

		YUKEN INDIA LIMITED An ISO 9001:2015 Company Manufacturers of Oil Hydraulic Equipment IN COLLABORATION WITH YUKEN KOGYO CO. LTD., JAPAN. CIN: L29150KA1976PLC003017			
Regd. Office:	No. 16-C, Doddanekundi Industrial Area II Phase, Mahadevapura, Bengaluru – 560 048.	Factory:	PB No. 5, Koppathimmanahalli Village, Malur-Hosur Main Road, Malur Taluk, Kolar District – 563 130.		
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Our Ref No:	YIL/Sec/2023	E-mail:	hmn_rao@yukenindia.com		
Date:	07/03/2023	Web:	www.yukenindia.com		

To,

**The General Manager,
Listing Compliance & Legal Regulatory,
BSE Limited,
PJ Towers, Dalal Street,
Mumbai-400001.
BSE Script Code: 522108**

**The General Manager,
Listing Compliance & Legal Regulatory,
National Stock Exchange of India Limited
Exchange Plaza,
Plot no. C/1, G Block,
Bandra-Kurla Complex,
Bandra (E), Mumbai – 400051
NSE Script Code: YUKEN**

Dear Sir,

Sub: Compliance under Regulation 30 (2) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 – receipt of NCLT Approval for the Scheme of Amalgamation of Yuflow Engineering Private Limited, a wholly owned subsidiary of the Company, with the Company.

With reference to the captioned subject, we would like to inform that the Scheme of Amalgamation involving Yuflow Engineering Private Limited (as Transferor) and Yuken India Limited (as Transferee) – Company Petition - CP (CAA) No. 27/BB/2022 has received the approval of THE NATIONAL COMPANY LAW TRIBUNAL, BENGALURU BENCH, Vide NCLT order dated 28th February, 2023.

In compliance with Regulation 30(2) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015, we are enclosing the final NCLT Order herewith.

This is for your information and records.

Thanking you,

Yours faithfully,
For **Yuken India Limited**

Vignesh P
Company Secretary & Compliance Officer



IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH

CP (CAA) No. 27/BB/2022
(Second Motion)

U/s. 230-232 of the Companies Act, 2013
R/w the Companies (CAA) Rules, 2016

IN THE MATTER OF:

M/s. YUFLOW ENGINEERING PRIVATE LIMITED

R/o: B-80, 2nd Cross, 1st Stage,
Peenya Industrial Area,
Bengaluru - 560058.

...

Petitioner Company No.1/
Transferor Company

And

M/s. YUKEN INDIA LIMITED

R/o: No.16-C, Doddanekundi
Industrial Area II Phase,
Mahadevapura,
Bangalore - 560048

...

Petitioner Company No.2/
Transferee Company

Order delivered on: 28th February, 2023

CORAM:

1. Hon'ble Justice (Retd.) T. Krishnavalli, Member (Judicial)
2. Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

PRESENT:

For the Petitioner Companies : Shri. A Murali, Adv. a/w
Shri. Abhijit Atur, Adv.
For the IT Dept. : Shri. Ganesh R Ghale, Adv.

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. This is a joint second motion petition filed on 02.06.2022 by M/s. Yuflow Engineering Private Limited (for brevity, the "Petitioner Company No. 1/ Transferor Company") and M/s. Yuken India Limited (for brevity, the "Petitioner Company No.2/ Transferee Company") under Sections 230 and 232 of the Companies Act, 2013, R/w the Companies (CAA) Rules, 2016 (for short to be referred hereinafter as the 'Act') and by inter alia seeking for the



sanction of Scheme, so as to be binding on the Petitioner Companies, its shareholders, and creditors.

2. The petitioner companies filed First Motion Application bearing CA (CAA) No. 38/BB/2021 before this Tribunal. And based on such application moved under section 230-232 of the Companies Act, 2013 necessary directions were issued vide order dated 14.03.2022. Details of the First Motion order are as under:

	Transferor Co	Transferee Co
Equity Shareholders	Meeting Dispensed (Consent Obtained)	Meeting Dispensed (Consent Obtained)
Secured Creditors	No Secured Creditors	Meeting Dispensed (Consent Obtained)
Unsecured Creditors	Meeting Convened	Meeting Dispensed (Consent Obtained)

3. In compliance to the above order, the aforesaid meeting were held on 05.05.2022 at 10:30 AM, wherein 25 Unsecured Creditors of the Transferor Company were present and voted in person or proxy or by authorised representative and the Chairperson appointed by this Tribunal has also filed report of the meeting dated 16.005.2022, which is annexed as Annexure – T1 of the Petition, stating that the Scheme has been approved by the Unsecured Creditors in the meeting.
4. When the petition was listed on 28.06.2022, through video conferencing, the following directions were issued:-

