

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

CSP 252/230-232/NCLT/MB/MAH/2017

Under section 230-232 of the Companies Act, 2013

In the matter of

M/s. Brett Plastics Private Limited

.....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. Ajit Singh Tawar, Advocate i/b. Kanga & Co. – Advocate for the Petitioner.

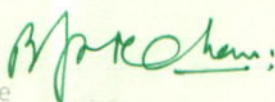
For the Regional Director :

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. Sony Mike's Holdings Limited (Transferor Company) with M/s. Brett Plastics Private Limited (Transferee Company).
2. It is stated that the Transferor Company is registered under laws of Mauritius and after sanctioning of the Scheme by this Tribunal the Transferor Company will make necessary application to the concerned Authorities of Mauritius.
3. 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.
4. The Transferor Company is engaged in the business of investment holding.
5. The Transferee Company is engaged in the business, inter alia, of trading of merchandise.



6. The Rationale of the Scheme is stated as under:

The proposed Merger will result in the combined businesses of Sony Mike's and Brett to be carried on more economically, efficiently and beneficially and the arrangement would be in the interests of both the companies and their shareholders as the businesses carried on by both the companies are under common management and ultimate common ownership. It will enhance financial strength, flexibility and consolidate and integrate the operations. It will synergize business activities; attain economies of scale, for further development and growth of the business of Brett. It will also result in pooling of resources in the most optimum manner of both the companies and enable Brett to carry on its business more profitably/effectively. The proposed Merger will create a focused platform for the future growth of Brett. Brett is expected to achieve greater efficiency due to consolidation of operations at one place and bring focused attention to strengthen and sustain its long term growth, have greater financial leverage on a global basis which will be a very good synergy with the existing strength of business along with strengthening its ability to face the increasing competitive regulatory environment and global risks.

7. The Authorised, Issued, Subscribed and Paid-up Share Capital of the Transferor Company is US \$ 10,00,000/- comprising of 10,00,000 Ordinary Shares of US \$ 1/- each. The Issued, Subscribed and Paid-up Share Capital of the Transferor Company is US \$ 10,000/- comprising of 10,000 Ordinary Shares of US \$ 1/- each.
8. The Authorised Share Capital of the Transferee Company is ₹ 31,37,00,000/- comprising of 31,36,000 Equity Shares of ₹ 100/- each and 10,000 Preference Shares of ₹ 10/- each. The Issued, Subscribed and Paid-up Share Capital of the Transferee Company is ₹ 24,61,500/- comprising of 24,615 Equity Shares of ₹ 100/- each.
9. 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.

As per scheme:

- b) The Regional Director has filed a Report on 28.11.2017 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 (a) to (h) of the said Report, the Regional Director has stated that:-

(a) The Transferor Company is registered in the Mauritius, therefore the said Company is required to apply for and obtain all such approvals as are required under the law of that country, including the approvals of their shareholders and creditors, and shall initiate and pursue all actions necessary under the laws of Mauritius. Therefore, requisite approval to be obtained by the Transferor Company from the Competent Authority/ forum under the laws of Mauritius.

(b) As per Clause 1.3 Definitions of the Scheme, 1st July 2016 or such other date as the Hon'ble High Court / Tribunal may direct. In this regard, it is submitted in terms of provisions of section 232 (6) of the Companies Act, 2013, it should be specific as 1st day of July, 2016.

(c) As regards Para No. 12 of the Scheme for safeguarding the interest of Employees & Workmen of the Foreign Transferor Company, the Transferee Company may be directed to comply with all Rules & Regulations of the concerned countries i.e. Mauritius or any other country, where ever they are employed.

(d) Since the Transferor Company is a Foreign Company and one of its shareholder is Non-Resident Indian, the Transferee Company prefers to issue Equity Shares to him, it is subject to the compliance of the FEMA Regulations/ RBI Guidelines by the Transferee Company and also compliance of terms and conditions imposed by Reserve Bank of India vide their letter No. FE.CO.FID/1314/10/02/001 (51)/2017-18 dated 02-08-2017 or thereafter, if any.

