

In Re: Sps Pharma Ltd.

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Court : Andhra Pradesh

Decided On : Nov-18-1996

Reported in : [1997]88CompCas774(AP)

Judge : S. Dasaradharama Reddy, J.

Acts : [Companies Act, 1956](#) - Sections 391 and 394

Appeal No. : Company Petition Nos. 82 and 83 of 1995 and Company Application Nos. 61 and 62 of 1995

Appellant : In Re: Sps Pharma Ltd.;In Re: Targof Pure Drugs Ltd.

Respondent : ;

Advocate for Pet/Ap. : T.S. Anand, Adv.;P. Ravi Prasad, Adv.; P. Innaiah Reddy, Adv.

Judgement :

S. Dasaradharama Reddy, J.

1. These petitions are filed by SPS Pharama Ltd. (transferor company) and Targof Pure Drugs Ltd. (transferee company) for approval of amalgamation of the former with the latter. Both the companies are formed for the purpose for manufacture and sale of bulk drugs and pharmaceutical formulations. The former is proposed to be amalgamated with the latter so that combined operation may be carried out

more efficiently, economically leading to wider capital base. As per the scheme, from the effective date March 8, 1995, all debts and liabilities, duties and obligations of the transferor company stand transferred to the transferee company. All the officers and employees of the transferor company shall be deemed to have become officers and employees of the transferee company.

2. Accordingly, meetings of the shareholders of the two companies were directed to be conducted. The chairpersons have filed reports stating that the scheme has been approved by the shareholders of the two companies. The proposed scheme was published in the newspapers both before convening of the meeting and after approval of the shareholders. Notices have been issued to the official liquidator and the Registrar of Companies. The official liquidator has filed a report stating that there is no objection for the proposed amalgamation and that the contention of the companies that the sale deed is not necessary, is not free from doubt.

3. The Registrar of Companies filed a counter stating that as it is out-right purchase of the transferor company for cash, it does not come under compromise or arrangement and hence the petitions are not maintainable.

4. Learned counsel for the petitioners, Sri Y. Sreenivasa Murthy, contended that amalgamation is of two kinds, i.e., amalgamation in the nature of merger and amalgamation in the nature of purchase and relied on the following paragraphs of the Accounting Standards (AS-14) issued by the Institute of Chartered Accountants of India, found in Guide to the Companies Act by A. Ramaiya, Thirteenth Edition, 1995 (Appendix).

'3. The following terms are used in this statement with the meanings specified :

(a) Amalgamation means an amalgamation pursuant to the provisions of the [Companies Act, 1956](#), or any other statute which may be applicable to companies.

(b) Transferor company means the company which is amalgamated into another company.

(c) Transferee company means the company into which a transferor company is amalgamated.

(d) Reserve means the portion of earnings, receipts or other surplus of an enterprise (whether capital or revenue) appropriated by the management for a general or a specific purpose other than a provision for depreciation or diminution in the value of assets or for a known liability.

(e) Amalgamation in the nature of merger is an amalgamation which satisfied all the following conditions :

(i) All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.

(ii) Shareholders holding not less than 90 per cent. of the face value of the equity shares of the transferor company (other than the equity shares already held herein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) becomes equity shareholders of the transferee company by virtue of the amalgamation.

(iii) The consideration for the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.

(iv) The business of the transferor company is intended to be carried on, after the amalgamation, by the transferee company.

(v) No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statement of the transferee company except to ensure uniformity of accounting policies.

(f) Amalgamation in the nature of purchase is an amalgamation which does not satisfy any one or more of the conditions specified in sub-paragraph (e) above.

(g) Consideration for the amalgamation means the aggregate of the shares and other securities issued and the payment made in the form of cash or other assets

by the transferee company to the shareholders of the transferor company.

(h) Fair value is the amount for which an asset could be exchanged between a knowledgeable, willing buyer and a knowledgeable, willing seller in an arm's length transaction.

(i) Pooling of interests is a method of accounting for amalgamations the object of which is to account for the amalgamation as if the separate business of the amalgamating companies were intended to be continued by the transferee company. Accordingly, only minimal changes are made in aggregating the individual financial statements of the amalgamating companies.

EXPLANATION

Types of amalgamation :

Generally speaking, amalgamations fall into two broad categories. In the first category are those amalgamations where there is genuine pooling not merely of the assets and liabilities of the amalgamation companies but also of the shareholders' interests and of the businesses of these companies. Such amalgamations which are in the nature of 'merger' and the accounting of such amalgamations should ensure that the resultant figures of assets, liabilities, capital and reserves more or less represent the sum of the relevant figures of the amalgamation companies. In the second category are those amalgamations which are in effect a move by which one company acquires another company and, as a consequence, the shareholders of the company which is acquired normally do not continue to have a proportionate share in the equity of the combined company, or the business of the company which is acquired is not intended to be continued. Such amalgamations are amalgamations in the nature of 'purchase'. . . .

22. In the case of an 'amalgamation in the nature of purchase', the balance of the profit and loss account appearing in the financial statements of the transferor company, whether debit or credit, loses its identity. . . .

28. An amalgamation may be either :

(a) an amalgamation in the nature of merger, or

(b) an amalgamation in the nature of purchase.

29. An amalgamation should be considered to be an amalgamation in the nature of merger when all the following conditions are satisfied :

(i) All the assets and liabilities of the transferor company become, after amalgamation, the assets and liabilities of the transferee company.

(ii) Shareholders holding not less than 90 per cent. of the face value of the equity shares of the transferor company (other than the equity shares already held therein, immediately before the amalgamation, by the transferee company or its subsidiaries or their nominees) become equity shareholders of the transferee company by virtue of the amalgamation.

