

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH

CSP NO 591 OF 2017
IN
CSA No. 405 of 2017

Dimexon (India) Holding Private LimitedFirst Petitioner Company

(Transferor Company)

AND

Dimexon Diamonds Limited

.....Second Petitioner Company

(Transferee Company)

In the matter of the Companies Act, 2013;

AND

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

AND

In the matter of Scheme of Amalgamation of Dimexon (India)
Holding Private Limited ('the Transferor Company') and
Dimexon Diamonds Limited ('the Transferee Company') and
their respective Shareholders

Order/Judgement delivered on 7th December 2017.

Coram:

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

Hon'ble **V. Nallasenapathy**, Member (T)

For the Petitioner(s): Mr. Hemant Sethi i/b Hemant Sethi & Co,
Advocates

For Regional Director :

S. Ramakantha , Joint Director

For the Official Liquidator:

Mr. Santosh Dalvi, Assistant from the office of Official
Liquidator

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

Order

1. Heard the learned counsel for the Petitioner Companies. No objector has come before the Tribunal to oppose the Petitions and nor any party has controverted any averments made in the Petitions.
2. The sanction of the Tribunal is sought under Sections 230 to 232 of the Companies Act, 2013, Scheme of Amalgamation of Dimexon (India) Holding

Private Limited ('the Transferor Company') and Dimexon Diamonds Limited ('the Transferee Company') and their respective Shareholders .

3. The learned Counsel for the Petitioners submit that the Transferor Company is engaged in the business of an investment holding company. The Transferee Company is engaged in the business of import, manufacturing and export of rough & polished diamonds.
4. The Rational for the Scheme is that it will result in the following benefits:
 - a. Simplified corporate structure and improved management.*
 - b. Greater integration and greater financial strength and flexibility for the amalgamated entity, which would result in maximizing overall shareholder value, and will improve the competitive position of the combined entity;*
 - c. Rationalization of administrative and compliance related costs;*
 - d. Greater efficiency in cash management of the amalgamated entity, and access to cash flow generated by the combined business which can be deployed more efficiently to fund organic and inorganic growth opportunities, to maximize shareholder value;*
 - e. Cost savings are expected to flow from more focused efforts and the elimination of duplication, and rationalization of administrative expenses; and*
 - f. The combined operations are expected to give rise to capital efficiency and improved cash flows.*
5. The learned Counsel for the Petitioner Companies further states that the Petitioner Companies have complied with all requirements as per the directions of this 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, 1956 / 2013 and the rules made there under whichever is applicable. The said undertaking is accepted.
6. The Regional Director has filed a Report dated 20th November, 2017 stating therein that save and except as stated in paragraph IV(a) to (f) of the said Report, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph IV of the said Report, the Regional Director has stated that:

(a) In addition to compliance of AS-14 (IND AS-103) the Transferee Company shall pass such accounting entries which

are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8) etc.,

- (b) As per existing practice , this Directorate has also issued a reminder 17/10/2017 to IT Department.*
- (c) 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 ax return filed by the transferee Company after giving effect to the scheme. The decision of the Income Tax Authority is binding on the petitioner Company.*
- (d) As per Clause 11.2 of the Scheme (Authorized, Issued, subscribed and paid up capital of Transferee Company) and fees payable by the Transferee Company shall be in accordance with the provisions of Section 232(3)(1) of the Companies Act, 2013.*
- (e) As regards Part-1(Share Capital) Clause-2.1 of the Scheme , it is submitted that on perusal of the share holding pattern of M/s Dimexon (India) Holding Private Limited -the Transferor Company indicates 99.99% of the share are held by M/s Dimexon International Holding BV Netherlands further, the said company along with Mr. Rajiv P Mehta holds 100 shares constituting 0.00013% of holdings. In this regard it is submitted that as M/s Dimexon International Holding BV Netherland the shareholders of M/s Dimexon (India) Holding Private Limited are receiving cash consideration amounting to Rs. 100,00,00,000/- (Rupees one Hundred Crores only) M/s Dimexon Diamonds Limited, the Transferee Company has to issue shares. Accordingly , the Transferee Company to comply with RBI and FEMA Guidelines as applicable;*
- (f) Since the cash consideration to be paid to M/s Dimexon International Holding BV Netherlands company, the share price per share arrived should be minimum of fair price determined as per FEMA guidelines . Hence valuer should certify that the price per share is as per FEMA guidelines.*
- (g) As the Transferee Company ism 100% subsidiary of the Transferor Company , Hon'ble Tribunal may kindly direct the*

companies involved in the scheme to file Solvency Certificate with the Register of Companies , Mumbai, as required u/s 233(1)(c) read with section 233(12) and 234(1) of the Companies Act, 2013 and pass appropriate order(s) as deem fit.

(h) In view of the objection raised by ROC Mumbai, mentioned at para 11 above Hon'ble NCLT may pass appropriate orders as deem fit.

