

IN THE NATIONAL COMPANY LAW TRIBUNAL : NEW DELHI

SINGLE BENCH

CA – 01/ C- III/ND/17

Connected with

CAA-99 (PB)/2017

SECTION : Under Sections 230 to 232 of the Companies Act, 2013.

IN THE MATTER OF

Scheme of Amalgamation Atheros Communication India Pvt. Ltd, CSR India Private Limited, CSR Technology (India) Private Limited Ltd and IKANOS Communications (India) Pvt. Ltd -Transferor- Non Petitioner Companies with Qualcomm India Private Limited..... Petitioner/Transferee Company

Qualcomm India Private Limited Applicant/Transferee Company

Order delivered on 14.07.2017

Coram :

**R. VARADHARAJAN,
Hon'ble Member (Judicial)**

For the Petitioner

**: Ms. Shilpi Jain, Advocate
Ms. Shreya Gulati, Advocate**

For the Respondent

: -



For Intervener

: -

ORDER

On 26.05.2017, in a second motion Petition in relation to the Scheme of Amalgamation as contemplated between the Petitioner/ Transferee Company with four other Companies stated to be non-petitioner Companies, as they have filed the concerned petitions in other NCLTs taking into consideration where the respective registered offices are situated, this Tribunal in relation to the service of notice to the authorities as contemplated under the provisions of Section 230 (5) of the Companies Act, 2013 has passed the following order :

(i) XXXXXXXXX

(ii) xxxxxxxxx

“(iii) In addition to the above public notice, each of the petitioners shall serve the notice of the Petition on the following Authorities, namely, (a) Central Government through Regional Director (Northern Region), Ministry of Corporate Affairs (b) Registrar of Companies, NCT of Delhi & Haryana, Ministry of Corporate Affairs (c) the Income Tax Department, (d) Reserve Bank of India (e) Ministry of Information Technology and to such other Sectoral Regulatory Authorities who may govern the working of the respective companies involved in the Scheme at least 30 days before the date fixed for hearing of the above Petition.

(iv) From the perusal of the Balance Sheet dated 31.12.2016 of the Transferee Company, it is seen that the Transferee Company alone is



having a total asset base of Rs.30,229.85 million. However, the Transferor Companies financials have not been filed. This Tribunal is unable to ascertain their asset Base. In any case, it will be appropriate to issue notice also to Competition Commission of India under the circumstances of the case.

(v) Though in para 60 of the petition, it is stated by the petitioner that the provisions of the Competition Act, 2002 will not apply but however taking into consideration the provisions of Section 6 of the Competition Act, 2002, the petitioners are directed keeping in view the above paragraph to intimate the Competition Commission of India about the proposed Amalgamation.

In light of the said order, on behalf of the petitioner/Transferee Company, an application has been moved on 28.6.2017 wherein the following prayer has been sought for by the petitioner/Transferee Company.

(i) Modify the order issued by the Hon'ble Tribunal on 26 May 2017 in Company Petition, being C.P. No.(CAA)-99(PB/2017) by deleting paras (iv) and (v) or dispense with the requirement of giving intimation of the Petition to the CCI,

(ii) Pass such further or other order/orders and/or issue such direction/directions as may be necessary or as this Hon'ble Tribunal may deem fit and proper.



The above application has been moved before this Tribunal by the Counsel for the applicant on 04.7.2017. It is pertinent to note that the date of hearing of joint petition filed by the petitioner for the approval of the Scheme is fixed on 28.7.2017 and the petitioner is required to give notice wherever it was required to be given as specified in the order including to the statutory authority within 30 days in advance so that the statutory /regulatory authority can react to the Scheme of Amalgamation as contemplated between the petitioner and the non-petitioners.

Obviously, moving the above application at such a late stage when all compliances are required to be made by the petitioner/Transferee Company is, in itself prima facie disentitles this application being taken up for consideration and the application deserves to be dismissed in limine. However, since the applicant/petitioner is also contending in relation to the scope of the powers of this Tribunal to direct the issue of notice as contemplated under Section 230 (5), this Tribunal is also dealing with same and for the aforesaid reason, the provisions of Section 230 (5) relevant for the purpose on hand is reproduced hereunder for ready reference:

“S.230 (1) xxx

(2) xxx



(3) xxx

(4) xxx

(5) *A notice under sub-section (3) along with all the documents in such form as may be prescribed shall also be sent to the Central Government, the income-tax authorities, the Reserve Bank of India, the Securities and Exchange Board, the Registrar, the respective stock exchanges, the Official Liquidator, the Competition Commission of India established under sub-section (1) of section 7 of the Competition Act, 2012 (Act 12 of 2003), if necessary, and as such other sectoral regulators or authorities which are likely to be affected by the compromise or arrangement and shall require that representations, if any, to be made by them shall be made within a period of thirty days from the date of receipt of such notice, failing which, it shall be presumed that they have no representation to make on the proposals”.*

Perusal of the above provision clearly highlights that it is not necessary that the concerned regulators or authorities are required to be affected by the compromise or arrangement definitely or affirmatively. A likelihood is sufficient in order to a ring bell for this Tribunal to order notice to the concerned regulatory authorities.

