

BEFORE THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH

TRANSFERRED COMPANY SCHEME PETITION NO. 190 OF 2017

IN

HIGH COURT COMPANY SCHEME PETITION NO. 698 OF 2016

Vertis Microsystems LLP

...Petitioner LLP

AND

TRANSFERRED COMPANY SCHEME PETITION NO. 191 OF 2017

IN

HIGH COURT COMPANY SCHEME PETITION NO. 699 OF 2016

Forgeahead Solutions Private Limited

...Petitioner Company

In the matter of the Companies Act, 2013

AND

In the matter of Sections 391 to 394

of the Companies Act, 1956

(corresponding Sections 230 to 232

of the Companies Act, 2013)

AND

In the matter of Scheme of
Amalgamation of Vertis
Microsystems LLP ("Transferor LLP")

With

Forgeahead Solutions Private Limited
("Transferee Company") and their
respective Designated Partners and
Shareholders

Called for Company Scheme Petition for hearing

Mr. Suhas Joshi i/b LegaLogic Consulting., Advocate for the Petitioners in both the Petitions.

Ms. Sheela, Director in the office of Regional Director in both the Petitions.

Mr. R Paula, Deputy Registrar of companies in both the petitions.

CORAM: B.S.V. Prakash Kumar, Member (Judicial),
V. Nallasenapathy, Member (Technical)

DATE: 23rd March, 2017

MINUTES OF THE ORDER

1. Heard Learned Counsel for the Petitioners. No objection has come before the court to oppose the Scheme and nor any party has controverted any averments made in the Petition.
2. The sanction of the Court is sought under Section 230 to 232 of the Companies Act, 2013, to the Scheme of Amalgamation of Vertis Microsystems LLP, the Transferor LLP with Forgeahead Solutions Private Limited, the Transferee Company and their Designated Partners and respective shareholders.
3. Learned Counsel for the Petitioner states that, Transferor LLP is engaged in the business of carrying on the business of software, business process outsourcing and allied activities under the name and style of Vertis Microsystems LLP and Transferee Company are the manufacturer, processors, purchasers, sellers, traders, agents, brokers, consultants, advisors, designers, programmers and dealer in computers, tabular of every kind of description, distributing computer

peripherals in computers, hardware, software etc., and further states that, since Transferor LLP and Transferee Company both are in similar business and also the Scheme is commercially and economically viable, feasible and in the interest of the Transferor LLP and Transferee Company and their Designated Partners and respective shareholders.

4. Learned Counsel for the Petitioners further states that the Board of Directors of the Petitioners Company have approved the said Scheme of Amalgamation by passing Board Resolution which are annexed to the respective Company Scheme Petitions.
5. The Learned Counsel for the Petitioners further states that, Petitioner LLP/Company have complied with all the directions passed in the respective Company Summons for Direction and that the respective Company Scheme Petitions have been filed in consonance with the order passed in respective Company Summons for Directions.
6. The Learned Counsel appearing on behalf of the Petitioner LLP/Company have stated that the Petitioner LLP/Company have complied with all requirements as per directions of the Court and they have filed necessary affidavit of compliance in the Court. Moreover, the Petitioner LLP/Company undertake to comply with all statutory requirements if any, as required under the Companies Act, 1956/ 2013 and rules made there under whichever is applicable. The said undertaking is accepted.
7. The Regional Director has filed an Affidavit on 6th day of

March, 2017 stating therein, save and except as stated in paragraph IV(1 to 5), it appears that according to Regional Director, the Scheme is not prejudicial to the interest of shareholders and public. In paragraph IV of the said Affidavit, the Regional Director has stated that :-

“IV (1) 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 Court may not deter the Income Tax Authority to scrutinize the tax 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.

(2) The schedule of investments in the Audited Balance Sheet of the Transferee Company, as at 31.03.2015, do not show any investments in the Transferor LLP. As as on the date of filing petition the Transferor LLP is not wholly owned subsidiary of the Transferee company as per the audited balance sheet as 31.03.2015.

In this regard the Transferee Company may be asked to submit audited Balance Sheet as at 31.03.2016.

(3) Certificate by the Company’s Auditor stating that the accounting treatment if any proposed in the scheme of compromise or arrangement is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013 is not available.

In this regard Petitioner may be asked to submit the certificate.

