

**BEFORE THE NATIONAL COMPANY LAW TRIBUNAL
MUMBAI BENCH**

CSP 421/230-232/NCLT/MB/MAH/2017

Under section 230-232 of the Companies Act, 2013

In the matter of

M/s. Midas-Care Holdings Private Limited
..... 1st Petitioner Company
(Transferor Company)

M/s. Midas-Care Pharmaceuticals Private
Limited
..... 2nd Petitioner Company
(Transferee Company)

Order delivered on: 22.01.2018

Coram :

Hon'ble M. K. Shrawat, Member (J)

Hon'ble Bhaskara Pantula Mohan, Member (J)

For the Petitioner :

Mr. Ankur Kumar, Advocate i/b. M/s. EZY Laws – Advocate for the Petitioners.

For the Regional Director :

Mr. Ramesh Gholap – Dy. Registrar (WR).

Per : Bhaskara Pantula Mohan, Member (J)

ORDER

1. The sanction of this Tribunal is sought under Sections 230 to 232 of the Companies Act, 2013, to a Scheme of Merger by Absorption (hereinafter as **Scheme**) between M/s. Midas-Care Holdings Private Limited (Transferor Company) with M/s. Midas-Care Pharmaceuticals Private Limited (Transferee Company).
2. The Transferor Company and the Transferee Company have approved the said Scheme by passing the Board Resolutions and thereafter they have approached the Tribunal for sanction of the Scheme.
3. The Transferor Company is engaged in the business related to the Shares, Stock, Debentures, Debenture-Stock etc.

4. The Transferee Company is engaged in the business of manufacturers of and dealers in pharmaceuticals, medical, chemical preparations and compounds, drugs and formulations.
5. Since both the Companies are of same group hence, the said Scheme will consolidate the business of both the Companies by way of merger and consequentially it would therefore lead to a more efficient utilization of capital and facilitate creation of a linear shareholding structure.
6. The Authorized, issued, subscribed and paid-up share capital of the Transferor Company as on 31st March, 2017 is stated below:

<u>Particulars</u>	<u>Amount (₹)</u>
<u>Authorised Share Capital</u> 1,00,000 equity shares of Rs. 10/- each.	10,00,000
Total	10,00,000
<u>Issued, Subscribed and paid up Capital</u> 40,000 equity shares of Rs. 10/- each	4,00,000
Total	4,00,000

7. The Authorized, issued, subscribed and paid-up share capital of the Transferee Company as on 31st March, 2017 is stated below:

<u>Particulars</u>	<u>Amount (₹)</u>
<u>Authorised Share Capital</u> 60,000 equity shares of Rs. 10/- each.	6,00,000
40,000 4% Cumulative Redeemable Preference Shares of Rs. 10/- each	4,00,000
Total	10,00,000
<u>Issued, Subscribed and paid up Capital</u> 59,900 equity shares of Rs. 10/- each fully paid up	5,99,000
Nil 4% Cumulative Redeemable Preference Shares of Rs. 10/- each	Nil
Total	5,99,000

8. The averments made in the petitions and the submissions made by the Learned Representative for the Petitioners are:

- a) The Petitioner Companies had complied with all requirements as per directions of the Tribunal and they have filed necessary Affidavits of compliance in this Tribunal. Moreover, the Petitioner Company undertakes to comply with all statutory requirements, if any, as required under the Companies Act, 2013 and the Rules made there under whichever is applicable.
- b) The Regional Director has filed a Report on 16.10.2017 stating therein, save and except as stated in paragraph IV, it appears that the Scheme is not prejudicial to the interest of shareholders and public. In paragraph IV (1) to (8) of the said Report, the Regional Director has stated that:-

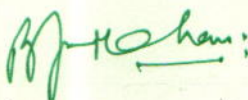
1. *"The tax implication if any arising out of the scheme is subject to final decision of Income Tax Authorities. The approval of the scheme by this Hon'ble Tribunal may not deter the Income Tax Authority to scrutinize the tax return filed by the transferee Company after giving effect to the scheme. The decision of the Income Tax Authority is binding on the petitioner Company.*

2. *It is submitted Petitioner Companies have not submitted the proof of serving notice upon the Income Tax authorities. In this regard petitioner has to submit the proof of serving the notice to Income Tax Authorities as per the provision of the Section 230 (5) of the Act, 2013.*

3. *Petitioner companies have not submitted Minutes of order, Chairman Report and copy of admitted petition. In this regard Petitioner Company have to undertake to submit the same for the record of Regional Director.*

4. *Petitioner Transferor Company is into Investment business as per the object of the company proof of serving notice to RBI not submitted.*

5. *Petitioner Companies have mentioned in clause 1 of the scheme that the "Appointed Date" is the 1st day of April, 2016 or such*



other date as may be determined by the Board of Directors of the transferee company.

