BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,

MUMBAI BENCH

CSP NO. 976 OF 2017
IN
CSA NO. 815 OF 2017

Atlas Copco (India) Limited……First Petitioner Company

AND

Epiroc Mining India Limited…..Second Petitioner Company

In the matter of the Companies Act, 2013;

AND

In the matter of Sections 230 to 232 read with Section 66 and other applicable provisions of the Companies Act, 2013;

AND

In the matter of Scheme of Arrangement between Atlas Copco (India) Limited ("Transferor Company") and Epiroc Mining India Limited ("Transferee Company") and their respective Shareholders.

Order delivered on 30th November, 2017
**Coram:**
Hon'ble B.S.V. Prakash Kumar, Member (J)
Hon'ble V .Nallasenapathy Hon'ble, Member (T)

For the Petitioner(s): Mr. Hemant Sethi i/b Hemant Sethi & Co.
Mr. Ramesh Gholap, Deputy Registrar of Companies

**Per: V. Nallasenapathy, Member (T)**

**ORDER**

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

2. The sanction of the Hon'ble Tribunal is sought under Sections 230 to 232 read with Section 66 and other applicable provisions of the Companies Act, 2013 to the of Arrangement between Atlas Copco (India) Limited ("Transferor Company") and Epiroc Mining India Limited ("Transferee Company") and their respective Shareholders ("Scheme").

3. The Counsel for the Petitioner Companies further submit that the First Petitioner Company is primarily engaged in the business of manufacturing and selling industrial gas and air compressors, vacuum solutions, industrial tools and solutions, mobile air, tools, power, pumps and light towers and mining and rock excavation (including civil construction) equipment. The Second Petitioner Company is primarily engaged in the business of manufacturing and dealing in mining equipment.

4. The Counsel for the Petitioner Companies further submit that the rationale for the Scheme is that it would lead to: (i) efficient and focused management; (ii) unlocking value for the shareholders of the Transferor Company; (iii) financial and administrative efficiencies; and (iv) alignment of Indian operations and legal structure of the Atlas Group entities with the global legal and operating structure, and therefore the management of the Transferor Company has decided to demerge the mining and rock excavation (including civil construction) equipment business of the Transferor Company into the Transferee Company. Accordingly, with a view to effect such plan, the Board of Directors of the Transferor Company and the Transferee Company proposes that the mining and rock excavation (including civil construction) equipment business of the Transferor Company be transferred to and be vested in the Transferee Company on a going concern basis.

5. The counsel for the Petitioner Companies submits that the Board of Directors of the Transferor Company and the Transferee Company have approved the said Scheme by passing board resolutions which are annexed to the Company Scheme Petition.

6. The counsel appearing on behalf of the Petitioner Companies further states that the Petitioner Companies have complied with all the directions passed in the Company

Scheme Application referred to above and that the Company Scheme Petition has been filed in consonance with the orders passed in abovementioned Company Scheme Application.

7. The Counsel appearing on behalf of the Petitioner Companies further states that the Petitioner Companies have complied with all requirements as per directions of the Tribunal and they have filed necessary affidavits of compliance in the Tribunal. Moreover, the Petitioner Companies through their counsel undertakes to comply with all statutory requirements if any, as required under the Companies Act, 2013 and the rules made there under as applicable. The said undertakings given by the Petitioner Companies are accepted.

8. The Regional Director has filed a report dated 13 November 2017 stating therein, save and except as stated in paragraph IV (a) to (i), it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph IV, of the said report it is stated that:

(a) *As per Clause 2.1 "Definitions" of the Scheme "The Appointed Date" means 30th November, 2017 and/or such other date as may be decided by the Tribunal. The expression "Appointed Date" is used to reflect the date of which assets and liabilities of the existing company were to be identified for the purpose of transfer to the Transferee Company/Resulting Company so that the Assets and Liabilities as on the date of "Appointed Date" stands lawfully transferred. It is stated that the Petitioners has fixed future Appointed date i.e. 30-11-2017. Approval or sanction of a Scheme of future date, which is yet to take place, cannot be considered, therefore the Hon 'ble NCLT may fix a specific date as Appointed Date.*

(b) *The Company had fixed a future Appointed date i.e. 30-11-2017 in the Scheme, therefore it is not possible to quantify the value of assets & liabilities as on that date, at present. Hence, the Scheme is not fair and needs to be amended, suitably.*

(c) *As the proposed merger is effective from a future date i.e. 30-11-2017, basis for ascertaining the proposed Swap/Exchange Ratio is questionable in absence of information of exact value of Assets & Liabilities on that date. The Swap/Exchange Ratio should be fair and reasonable. As the scheme once approved becomes binding "on the company".*

*(d) In accordance to proviso to Section 232(3) of the Companies Act, 2013, the Company may be directed to file a Certificate from the Company's Auditors to the effect that the Accounting Treatment as proposed in the Scheme is in conformity with the Accounting Standards as prescribed under Section 133 of the Companies Act, 2013.*