“Admit & Issue notice. Registry is directed to issue notice to all the statutory authorities viz. the Registrar of Companies, Karnataka, the Regional Director, Hyderabad, the Official Liquidator, Designated Nodal Officer, the Jurisdictional Income Tax Authorities, the Assessing Officers for the Transferee Company at Koramangala, Bengaluru and also for the Transferee Company at Chennai, the Secretary, Competition Commission of India and other applicable Sectoral Regulators, if any, by email. The Petitioner is also permitted to collect the notices and serve it personally to all the Statutory Authorities along with material papers and Company Petition by authorised email as well as by Speed Post, and to file proof of service in the Registry within ten days. The Petitioner is also directed to publish Paper publication in one English Newspaper viz. “The Hindu”



and in one Kannada Newspaper viz. "Udayavani", at least ten days before the next date of hearing. The said statutory authorities may file their respective reports, if any, within three weeks from the date of receipt of the notice, with a copy served on the Petitioner Companies. The Petitioner shall also file the response, if any, thereto within two weeks from the date of receipt of copy of reports. List the matter on 04.08.2022."

5. In pursuant to the aforesaid notice, the learned Counsel for the petitioner companies has filed copies of proof of service of notices vide Diary No. 2989 dated 12.07.2022, on the aforesaid authorities and also copies of paper publication of notice of hearing vide Diary No. 3252 dated 26.07.2022.
6. The main objects, dates of Incorporation, authorized, issued and paid-up share capital, rationale of the scheme and interest of employees have been discussed in detail in first motion order dated 14.03.2022.
7. The Board Resolution of the Petitioner Companies approving the Scheme is annexed as Annexure K and L of the Petition.
8. It is further submitted that the Certificate of Statutory Auditors of the Transferor Company, stating that, the accounting treatment prescribed under the Scheme of Amalgamation as contained in Clause 10 is in compliance with the provisions of Sections 230-232 of the Companies Act, 2013 with reference to its compliance with the applicable Accounting Standards notified under Section 133 of the Companies Act, 2013 read with the rules made thereunder, and other generally accepted accounting principles in India.
9. The audited financial statement as on 31.03.2021 and Unaudited accounts as on 31.03.2022 of the Petitioner Companies are attached as Annexures H, J, U & V of the Petition.
10. The learned Counsel for the Petitioners has filed affidavits with regard to the no other sectoral regulator, no corporate debt restructuring and no investigations, litigations or proceedings are pending against the Petitioner Companies U/s. 210 to 266 of the Companies Act, 2013 at Page Nos. 588 to 598 of the Petition and also filed memo for joint undertaking by the Petitioner Companies vide Diary No. 5269 dated 07.12.2022.



11. As per the Scheme, the “Appointed Date” means April 01, 2021, or such other date as the NCLT may direct.
12. In pursuant to the notice, the Regional Director (RD) and the Registrar of Companies (ROC) has filed its Common Report vide Diary No. 4935 dated 18.11.2022. Both RD and ROC have raised the following observation vide para 2:
 - I. As per the Scheme, the Transferor Company is a wholly owned subsidiary of Transferee Company. However, as per shareholder’s list attached to Annual Return as on 31.03.2021, C.P. Rangachar is holding 4,000 shares in the Transferor Company. Company in its reply dated 03.10.2022 has stated that Mr. C.P Rangachar is holding 4000 shares in Transferor Company as a nominee shareholder only and confirmed that Mr. C.P Rangachar is nominee of the transferee Company and there is no share transfer pursuant to 31.03.2021.
 - II. Company in its reply dated 03.10.2022 has stated that Company is a wholly owned subsidiary of Transferee Company and under the proposed Scheme the transferor company is proposed to be merged with the Transferee Company. Transferee Company being a listed entity is required to comply with Regulations 37(6) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and stated the Transferee Company has complied with the regulation 37(6) of the SEBI (LODR), Regulations 2015 by sending intimations to the stock exchange. Petitioner Transferee Company may be advised to furnish an undertaking to this effect.
 - III. The Appointed Date of the Scheme is 01st April 2021. Being an old dated, the scheme if approved, may be allowed from 01.04.2022 as appointed date.
 - IV. The Transferor Company is engaged in the business of manufacturers, assemblers, importers and exporters, buyers and sellers of various hydraulics cylinders, hydraulic and fluid powered motors, pumps, control valves, winches, gear boxes and other related industrial fluid power, electrical, electronic and mechanical engineering products, equipment, spare parts and accessories. Whereas the business of Transferee Company relates to design,



manufacture, sale and servicing of hydraulic equipment. Hence the object of Transferee Company needs to be altered suitably to enable it to carry out the objects of Transferor Companies after the scheme is sanctioned.