(4) It may be submitted that the advocates for the petitioner companies submitted duly acknowledged letter dated 9.11.2016 for the company and letter dated 7.11.2017 for the LLP informing the Income Tax Department about filing of Scheme and seeking specific comments of the I.T. Authority. Both the letters were acknowledged on 9.11.2016.

In this regard it may be submitted that Office of the Asstt. Commissioner of Income Tax-593(1), Mumbai inter alia mentioned in para 4 (ii) to (iv) and 5 of its letter No. ACIT-5 (3) (1)/Scheme of Amalgamation/16-17 dated 28.11.2016 received through Office of the PR. Commissioner of Income Tax-5, Mumbai dated 5.12.2016 as under:

4 (ii) At the moment this scheme is not being examined with reference to the taxation aspect vis-a vis other such scheme/s if any. In future if it is discovered that this scheme are in any way acting as advice for tax avoidance such department will be at liberty to initiate the appropriate course of action as per law.

(iii) The Income Tax Department will be free to examine the aspect of any tax payable as a result of the scheme and in case it is found that the scheme of amalgamation ultimately results in tax avoidance or is not in accordance to the amalgamation provisions of the Income Tax Act then the Department will be at liberty to initiate the appropriate course of action as per law.

iv) It is requested that the rights of the Income Tax Department should remain intact to take out appropriate proceedings regarding raising of any tax demand against the transferor company at any future date and these rights should not adversely affected in view of the sanction of the scheme.

5) It is also pointed out that the scheme of amalgamation should not be designed in such a way that all brought forward losses of previous years of any of the companies to the scheme of amalgamation should not be adjusted against future profits so that the interest of revenue is safeguarded.

In this regard it may be submitted that petitioner in Clause D-1 inter alia mentioned that With effect from the Appointed Date and upon the Scheme becoming effective, any tax credits, tax receivables, advance/prepaid taxes, taxes deducted at source,

the unabsorbed depreciation and losses of the Transferor LLP shall be treated as the tax credits, tax receivables, advance/prepaid taxes, taxes deducted at source, the unabsorbed depreciation and losses of the Transferee Company as on the Appointed Date and the Transferee Company shall be entitled to claim in its tax return or in the statutorily prescribed manner the tax credits, tax receivables, advance, prepaid taxes, taxes deducted at source, set-off/carry forward the losses and unabsorbed depreciation of the Transferor LLP and to revise its tax returns and including any loss, related tax deduction certificates and to claim refund, advance tax credits, tax receivables, etc., accordingly.

In view of above comments of the IT Authority the clause needs to be amended in lines with the comments of the Income Tax Authority.

5. Petitioner in Clause C-6 inter alia mentioned that "it is clarified that the employees of the transferee company by virtue of this scheme shall not be entitled to the employment policies, and shall not be entitled to avail of any schemes and benefits that are applicable and available to any of the employees of the transferee company. The transferee company undertakes to continue to abide by any agreement/settlement, if any entered into by the transferor LLP with any employee of the Transferor LLP.

In this regard, it may be submitted that the Petitioner Company may be asked to protect the interest of the employees."

8. As far as the observation of the Regional Director, Western Region, Mumbai in paragraph IV (1) of the Affidavit is concerned, the Petitioner LLP/Company undertakes to comply with all applicable provisions of Income Tax Act and all tax issues arising out of the Scheme will be met and answered in accordance with law.

9. As far as the observation of the Regional Director, Western Region, Mumbai in paragraph IV (2) of his Affidavit regarding non-filing of audited Balance Sheet for the financial year ending March 2016, the Petitioner Company, has sought for the extension of holding annual general meeting till December 31, 2016. Petitioner Company has done the filings with the Registrar of Companies, Mumbai on September 30, 2016. Approval of the same has been received from Registrar of Companies, Mumbai vide letter dated, September 30, 2016 which states as "The Company has stated that a merger scheme is pending before the Hon'ble Court. Hence extension is requested. The request is accepted". The Petitioner Company has also informed Registrar of Companies, Mumbai vide letter dated December 30, 2016 filed in Form GNL 2 and stated that Company is awaiting for order of amalgamation of Vertis Microsystems LLP with Forgeahead Solutions Private Limited and shall hold annual general meeting for adoption of accounts pursuant to such order.

