

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH
T.P.No.150/17 & T.P.No.151/17
IN
Co.P.No.276/15 & Co.P.No.277/15.
DATED: THURSDAY THE 1ST OF JUNE 2017
PRESENT: SRI RATAKONDA MURALI, MEMBER JUDICIAL
SRI ASHOK KUMAR MISHRA, MEMBER TECHNICAL

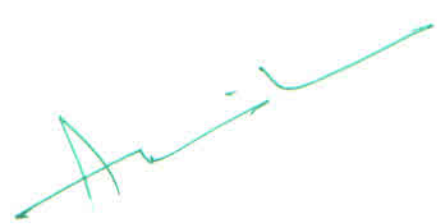

IN THE MATTER OF COMPANIES ACT, 1956
SECTIONS 391 TO 394 OF COMPANIES ACT, 1956
AND
IN THE MATTER OF COMPANIES ACT, 2013
SECTIONS 230 and 232 OF THE COMPANIES ACT, 2013
AND

IN THE MATTER OF SCHEME OF AMALGAMATION
CERNER INDIA SALES PRIVATE LIMITED
WITH
CERNER HEALTH CARE SALES INDIA PRIVATE LIMITED
T.P.No.150/17&151/17 IN Co.P.No.276/15 & 277/15

1. Cerner India Sales Private Limited
No.102, 1st Main, 1st Stage, KHB Colony
Basavaeshwaranagar, Bangalore-560079
-PETITIONER/TRANSFEROR COMPANY
2. Cerner Health Care Sales India Private Limited
No.102, 1st Main, 1st Stage, KHB Colony
Basavaeshwaranagar, Bangalore-560079
-PETITIONER/TRANSFeree COMPANY

PARTIES PRESENT: 1. Mr. Anind Thomas, Advocate
AZB & Partners,
AZB House, 67-4, 4th Cross,
Lavelle Road, Bengaluru 560001
Advocates for the Petitioner Company
2. Mr.Vasant Kumar, Assistant
Representative for Official Liquidator
3. Ms. Sinchana M.R, Standing Counsel
Advocate for Regional Director

Heard on: 07.02.2017, 09.03.2017, 31.03.2017



COMMON ORDER

Originally these two petitions were filed before the Hon'ble High Court of Karnataka and they were numbered as Co.P.No.276/2015 & Co.P.No.277/2015. Subsequently as per Notification No.GSR.1119(E) dated 7th December 2016 issued by Ministry of Corporate Affairs, New Delhi, the said cases are transferred to this Tribunal and renumbered as T.P.No.150/17 &151/17 respectively.

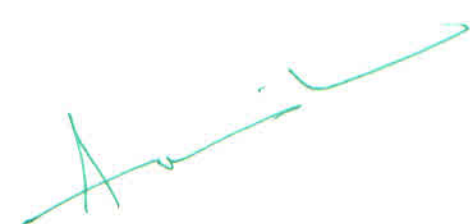

These Company Petitions were filed on behalf of the Petitioner Companies under Section 391-394 of the Companies Act, 1956 read with Rule 9 of the Companies (Court) rules, 1959, praying to order for sanctioning of the scheme of Amalgamation of the Transferor Company with the Transferee Company and shall be binding upon all the Shareholders and Creditors of the Companies.

The averments made in the Company Petitions are briefly described hereunder:-

The Petitioner Companies seeks an order for sanctioning the Scheme of Amalgamation of Cerner India Sales Private Limited (Transferor Company) with Cerner Healthcare Sales India Private Limited (Transferee Company). The Scheme of Amalgamation is shown as **Annexure-F**.

The Transferor Company was incorporated on 10th June, 2009 as Private Limited Company under the name, Cerner India Sales Private Limited. The Registered office of the Transferor Company is situated at No.102, 1st Main, 1st Stage, KHB Colony, Basaveshwaranagar, Bengaluru-560079.

The main objects of the Transferor Company is to carry on the business of programming, system analysis, data management systems, feasibility studies, leveraging clinical and pharmaceutical data, design and development of web-based application, surveillance systems and allied areas associated with healthcare consulting services and to sell, develop, manufacture and deal in computer aided designs, application software and information systems, maintenance of solutions throughout the application lifecycle etc., A Copy of Memorandum and Articles of Association of the Transferor Company is shown as **Annexure-B in T.P.150/17**.