In this regard the petitioner company to undertake to amend the scheme to state that the appointed date is either 01.04.2016 or such other date as may be fixed by the Hon'ble Tribunal.

6. Valuation Report, recommending share exchange ratio not submitted by the petitioners.

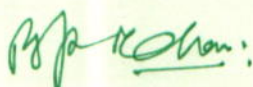
In this regard petitioner to undertake to submit the same

7. Certificate stating that the accounting treatment is 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 read with Rules not submitted.

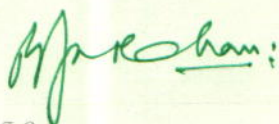
In this regard petitioners to undertake to submit the same.

8. Roc, Mumbai in their report mentioned 13 observations at point no. 32, for which petitioner have to undertake to comply with the same.

- c) As far as the observations in paragraph IV (1) and IV (2) of the Report of the Regional Director is concerned, the Learned Advocate for the Petitioner Companies submits that the Petitioner Companies have served the notices to the concerned Income Tax Department respectively and filed the original acknowledgements with the Tribunal vide its Affidavit of Service July 19, 2017. Further, the Learned Advocate for the Petitioner Companies undertake to comply with all applicable provisions of the Income Tax Act and all tax issues arising out of the Scheme of Amalgamation will be met and answered in accordance with law.
- d) As far as the observations in paragraph IV (3) of the Report of the Regional Director is concerned, the Learned Advocate for the Petitioner Companies submits that the Petitioner Companies have submitted Minutes of Order vide letter dated September 1st 2017. Further, the Learned Advocate for the Petitioner Companies undertakes to submit Minutes of Order, Chairman Report and Copy of admitted petition for the record of the Regional Director.




- e) As far as the observations in paragraph IV (4) of the Report of the Regional Director is concerned, the Learned Advocate for the Petitioner Companies submits that the *“Financial activity as principal business is when a company's financial assets constitute more than 50 per cent of the total assets and income from financial assets constitute more than 50 per cent of the gross income. A company which fulfils both these criteria will be registered as NBFC by RBI.”* However, as per the Financials of Transferor Company submitted before the Hon'ble Tribunal, neither the financial assets of the transferor company constitute more than 50 % of the total assets nor income from financial assets constitutes more than 50% of the gross income. Since Transferor Company is not fulfilling both the criteria of NBFC / Investment Company, Notice was not served to RBI.
- f) As far as the observations in paragraph IV (5) of the Report of the Regional Director is concerned, the Learned Advocate for the Petitioner Companies undertakes to amend the Scheme to state that the appointed date is either 1.4.2016 or such other date as may be fixed by the Hon'ble Tribunal.
- g) As far as the observations in paragraph IV (6) of the Report of the Regional Director is concerned, the Learned Advocate for the Petitioner Companies states that Copy of valuation report of M/s. Chatruvedi & Shah, Chartered Accountants recommending the share exchange ratio is annexed to the joint petition filed by the Petitioners companies. However, the Learned Advocate for the Petitioner Companies undertakes to submit the Copy of valuation report of M/s. Chatruvedi & Shah, Chartered Accountants recommending the share exchange ratio for the record of the Regional Director.
- h) As far as the observations in paragraph IV (7) of the Report of the Regional Director is concerned, the Learned Advocate for the Petitioner Companies states that Petitioner Companies have complied with proviso to Section 230(7) read with Rule 6 (3) (ix) (e) of the Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 wherein the Auditor i.e. M/s Pathak HD & Associates, Chartered Accountants of the Company has issued Certificate to the effect that the Accounting treatment proposed in the Scheme is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013 read with Rules.
- i) Apropos the observations in paragraph IV (8) of the Report of the Regional Director is concerned with respect to 13 observations at point no, 32 made by ROC,