*(e) The Demerged Company may be restricted to use Security Premium Account, which is only available for purposes mentioned in Section 52(2) of the Companies Act, 2013 for adjusting any capital loss arising out of transfer of Demerged Undertaking to the Resulting Company. In this regard, the Company may be directed to debit/adjust such capital loss in Goodwill Account or Capital Reserve Account.*

*(f) As regards para No. 12 of the Scheme, it is stated that the Petitioners have not given any justifiable reason for cancellation of 7 Equity Shares for reduction of paid-up capital of the Transferee Company. Further, it is also not found in accordance to Section 66(1) of the Companies Act, 2013. Therefore, the Hon'ble NCLT may restrict the Transferee Company for cancellation of such Shares.*

*(g) Since the Transferor Companies has Non-Resident Shareholders and the Company prefers to issue Equity Shares to NRIs, it is subject to the compliance of Section 55 of the Companies Act, 2013 and FEMA Regulations/RBI Guidelines by the Transferee Company.*

*(h) As per existing practice, the Petitioner Companies are required to serve Notice for Scheme of Arrangements to the Income Tax Department for their comments. These Companies reported that they have served copy of Scheme Application along with relevant orders etc. vide their letter dated 3rd May 2017 to IT Department. Further, this office has also issued reminder vide letter dated 23-10-2017 to the concerned Income Tax authorities.*

*(i) The Tax Implication, if any arising out of the scheme is subject to final decision of Income Tax Authorities. The approval of the Scheme by this Hon'ble Tribunal may not deter the Income Tax Authority to scrutinize the Tax Return filed by the both Companies after giving effect to the Scheme. The decision of the Income Tax Authority is binding on these companies.*

*Save and except as stated in para IV (a) to (i) above, it appears that the Scheme is not prejudicial to the interest of Shareholders and Public.*
*Under these circumstances the Regional Director prays this Hon'ble Tribunal may kindly be pleased to:*

*(a) take this report on record;*
*(b) Consider the observations made at Sr. No. IV (a) to (i) as mentioned above; and*
*(c) Pass such other order or orders as deemed fit and proper in the facts and circumstances of the case.*

9. As far as observations made in paragraph IV (a) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that the Companies Act, 2013 does not prohibit a prospective Appointed Date and Section 232(6) of the Companies Act, 2013 merely provides that the Scheme shall

be deemed to be effective only from the Appointed Date specified in the Scheme and not from a date subsequent to such Appointed Date. The Petitioners clarify that that the Appointed Date shall be as on close of business hours on 30 November 2017.

10. As far as observations made in paragraph IV (b) and (c) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that the value of the assets and liabilities as on the Appointed Date is immaterial in the present case as the Scheme intends to mirror the shareholding of the Transferor Company and Transferee Company by prescribing a share exchange ratio of 1:1 i.e., the Transferee Company shall issue and allot 1 equity share of Rs. 10/- each to each shareholder of the Transferor Company for every 1 (one) equity share of Rs. 10/- each of the Transferor Company held by them. The valuation report issued by Thadani & Company, Chartered Accountants, for this purpose also states that proposed share exchange ratio is fair and reasonable given that:

(a) once the Scheme is implemented all shareholders of the Transferor Company will become shareholders of the Transferee Company;

(b) the share of earnings to which they are presently entitled to from the Transferor Company, would, on implementation of the Scheme, be received by them as shareholders of the Transferor Company and the Transferee Company;

(c) at present the profits generated by the Transferor Company are available to the shareholders in a single entity viz. the Transferor Company. On implementation of the Scheme the profits generated by the Transferor Company would now be available to them as shareholders of the Transferor Company and the Transferee Company; and the effect of the Scheme is that each shareholder of the Transferor Company becomes the owner of two scrips instead of one; and

(d) as an integral part of the Scheme, the entire current equity share capital of the Transferee Company would be cancelled. Thus, upon implementation of the proposed demerger, the entire share capital of the Transferee Company would be held by all the shareholders of the Transferor Company and the percentage holding of each shareholder in the Transferee Company and the Transferor Company remains unchanged from the proportion of capital held by such shareholder presently in the Transferor Company. Any contemplated change in shareholding will only be as a result of the independent volition of the concerned shareholders or affecting all the shareholders as a class.

Further, the share swap ratio has been unanimously approved by the shareholders of the Transferor Company and the Transferee Company. The Counsel for the Petitioners submit that even in a given situation where the appointed date was retrospective the swap ratio would have been the same.

11. As far as observations made in paragraph IV (d) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that the certificate issued by the auditors of the Transferor Company and Transferee Company stating that the accounting treatment proposed in the Scheme is in conformity with the accounting standards prescribed under Section 133 of the Companies Act, 2013 has already been filed before this Tribunal along with the Company Scheme Petition and are appended as Exhibits H1 & H2 to the Company Scheme Petition and the same has also been served in the office of the Regional Director on 13 October 2017. The counsel for the Petitioner Companies further submit that the Regional Director has annexed the auditors' certificate to his report at page no. 23 and 32 respectively.