Hence, the provision vests this Tribunal with the discretion, in relation to authorities to whom notice is required to be issued. The order dated



26.05.2017 discloses the apprehension based on which this Tribunal had ordered notice to be issued to CCI , even though such an explanation was not required to be given, as what is contemplated under the provisions of Section 230 (5), is enabling this Tribunal to ascertain from the authorities that while sanctioning the Scheme that it is not violative nor is contrary to be public policy, which has been the consistent stand taken by the Hon'ble Supreme Court in its judgments including the one in Miheer H. Mafatlal v. Mafatlal Industries Ltd reported in (1996) 87 Com.Cas 792.

The Transferee petitioner Company is one of the leading manufacturers of semiconductor and telecommunications equipment company and its products and technologies are a vital component in relation to smart Phones of which it is having a substantial say in the World market and even in relation to leading smart phone manufacturers. Thus, taking into consideration the quantum of turnover, this Tribunal had directed the issue of notice to CCI and it is for the said authority to respond or not to respond to consider in elaborate detail whether the provisions of Competition Act, 2002 will apply or not, as it is in the domain of CCI and not this Tribunal. A likelihood of the application of the provisions of Competition Act, 2002 is enough and sufficient to trigger the issue of notice on the part of this Tribunal and it is for the CCI to consider

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whether the business combination attracts the concerned Act or not, including whether such combinations are exempt. In this connection this Tribunal is of the view that it is better on the part of the Tribunal to err on the right than decide the other way, by refraining from ordering notice to the authorities of which it feels, will have a bearing on the Scheme which has come before it for sanction.

The Learned Counsel for the applicant took a stand that notice to the Competition Commission of India will unnecessarily delay the proceedings by a period of more than 210 days as by the issue of notice as directed by this Tribunal under Section 230 (5), an elaborate procedure as contemplated under the provisions of Competition Act, 2002 in relation to the business combination is required to be considered. However, the Learned Counsel seems to have completely misconstrued the provision of Section 230 (5) as by virtue of such notice to the Regulator/Authority in this case, the Competition Commission of India is required to respond to the notice issued under Section 230 (5) or for that matter, any other authority including any other Sectoral Regulators, within a period of 30 days from the date of such notice and the said Section also specifically provides that failing any representation from the authorities to whom notice has been issued, then it shall be presumed that

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they have no representation to make on the proposal. The provision of notice and its response or lack of it as contained in Section 230 (5) of the Companies Act, 2013 is self-contained, as in case of failure on the part of concerned authorities to respond, this Tribunal can always consider that the authorities named therein have no proposal to be placed before the Tribunal in relation to Scheme which enables the Tribunal to proceed further without perpetually awaiting for the response of the concerned authority. Thus, the onus is placed on the authority to whom notice is issued to act within the prescribed limit. Consequence of failure to act within the time limit by the authority enables this Tribunal to proceed further in relation to the consideration of the Scheme for its sanction or otherwise.

In this connection, reference to the decision rendered by Hon'ble NCLT, Ahmedabad Bench in Re: SB Blades Limited and Ors. reported in MANU/NC/6436/2017 will be apposite wherein the onus has been placed on the authorities to whom notices are issued to respond within 30 days, failing which, this Tribunal will have the liberty to proceed with the disposal of the petition. Hence, the submission made by the Learned Counsel for the applicant that for approving the Scheme of Amalgamation as contemplated amongst the Transferee Company on the one hand and the Transferor Companies on the

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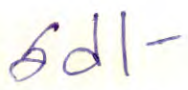
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other, this Tribunal is required to wait for a period of 210 days is misplaced and made without appreciating the impact of the provision. If the authority is required to be satisfied about the applicability then it is the primary purpose for which such a notice is intended. Thus looking at any angle, this application seems to be misplaced and not made bonafide and seems to be an abuse of process of law.

Hence, viewing from any angle, this application deserves to be dismissed with costs of Rs.25,000/- payable to Prime Minister's National Relief Fund within a week from the date of this order. Further, the order dated 26.05.2017 also stands as such without any necessity for its modification or deletion as prayed for in application.


(R. VARADHARAJAN)
MEMBER (JUDICIAL) | 14/7/17