- V. The Transferee Company is a profit making company whereas the Transferor Company is a loss making company at least since for the last two financial years. There may be a negative outflow of the tax liability once the Scheme is approved. Transferee being a listed company, may be advised to furnish an undertaking that the company will ensure the interest of the public shareholders at large will be protected in all circumstances.
- VI. As per note no. 10 of the Balance Sheet for the financial year ending 31.03.2021, the Transferor Company has undisputed statutory dues to the tune of Rs.32,000. The Transferor Company may be directed to furnish an undertaking to the effect that it will settle the statutory dues immediately, if not settled so far.
- VII. According to note 9 of the Audited Financial Statement for the year ending 31/03/2021 of the Transferor Company, there is total outstanding dues payable to Micro, Small and Medium Enterprises to the tune of Rs.154,13,000. Company in its reply dated 03.10.2022 has stated that both the companies have complied with the provisions of MSME Act, every half year ending both the companies are filing MSME-1 half yearly returns with MCA with respect to the outstanding amount payable to MSME more than 45 days and confirmed that the above outstanding balances are settled. Petitioner Transferee Company may be advised to furnish an undertaking to this effect.
- VIII. As per note 48 of financial statements for the year ending 31.03.2021, the Transferee Company has an unspent CSR amount of Rs.7.48 Crore. Company in its reply dated 03.10.2022 has stated that as per notes 48 of the financial statement of the year ending 31.03.2021, the unspent CSR amount of the transferee company is of Rs.7.48 lakhs.
- IX. As per the Independent Auditor's Report of Transferee Company for the financial year 2020-21, the Company has outstanding disputed Income Tax dues to the tune of Rs.50.56 lakhs. The Transferee



Company may be directed to furnish an undertaking to the effect that it will settle the dues as and when the claim is crystalized.

- X. According to note 21 of the Audited Financial Statement for the year ending 31/03/2021 of the Transferee Company, there is total outstanding dues payable to Micro, Small and Medium Enterprises to the tune of Rs.206,73,000. The Company may be asked to show as to how it has complied with Micro, Small and Medium Enterprises Development Act and may be directed to settle the dues as per the said Act.
- XI. Both Transferor Company and Transferee Company have related party transactions during the financial year 2020-21. Hence, the Petitioner Companies shall furnish an undertaking with regard to compliance of section 188 of the Companies Act, 2013 before the Hon'ble NCLT.
- XII. As per Clause 9.2 of the Scheme, provides for Clubbing of Authorized Share Capital wherein it is stated that the authorized share capital of the Transferor Company shall stand combined with the authorized share capital of the Transferee Company. The Transferee Company shall pay the prescribed fees due on the revised capital as required under section 230 to 232 of the Act. In this regard, the Transferee Company shall comply with provisions of the Section and pay the difference of fee, after setting off the fee already paid by the Transferor Company on its respective capital. In this case, the Transferee Company needs to make a separate request letter to ROC for clubbing of Authorized Share Capital within one month from the order or else interest will be levied as per the provisions of Section 403 of the Companies Act, 2013.
- XIII. Official Liquidator, Karnataka in his report filed before Hon'ble NCLT Bengaluru Bench has pointed out certain observations. The Hon'ble Tribunal may kindly direct the Petitioner Companies to comply with the observations pointed out by the Official Liquidator, Karnataka.
- 13.** Subsequently, reply affidavit to the Common Report of RD & ROC have been filed by the Petitioner Companies vide Diary No. 5270 dated 07.12.2022, inter alia stating as under:-



1. **Reply to point 2(II) of the Common Report of RD & ROC:** It is explained that as per Regulation 37(6) of SEBI (LODR) regulations, the regulation do not apply to merger of a wholly owned subsidiary with the Holding Company and the only requirement was filing of the Scheme with the Exchanges. It is submitted that the Transferee Company has complied with Regulation 37(6) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 by sending intimations to the stock exchange. Further, submits that the Transferee Company has not received any comments or objections from Stock Exchanges.
2. **Reply to point 2(III) of the Common Report of RD & ROC:** The appointed date of the Scheme has been kept as 01.04.2021, considering the business requirements and operations of the Transferee Company and the business interest of the amalgamated companies. Further, it is submitted that under law, Appointed Date can be retrospective date. The shareholders of both the companies and the creditors of the Transferor Company have approved the scheme in their respective meetings. Therefore, if the Appointed Date is changed to 01.04.2022, it will not be in the interest of the Scheme and will adversely affect the business requirements and operations of the Transferor Company and the Transferee Company.
3. **Reply to point 2(IV) of the Common Report of RD & ROC:** As per Clause III of the Memorandum of Association of the Transferor Company, the Transferor Company is, inter alia, engaged in the business of designing, manufacturing, assembling, importing etc. of various hydraulic cylinders, motors, mechanical engineering products, equipment's, spare parts, undertake and execute turnkey projects, carry on business of engineers and other incidental or ancillary business.

As per Clause III of the Memorandum of Association of the Transferee Company, the Transferee Company is, inter alia, engaged in the business of manufactures, designers, assemblers, merchants, dealers, sellers, exporters and importers of all kind of hydraulic, pneumatic, electro-hydraulic, electro-pneumatic, electrical, electronic, mechanical engineering products.



The Boards of the Transferor Company and the Transferee Company discussed and deliberated upon the Companies' business profiles and concluded that as the business of the Companies is similar and compliments each other, it is in the best interest of the Companies to amalgamate the Transferor Company with its parent company i.e. the Transferee Company.