In relation to the investment by Petitioner Company in the Transferor LLP, Petitioner Company invested an amount of Rs. 25,00,000/- on October 28, 2015 and Rs. 2,99,99,000/- on November 19, 2015 in the Transferor LLP, in the financial year 2015-16 by way of execution of Supplementary LLP Deed on November 23, 2015, the same was filed with Registrar of Companies, Mumbai on March 30, 2016 in e-Form 3.

The Petitioner Company has submitted the Balance Sheet for the year ending March 31, 2016 is produced before this Tribunal.

10. As far as the observation of the Regional Director, Western Region, Mumbai in paragraph IV (3) of his Affidavit is concerned, the Petitioner Company states that the Certificate dated March 11, 2017 which is issued by Gandhi and Lakhani, Chartered Accountants is submitted before this Tribunal.
11. As far as the observation of the Regional Director, Western Region, Mumbai in paragraph IV (4) of his Affidavit is concerned, Petitioner Company states that there is no requirement to amend the Scheme, owing to the fact that that Scheme provides for necessary tax treatment and is drafted in such a manner, that post merger being effective, all the tax liabilities of the Transferor LLP arising during the assessment of the accounts by the Tax Authorities shall become the liabilities of Transferee Company. The provisions of the Scheme do not bar the Income Tax Authorities to assess the accounts of Transferor LLP or Transferee Company. Income Tax Authorities can pass necessary orders based on the merits of the assessment of individual entities up to the Appointed date and the same shall be binding on the merged entity. As far as the observation of the regional Director, western region, Mumbai in Paragraph (5) of his affidavit is concerned, Petitioner Company states that carry forward and set-off of business losses and unabsorbed depreciation be permitted in accordance with the law.
12. As far as the observation of the Regional Director, Western Region, Mumbai in paragraph IV (5) of his Affidavit is concerned, the Petitioner Company undertakes to protect the

interest of the employees of the Transferor LLP. The Petitioner Company further states that, the Scheme is prepared in such a way that the interest of the employees of the Transferor LLP are protected and the aforesaid employees are entitled to all the employee benefits which is no less favourable than benefits which they are entitled to under the employment with Transferor LLP. The Transfree Company states that, they will provide all the benefits to the employees of Transferor LLP which are available to the employees of Transferee Company.

The Petitioner Company further states that, utmost care is taken while preparing the Scheme of Amalgamation, so that the interest of the employees of the Transferor LLP are protected.

13. Ms. Sheela, Director in the office of the Regional Director, Ministry of Corporate Affairs, Western Region, Mumbai states that they are satisfied with the submissions/undertakings given by the Petitioner Companies. The above undertakings are accepted.
14. The Official Liquidator has filed his report on February 23, 2017 stating that the affairs of the Transferor LLP have been conducted in a proper manner and the Transferor LLP may be ordered to be dissolved by this Court.
15. 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.
16. Since all the requisite statutory compliances have been

fulfilled, Transferred Company Scheme Petition No. 190 of 2017 and Transferred Company Scheme Petition No. 191 of 2017 are made absolute in terms of prayer clause (a).

17. The Petitioner LLP/Company to file a copy of this order and the Scheme duly authenticated by the Deputy Director/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.
18. The Petitioner LLP/Company are directed to file a certified copy of order along with a copy of the Scheme of Amalgamation with the concerned Registrar of Companies, electronically, along with E-Form INC-28, in addition to physical copy within 30 days from the date of issuance of as per the relevant provisions of the Companies Act, 1956/2013 whichever is applicable.
19. The Petitioner LLP/Company to pay cost of Rs. 25,000/- in each Petition to the Regional Director, Western Region, Mumbai and the Petitioner in Transfer Company Scheme Petition No. 190 of 2017 to pay costs of Rs. 25,000/- to the Official Liquidator, High Court, Bombay. Costs to be paid within four weeks from the date of receipt of the Order.
20. All concerned regulatory authorities to act on a copy of this order along with Scheme duly authenticated by the Deputy Director/Registrar, National Company Law Tribunal, Mumbai Bench.

21. Any person interested shall be at a liberty to apply to the Tribunal in the above matter for any direction that may be necessary.

Sd/-

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

Sd/-

V. Nallasenapathy, Member (Technical)