(e) As regards, Para No. 15.1 of the Scheme, the Transferee Company shall pass such Accounting Entries which are necessary in connection with the Scheme to comply with

applicable Accounting Standards such as AS-14(IND S-103), AS-5 (IND S-8) etc and it should not be conditional.

(f) As regards Clause No. 15.4 of the Scheme, the Transferee Company may be directed to transfer all such capital profits in Capital Reserve Account. It shall be restricted to transfer such amounts in General Reserves.

(g) 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.

(h) In accordance to proviso to Section 66(3) and 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.

- c) Apropos observations made in paragraph IV (a) of the Report of the Regional Director are concerned, it is submitted that the Petitioner Company shall ensure that the Transferor Company will apply for and obtain all such approvals as are required under law in Mauritius, including the approval of its shareholders and creditors, and shall initiate and pursue all actions necessary under the laws of Mauritius and obtain requisite approval from the Competent Authority/forum under the laws of Mauritius.
- d) Apropos observations made in paragraph IV (b) of the Report of the Regional Director are concerned, it is stated that the "Appointed Date" shall be 1st July, 2016.
- e) Apropos observations made in paragraph IV(c) of the Report of the Regional Director are concerned, it is submitted that the Petitioner Company undertakes to safeguard the interest of the employees and workmen of the foreign Transferor Company by complying with all the Rules & Regulations of Mauritius or any other

Approved:

country wherever the employees and workmen of the foreign Transferor Company are employed.

- f) Apropos observations made in paragraph IV (d) of the Report of the Regional Director and the Registrar of Companies, Maharashtra, Mumbai are concerned, it is stated that the Petitioner Company undertakes to comply with the FEMA Regulations/RBI Guidelines and also comply with the terms and conditions imposed by the Reserve Bank of India vide their letter No. FE.CO.FID/1314/10/02/001(51)/2017-18 dated 02-08-2017.
- g) Apropos observations made in paragraph IV (e) of the Report of the Regional Director are concerned, it is stated that Petitioner Company undertakes to comply with all the applicable Accounting Standards. Further, in addition to compliance with the applicable Accounting Standards, the Transferee Company shall pass such accounting entries as may be necessary in connection with the Scheme of Merger to comply with the applicable Accounting Standards such as AS-14 (IND S-103), AS-5 (IND-8).
- h) Apropos observations made in paragraph IV (f) of the Report of the Regional Director are concerned, it is stated that the Petitioner Company undertakes that any capital profits arising out of the Scheme shall be transferred to its Capital Reserve Account and not to General Reserves.
- i) Apropos observations made in paragraph IV (g) of the Report of the Regional Director are concerned, it is stated that the Petitioner Company undertakes to comply with all the applicable provisions of the Income Tax Act, 1961 and that all tax issues arising out of the Scheme will be met and answered in accordance with law.
- j) Apropos observations made in paragraph IV (h) of the Report of the Regional Director are concerned, it is submitted that the Petitioner Company has filed the certificate from the Company's Auditors to the effect that the Accounting Treatment as proposed in the Scheme is in conformity with the Accounting Standard as prescribed under Section 133 of the Companies Act, 2013 with the Hon'ble Tribunal by an additional affidavit on behalf of Petitioner Company confirming compliance of Accounting Standards dated 20th December, 2017.
- k) Further, the ROC, Mumbai vide Report/ letter No. ROC/STA (DG)/ 81864/391-394-929 dated 27.11.2017 has mentioned that there is no compliant, prosecution or

technical scrutiny lying with the said office in the matter of both of the Companies. The ROC has made the following comments about the Scheme and the Companies in the Report:

29. The Petitioner Companies shall follow the below mentioned conditions on implementation of the Scheme:

1. Notice to RBI (NBFC/DNBS Department) may be required to be issued by Transferee Company, being an "NBFC Company" as evident from the latest Audited Financials as at 30-06-2016 (appointed at 01-07-2016).

2. The conditions to be complied with as imposed by RBI (Foreign Exchange Department) while giving their prior approval vide their letter dated 02-08-2017 may please be incorporated in the order sanctioning the Scheme.

3. With reference to Para No.1.10 of the Scheme, Record Date to be in sync with appointed date only without any further determination by Board.