Mumbai, the Learned Advocate for the Petitioner Companies has submitted as under :

Sr. No.	ROC, Mumbai, Observations	Reply / Remarks
1.	Company may be asked to file GNL-1 eform with ROC for filing of scheme in terms of section 398 of the Companies Act, 2013 read with Rule 12 (2) of Companies (Registration offices & Fees) Rules, 2014 before sanction of the Scheme	Form GNL-1 has been filed on 29.09.2017 vide SRN no. G54382049
2.	Notice to RBI need to be served by the Transferor Company being an NBFC Company.	The Transferor Company is not a NBFC Company. Please refer to explanation given in Para 19 above.
3.	The main object of the Transferor Company are not similar to the main objects of the Transferee Company and hence this amalgamation may not be allowed for want of enabling main objects of the Transferee Company to carry out NBFC activity and reflecting the finance/NBFC as part of the Transferee's name.	The Transferor company is the holding company of Transferee Company holding 98.50 % equity shares of the Transferee Company. The object and benefits of the Scheme are detailed in Paragraph 4 above. The Transferee Company is into pharmaceutical business.
4.	It is a case of reverse merger i.e. holding company merging into its Subsidiary Company (98.50%) . Hence the enabling Board Resolution of the Transferee Company shall be passed with reference to section 100 to 104 of the Companies Act, 1956 / section 66 of the	In PMP Auto Industries Ltd. 1994 80 CompCas 289 , Bombay High Court observed as under: Not only is Section 391 a complete code, but it is intended to be in the nature of a 'single window clearance' system to ensure

<p>Companies Act, 2013. However, the same is not referred in the Board resolution dated 02.09.2016 of the Transferee Company. Hence shares of transferee company held by the transferor company cannot be cancelled as provided in 2nd para of page 10 of the scheme. Further, it results in non compliance of section 230 (2) (b) of the Companies Act, 2013.</p>	<p>that the parties are not put to avoidable, unnecessary and cumbersome procedure of making repeated applications to the court for various other alterations or changes which must be needed effectively to implement the sanctioned scheme whose overall fairness and feasibility has been judged by the court under Section 394 of the Act. In Re: Eoc Tailor Made Polymers ... vs Unknown on 10 February, 2005, the Hon'ble Bombay High Court Held that Section 101 would not apply in case where there is a reduction in the share capital of the company by virtue of amalgamation of two companies and in case where the transferor company held the shares in the transferee company. Hence, the separate compliance of section 66 of Companies Act, 2013 is not required and there is no non-compliance of section 230 (2) (b) of the Companies Act, 2013.</p>
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5.	Contents of Para D a. at page 2 of the Scheme are contradictory and needs amendments .	Typographical mistake. Undertake to rectify the same.
6.	Power to Board regarding Appointed Date at page 5 of the Scheme needs amendment as it gives power to Board instead of to NCLT.	As mentioned in Para 20 above, the Petitioner Companies undertakes to amend the Scheme to state that the appointed date is either 1.4.2016 or such other date as may be fixed by the Hon'ble Tribunal
7.	Record Date should be appointed date only with respect to page 6 of the scheme.	The Petitioner Companies undertake to rectify the same.
8.	Para 14 (f) of page 25 of the scheme needs to be deleted as powers are proposed to be given to the Board instead of NCLT.	The Petitioner Companies undertake to rectify the same so as to give power to Hon'ble Tribunal.
9.	With respect to Para 14.e of the scheme, Transferor company needs to clarify whether any share transfer took place from appointed date to till date. If so, whether, Transferor Company remains Holding Company or not.	The Transferor Company confirms that there is no share transfer from appointed date to till date.
10.	With respect to para 15. A of the Scheme fair value of the assets and liabilities are not yet determined and hence should be determined first.	As clarified in Para 21 above, Valuation Report of M/s. Chatruvedi & Shah, Chartered Accountants recommending the share exchange ratio is annexed to the joint petition filed by the Petitioners companies

Apkohan:

