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NCLT allows amalgamation of LLP into company

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Synopsis

The National Company Law Tribunal, Chennai Bench (NCLT) allows amalgamation of a Limited Liability Partnership (LLP) with a company *inter alia* holding that the legislative intent behind enacting both the LLP Act, 2008 and the Companies Act, 2013 (the 2013 Act) is to facilitate ease of doing business and create a desirable business atmosphere for both companies and LLPs.

Facts

- The NCLT considered a petition for amalgamation of the Transferor LLP with the Transferee Company under a scheme of amalgamation (Scheme) for which an application was filed under section 230 to 232 of the 2013 Act. (Transferor LLP and Transferee Company are collectively referred to as the Petitioner Companies).
- The Scheme provides for transfer of whole of the undertaking of the Transferor LLP to the Transferee Company as a going concern.
- The Regional Director of the Ministry of Corporate Affairs, Southern Region (RD) and the Official Liquidator, Chennai (OL) did not raise any objection to the Scheme and observed that the Scheme is not prejudicial to the interests of the members, creditors or employees of the Petitioner Companies.

Question of law

The question that arose before the NCLT is whether an LLP can be allowed to be amalgamated with a private limited company under the Scheme filed before NCLT.

Submissions before NCLT

- Under Section 394(4)(b) of the Companies Act, 1956, (the 1956 Act) there was no bar for a transferor in a scheme of amalgamation to be a body corporate including an LLP. However, section 232 of the 2013 Act does not contain the same clause as had been provided under the erstwhile 1956 Act.
- Section 234 of the 2013 Act permits a foreign company to merge with a company registered under the 2013 Act and *vice versa*. "Foreign company" as defined under section 234 of the 2013 Act includes a body corporate incorporated outside India including a foreign LLP.

Ruling of the NCLT

- NCLT held that the legislative intent behind enacting both the LLP Act, 2008 and the 2013 Act is to facilitate ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both legislations have provided for merger or amalgamation of two or more LLPs or companies respectively.
- The absence of a provision corresponding to section 394(4)(b) of the 1956 Act in the 2013 Act is a clear case of *casus omissus* (omission in law).
- If the intention of the lawmakers is to permit a foreign LLP to merge with an Indian company, then it would be incorrect to presume that the 2013 Act prohibits the merger of an Indian LLP with an Indian company. There does not seem to be any express statutory bar to prohibit such a merger.
- On facts, the Scheme appeared to be fair and reasonable and not contrary to public policy and does not violate any provisions of law. Thereby NCLT allowed the Scheme and further *inter alia* provided that on the scheme becoming effective the Transferor LLP will be dissolved without winding-up.

Potential income-tax implications

There are no specific provisions in the Income-tax Act, 1961 (IT Act) providing for tax neutrality to the transferor LLP and the partners of the transferor LLP with respect to merger of an LLP with a company registered under the 2013 Act. Whilst the NCLT has cleared the decks for amalgamation of an LLP with a company, it may be necessary to examine implications of the proposal under the IT Act.

Conclusion

NCLT Ahmedabad Bench had in the matter of Kediya Ceramics (144 SCL 309 / 141 CLA 507 dated 22 September 2017) held that a registered partnership firm is not a "company" within the meaning of the 2013 Act and therefore cannot participate in amalgamation proceedings initiated under section 230-232 of the 2013 Act. The NCLT Chennai has taken a different view and permitted the merger of an LLP (which is a 'body corporate' under the LLP Act, 2008 but not a 'company' under the 2013 Act) with a company.

The NCLT Chennai *inter alia* held that there has been an omission of law in drafting the 2013 Act. The fact that a foreign LLP (which is considered as a 'body corporate' under section 234 of the 2013 Act) is allowed to be merged with an Indian company, there cannot be a situation where similar benefit is denied to an amalgamation between an Indian LLP and a company. The NCLT Chennai also considered the amalgamation as furthering the ease of doing business.

Source: NCLT Chennai Bench Order delivered on 11 June 2018 in the matter of Scheme of Amalgamation between Real Image LLP and Qube Cinema Technologies Private Limited – CP/123/CAA/2018 [TCA/157/CAA/2017]

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