Therefore, it is respectfully submitted that the alteration of Object clause of Transferee Company is not required as the objects of the Transferee Company already encompasses the business activities undertaken by the Transferor Company.

4. **Reply to point 2(V) of the Common Report of RD & ROC:** The Transferor Company is a wholly owned subsidiary of the Transferee Company and the Transferee Company being a listed company has always presented consolidated financials to its shareholders for approval. Further, it is submitted that even if the losses are set off after the scheme is adopted, then such set off is permissible under applicable laws. Moreover, such set off will only facilitate paying lesser taxes (*as permissible under law*) and will benefit the public shareholders of the Transferee Company. Further, the Transferee Company hereby undertakes to ensure that the public shareholders at large will always be protected in all circumstances.
5. **Reply to point 2(VI) of the Common Report of RD & ROC:** The Transferor Company has already settled the statutory dues, i.e., TDS amounting to Rs. 31,017 and Professional tax of Rs. 800, totaling to Rs.32,000/- by making payments to various Statutory Authorities. The Transferee Company undertakes to settle any and all undisputed and admitted statutory dues of the Transferor Company upon the scheme coming into effect.
6. **Reply to point 2(VII) of the Common Report of RD & ROC:** The Transferor and Transferee Company have complied the provisions of Micro, Small and Medium Enterprises Development Act. Every half year ending both the companies are filing the MSME-1 half yearly return with Ministry of Corporate Affairs with respect to outstanding amount payable to Micro and Small Enterprises more than 45 days. The Transferee Company has also filed an undertaking to this effect.



7. **Reply to point 2(VIII) of the Common Report of RD & ROC:** During the financial 2020-21, the Company has to spend Rs.23.74 Lakhs as CSR expenditure. Out of that Rs.16.26 lakhs spent on the various activities as per the provisions of Section 135 and compliance with schedule VII of the Companies Act, 2013. Balance unspent amount is Rs.7.48 lakhs.
- Further, carry forward CSR unspent amount is Rs.11.75 lakhs for the FY 2019-20. The Company has identified certain projects but due to Covid -19 pandemic and lockdown during April to June -2020, the Company could not spend as planned.
- Considering the above, total unspent amount is Rs.19.23 lakhs. Out of that, in the month of May - 2021, the Company has contributed Rs.5 lakhs towards Covid-19 relief and balance outstanding amount of Rs.14.23 lakhs has been transferred to Separate Bank Account on 07.05.2021 for the purpose of spending for identified projects which is under progress.
8. **Reply to point 2(IX) of the Common Report of RD & ROC:** The Transferee Company undertakes to settle the dues to the Income Tax as and when the said claim is crystallized.
9. **Reply to point 2(X) of the Common Report of RD & ROC:** The Transferor and Transferee Company have complied the provisions of Micro, Small and Medium Enterprises Development Act. Every half year ending both the companies are filing the MSME-1 Half yearly return with Ministry of Corporate Affairs with respect to outstanding amount payable to Micro and Small Enterprises more than 45 days. Further confirm that the above outstanding balances are settled.
10. **Reply to point 2(XI) of the Common Report of RD & ROC:** It is submitted that all related party transactions during the financial year 2020-21 have been carried out in accordance with law. Further, the Transferor Company and Transferee Company undertake to comply with Section 188 of the Companies Act, 2013.
11. **Reply to point 2(XII) of the Common Report of RD & ROC:** The Transferee Company undertakes to pay prescribed fees due on the revised capital as required under Section 230 to 232 of the Companies Act, 2013, after setting off the fees already paid by the Transferor



Company on its respective capital. The Transferee Company undertakes to make a separate letter to the Registrar of Companies, Karnataka for clubbing of Authorised Share Capital within one month from the order sanctioning the Scheme by this Hon'ble Tribunal.

14. The Jurisdictional Income Tax Authority, Bangalore has filed its report for the Transferee Company i.e. M/s. Yuken India Ltd vide Diary No. 4269 dated 10.10.2022, giving details of the outstanding demands in respect of the Transferee Company. It is further stated that there is no objection for Merger/Amalgamation subject to the following:

- (a) *“A condition may be imposed on the Transferee Company that any carry forward of losses of M/s. Yuflow Engineering Pvt Ltd, claimed set off in the Transferee Company after amalgamation, should be in alignment with provision of sec. 79 of the IT Act.*
- (b) *In case of any Appeal proceedings pending in respect of the Transferor Company, condition should be imposed on the Transferee Company that Revenue is entitled for continuation of appeal proceedings filed by Revenue in respect of Transferor Company.*
- (c) *It is also pointed out that in case of any transfer/swapping of shares of the shareholders of the Transferor Company with the shares of the Transferee Company; the relinquishment of shares of Transferor Company would give rise to Capital gains in the hands of the shareholders. The amalgamation scheme should impose a condition that the Capital gains arising on such transfer/swapping of shares, should be offered to tax by the shareholders by filing return of income.”*

15. The Transferee Company has filed their reply to the Income Tax report vide Diary No. 5271 dated 07.12.2022, which inter-alia submits as follows:

- i. It is submitted that any carry forward losses of the Transferor Company claimed set off in the Transferee Company after amalgamation shall be in terms with Section 79 and other applicable provisions under the Income Tax Act, 1961.
- ii. In case of any appeal proceedings pending in respect of the Transferor Company, the Transferee Company confirms that upon the Scheme coming into effect, the said appeal proceedings shall be continued



against the Transferee Company as if the proceedings were continued against the Transferor Company.

