

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH, COURT-II

COMPANY PETITION NO. (CAA)-111(ND)/2021
CONNECTED WITH
COMPANY APPLICATION NO. CA (CAA)-118(ND)/2021

IN THE MATTER OF SCHEME OF AMALGAMATION:

BETWEEN

MINDA TG RUBBER PRIVATE LIMITED

... Applicant/Transferor Company

WITH

TOYODA GOSEI MINDA INDIA PRIVATE LIMITED

... Non-Applicant /Transferee Company

AND

THEIR RESPECTIVE SHAREHOLDERS AND CREDITORS

Order Delivered on : 23.12.2022

Section: 230 and 232 of the Companies Act, 2013

CORAM:

SH. BACHU VENKAT BALARAM DAS, HON'BLE MEMBER (J)

SH. L. N. GUPTA, HON'BLE MEMBER (T)

PRESENT:

For the Applicant	:	Adv. Sarvik Singhai
For the OL	:	Ms. Hemlata Rawat, Mr. Aayushmaan Vatsyayana
For the RD	:	Adv. Shankari Mishra, Adv. Niharika Tanwar
For IT Department	:	Mr. Sunil Aggarwal, Sr. Standing Counsel Mr. Tushar Gupta Jr. Standing Counsel, Adv. Radhika Sachdeva

ORDER

PER SHRI L. N. GUPTA, MEMBER (T)

Under consideration is the Petition filed by the Transferor Company under Section 230 to 232 of Companies Act, 2013 read with the Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 for approval of the Scheme of Amalgamation (**hereinafter, referred to as the 'Scheme'**) as contemplated between the Companies, its Shareholders and Creditors. The copy of the Scheme has been placed on record. The details of the Companies proposed to be amalgamated, as placed on record, are given in the following paragraphs.

2. Minda TG Rubber Private Limited (**hereinafter, referred as the "Applicant Company/Transferor Company"**) having CINU29253DL2015 PTC275475 is a Private Limited Company incorporated on 14.01.2015 under the Companies Act, 2013. The registered office of the Transferor Company is situated at B-64/1, Wazirpur Industrial Area, New Delhi-110052.

3. Toyoda Gosei Minda India Private Limited (**hereinafter, referred to as the "Non-Applicant Company/Transferee Company"**) having CIN U28111RJ 2008PTC026385 is a Private Limited Company incorporated on 17.04.2008 under the erstwhile Companies Act, 1956. The registered office of the Transferee Company is situated at Plot No. SP2-30 & 31, RIICO Industrial Area, Majrakath Area, Neemrana, Rajasthan -301705.

4. The present Petition is preferred by the Transferor Company (**hereinafter, called to as the “Applicant Company”**) only. The Registered office of the Applicant Company is in Delhi and therefore, the territorial jurisdiction lies with this Bench. The directions passed vide this order shall be confined to the Applicant (i.e., Transferor) Company only.

5. During the course of hearing on 13.10.2022, this Bench was informed that the NCLT, Jaipur Bench vide their order dated 23.06.2022 has already allowed the Scheme in respect of Transferee Company.

6. From the records, it is seen that the First Motion Petition No. CO. APPL. (CAA) 118/ND/2021 was filed by the Applicant Company for dispensing with the meetings of Equity Shareholders and Unsecured Creditors. This Tribunal vide Order dated 16.11.2021 had dispensed with the requirement of convening meetings of Equity Shareholders and Unsecured Creditors of the Applicant Company.

7. The Appointed date as per clause 1.1(b) of Part I of the Proposed Scheme of Amalgamation is 01.04.2022.

8. Subsequently, the Petitioner Companies moved the Second Motion petition and vide order dated 03.12.2021, this Bench directed the Petitioners to publish the notice in two newspapers and issue notices to the Central Government, Registrar of Company NCT of Delhi & Haryana, Regional Director (Northern Region) MCA, Income Tax Authorities, Official Liquidator and to such other Objector(s), if any.

9. By filing an Affidavit of compliance, the Applicant Company has confirmed that it has duly published the Notice of the present Company Petition in the "Financial Express" (English) and "Jansatta" (Hindi), Delhi Edition newspapers on 21.12.2021. The Transferor Company has also stated that notices are duly served to the Central Government, Registrar of Company NCT of Delhi & Haryana, Regional Director (Northern Region), Income Tax Authorities and Official Liquidator.