The authorised share capital of the Transferor Company as on 31st March, 2015 is Rs.15,00,000/- divided into 1,50,000 equity shares of Rs.10/- each. The issued, subscribed and paid-up share capital is Rs.12,09,330/- divided into 1,20,993 equity shares of Rs.10/- each. The Audited Balance Sheet of the Transferor Company is shown in **Annexure C in T.P.No.150/17**.

The Transferee Company was incorporated on 5th December, 2014 under the name, Cerner Healthcare Sales India Private Limited. The Registered office of the Transferee Company is situated at No.102, 1st Main, 1st Stage, KHB Colony, Basaveshwaranagar, Bengaluru-560079.

The main objects of the Transferee Company is to carry on the business of sale of healthcare products in India and abroad, and to engage in design, development. Manufacture, researching, making, assembling, purchasing, selling, licensing products, importing, exporting, servicing, certification, testing and maintenance of system and application software, information system electronic hardware components and peripherals and products for various platforms, products, technologies etc., and clause 22 of the Memorandum of Association permits amalgamation. A Copy of Memorandum and Articles of Association of the Transferee Company is shown as **Annexure-B in T.P.151/17**.

The authorised share capital of the Transferee Company as on 31st March, 2015 is Rs. 10,00,000/- divided into 1,00,000 equity shares of Rs.10/-. The issued, subscribed and paid-up share capital is Rs. 1,00,000/- divided into 10,000 equity shares of Rs.10/-each. The Audited Balance Sheet of the transferee Company is shown in **Annexure C in T.P.No.151/17**.

It is further averred that the proposed merger will benefit both the companies in the following manner:

- (i) Enhanced operational flexibility resulting in synergies of operations and economies of scale thereby creating a stronger base for future growth of the amalgamated entity
- (ii) Structural efficiency leading into more efficient utilization of capital and simplified business structure
- (iii) Greater management effectiveness with concentrated effort to further aid the growth and expansion of the amalgamated entity
- (iv) Benefit of scale, translating into increased business opportunities and reduced expenses.

The Board of Directors of the Transferor Company and Transferee Company at their respective Board Meetings held on 9th September, 2015 adopted the scheme of Amalgamation. The Copy of Board Resolution is shown as **Annexure G** in the respective Company Petitions in T.P.No.150/17 & 151/17.

The Transferor Company and the Transferee Company had filed C.A.No.1073/15 & C.A.No.1072/15 respectively before the Hon'ble High Court of Karnataka to dispense with the convening of the meeting of Shareholders and Creditors of the companies. The Hon'ble High Court of Karnataka vide separate orders dated 30th October, 2015 allowed the Application and dispensed with convening of meeting of the shareholders, secured creditors and unsecured creditors. Copies of orders of Hon'ble High Court of Karnataka in C.A.No.1073/15 & C.A.No.1072/15 is shown as **Annexure-A** in T.P.No.150/17 and T.P.No.151/17 respectively.

It is averred that the Transferee Company and the Transferor Company filed the petition bearing Co.P.No.277/15 and Co.P.No.276/15 respectively before the Hon'ble High Court for approving the scheme of Amalgamation on 1st December, 2015.

The Hon'ble High Court of Karnataka vide order dated 4th December, 2015 in Co.P.No.277/15 issued notice to Regional Director and also directed to have an advertisement be published in the "The Hindu" and "Kannada Prabha" newspapers on or before 31st December, 2015 stating that the next date of hearing of the present petition on 8th January, 2016. Similar order was passed by the Hon'ble High Court of Karnataka vide order dated 4th December, 2015 in Co.P.No.276/16 with additional notice to the Official Liquidator. A Memo dated 18th December, 2015 has been filed at **Page No.158-161 in T.P.No.150/17 & T.P.151/17 respectively** furnishing the newspaper publication.