- iii. The Transferor Company is a wholly owned subsidiary of the Transferee Company and therefore, in terms of Clause 9 of the Scheme, all shares held by the Transferee Company in the Transferor Company will be cancelled without any further act or deed. Therefore, no new shares will be issued to the shareholders of the Transferor Company.
- iv. It is further submitted that the Transferee Company is a going concern and the Transferee Company undertakes and confirms that any legitimate taxes payable by the Transferor Company under the applicable laws will be discharged by the Transferee Company in accordance with law, upon the Scheme coming into effect.

16. The Jurisdictional Officer, Income Tax department, Chennai has filed its report for the Transferor Company i.e. M/s. Yuflow Engineering Pvt Ltd directly on 21.11.2022; and again through the Counsel vide Diary No. 5514 dated 19.12.2022, stating that Amalgamation for Income tax purposes is defined U/s 2(1B) of IT Act, 1961, based on which the following comments were given:

2.1 Condition 1: *All the property of the amalgamating company or companies immediately before the amalgamation becomes the property of the amalgamated company by virtue of the amalgamation: Whether fulfilled or not?*

It is commented by the Jurisdictional Income Tax Officer that this condition is fulfilled.

2.2 Condition 2: *All the liability of the amalgamating company or companies immediately before the amalgamation becomes the liability of the amalgamated company by virtue of the amalgamation. Whether fulfilled or not?*

It is commented by the Jurisdictional Income Tax Officer that this condition is fulfilled.

2.3 Condition 3: *Shareholders holding not less than three-fourths in value of the shares in the amalgamating company or companies (other than shares already held therein immediately before the amalgamation by, or by a nominee for, the amalgamated company or its subsidiary) become*



shareholders of the amalgamated company by virtue of the amalgamation. Whether fulfilled or not?

It is commented by the Jurisdictional Income Tax Officer that this condition is fulfilled.

2.4 Condition 4: Entire Scheme should not be a result of purchasing the assets of one company by the other. Whether fulfilled or not?

It is commented by the Jurisdictional Income Tax Officer that this Scheme is not resulting in purchasing of assets.

2.5 Condition 5: Entire Scheme should not be a result of distribution of assets on winding up of one company to the other company. Whether fulfilled or not?

It is stated that based on the materials submitted along with the Scheme of Arrangement, the Officer is not in a position to offer any comments whether this condition is fulfilled or not.

2.6 Condition 6: Entire Scheme should not be only for avoidance of Capital Gains Tax. Whether fulfilled or not?

It is commented by the Jurisdictional Income Tax Authority that this condition is fulfilled.

2.7 Condition 7: Entire scheme should not be only for avoiding payment of tax by merging loss making and profit making companies. Whether fulfilled or not?

It is observed by the Income Tax Authority that from the financials submitted along with scheme documents that Transferor Company is loss making company and Transferee Company is a profit making company.

It is also observed from the Income Tax return filed by the Transferor Company for AY: 2021-22 that it is having total loss to be carried forward to future years to the tune of Rs.8,09,04,600/- (Business Loss Rs.6,69,94,054/-, and unabsorbed depreciation of Rs.1,39,10,546/-).

Therefore, it is evident that the scheme is for avoiding payment of tax by merging loss making and profit making companies.

2.8 Condition 8: No particular shareholder or shareholder group should be benefitted without paying any Capital Gains tax. Whether fulfilled or not?

It is observed from the Scheme of arrangement that 99.80% of shares of Transferor Company are held by Transferee Company. Entire assets of



the Transferor Company are being transferred to the amalgamated company in the garb of amalgamation, wherein capital gain arising out of transfer of shares will be exempted u/s. 47 (vii), resulting in avoidance of capital gain tax benefitting transferee company.

Hence, it may be construed that the condition laid down for amalgamation in section 2(1B) of the Income Tax Act, 1961 is not fulfilled.

2.9 Condition 9: *No assets of the amalgamating companies should be revalued prior to amalgamation. Whether fulfilled or not?*

Based on the materials submitted along with the Scheme of Arrangement, the undersigned is not in position to offer any comments whether this condition is fulfilled or not.