10. The RD (ND) has filed its report dated 06.05.2022 and has not raised any objections towards approval of the Scheme. During the course of hearing on 13.10.2022, Ld. Counsel appearing for the RD reiterated that the RD (ND) has no objection towards approval of the Scheme.

11. The Official Liquidator (OL) has filed its report dated 13.05.2022 and has not raised any objections towards the approval of Scheme.

12. The Income Tax Department (Delhi) has filed its Report vide Affidavit dated 06.07.2022 with the following recommendation:

4. In view of the facts as narrated above and the Reports of the Assessing Officers (annexed herewith), it is humbly submitted that the Department has objections to the sanction of the Amalgamation Scheme proposed by the Petitioners/Applicants. Accordingly, it is humbly prayed that this Hon'ble Court may be pleased to take on record the Report being filed on behalf of the Income Tax Department and consider dismissing the Petition of the Appellant u/s. 230-232 of the Companies Act, 2013, on the abovementioned grounds.

The complete Report of the Income Tax Department is reproduced below for the sake of convenience:

Report of Income Tax Department to The Hon'ble Court

1. The Reports of the Assessing Officers of Minda TG Rubber Pvt. Ltd. (Transferor Company) and Toyoda Gosei Minda India Pvt. Ltd. (Transferee Company) have been annexed hereto and marked as **Annexure 'A'** and **Annexure 'B'** respectively.
2. It is submitted that in relation to **M/s Minda TG Rubber Pvt. Ltd.**, The assessment of assessee company was completed for A.Y 2015-16 by making a protective addition of Rs 10,00,00,000 u/s 68 of the Income Tax Act, 1961 and as on date demand of Rs.3,78,02,420/- is recoverable from M/s Minda TG Rubber Pt Ltd. Current demand and future demand if any recoverable from Transferor Company shall be enforceable against Transferee Company and merger order should not be passed containing otherwise.
3. It is submitted that in the case of **M/s Toyoda Gosei Minda India Pvt. Ltd.**, Accumulated Unabsorbed Depreciation as on Rs. 25,38,93,225/- 31.03.2021, total loss carried forward is Rs. 2,90,88,939/- in the books of transferor company to transferee Company, which will result into the decrease in the taxable income of M/s Toyoda Gosei Minda India Private Limited (which is a profit-making company) by the amount mentioned above and the Tax effect will not be in favour of the Revenue.
4. In view of the facts as narrated above and the Reports of the Assessing Officers (annexed herewith), it is humbly submitted that the Department has objections to the sanction of the Amalgamation Scheme proposed by the Petitioners/Applicants. Accordingly, it is humbly prayed that this Hon'ble Court may be pleased to take on record the Report being filed on behalf of the Income Tax Department and consider dismissing the Petition of the Appellant u/s. 230-232 of the Companies Act, 2013, on the abovementioned grounds.