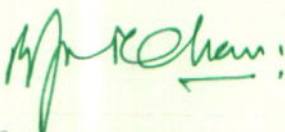
11.	Para 19 of the Scheme should be deleted as it empowers Board instead of NCLT	The Petitioner Companies undertake to rectify the same so as to give power to Hon'ble Tribunal.
12.	Company to submit certificate from Auditors in terms of proviso to section 232 (30) of the Act.	As clarified in paragraph 22 above, M/s Pathak HD & Associates Chartered Accountants of the Company has issued Certificate to the effect that the Accounting treatment proposed in the Scheme is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013 read with Rules.
13.	With respect to Para 15, page 26 of the Scheme it should follow "pooling of interest" method as all conditions of AS- 14 (P.I.M.) are met. Hence, Accounting Treatment should be at book values instead of fair values.	M/s Pathak HD & Associates, Chartered Accountants of the Company has issued Certificate to the effect that the Accounting treatment proposed in the Scheme is in conformity with the accounting standards prescribed under section 133 of the Companies Act, 2013 read with Rules.

- j) The Official Liquidator, Mumbai has filed his report dated 14.11.2017 in respect of the Transferor Company and stating therein that, the affairs of the Transferor Company have been conducted in a proper manner and accordingly the Transferor Company may be ordered to dissolve without winding up. Further it is submitted that, the Scheme is not prejudicial to the interest of public or shareholders.

k) It is further submitted that, no objector has approached neither to the Petitioners nor before Tribunal, to oppose this Scheme.

9. 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. And hereby this Bench, to the Petitioner Companies, **do Order that:**

- a) All the liabilities including taxes and charges, if any, and duties of the Transferor Company, shall, pursuant to S. 232 of the Companies Act, 2013, be transferred to and become the liabilities and duties of the Transferee Company.
- b) The clarifications and undertakings given by the Learned Counsel for the Petitioners to the observations made in the Report of the Regional Director are considered by this Bench and those are hereby accepted. Subsequently, this bench hereby directs petitioners to comply with the provisions/statements which the Petitioners undertakes herein.
- c) In lieu of the Consideration of the Scheme, 3 Equity Shares of ₹ 10 each, credited as fully paid up of the Transferee Company shall be issued and allotted for every 2 Equity Shares of ₹ 10 each, credited as fully paid up, of the Transferor Company. And in so far as the equity shares of the Transferee Company held by the Transferor Company, on the Effective Date are concerned, such shares shall stand cancelled.
- d) Further, during the course of hearing it is noticed that, the said Scheme is not a Scheme of Amalgamation as titled but contrary it is a Scheme of Merger by Absorption, hence, a liberty is granted to the Petitioners to amend the Scheme appropriately.
- e) Transferor company is to be dissolved without winding-up after Scheme becomes effective.
- f) Petitioner Companies are directed to file a copy of this Order along with a copy of the Scheme with the concerned Registrar of Companies, electronically, along with E-Form INC-28, in addition to the physical copy within 30 days from the date of issuance of the Order by the Registry, duly Certified by the Deputy Director or the Assistant Registrar, as the case may be, of the National Company Law Tribunal, Mumbai Bench.



- g) The Petitioner Companies to lodge a copy of this Order and the Scheme duly Certified by the Deputy Director or the Assistant Registrar, as the case may be, 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.
- h) Petitioner Company to pay cost of ₹ 25,000/- to the Regional Director, Western Region, Mumbai to be paid within four weeks from the date of receipt of the duly Certified Copy of this Order.
- i) Petitioner Company to pay cost of ₹ 25,000/- to the Official Liquidator, Mumbai to be paid within four weeks from the date of receipt of the duly Certified Copy of this Order.
- j) All authorities concerned, to act on a copy of this Order along with Scheme duly Certified by the Deputy Director or Assistant Registrar, as the case may be, National Company Law Tribunal, Mumbai Bench.
- k) Any person interested is at liberty to apply to the Tribunal in these matters for any directions or modification that may be necessary.
- l) Any concerned Authority is at liberty to approach this Bench for any further clarification after sanctioning of the Scheme.
- m) The Scheme is sanctioned and the appointed date of the Scheme is fixed as, 1st April, 2016.

10. Ordered accordingly. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Sd/-

M. K. SHRAWAT
MEMBER (JUDICIAL)

Dated : 22.01.2018