3. *As per the data-base of the Department, the Transferor Company is having tax arrears of Rs.5,22,112/- for AY 2005-06. The same was intimated to the transferor company and in reply the company claimed that it had paid an advance of Rs.4,54,506/- vide challan number dated 14.12.2001 with BSR Code: 00265. But on checking in system it is seen that the challan for the details submitted by the company is not available. Hence the company was requested to submit the correct challan details. Till the company submits the correct challan details or copy of challan, this tax arrears will exist.*
4. *As out of the above conditions, the transferor company is not fulfilling the conditions mentioned hereinabove in para 2.7 and 2.8. Therefore, the Income Tax Department has objected to the Scheme.*

17. The Transferor Company has filed their reply to the Income Tax report vide Diary No. 5273 dated 07.12.2022, which *inter-alia* submits as under:

- i. **Reply to point 2.7 of the IT Report:** The Transferor Company is a wholly owned subsidiary of the Transferee Company and as per the Scheme all assets and liabilities of the Transferor Company is proposed to be transferred to the Transferee Company under the Scheme. Further it is submitted that the amalgamation of the Transferee Company and the Transferor Company is primarily to streamline the business operations of the companies, as the Transferor Company manufactures products and components which are in turn used by the Transferee Company. In order words, the products manufactured by the Transferor



Company complements the products manufactured by the Transferee Company and therefore, the amalgamation would enhance business synergies between the companies. It is therefore commercially, financially and operationally beneficial to the stakeholders of both the companies.

Since the Transferor Company is a wholly owned subsidiary of the Transferee Company, the Transferee Company has always been consolidating the financials of the Transferor Company with its financials as mandated under law. Further, the Scheme is in accordance with accounting treatment prescribed under Section 133 of the Companies Act, 2013 and the copy of the Certificate issued by the Statutory Auditors has already been submitted before this Hon'ble Tribunal. Further, the Transferee Company is a consistent profit-making company (except for the period affected by COVID-19 pandemic) and the tax paid by the Transferee Company is substantially high. Even if the Transferee Company is eligible to set off against the losses carried forward after amalgamation, the same would be negligible and insignificant compared to the taxes that are paid by the Transferee Company. Therefore, it is submitted that the scheme is not for avoiding payment of taxes as observed by the Income Tax Department.

- ii. **Reply to point 2.8 of the IT Report:** The Transferor Company is a wholly owned subsidiary of the Transferee Company and as per the Scheme all assets and liabilities of the Transferor Company is proposed to be transferred to the Transferee Company under the Scheme. Further, since entire share capital of the Transferor Company is held by the Transferee Company, the Scheme only provides for cancellation of the shares held by the Transferee Company upon the Scheme coming into effect and there will be no new issuance of any shares. It is further submitted that the Scheme is in accordance with accounting treatment prescribed under Section 133 of the Companies Act, 2013 and the copy of the Certificate issued by the Statutory Auditors has already been submitted before this Hon'ble Tribunal.

It is further submitted that the Transferee Company undertakes to pay all legitimate dues to the Income Tax Department in respect of the present Scheme as per applicable laws.



- 18.** The Assessing Officer, Income Tax Department, Chennai has filed rejoinder to the reply filed by the Petitioner Company vide Diary No. 5536 dated 19.12.2022 in which he has contested the reply of the Company that there will be insignificant tax effect on set off of brought forward losses of the Transferor Company. It is further stated that since the brought forward losses are Rs.8 Crores, the tax effect at the rate of 30% was Rs.2.4 Crores.
- 19.** With reference to Para 2.5 (Condition 5) of the Income Tax Report filed on 21.11.2022, it is commented that it is not a case of distribution of assets on winding up as defined U/s. 271/272 of Companies Act, but a Merger of wholly owned subsidiary with the holding Company U/s. 230-232 of the Companies Act.
- 20.** Moreover, in respect of the explanation dated 07.12.2022 filed by the Petitioner to Para 2.8 of the earlier Report (mentioned above), no comments has been offered by the Tax Department. However, the Assessing Officer has relied upon the decision dated 13.07.2017 of Hon'ble NCLT, Hyderabad Bench in the matter of *M/s. Wiki Kids Limited and M/s. Avantel Limited*, in which the Scheme of Amalgamation was rejected; and the same was also upheld by the Hon'ble NCLAT vide order dated 21.12.2017.
- 21.** In response to the rejoinder dated 19.12.2022, the Applicant Company has filed further submission on 05.01.2023, in accordance with the directions given by this Tribunal vide order dated 22.12.2022, in which it is contended as follows:
- a) It is submitted by the Department in the Rejoinder that the benefit of the set off of the losses of the Transferor Company will be beneficial only to the Transferee Company and no public interest will be served. In this regard, reliance was placed on NCLT and NCLAT judgment wherein the scheme of amalgamation between M/s Wiki Kids Limited and M/s Avantel Limited was rejected since the same was beneficial only to common promoters of the Transferee and the Transferor Company and not in general public interest.
 - b) It is submitted that the above case law on which the Department placed reliance on is not applicable to the present case, and the same can be distinguished on facts and in ratio from the Petitioners' case.



In the matter of M/s Wiki Kids Limited and another, the Transferor Company had not commenced any commercial operations since its incorporation, for almost 13 years and hence the business operations were stated as NIL, no profit and loss account was prepared and no revenue was generated by it. The Hon'ble NCLT arrived at the considered view that *"the amalgamation of scheme in question is beneficial only for the common promoters of both the companies and public interest is not being served as envisaged in the scheme. Moreover, the rationale, objective and purpose of scheme as stated is not justified based on the above facts/discussions"*. The Hon'ble NCLT also observed that the financial benefit flowing from the amalgamation is only to a few common promoters for an amount of Rs.12 crores approx., as against a net worth value of Rs.22.32 lakhs approx. for Transferor Company.