Report in response to the notice issued to Income Tax Department u/s 230 of the Companies Act, 2013 to propose the scheme of arrangement/ amalgamation/ demerger		
S. No.	Important Components of the Proposal	Observation of the AO
1.	Name of Company in relation to which this report is submitted	M/s Minda TG Rubber Private Limited (Transferor Company)
2.	Details of proposal	<ul style="list-style-type: none"> • Whether the scheme is amalgamation/ demerger/reduction of capital/winding up of company. - Scheme of Amalgamation of Companies under Section 230 to 232 of the Companies Act, 2013 between M/s Minda TG Rubber Private Limited [Transferor Company] and M/s Toyoda Gosei Minda India Private Limited [Transferee Company] • Number of companies are involved - Two (2)
3.	Details of appointed date and effective date	<p>Appointed Date is 1st day of April, 2022;</p> <p>Effective Date" means the date on which the last of the dates on which certified true copy of orders of Hon'ble NCLT under Section 230-232 of the Act are filed with the office of the respective Registrar of Companies. Any references in this Scheme to the "date of coming into effect of this Scheme" or "effectiveness of the Scheme" or "Scheme taking effect" shall mean the Effective Date.</p>
4.	Details of rationale and benefit as stipulated in the scheme	<p>It is proposed to consolidate the operations/business of the Transferor Company and the Transferee Company into a single company by amalgamation of the Transferor Company with the Transferee Company pursuant to the Scheme of Amalgamation under Sections 230-232 and other applicable provisions, if any, of the Companies Act, 2013. The amalgamation of the Transferor Company with the Transferee Company shall result, inter-alia, in the following benefits: -</p> <ul style="list-style-type: none"> (a) Achieving business and administrative synergies. (b) Consolidation and simplification of the shareholding structure, cost savings/ synergies resulting from rationalization, standardization and simplification of business processes. (c) Improved organizational capability arising from pooling of financial resources. (d) Avoiding un-necessary duplication of costs of administration, distribution, selling and marketing and reduction in legal and regulatory compliances. (e) Maximize the overall shareholders value by strengthening its core competencies.
5.	Object Clause contained in the Memorandum of Articles of the Applicant Companies.	<p>As per the Memorandum of Association of Transferor Company, main objects of the Transferor Company is -</p> <ol style="list-style-type: none"> 1. "To carry on the business in India or abroad whether by itself or in collaboration whether India or Foreign the business of manufacturers, fabricators, assemblers and sub-assemblers processors, agents, importers, exporters. Holders, stockists, distributors, buyers and sellers and suppliers of all kind of Hose (Industrial Brake Hose & Fuel Hose), Components, Parts accessories and fittings for the said articles and things used in connection with the manufacturer thereof, for motor cars, motor cycles, scooters, tractors, vans, jeeps, lorries, mopeds, cycles, aeroplanes, railways, other vehicles & conveyance of all kinds including miners.

		Shippers and Industrial application etc. not reserved for MSME/SME Industries.
6.	Details of the business in which the applicant companies are presently engaged and whether there is any synergy in the business. Details about nature of business to be continued after merger.	<p>The Transferor Company is inter-alia engaged in the business of manufacturing of auto components.</p> <p>The Transferee Company is primarily engaged in business to manufacture, distribute, sell, import and export automotive parts and to render service in this respect.</p> <p>Transferor Company on a going concern basis, comprising, inter alia, undertakings, assets, estate, properties, claims, reserve & surplus including securities premium account, liabilities of whatsoever nature and kind, and wherever situated, along with investments, in relation to and pertaining to the auto component manufacturing business are proposed to be transferred to Transferee Company as part of the Scheme.</p> <p>Both Transferor and Transferee Company are engaged in the manufacturing business of auto components, hence post-merger the Transferee Company shall have business and administrative synergies resulting from rationalization, standardization and simplification of business processes</p> <p>The proposed Scheme of arrangement will consolidate the manufacturing activities under one roof, leading to optimization of resources and business and administrative synergies.</p>
7.	Details of any proceedings pending against applicant companies under the Income Tax Act.	No proceeding pending for M/s Minda TG Rubber Private Limited.
8.	Details of tax demand pending for recovery from applicant companies (*Specify year wise amount outstanding)	AY 2015-16: 3,78,02,420
9.	Whether any significant information received from NMS/AIR etc.	Not Applicable
9.1	Details of pendency of investigation/inquiry proceedings, if any.	Nil.
9.2	Whether any proceedings are contemplated any provisions of the IT Act.	Not Applicable
10.	Whether proposed scheme envisages/will impact allow ability of carry forward of business losses or unabsorbed depreciation or any other benefits under the IT Act.	Accumulated Unabsorbed Depreciation as on 31 March 2021 is 25,38,93,225/-, total loss carried forward is Rs 2,90,88,939/-.

	<p>If yes quantify the amount of tax effect.</p> <p>Compliance of Section 72A</p>	
11.	<p>In case of reverse merger where loss making company continues to exist and profit making company dissolves to reduce its tax. What is the specific reason(s) for continuation of loss making company? Quantum of tax effect of such reverse merger. (Usually after the sanction of the scheme the loss making after some time changes its name to profit making company) Examine w.r.t. applicability of provision of GAAR.</p>	Not Applicable, this is a scheme of Arrangement. No reverse merger is involved in this Amalgamation.
12.	<p>In case of demerger:</p> <ul style="list-style-type: none"> • Whether all assets and corresponding liabilities of the demerged undertaking are being transferred or not. As per requirement of Section 2(19AA) • Examine w.r.t. Sec. 72A(5) • Whether clear cut demarcation/specifics of demerged undertaking and remaining undertaking are given in the scheme or not. • Whether complete details of assets and liabilities of demerged undertaking and remaining undertaking are provided in the scheme, if not given ask for the same. • Whether separate profit and loss account of the demerged undertaking and the remaining undertaking are providing in the scheme or not, if not given ask for the same. 	Not Applicable, this is a scheme of Arrangement. No demerger is involved in this Amalgamation.