7. In so far as observations made in paragraph IV (a) of the Report of Regional Director is concerned, the Transferee Company through their Counsel undertakes that in addition to compliance of AS-14 (IND AS-103) the Transferee Company shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5 (IND AS-8) to the extent applicable.
8. In so far as observations made in paragraph IV. (b) & (c) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel undertakes to comply with all applicable provision of the Income Tax Act, 1961 and all tax issues arising out of the Scheme will be met and answered in accordance with law.
9. In so far as observations made in paragraph IV (d) of the report of Regional Director is concerned, the Transferee Company clarifies that in respect of fees payable by the Transferee Company on its Authorized Share Capital, subsequent to the Amalgamation shall be set-off of fees paid by the Transferor Company on its Authorized Share Capital in accordance to the provisions of Section 232(3)(i) of the Companies Act, 2013.
10. In so far as observations made in paragraph IV (e) & (f) of the Report of Regional Director is concerned, the Petitioner Companies have filed affidavit dated 7th December 2017 annexing therewith no objection letter dated 16th June 2017 from Reserve Bank of India to the proposed Scheme. The Transferee Company through their Counsel further undertakes that for allotment of new shares , debentures and cash consideration to be paid to the shareholder of Transferor Company in

the manner set out in the scheme, the Transferee Company undertakes to comply with FEMI/RBI Regulations to the extent applicable.

11. In so far as observations made in paragraph IV (g) of the Report of Regional Director is concerned, the Petitioner Companies submits that the present petition is filed under sections 230 to 232 of the Companies Act, 2013 and therefore solvency certificate as required under section 233 of the Companies Act, 2013 is not applicable in the present case.
12. The Registrar of Company has filed his Report to the Regional Director and has made the following observations which have been captured in paragraph 11 of Regional Directors' report :-

- (i) *The main objects of the transferor company are not similar to the main objects of the transferee company and hence the amalgamation cannot be allowed for want of enabling main objects of the transferee company to carry out NBFC activity and reflecting the finance/ NBFC activity as part of transferee's name.*
- (ii) *Solvency Certificate etc. is required to be filed u/s. 233(1)(c) read with Section 233(12) of the Companies Act, 2013 as the scheme is between holding company & its wholly owned subsidiary company.*
- (iii) *Merger record date should be the "Appointed date" instead of future determination by Board of Director as referred in para 1.9 of the Scheme.*
- (iv) *As the reference to cross Border India-Netherlands Double Taxation Avoidance Agreement is referred in para 1.15 & 3.2 of the scheme, RBI's approval (FEMA) may be obtained, also considering that the sole shareholder of the Transferor Company to whom share being issued is foreign company.*
- (v) *Valuation per share (as consideration) shall not be less than the FEMA Guideline Price, & to that effect authorized Value need to certify.*
- (vi) *Separate Notice to RBI (FEMA/FE Department) & RBI (NBFC/DNBS Department) need to be issued as Rs 100 crores cash consideration sought to be paid to foreign shareholders etc., & Transferor being an NBFC.*
- (vii) *It is a case of Reverse Merger i.e. Holding company merging into its Subsidiary Company (100%). Hence the enabling Board Resolution of the Transferee Company shall be passed with reference to Section 66 of the Companies Act, 2013 as well. However, the same is not referred in the Board resolution dated 08/02/2017 of the Transferee Company. Hence, shares of Transferee Company held by the Transferor Company cannot be cancelled as provided in para 11.4 of the Scheme. Further it results in non-compliance of Section 230(2)(b) of the Companies Act, 2013.*
- (viii) *With reference to para 12 of the scheme, it should follow "Pooling of interest Method" only at book values & allocation to identifiable at fair values cannot be allowed under AS-14 (Pooling of Interest Method) as all*

applicable conditions of AS-14 (Pooling of Interest Method) are duly met. Para 12 of the scheme needs amendment.

13. In so far as observations made in paragraph 11(i) (iv) & (vi) of the Report of Regional Director pertaining to ROC's observations , the Transferee Company through their Counsel submit that Reserve Bank of India by their letter dated 16th June 2017 have given their approval and directed the Transferee Company to make compliance of relevant FEMA regulations which the Transferee Company has already undertaken .
14. Counsel for the Petitioners further invite our attention to notification from RBI dated January 5, 2011 which states that where a company which is a Holding company and the 90% of its investments are in the subsidiary company will be treated as Core Investment Company and not an NBFC. Further it states that such CIC which have a asset size of less than 100 crores and does not accept public deposits will be treated as Non Deposit taking and are not required to register themselves with RBI.
15. The Counsel for Petitioners further invite our attention to audit report of M/s Chaitanya C Dalal & Co. Chartered Accountants who have also in their audit report dated 30th March 2017 for the financial year 2016-17 observed that the Transferee Company is a core investment Company where in more than 90% of the net assets are in form of Investment in in equity shares and loans in Group Companies. The auditors have further observed that since asset size of the Company is less than 100 Crores and it is not Systemically Important Core Company , defined in clause (h) of sub-paragraph (1) of Paragraph 3 of the Core Investment Companies , as defined in clause (h) of sub-paragraph (1) of paragraph 3 of the Core Investment Companies (Reserve Bank) Directions, 2011 as on 31st December 2016 , hence it is exempted from registration under section 451A of the Reserve Bank of India Act, 1934 vide Notification No. DNBS . PD220/CGM/(US)2011 dated January 5, 2011 and also does not