- c) Further, the Hon'ble NCLAT, in the Company Appeal filed by the petitioner companies, had categorically observed that the *"transferor company has created assets in its books but are yet to generate any revenue... In this scheme of amalgamation, the interest of promoters has been kept in mind and well protected on the merger itself whereas for other shareholders it depends on the future performance. It clearly shows that the entire scheme has been designed just to give benefit to the promoters of both the companies"*.
- d) It is submitted that the facts of the above case relied on by the IT Department are completely distinct from the facts of the Scheme filed by the Petitioner Companies. In the present case, the Transferor Company is a wholly owned subsidiary of the Transferee Company. Transferor Company has been carrying on business from the date of its incorporation and the same is evident from the financial statement furnished by the Transferor Company. The losses suffered by the Transferor Company is on account of operational losses. The products which are manufactured by the Transferor Company are complementary to the products manufactured by the Transferee Company. Therefore, the objective of the scheme is primarily to streamline the business operations of the companies as the Transferor Company manufactures products and components which are in turn



used by the Transferee Company. The amalgamation of the Petitioner Companies would enhance efficiency and increase synergies between the Petitioner Companies and not to give benefit to any common promoter as was applicable in M/s Wiki Kids Limited.

- e) It is submitted that the Transferee Company vide its Affidavit filed in response to the report filed by the Income Tax Department dated 17.05.2022 has undertaken that carry forward losses of the Transferor Company claimed to be set off in the Transferee Company after amalgamation shall be in terms with Section 79 and other applicable provisions of the Income Tax Act, 1961 and therefore, the IT Department may disallow the carry forward of losses if the Petitioner Companies are disentitled under law even after sanctioning of the Scheme by this Hon'ble Tribunal.

22. We have considered the above reports and rejoinder filed by the Income Tax Department and the responses thereto filed by the Petitioner Companies. On a perusal of the decision of Hon'ble NCLAT in the matter of *M/s. Wiki Kids Limited and M/s. Avantel Limited* decided on 21.12.2017, which was relied upon by the Income Tax Department for objecting to the Scheme, it is correctly explained by the Petitioner that the ratio of the decision was distinguishable on facts. It is noticed that in this case the major issue was regarding the valuation of shares and the exchange ratio for the shareholders of the Transferor Company (Unlisted Company) for the allotment of shares of the Transferee Company (Listed Company). It is observed in the order that the Transferor Company M/s. Wiki Kids Limited was incorporated on 15.10.2004 i.e. almost 13 years ago and still had not started any commercial operations. As a result, even profit and loss account was not prepared for this Company, and the income from the business operations were nil. An analysis was made of the share exchange ratio along with the market prices of the listed shares, and the fact that the shares were to be allotted by the Transferee Company to the shareholders of the Transferor Company who were only the common promoters of both Companies. Accordingly, it was concluded that there was transfer of disproportionate benefit to the common promoters, whereas the Transferor Company did not have any business operations at all since it was



incorporated. On the basis of this, the Scheme of Amalgamation was rejected by the Hon'ble NCLT. The Hon'ble NCLAT observed that the conclusion of the NCLT was based on the objection to the valuation report/exchange ratio which was going to result in undue advantage to promoters. It was also observed that the Transferor Company has not generated any revenue and did not sell even a single product since its inception on 15.10.2004. In such a matter, it was to be seen whether the interest of all the shareholders and the company has been duly considered, and the Tribunal has to look into the aspect that unfair advantage does not flow to one group of the shareholders or the other. Hence, the Hon'ble NCLAT, noting the fact that the net worth of the Transferor Company was extremely low as compared to the valuation of shares and also the proposed share exchange ratio, upheld the order of Hon'ble NCLT.

- 23.** After carefully considering the reasons given in the judgement and the explanation which has been furnished by the Petitioners in the submissions filed on 05.01.2023, we are of the opinion that the said decision of the Hon'ble NCLAT is not applicable in the facts of the instant case. While distinguishing the facts of the M/s. Wiki Kids case, the Petitioners have explained that in this case, it is a Merger of wholly owned subsidiary with the holding company, and the products manufactured by the Transferor Company was also complementary, being used by the Transferee/Holding Company in its production line. The Transferor Company was in regular operation; and the loss incurred was operational loss in business. Therefore, it is not a case that a Company which was defunct since its incorporation, and doing no business at all for 13 years; was merged with a Listed Company; so that the common promoters get allotment of Listed Companies shares in exchange of shares of this defunct company having no business. Thus, the Petitioners have emphasized that this amalgamation was for increased business synergies and efficiency; and on an entirely different footing altogether on facts.
- 24.** It is pertinent to note here that Section. 2(1B) of the IT Act, 1961 specifically deals with the definition of Amalgamation and Sub-clauses (i), (ii) and (iii) of this Section 2(1B) give the conditions to be satisfied for Amalgamation. The Assessing Officer in report dated 11.11.2022 has categorically admitted