(iii) The consideration of the amalgamation receivable by those equity shareholders of the transferor company who agree to become equity shareholders of the transferee company is discharged by the transferee company wholly by the issue of equity shares in the transferee company, except that cash may be paid in respect of any fractional shares.

(iv) The business of the transferor company is intended to be carried on, after amalgamation, by the transferee company.

(v) No adjustment is intended to be made to the book values of the assets and liabilities of the transferor company when they are incorporated in the financial statements of the transferee company except to ensure uniformity of accounting policies.

30. An amalgamation should be considered to be an amalgamation in the nature of purchase, when any one or more of the conditions specified in paragraph 29 is not satisfied.

31. When an amalgamation is considered to be an amalgamation in the nature of merger, it should be accounted for under the pooling of interests method described in paragraphs 33-35.

32. When the amalgamation is considered to be an amalgamation in the nature of purchase, it should be accounted for under the purchase method described in paragraph 36-39.'

5. He further submits that though the Income-tax Act defines amalgamation in section 2(1B) of the Income-tax Act, 1961, as amalgamation in the nature of merger but does not include amalgamation in the nature of purchase, it does not mean that amalgamation in the nature of purchase is not recognised by the Companies Act.

6. Section 2(1B) of the Income-tax Act defines 'amalgamation' as follows :

"amalgamation', in relation to companies, means the merger of one or more companies with another company or the merger of two or more companies to form one company (the company or companies which so merge being referred to as the amalgamating company or companies and the company with which they merge or which is formed as a result of the merger, as the amalgamated company) in such a manner that -

(i) 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;

(ii) all the liabilities of the amalgamating company or companies immediately before the amalgamation becomes the liabilities of the amalgamated company by virtue of the amalgamation;

(iii) shareholders holding not less than nine-tenths 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,

otherwise than as a result of the acquisition of the property of one company by another company pursuant to the purchase of such property by the other company or as a result of the distribution of such property to the other company after the

winding up of the first-mentioned company.'

7. This definition is relevant for, inter alia, sections 32A(5) and (6), 33(3), 33A(4) and (5), 34(3)(b), proviso, 35(5), 35A(6), 35D(5), 35E(7), 41(2) (now deleted), 41(4) (Explanation 2), 43(1) (Explanation 7), 43(6) (Explanation 2), 43C, 47(vi) and (vii), 49(1)(iii)(e), 49(2), and 72A - for the purposes of development rebate, balancing charge, cost of acquisition and set-off and carry forward of loss and depreciation allowance, etc.

8. Section 47(vi) of the Income-tax Act says that transfer in a scheme of amalgamation of a capital asset by the amalgamating company is not a transfer for the purpose of capital gains, if the amalgamated company is an Indian company. Similarly, under section 47(vii) any transfer of shares by a shareholders made in consideration of allotment of any share in the amalgamated company is not a transfer attracting capital gain, provided the amalgamated company is an Indian company. Similarly there are other provisions giving benefits to amalgamated companies in the matter of development rebate, balancing charge, development allowance, etc.

9. But from this it does not follow that amalgamating in the nature of purchase is not recognised under the company law. Whether the transaction in question attracts capital gains tax or whether it requires execution of a sale deed with the necessary stamp duty are not necessary to determine in this case.

10. Mr Y. Srinivasa Murthy contended that under section 394 of the [Companies Act, 1956](#), the Registrar and the official liquidator can object only if the affairs of the company are conducted in a manner prejudicial to public interest and cannot raise any other objection. He relied on *Sanghi Industries Ltd. v. Goldy Projects Ltd.* : 1993(3)ALT719 and *Vinay Metal Printers (P) Ltd., In re* : 1995(3)ALT222 . In the former case, the Registrar objected to the proposed scheme on the ground that the share exchange ratio was not fair to the shareholders of the transferor company. That was overruled by the court on the ground that the share exchange ratio was approved by an overwhelming majority of the shareholders and no shareholder or creditor objected to the scheme in the court.

11. In *Vinay Metal Printers (P) Ltd., In re* : 1995(3)ALT222 , the Registrar has taken objection that the proposed scheme results in avoidance of income-tax and hence notice may be issued to the Income-tax Department. The objection was rejected, and the court held that it has to consider the scheme as a whole and must have regard to the text and object of the scheme and has to find out whether it is reasonable or fair. If the court finds that the scheme is beneficial to the members of both the companies and the affairs of the transferor company have not been conducted in any manner prejudicial to public interest, it is not for the court to investigate upon the commercial merits and demerits of the scheme.

12. But these decisions do not come in the way of objection either by the Registrar or the official liquidator stating that the petitions are not maintainable. These decisions are only authority for the proposition that the Registrar cannot ask the courts to examine the scheme with reference to avoidance of income-tax or any other taxes or duties. Thus, the Registrar is entitled to raise the preliminary objection that the petition are not maintainable.

13. Though the accounting standards as extracted above are mandatory from April 1, 1995, they can be taken as guidelines and be applied even for the period prior to April 1, 1995. As amalgamation by purchase is recognised as one of the two modes of amalgamation, I hold that the petitions are maintainable.

14. Coming to the merits of the scheme, the shareholders of both the companies have approved the scheme and the auditors have given a certificate that the assets and liabilities of the transferor company have been taken at book value, as on March 8, 1995, and that the transferee company paid consideration of Rs. 55,00,000 in cash to the transferor company. In view of this, the scheme is approved. However, it is made clear that the question whether the transfer attracts income-tax and stamp duty and whether a regular sale deed is necessary are not necessary to decide in this proceeding and are left open.

15. In the result, the petitions are allowed. The order be communicated to the Registrar of Companies within six weeks from the date of receipt of a copy of this order. The transferor company shall stand dissolved with effect from March 8, 1995. Any shareholder may move this court for modification of the scheme if found

necessary. No costs.

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