	<ul style="list-style-type: none"> • In case of business losses and unabsorbed depreciation, quantify: <ul style="list-style-type: none"> o the losses and unabsorbed depreciation which is directly relatable to demerged undertaking o Loss and unabsorbed depreciation which is proportionate to the assets of the demerged undertaking and remaining undertaking. In case details are not available please seek the detailed financials of the applicant companies. 	
13.	Whether the proposed scheme will have any impact of exemption of capital gain tax?	Not Applicable
14.	Whether proposed scheme will have any impact of exemption of dividend distribution tax.	Not Applicable
15.	Whether in view of the Assessing Officer, Prima facie GAAR provisions appear to be attracted in the scheme of the arrangement. If yes, the reasons thereof.	Not Applicable
16.	If possible, quantum of tax evaded which is proposed to be avoided through the scheme of arrangement.	Not Applicable
17.	Comments on Valuation Report attached to the scheme after considering disclaimer if any given by an expert.	Valuation report determining the share swap ratio has been issued by Registered valuer
18.	Comments on share exchange/swap ratio attached to the scheme after considering the disclaimer.	<p>Upon this Scheme becoming effective, the Transferee Company shall without any further application, act or deed, issue and allot fully paid-up equity shares to the Shareholders of the Transferor Company whose name appear in the Register of Members of the Transferor Company as on the Record Date in the following manner:</p> <p><i>"100 (One Hundred) fully paid up Equity Shares of Toyoda Gosei Minda India Private Limited of the face value of Rs. 10/- (Rupees Ten each) against 156 (One Hundred and Fifty Six) fully paid up Equity Shares of the face value of Rs. 10 (Rupees Ten) of Minda TG Rubber Private Limited"</i></p>

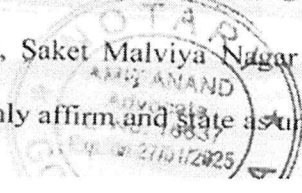
19.	Details for tax demand pending for recovery from the applicant companies.	Rs 3,78,02,420/- protective demand is raised for A.Y 2015-16																		
20.	Details of ITRs filed by the company.	<table border="1"> <thead> <tr> <th rowspan="2">S.No.</th> <th rowspan="2">Details in ITR</th> <th colspan="3">Minda TG Rubber Pvt. Ltd.</th> </tr> <tr> <th>AY-2021-22</th> <th>AY-2020-21</th> <th>AY-2019-20</th> </tr> </thead> <tbody> <tr> <td>1</td> <td>Total Income</td> <td>(2,90,88,939)</td> <td>(2,93,50,374)</td> <td>Nil</td> </tr> <tr> <td>2</td> <td>Total Tax Paid</td> <td>1,58,460</td> <td>9,07,650</td> <td>Nil</td> </tr> </tbody> </table>	S.No.	Details in ITR	Minda TG Rubber Pvt. Ltd.			AY-2021-22	AY-2020-21	AY-2019-20	1	Total Income	(2,90,88,939)	(2,93,50,374)	Nil	2	Total Tax Paid	1,58,460	9,07,650	Nil
S.No.	Details in ITR	Minda TG Rubber Pvt. Ltd.																		
		AY-2021-22	AY-2020-21	AY-2019-20																
1	Total Income	(2,90,88,939)	(2,93,50,374)	Nil																
2	Total Tax Paid	1,58,460	9,07,650	Nil																
21.	Details of receipts of the Notice.	Received vide email dated 24/03/2022																		
22.	Date of present report.	07/04/2022																		
23.	Remarks about objection to the scheme or any representation to NCLT to protect the interest of Revenue.	<p>The assessment of M/s Minda TG Rubber Pvt Ltd was completed for A.Y 2015-16 by making a protective addition of Rs 10,00,00,000 u/s 68 of the Income Tax Act,1961 and as on date demand of Rs.3,78,02,420/- is recoverable from M/s Minda TG Rubber Pvt Ltd.</p> <p>Current demand and future demand if any recoverable from M/s Minda TG Rubber Pvt. Ltd. (Transferor Company) shall be enforceable against M/s Toyoda Gosai Minda India Pvt. Ltd. (Transferee Company) and merger order should not be passed containing otherwise.</p>																		