- l) Apropos observation in paragraph 29 (1) of the ROC's report is concerned, the Petitioner Company through its Counsel Submits it has issued notice to RBI on 15th June, 2017 and RBI has tendered its approval to said Scheme of Merger vide Approval Letter FE.CO.FID/ 1314/10.02.001 (51)/2017-18 dated 2nd August, 2017. The Counsel for the Petitioner Company further clarifies that the Petitioner is not an NBFC company and is engaged in the business of trading in Merchandise.
- m) Apropos observations in paragraph 29 (2) of the ROC's report is concerned, the Petitioner Company through its Counsel undertakes to comply with the conditions as prescribed under the RBI approval letter i.e. FE.CO.FID/ 1314/10.02.001 (51)/2017-18 dated 02.08.2017 which are as follows:

i) Any issue or transfer of security by Brett Plastics Private Limited, the resultant Company, to a person resident outside India shall be in accordance with the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident outside India) Regulations, 2000

ii) Any borrowing or impending borrowing of the foreign company from overseas sources which becomes the borrowing of the resultant company or any borrowing from overseas sources



entering into the books of resultant company shall conform to the external commercial borrowing norms or other foreign borrowing norms, as laid down under Foreign Management (Borrowing or Lending in Foreign Exchange) Regulations, 2000 or Foreign Exchange Management (Guarantee) Regulations, 2000, as applicable.

iii) The resultant company may acquire and hold any asset outside India which an Indian Company is permitted to acquire under the provisions of the Act, rules and regulations framed there under. Such assets can be transferred in any manner for undertaking a transaction permissible under the Act or rules or regulations framed there under.

iv) Where the asset or security is not permitted to be acquired or held by the resultant company under the Act, rules or regulations, the resultant company shall sell such asset or security within a period of 180 days from the date of sanction of the Scheme of cross border merger and the sale proceeds shall be repatriated to India immediately through banking channels.

- n) Apropos observation contained in paragraph 29 (3) of the ROC's report is concerned, the Petitioner Company undertakes to fix a Record Date within one month from the effective date.
- o) It is further submitted that, no objector has approached neither to the Petitioners nor before Tribunal, to oppose this Scheme.

10. 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, and pursuant to applicable laws of Mauritius, 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 consideration of the Scheme, the Transferee Company shall issue and allot 8 equity shares of ₹ 100/- each, credited as fully paid up, in respect of every 1 Ordinary Shares of Transferor Company of USD 1/- each held by its member.
- d) The cancellation of the paid-up share capital of the Petitioner Company by cancellation of 10,090 Equity shares of ₹ 100/- each fully paid-up be and the same is hereby confirmed in accordance with Section 66 of the Companies Act, 2013 corresponding to Section 100-103 of the Companies Act, 1956 and the addition of the words “and reduced” to the name of the Petitioner Company is not required as the cancellation of paid-up share capital is pursuant to Clauses 12 (a) and 12.6 of the Scheme and does not involve either diminution of liability in respect of the unpaid share capital or payment to any shareholder of any paid-up share capital of the Petitioner Company.
- e) Hence, the paid-up share capital of the Petitioner Company upon the scheme becoming effective is as under:

“The paid-up equity share capital of the Petitioner Company shall be ₹ 94,52,500/- divided into 94,525 equity shares of ₹ 100/- each fully paid-up.”
- f) 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.
- g) Transferor Company to be dissolved without winding up from the date of said Scheme becomes effective subject to laws of Mauritius.
- h) 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.



- i) 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.
- j) 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.
- k) 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.
- l) Any person interested is at liberty to apply to the Tribunal in these matters for any directions or modification that may be necessary.
- m) Any concerned Authority is at liberty to approach this Bench for any further clarification after sanctioning of the Scheme.
- n) The Scheme is sanctioned and the appointed date of the Scheme is fixed as, 1st July, 2016.

11. Ordered accordingly. To be consigned to Records.

Sd/-

BHASKARA PANTULA MOHAN
MEMBER (JUDICIAL)

Sd/-

M. K. SHRAWAT
MEMBER (JUDICIAL)

Dated : 22.01.2018

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