that the condition given in the sub-clause (i), (ii) and (iii) of Section 2(1B) are duly satisfied. Moreover Section 72A of the Income Tax Act, read with Rule 9C deals with the provisions related to carrying forward and set off of accumulated losses and unabsorbed depreciation, in the case of Amalgamation and Demerger. In section 72A(2) specific conditions are given for allowing the claim of carrying forward and set off of said losses/depreciation in the Income Tax Assessment proceedings. Accordingly, it is observed that there is no bar for set off of losses of the Amalgamating Company with the Amalgamated Company even if the Amalgamated Company was having substantial profits under the Income Tax Act. There were sufficient safeguards built in for the revenue by providing for the conditions U/s. 72A(2); when the Assessing Authority can disallow the claim for carry forwards and set off of losses if these are not satisfied. Moreover, it is correctly stated by the Petitioners that the Assessing Officer is free to disallow such a claim in the Income Tax Assessment proceedings; even if the Scheme is approved u/s. 230-232 of the Companies Act, 2013; depending on the satisfaction of conditions under the Income tax Act, 1961. The Applicant has also relied upon certain other decisions, which are as follows; (i) *Vodafone Essar Gujarat Ltd. Vs. Department of Income Tax CP No. 183 of 2009, OJ Appeal No. 81 of 2010 & CA No. 254 of 2009 decided on 31.08.2012 reported in 2012 SCC online Guj 6485*, (ii) *Panasonic India Pvt. Ltd. and Panasonic Life Solutions India Pvt. Ltd. in CP (CAA) No. 8/CHD/HRY/2021* and (iii) *Pangenomics International Private Limited with M/s. Sterling Accuris Wellness Private Limited, CP (CAA) 57/AHM/2021*. Considering the same, along with above reasoning, we are of the considered opinion that the objection raised by the Income Tax Department has been adequately explained by the Petitioners, and there is no impediment in the approval of the Scheme.

- 25.** The Official Liquidator (OL) has filed its report vide Diary No. 4577 dated 25.10.2022 wherein it is stated that in the Chartered Accountant Report no adverse comments as such have been made about the state of the affairs of the Transferor Company. The CA Report is enclosed along with the OL Report.



- 26.** The reports of the ROC, RD, OL, IT Reports and Rejoinder filed by the IT Dept. to the reply filed by the Transferor Company to the IT Report are taken on record. Similarly, reply filed by the petitioner companies to the above mentioned reports and rejoinder are also taken on record.
- 27.** In view of the above discussion, we conclude that the objections/observations to the Scheme received from RD, ROC, OL, and IT have been adequately replied by the petitioner companies and hence there is no impediment in approval of the Scheme.
- 28.** The Scheme in question as annexed at Annexure-M & N is approved and we hereby declare that the same is to be binding on all the shareholders and creditors of the Transferor as well as Transferee Companies. While approving the Scheme, it is clarified that this order should not be construed as an order in anyway granting exemption from payment of any stamp duty, taxes, or any other charges, if any, and payment in accordance with law or in respect of any permission/compliance with any other requirement which may be specifically required under any law.

AND THIS TRIBUNAL DOES FURTHER ORDER:

- (i) That the Petitioner Companies do, within 30 days after the date of receipt of this Order, cause a certified copy of this Order to be delivered to the Registrar of Companies, Karnataka for registration. The concerned Registrar of Companies shall place all documents relating to the Transferor Company registered with him on the file relating to the said Transferee Company and the files relating to Transferor and Transferee Companies shall be consolidated accordingly, as the case may be; and
- (ii) That the Transferee Company shall deposit an amount of Rs.75,000/- with the Pay & Accounts Office, Chennai in respect of the Regional Director, South East Region, Ministry of Corporate Affairs, Hyderabad and Rs.25,000/- in favour of The Prime Minister's National Relief Fund, within a period of four weeks from the date of receipt of certified copy of this Order; and
- (iii) That any person interested shall be at liberty to apply this Tribunal in the above matter for any directions that may be necessary.



(iv) The approval /sanctioning of the Scheme shall not be construed as an exemption from any of the provisions under the Income Tax Act, 1961 or the Companies Act,2013 and that the authorities under both the Acts, are at liberty to take appropriate action, in accordance with law, if so advised.

29. As per the directions, Form No.CAA-7 of Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, formal orders be issued on the petitioner companies on filing of the Schedule Property i.e., (i) freehold property of the Transferor Company and (ii) leasehold property of the Transferor Company by way of affidavit of the Transferor Company respectively.

30. Accordingly, **CP (CAA) No.27/BB/2022**, is disposed of. Copy of this Order be communicated to the Counsel for the Petitioner Companies.

Sd/-

**(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)**

Sd/-

**(T.KRISHNAVALLI)
MEMBER (JUDICIAL)**

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