12. As far as observations made in paragraph IV (e) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that

the excess of the book value of assets and the book value of liabilities of the Demerged Undertaking transferred pursuant to the Scheme are proposed to be adjusted against the retained earnings of the Transferor Company (first against Securities Premium Account, then against General Reserves and thereafter against Surplus in the Statement of Profit and Loss). In case of deficit, the same shall be credited to the capital reserve account of the Transferor Company.

13. The Counsel for the Petitioners further submit that the proposed utilisation of the Securities Premium Account amounts to reduction of capital of the Transferee Company by virtue of the provisions of Sections 52 and 66 of the Companies Act, 2013 ("Act"). As Section 52 of the Act expressly provides that provisions of the said Act relating to the reduction of share capital of a Company shall, except as provided in Section 52(2) of the Act apply even for adjustment of Securities Premium Account as if it were the paid up share capital of the Company. The Counsel for the Petitioner Companies further submits that as per Section 52(1), where a company issues shares at a premium whether for cash or otherwise, a sum equal to the aggregate amount of the premium received on those shares shall be transferred to a securities premium account and the provisions of this Act relating to reduction of share capital of a company shall, except as provided in this section, apply as if the securities premium account were the paid-up share capital of the company.

14. The Counsel for Petitioners further submit that:-

*Section 52 of the Companies Act, 2013 reads as follows: -*

*Notwithstanding anything contained under Section 52 (1) of the Companies Act, 2013, the securities premium account vide Section 52 (2) of the Companies Act, 2013, may be applied by the company –*

*a) towards the issue of unissued shares of the company to the members of the company as fully paid bonus shares;*

b) *in writing off the preliminary expenses of the company;*
c) *in writing off the expenses of, or the commission paid or discount allowed on, any issue of shares or debentures of the company;*
d) *in providing for the premium payable on the redemption of any redeemable preference shares or of any debentures of the company; or*
e) *for the purchase of its own shares or other securities under section 68.*

15. As provided under section 52 (1) of the Act, for reduction of share capital of the company in accordance with the provisions of the Act (except for the purposes specified under Section 52(2) of the Act), the Securities Premium Account shall be treated as paid-up share capital of the company. Accordingly, if the Securities Premium Account is applied/ utilized for any of the purposes (s) other than those mentioned in Section 52(2) of the Act, then such utilization would be treated as reduction of share capital in accordance with the provisions of the Act. The Petitioner, in such a case, is required to follow the provisions of Section 66 of the Act. Further, the statutory auditors of the Transferor Company has also confirmed that the proposed adjustments to the Securities Premium Account are in conformity with the accounting standards prescribed under Section 133 of the Companies Act, 2013.

16. As far as observations made in paragraph IV (f) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that cancellation of the existing paid up capital of the Transferee Company comprising of 7 equity shares having face value of Rs. 10 each is an integral part of the Scheme and critical for ensuring that the shareholding of the Transferor Company and the Transferee Company post the demerger is identical for the reasons set out in paragraph 10 above. Non-cancellation of the existing paid up capital of the Transferee Company will be prejudicial to the rights of the shareholders of the Transferor Company. As stated above, the share swap ratio has been unanimously

approved by the shareholders of the Transferor Company and the Transferee Company.

17. As far as observations made in paragraph IV (g) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that the Petitioner Companies undertake to comply with all applicable provisions of the FEMA Regulations/RBI Guidelines for issuing shares to non-resident shareholders (including NRIs) pursuant to the demerger. No preference shares are being issued or redeemed by the Petitioner Companies pursuant to the demerger and accordingly the provisions of Section 55 of the Companies Act, 2013 do not apply in the present case.

18. As far as observations made in paragraph IV (h) and (i) of the report of the Regional Director are concerned, the Petitioner Companies through their counsel submit that the Petitioner Companies undertake to comply with all applicable provisions of the Income Tax Act, 1961 and all tax issues arising out of the Scheme will be met and answered in accordance with law.

19. The observations made by the Regional Director have been explained by the Petitioner Companies in paragraph 9 to 18 above. The clarifications and undertakings given by the Petitioner Companies are hereby accepted.

20. 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.

21. Since all the requisite statutory compliances have been fulfilled, the Company Scheme Petition referred to above has been made absolute in terms of prayer clause (a) to (b) of the said Petition.

22. The Petitioner Companies are directed to file a copy of this order along with a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically, along with e-Form INC-28, within 30 (thirty) days from the date of issuance of a certified copy of this order.

23. The Transferee Company to lodge a copy of this order and the Scheme duly certified by the Deputy Director or Assistant Registrar National Company Law Tribunal, Mumbai Bench, with the concerned Superintendent of Stamps for the purpose of adjudication of stamp duty payable, if any, on the same within 60 (sixty) days from the date of receipt of the certified copy of the order.

24. The Petitioner Companies to pay costs of INR 25,000/- each to the Regional Director, Western Region, Mumbai. The costs to be paid within 4 (four) weeks from the date of receipt of Order.

25. All authorities concerned to act on a certified copy of this order along with Scheme duly certified by the Deputy Director or Assistant Registrar , National Company Law Tribunal, Mumbai Bench.

Sd/-

**V. Nallasenapathy, Member (T)**

Sd/-

**B.S.V. Prakash Kumar, Member (J)**

Date: 30.11.2017