The Regional Director, Ministry of Corporate Affairs, South-East Region, Hyderabad represented by Registrar of Companies has filed Affidavits dated 16th February, 2016 making some observations and in furnishing response to the same, Director of the Transferee Company has filed Affidavit dated 29th June, 2016 which is as follows:

- a. The Notice dated 23rd December, 2015 was issued to Income-Tax department as required by Ministry of Corporate Affairs General Circular No.1/2014 dated 15th January, 2014 giving 15 days' time to offer comments/objections, if any. The Income Tax officer, ward 2(1)(1), Bangalore vide letter No. Amalgamation/ report/ITO Ward 2(1)(1)/ Blr/15-16 dated 18.01.2016 has made the following comments/observations:




- i. During the course of Amalgamation and subsequent to the same, all the provisions of the Income Tax Rules, 1962 and other allied Acts and directions contained in the relevant Notifications/instructions of the Central Board of Direct Taxes should be strictly adhered to.
- ii. The assessee company should make arrangement for attending/providing necessary details/documents as required as on date, such as scrutiny assessments, penalty, appellate proceedings etc
- iii. The Assessee Company and other concerned parties should make arrangement to pay the tax liability including interest, arising on account of amalgamation/merger and file the concerned return of income accordingly.
- iv. Any outstanding demand payable to the Income Tax Department, has to be paid immediately along with the corresponding interest thereon

The Authorised Signatory of Transferee Company has filed Affidavit dated 30th June, 2016 stating that, the Petitioner/Transferee Company will duly comply with all its obligations under law.

- b. The next observation made by the Regional Director (South-East) Region that the Memorandum of Association of the Transferor Company does not provide any clause for amalgamation. The petitioner transferor company may amend the memorandum of association accordingly by inserting the amalgamation clause before the scheme is implemented.

The counsel for Petitioners submit that the Memorandum of Association of the Transferee Company in clause 22 empowers the Transferee Company to acquire and undertake the whole or any part of the business, goodwill or assets of any person, firm or company or to acquire an interest in, amalgamate with, or enter into partnership or any arrangement for sharing profits, or for co-operation, or joint venture or mutual assistance with any such person, firm or company etc., The counsel further submits that the objects clause in Memorandum of Association of the Transferee Company expressly enables the Transferee Company to enter into the Scheme and there is no need for the Transferee Company to amend its Memorandum of Association prior to the scheme being sanctioned.



The Counsel further submits that even in the absence of the objects clause enabling amalgamation contained in Memorandum of Association of the Transferee Company, the Transferor and the Petitioner/ Transferee Companies may be amalgamated pursuant to the scheme under section 391-394 of the Companies Act, 1956. The counsel further relied on the judgement dated July 04, 2005 in Re:Hindhivac Private Limited and Anr. Vs Nil Reported in ILR 2005 Kant.4523.




The learned counsel for the Petitioner contended that the Tribunal has statutory power by virtue of provisions of Section 391-394 of Companies Act, 1956 corresponding to Section 230-232 of Companies Act, 2013 to order for amalgamation of the Transferor Company with Transferee Company. The learned counsel has relied on decision of the Hon'ble High Court of Karnataka reported in ILR 2005 KAR page 4523 Re:Hindhivac Private Limited and Anr vs Nil for the said proposition. The Hon'ble High Court of Karnataka has observed in Para 20 and 21 of the judgement as follows:

20. Section 17 of the Act, is an aid to the companies seeking amalgamation in terms of the scheme. Section 391 to 394 in Chapter V of the Act are of very wide amplitude so as to take into its fold compromise or arrangement including unconstruction. The legislature in its wisdom provided for such wide range of power to be exercised by this Court, since in matters of amalgamation conducive to the interest of shareholders, there should be no fetters. In short, the power of the companies to amalgamate may flow either from the objects in their memorandum or may be acquired by resort to Section 391 to 394 of the Act.

21. The Hon'ble High Court further observed that in the first place clause 32, of the Memorandum of Association sufficiently provides for reconstruction or amalgamation. Applying the meaning of the term 'amalgamation' as observed by the Supreme Court in Saraswathi Industrial syndicate's case (supra), the object clause No.32 appears to empower the company to amalgamate. Secondly Section 17 of the Act, being only an aid to the companies seeking amalgamation, this court in exercise of its statutory powers under Section 391 to 394 of the Act, while ordering dissolution of the transferor company without winding up, can also order the amalgamation without any specific power for amalgamation, this court in exercise of its statutory powers under section 391 to 394 of the Act, while ordering dissolution of the transferor company without winding up, can also order the amalgamation without specific power for amalgamation in the Memorandum of Association of the Company.



