circular bearing no. 1/2014, dated 15.01.2014. Based on the aforementioned circulars, as per the affidavit of the RD, communication was sent to the Registrar of Companies, Delhi and Haryana (in short the ROC), and the Income Tax Department. A perusal of the affidavit of the RD would show that vide communication dated 01.06.2015 it had raised the following concern:

“... The assessee company has filed the reply in part vide letter dated 28.05.2015. It has been also informed that the accounts for the Financial Year 2014-15 (relevant to assessment year 2015-16) are under finalization of audit. In the absence of the complete information from the transferor and transferee company, the status report may not be sent. The status report may be submitted in the said case after receiving the complete information from the said companies.....”

3.1 Besides the aforesaid, the affidavit of the RD also indicated, that since, the transferee company included, one NRI shareholder, located in Singapore, which held 7965 shares, the transferee company should be directed to comply with the provisions of the Reserve Bank Act, 1934 (in short the RBI Act), and the Foreign Exchange Management Act, 1999 (in short the FEMA).

3.2 Furthermore, the RD's affidavit also stressed the fact that the transferee company should follow provisions of Accounting Standard 14 as

the amalgamation proposed in the scheme was in the nature of merger. The RD in its affidavit, re-emphasised the provisions of clause 17.1 of Part VI of the proposed scheme which adverts to the fact that the staff, workmen and the permanent employees of the transferor company, who were in service on the date immediately preceding the date from which the scheme would take effect (i.e. the “effective date”), shall continue as the staff, workmen and, employees of the transferee company without any break or interruption in employment/ service and, upon, such terms and conditions, which are not less favourable than those that obtained qua them while they were engaged/ employed with the transferor company.

3.3 Furthermore, the affidavit also brought to fore the fact that, as indicated in clause 21 of Part VI of the proposed scheme, on the scheme being sanctioned, the transferee company shall stand dissolved without winding up.

4. In so far as the OL is concerned, he has, inter alia, stated in his report that no complaint against the proposed scheme has been received by him from any interested person or party. The OL has also averred in his report that on the basis of information supplied by the petitioners, it appears, the affairs of the transferor company have been conducted in a manner which could not be construed as being prejudicial to either the interest of their members or the public at large. In other words, affairs of the company, according to the OL, did not fall foul of the provisions of the second proviso of Section 394(1) of the Act.

5. In response to the concerns raised by the RD, from the point of view of the Income Tax Department, the petitioners have submitted that vide letter dated 28.05.2015, complete information was provided to the

concerned Income Tax Officer (ITO). It is further averred that annual accounts for the financial year 2014-2015, which ended on 31.03.2015, were, at that point in time under preparation. Accordingly, it was emphasised that the following was required to be noted: (i) that since the due date for filing the return was 30.09.2015; time was available to make compliance; and (ii) that there was no outstanding or disputed income tax demand pending qua the transferee company.

5.1 It is further averred by the petitioners that copies of income tax returns, balance sheets, profit and loss account for the financial years 2012-2013 and 2013-2014, along with the other relevant documents, have already been provided to the concerned ITO. In sum, it was stated that the concerned ITO's stand in his letter dated 01.06.2015, was erroneous, for the reason that he failed to appreciate that accounts for financial year 2014-2015 were, at that relevant point in time, under finalization.

5.2 As regards the concern raised with regard to the NRI shareholder, of the transferee company, it was stated that the said shareholder held less than 1% shares in the transferee company, and that, the requisite form FC-TRS had already been filed with the RBI, when, transfer of shares took place in his favour, in 2012; in accordance with the provisions of the RBI Act, 1934 and FEMA. It is further stated that the said information qua transfer of shares, was also, disclosed to the ROC, in the relevant annual return. To be noted, along with the reply, filed by the petitioners, copy of form 'FC-TRS', dated 23.05.2012, is also filed.

6. I may also note that the petitioners, have also placed on record a letter dated 12.10.2015. This is a letter, apparently, written by the transferee company to the concerned ITO is indicative of the fact that copy of the

acknowledgement of income tax returns, along with audited financials and audited report for the financial year 2014-2015, concerning the transferor and transferee company, stood filed. Furthermore, copies of assessment orders for assessment years 2010-2011, 2011-2012 and 2012-2013 qua the transferee company also, appears to have been filed. Furthermore, outstanding demands qua the transferee company for assessment years 2010-2011, 2011-2012 and 2012-2013 also stand disclosed.

6.1 In so far as the transferor company is concerned, it is indicated in the very same letter, that income tax returns, have been filed till assessment year 2015-2016, and that, no demands were due and pending, as on the date of the communication. The stand taken in the communication, is that, the proposed amalgamation is tax neutral as the transferor company, which is a subsidiary of the transferee company, is being amalgamated with its holding company i.e. the transferee company. Reference in this regard is placed on Section 47(1)(vi) of the Income Tax Act, 1961.

7. Having regard to the stand taken by the petitioners, I am of the view that the concerns which are raised by the R.D. on behalf of the Income Tax Department, have been duly answered.

7.1 In any event, notwithstanding what is stated by the petitioners, the transferee company will file an undertaking with this court, within two weeks from today, stating therein, that it will take over and defray all liabilities of the transferor company. It is also made clear, that the Income Tax Authorities will be entitled to proceed against the transferee company qua any liability which it would have fastened on to the transferor company for the relevant period, and that, which may arise on account of the scheme being sanctioned.

8. As regards the concern raised with regard to the shares held by an NRI in the transferor company, the same seems to be adequately answered. The relevant form appears to have been filed by the petitioners.

8.1 Notwithstanding the above, if there is any deficiency found or, any violation committed of any provisions of the RBI Act and/or FEMA, the sanction granted by this court to the scheme will not come in the way of any action being taken, in accordance with law, against the concerned persons, directors and officials of the petitioners.

9. As indicated above, the OL has indicated, that no objections have been received by him, from any person and / or interested party qua the proposal scheme. Furthermore, the OL has also indicated that the requirement of the second proviso of Section 394 (1) of the Act are met.

10. Accordingly, in view of the approval accorded to the scheme by the shareholders and creditors of the petitioners and, given the fact, that the concerns of the RD and the OL, as indicated above, have been duly taken care of, in my opinion, there appears to be no impediment to the grant of sanction to the scheme. Consequently, sanction is granted to the scheme in terms of Section 391 and 394 of the Act. The petitioners will, however, comply with all statutory requirements, as mandated in law. A certified copy of the order, sanctioning the scheme, will be filed with the ROC, within thirty (30) days of its receipt.

10.1 In terms of the provisions of Section 391 and 394 of the Act, and in terms of the scheme the entire undertaking, properties, rights and powers of the transferor company will stand transferred to and / or vest in the transferee company without any further act or deed. Similarly, in terms of the scheme, all liabilities and duties of the transferor company shall stand

transferred to the transferee company without any further act or deed. Upon the scheme coming into effect, the transferor company shall stand dissolved without having to follow the process of winding up.

10.2 It is made clear, that this order will not be construed as an order granting exemption from : payment of stamp duty or, taxes or, any other charges, if any, payable, as per the relevant provisions of law or, from any applicable permissions that may have to be obtained or, even compliances that may have to be made, as per the mandate of law.

11. Resultantly, the petition is allowed and disposed of in the aforesaid terms.

RAJIV SHAKDHER, J

JANUARY 13, 2016

Yg/kk