13. On perusal of the aforesaid Report, it is observed that the Income Tax Department has objected to the Scheme and stated that the Transferee Company will carry forward the total loss of Rs.25,83,93,225/- and unabsorbed Depreciation of Rs.02,90,88,939/- as on 31.03.2021, reflecting in the books of accounts of the Transferor Company, which will decrease the Taxable income of the Transferee Company. Hence, loss of revenue will be caused to the Income Tax Department.

14. The Applicant Company has filed the Reply affidavit dated 05.05.2022 to the observations made by the Income Tax Department, which is reproduced overleaf, for the sake of convenience:

**REPLY AFFIDAVIT ON BEHALF OF THE TRANSFEROR COMPANY/
APPLICANT COMPANY TO THE REPRESENTATION OF LD. INCOME
TAX DEPARTMENT**

I, Ravi Shankar Gupta, son of Shri Prem Shankar Gupta aged about 65 years, residing at A-73/3 S.F.S. Flats, Saket Malviya Nagar Hauz Khas, South Delhi, Delhi-110017, do hereby solemnly affirm and state as under:



1. That I am Authorized Signatory for and on behalf of Transferor Company/ Applicant Company and I am conversant with the facts and circumstances of the case and fully authorized and competent to swear and file this affidavit on behalf of the Transferor Company/ Applicant Company.
2. That the present affidavit is being filed in response to the report filed by Income Tax Office for Transferor Company/ Applicant Company.
3. That the Ld. Income Tax Officer in its report in respect of Transferor Company/ Applicant Company has submitted his representation as under:

Point No.	Particulars
In point no. 23 of said report	there is tax demand of Rs. 3,78,02,420/- for Assessment Year 2015-16 is pending for recovery from Applicant Company
In point no. 10 of said report	as on March 31, 2021, there is accumulated unabsorbed depreciation of Rs. 25,38,93,225/- and total loss carried forward is Rs. 2,90,88,939/- in the Applicant Company

In this respect, the **Transferor Company/ Applicant Company** reiterate that Ld. Income Tax Department in its report impliedly provided their no objection to the scheme. Further, the Transferor Company/ Applicant Company does not have any objection in respect to the remarks made by Ld. Income Tax Department in its report and the same shall be duly complied with by the Transferee Company accordingly.  ✓

4. That the Transferor Company/ Applicant Company also hereby confirms and undertakes that Para No. 2 (s) of Part II of the Scheme *inter-alia* provides that upon this Scheme becoming effective, all taxes, benefits of any nature, duties, cesses or any other like payments or deductions available to Transferor Company under Income Tax, Sales tax, Service tax, Goods and Services tax etc. or any tax deduction/ collection at source, tax credits, benefits of CENVAT credits, benefits of input credits relating to the period after the Appointed Date up to the Effective date shall be deemed to have been on account of or paid by the Transferee Company and the relevant authorities shall be bound to transfer to the account of and give credit for the same to Transferee Company upon sanction of this Scheme by the Hon'ble NCLT. The benefit of all taxes paid including minimum alternate tax under Income Tax Act, unabsorbed depreciation, carry forward of losses as well as set-off of losses thereof shall be available to the Transferee Company as would have been available to the Transferor Company upon the sanction of the scheme by the Hon'ble NCLT

and therefore, the Transferor Company / Applicant Company hereby confirms and undertakes that upon the scheme becoming effective, all tax liabilities including income tax liabilities pending or payable by the Transferor Company (existing or future), unabsorbed depreciation shall be paid and honored by the Transferee Company accordingly.

15. On perusal of the reply, this Bench observes that the Applicant Company has presumed that the Income Tax Department has impliedly provided no Objection towards the Scheme.