require registration as Core Investment Company with Reserve Bank of India under Notification No. DNBS.PD/221/CGM(US)2011 dated January, 2011. The Counsel for Petitioners therefore submit there is no need to amend object clause of the Memorandum of Association of the Transferee Company. In so far as compliance under the FEMA Regulations, the Transferee Company through their Counsel undertakes to comply with Regulation 7 of Foreign Exchange Management (Transfer of security by a person resident outside India) Regulation 2000 as amended from time to time.

16. In so far as observations made in paragraph 11 (ii) of the Report of Regional Director pertaining to ROC's observations is concerned, the Counsel for Petitioners submits that the present petition is filed under sections 230 to 232 of the Companies Act, 2013 and therefore solvency certificate as required under section 233 of the Companies Act, 2013 is not applicable in the present case.
17. In so far as observations made in paragraph 11 (iii) of the Regional Director pertaining to ROC's observations is concerned, the Counsel for Petitioners clarify that the Appointed Date as per clause 1.2 of the Scheme is 1st April 2016 and Merger Record Date as per clause 1.9 of the Scheme only indicated the date to be fixed by the Board of Directors of the Transferee Company for the purpose of determining the names of the equity shareholders of the Transferor Company who shall be entitled to shares/ debentures or cash consideration as per Clause 1.2 of the Scheme though the Scheme will be effective from the date when the certified copy of order of this Tribunal is filed with ROC, it shall be made operative from the Appointed Date.
18. In so far as observations made in paragraph 11 (v) of the Regional Director pertaining to ROC's observations is concerned, the Petitioners through their Counsel clarify that with the application made to the Reserve Bank of India for their approval to the scheme of Amalgamation, a copy of valuation report and fairness opinion issued by M/S.V.R. Pandya & Co. chartered Accountant was

also annexed and the RBI has given its approval by their letter dated 16th June 2017 after perusing the said report.

19. In so far as observations made in paragraph 11 (vii) of the Regional Director pertaining to ROC's observations is concerned, the Counsel for the Petitioners submit that reduction is being done as integral part of the Scheme which have been approved by the Board of Directors of the Petitioner Companies. The Counsel for Petitioners further submit that as per explanation to section 230 of the Companies Act 2013 it is clearly stated that for removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section. Further the Scheme has been unanimously approved by the shareholders of the Transferor and Transferee Company.
20. In so far as observations made in paragraph 11 (viii) of the Regional Director pertaining to ROC's observations is concerned, the Counsel for Petitioners submit that the Transferee Company shall comply with Accounting Standard (AS-14 Purchase Method) as stated in the Companies (Accounting Standards Rules 2006 read with General Circular No 8/2014 dated 4th April 2014 issued by the Ministry of Corporate affairs and any amendments thereto).
21. The observations made by the Regional Director and the Registrar of Companies have been explained by the Petitioner Companies in paragraphs 7 to 11, 13 to 20 above. The clarifications and undertakings given by the Petitioner Companies are hereby accepted.
22. The Official Liquidator has filed his report stating therein that the affairs of the Transferor Company have been conducted in a proper manner and the Transferor Company may be ordered to be dissolved without winding up.

23. From the material on record, the Scheme appears to be fair and reasonable and is not in violation of any provisions of law and is not contrary to public policy. None of the parties concerned have come forward to oppose the Scheme.
24. Since all the requisite statutory compliances have been fulfilled, Company Scheme Petition No. 540 of 2017 filed by the Transferor and Transferee Company are made absolute in terms of prayer clause (a) of the Petition .
25. The Petitioner Companies to lodge a copy of this order and the Scheme duly authenticated 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 days from the date of receipt of the order.
26. Petitioner Companies are directed to file a certified copy of this order along with a copy of the Scheme with the concerned Registrar of companies, electronically, along with E-form INC 28 within 30 days from the date of issuance of the order by the Registry.
27. The Petitioner Companies to pay costs of Rs. 25,000/- each to the Regional Director, Western Region, Mumbai. Transferor Company to pay cost of Rs. 25,000/- to the Official Liquidator, High Court, Bombay.
28. The costs to be paid within four weeks from the date of receipt of Order.
29. 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)

Date: 7.12.2017

Sd/-

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