



NCLT approves merger scheme, rejects Revenue's tax objections

The New Delhi Bench of National Company Law Tribunal ('NCLT') in its recent decision, approved the Scheme of Amalgamation between investment holding companies [PIPL Business Advisors and Investment Private Limited ('Amalgamating Company 1') and GSPL Advisory Services and Investment Private Limited ('Amalgamating Company 2')] with a listed entity, NIIT Technologies Limited ('Amalgamated Company')¹

The NCLT has set aside the observations raised by the Income Tax Authorities ('ITA'), terming the Scheme as a vehicle created solely to evade tax liabilities, as being unfair, unreasonable and resulting in a huge tax loss to the government.

Background and Facts

- The Amalgamating Company 1 and Amalgamating Company 2 each hold 2,175,911 equity shares (~ 3.53%) in the Amalgamated Company.
- 100% of the equity shares of Amalgamating Company 1 were held by promoter trust [Pawar Family Trust] which were acquired by the Pawar Family Trust through a mix of preferential allotment and secondary acquisition from Pace Industries Pvt Ltd during the financial year 2016-17.
- Further, the Amalgamating Company 1 became the shareholder of Amalgamated Company, by acquiring the entire 2,175,911 equity shares from Pace Industries Pvt Ltd during the financial year 2016-17 for a nominal consideration of Rs 100.

¹ Scheme of Amalgamation between PIPL Business Advisors and Investments Private Limited and GSPL Advisory Services and Investment Private Limited and NIIT Technologies Limited – Company Petition CAA – 385/ND/2017 connected with CA (CAA) – 83(ND) of 2017



- 100% of the equity shares of Amalgamating Company 2 were held by Thadani Family Trust [another promoter family].
- Pursuant to the merger, shares of the Amalgamated Company held by the Amalgamating Company 1 and Amalgamating Company 2 would get cancelled and new shares would be issued by the Amalgamated Company to the shareholders of the Amalgamating Companies, being the two trusts.
- The Scheme was undertaken with the objective of simplifying and streamlining the shareholding structure, which will not only demonstrate the promoter group's direct engagement with the listed entity but will also enable succession planning of the promoters.

Objections raised by the Income Tax Authorities

The summary of objections raised by the ITA is provided below:

- The Group has undertaken a series of transactions within a short period of time [ie, gift of shares, family trust becoming shareholder of Amalgamating Company and the merger] with the sole intention of providing benefit to the promoter family trusts only.
- The shares of the Amalgamated Company received by the Amalgamating Company 1 from Pace Industries Pvt Ltd for a nominal consideration should be subject to tax.
- The amalgamation involving cancellation of equity shares held by Amalgamating Companies in Amalgamated Company and consequent issue of shares to promoter family trusts is solely undertaken to misuse the provisions of Section 47 of the Income Tax Act, 1961 ('the Act') and to evade tax liabilities, as in effect, it is a transfer of shares of the listed company from Amalgamating Companies to the promoter family trusts and should be subject to capital gains tax.
- The petitioner companies, by keeping the Appointed Date for the Scheme as March 31, 2017 have avoided the tax liability which may arise under Section 56(2)(x) of the Act introduced in Finance Act, 2017.
- The interest of the revenue needs to be protected with regard to the pending tax dues of the petitioner companies and tax dues arising on transfer of shares pursuant to the Scheme.



Contentions of Petitioner Companies

The various contentions put forth by the petitioner companies are summarised below:

- The objective of the Scheme is simplification of the shareholding structure and reduction of shareholding tiers by bringing such shares directly under the control of the trusts which is necessary for the purpose of succession planning.
- Transfer of capital assets to irrevocable trust is exempted from capital gains tax and hence the hypothesis of ITA that the transfer of shares would result in tax liability are mere assumptions and unsustainable.
- Where there is more than one option available to the tax payer to structure a transaction, the tax payer is free to choose the option which is more beneficial and tax efficient and the same cannot be said to be evasion of tax.
- Acquisition of shares of Amalgamating Companies by the promoter family trusts were duly disclosed to the stock exchanges and such indirect acquisition of shares of the Amalgamated Company were duly undertaken with prior approval of the Securities and Exchange Board of India, in terms of the applicable provisions.
- Tax dues of earlier and future assessments can be recovered from the Amalgamated Company.

Observations of the NCLT

The NCLT after considering the objections raised by ITA and relying on various decisions of High Courts in various schemes^{2/} instances observed the following:

- The onus is on ITA to establish that the Scheme is merely a vehicle to evade tax and it is not open to the Court/ Tribunal to sit over the views of shareholders and Board of Directors, unless their views are against the framework of law and public policy.
- Every attempt at tax planning cannot be held illegitimate or every transaction or arrangement which is permissible under law and has the effect of reducing tax burden cannot be looked upon with disfavour.
- Where the petitioners have chosen one of the available routes to achieve their objective, they cannot be faulted for the same on account of it being an elaborate one.
- ITA failed to demonstrate convincingly the 'tax evasion' allegations levied by them.

² In the matter of Vodafone Essar Limited and Vodafone Essar Infrastructure Limited in CP No. 334 of 2009 dated 29.03.2011 (Delhi High Court)
In the matter of AVM Capital Services Pvt. Ltd. in Company Scheme Petition No. 670 of 2011 (Bombay High Court)



- ITA is entitled to recover any pending statutory dues from the Amalgamated Company post the Scheme.

Accordingly, the NCLT sanctioned the Scheme.

Dhruva Comments

It is common for companies to re-organise their corporate and holding structures by way of merger of investment holding companies for the purpose of simplification of structure, removal of additional corporate layers and for efficient succession planning. The companies are entitled to adopt an efficient route to achieve the same in compliance with applicable laws. Alleging tax avoidance on such transactions without clearly demonstrating the nature of the tax avoidance appears arbitrary.

The NCLT duly considered the objections raised by the ITA and relying on jurisprudence sanctioned the amalgamation scheme. However, the ITA still retains its right to assess the taxability of the transactions and the amalgamation at the assessment stage and the approval by the NCLT should not impact the ITA's rights and remedies under law.

It will, however, be interesting to see whether the ITA can and will invoke the General Anti-Avoidance Rules ('GAAR') on the amalgamation and the transactions preceding the amalgamation, claiming the entire arrangement and series of steps as an 'impermissible avoidance arrangement'.

In this respect, the CBDT in its Circular dated January 27, 2017 had released certain clarifications on GAAR. One of these clarifications was on whether GAAR can be invoked if arrangement is sanctioned by an authority such as the NCLT. The CBDT had clarified as follows: "where the Court has explicitly and adequately considered the tax implication while sanctioning an arrangement, GAAR will not apply to such arrangement". In view of the fact that the NCLT has sanctioned this amalgamation scheme and has put forth its observations in setting aside the objections from the ITA, it needs to be seen whether NCLT could be said to have explicitly and adequately considered the tax implications.

It is interesting to note that the Mumbai bench of NCLT in a recent case of Scheme of Amalgamation between Gabs Investments Private Limited and Ajanta Pharma Limited³ rejected an application filed for the amalgamation of an investment holding company into the listed entity owing to the adverse observations raised by ITA, terming the Scheme as an 'Impermissible Avoidance Arrangement' under GAAR. The current positive judgement by the New Delhi NCLT is a welcome move as it sets positive precedent in similar transactions.

³ Scheme of Amalgamation between Gabs Investments Private Limited and Ajanta Pharma Limited – CSP No. 995 of 2017 and CSP No. 996 of 2017 in CSA No. 791 & 792 of 2017



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