Considering the decision cited the Transferor Company may be permitted to be amalgamated with Transferee Company even though there is no object clause permitting amalgamation in the Memorandum of association of the Transferor Company.

On the prayer made by the Official Liquidator in OLR No.400/2015 in Co.P.No.276/15, vide order dated 1st January, 2016 M/s Kupendra & Associates was appointed by the Hon'ble High Court of Karnataka to scrutinize the Books of Accounts and records of the Petitioner/Transferor Company. Upon scrutiny of Books & Records and other material made available by the Transferor Company M/s Kupendra & Associates Chartered Accountants have submitted report dated 3rd June, 2016. Pursuant to the same, the Official Liquidator has filed a report in OLR.No.92/16 in Co.P.No.276/15 stating that the Company has maintained proper books and records and that the affairs of the Company have not been conducted in a manner prejudicial to the interests of the members or to public interest.

The Counsel for the Petitioner Companies has filed Memo dated 9th March, 2017 furnishing the certificate of the Chartered Accountant stating that the accounting treatment detailed in the aforesaid Scheme is in compliance with Accounting Standard-14 for Amalgamation as prescribed under Section 133 of the Act read with Rule 7 of the Companies (Account) Rules, 2014.

Further the Authorised Signatory of the Petitioner/ Transferor Company in his Additional Affidavit dated 31st March, 2017 stated that there are no other statutory authorities, other than the Regional Director, Registrar of Companies, Official Liquidator and the Income Tax Department and they have provided their respective comments/observations on the scheme of amalgamation. After hearing the counsel for the Petitioner Companies and also considering the materials on records,

THIS TRIBUNAL DO FURTHER ORDER

While Approving the Scheme as above, we further clarify that, this order should not be construed as an order in any way ranting exemption from payment of Stamp Duty, taxes or any other charges, if any, and payment in accordance with law or in respect to any permission/ compliance with any other requirement which may be specially required under any law.



The Whole of the property, rights and powers of the Transferor Company be transferred without further act or deed to the Transferee Company and accordingly the same shall pursuant to section 232 of the Companies Act, 2013, be transferred to and vest in the transferee company for all the state and interest of the Transferor Company therein but subject nevertheless to all charges now affecting the same; and

All liabilities including taxes and charges as observed in the Official Liquidator Report, if any and duties of the transferor Company be transferred without further act or deed to the Transferee Company and accordingly the same shall pursuant to section 232 of the Companies Act, 2013, be transferred to and become the liabilities and duties of the transferee company; and

All proceedings now pending by or against the Transferor Company, if any, be continued by or against the Transferee Company; and

The tax implications, if any arising out of the scheme is subject to final decision of concerned Tax Authorities and the decision of the respective Tax Authority shall be binding.

The Transferee Company shall within thirty days of the date of the receipt of this order cause a certified copy of this order along with a copy of scheme of Amalgamation to be delivered to the Registrar of Companies for registration in accordance with Rule 25 (7) of Companies (Compromises, Arrangements And Amalgamations) Rules, 2016.

The Scheme shall be effective from the appointed date as mentioned in the Scheme of Amalgamation i.e., 1st April, 2015 subject to the compliances as enumerated by Registrar of Companies in his Affidavit.

The Transferor Company or its authorised signatory is directed that after the completion of the process of Amalgamation to handover the possession of the books of accounts and other relevant documents of the Petitioner Company to the transferee Company for the purpose of Section 239 of the Companies Act, 2013.

Any person shall be at the liberty to apply to this Tribunal in the above matter for any directions that may be necessary.


(RATAKONDA MURALI)
MEMBER, JUDICIAL

DATED THIS THE 11th


(ASHOK KUMAR MISHRA)
MEMBER, TECHNICAL

1st DAY OF JUNE, 2017