16. However, when we visit the Affidavit filed by the Income Tax Department, it becomes amply clear that the Income Tax Department had recommended rejection of the scheme. The main contention of that Revenue/Income Tax Department is that the Transferee Company will carry forward the Loss and the Unabsorbed Depreciation of the Transferor Company into the Transferee Company, which will eventually result in the loss of revenue to the Income Tax Department.

17. Therefore, we would like to examine the contention of the Income Tax Department. We are aware that the legal framework of carrying forward losses and unabsorbed depreciation is stipulated under Section 72A of Income Tax Act 1961. Therefore, at this juncture we would like to refer to Section 72A of Income Tax Act, which is reproduced overleaf:

Provisions relating to carry forward and set off of accumulated loss and unabsorbed depreciation allowance in amalgamation or demerger, etc.

72A. (1) Where there has been an amalgamation of—

- (a) a company owning an industrial undertaking or a ship or a hotel with another company; or
- (b) a banking company referred to in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949) with a specified bank; or

⁸²[(c) one or more public sector company or companies with one or more public sector company or companies; or

- (d) an erstwhile public sector company with one or more company or companies, if the share purchase agreement entered into under strategic disinvestment restricted immediate amalgamation of the said public sector company and the amalgamation is carried out within five years from the end of the previous year in which the restriction on amalgamation in the share purchase agreement ends.]

then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the amalgamating company shall be deemed to be the loss or, as the case may be, allowance for unabsorbed depreciation of the amalgamated company for the previous year in which the amalgamation was effected, and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly:

⁸³[**Provided** that the accumulated loss and the unabsorbed depreciation of the amalgamating company, in case of an amalgamation referred to in clause (d), which is deemed to be the loss or, as the case may be, the allowance for unabsorbed depreciation of the amalgamated company, shall not be more than the accumulated loss and unabsorbed depreciation of the public sector company as on the date on which the public sector company ceases to be a public sector company as a result of strategic disinvestment.

Explanation.—For the purposes of clause (d),—

- (i) "control" shall have the same meaning as assigned to in clause (27) of section 2 of the Companies Act, 2013 (18 of 2013);
- (ii) "erstwhile public sector company" means a company which was a public sector company in earlier previous years and ceases to be a public sector company by way of strategic disinvestment by the Government;
- (iii) "strategic disinvestment" means sale of shareholding by the Central Government or any State Government in a public sector company which results in reduction of its shareholding to below fifty-one per cent along with transfer of control to the buyer.]

(2) Notwithstanding anything contained in sub-section (1), the accumulated loss shall not be set off or carried forward and the unabsorbed depreciation shall not be allowed in the assessment of the amalgamated company unless—

(a) the amalgamating company—

- (i) has been engaged in the business, in which the accumulated loss occurred or depreciation remains unabsorbed, for three or more years;
- (ii) has held continuously as on the date of the amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of amalgamation;

(b) the amalgamated company—

- (i) holds continuously for a minimum period of five years from the date of amalgamation at least three-fourths of the book value of fixed assets of the amalgamating company acquired in a scheme of amalgamation;
- (ii) continues the business of the amalgamating company for a minimum period of five years from the date of amalgamation;

(iii) fulfils such other conditions as may be prescribed²² to ensure the revival of the business of the amalgamating company or to ensure that the amalgamation is for genuine business purpose.

(3) In a case where any of the conditions laid down in sub-section (2) are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the amalgamated company shall be deemed to be the income of the amalgamated company chargeable to tax for the year in which such conditions are not complied with.

(4) Notwithstanding anything contained in any other provisions of this Act, in the case of a demerger, the accumulated loss and the allowance for unabsorbed depreciation of the demerged company shall—

(a) where such loss or unabsorbed depreciation is directly relatable to the undertakings transferred to the resulting company, be allowed to be carried forward and set off in the hands of the resulting company;

(b) where such loss or unabsorbed depreciation is not directly relatable to the undertakings transferred to the resulting company, be apportioned between the demerged company and the resulting company in the same proportion in which the assets of the undertakings have been retained by the demerged company and transferred to the resulting company, and be allowed to be carried forward and set off in the hands of the demerged company or the resulting company, as the case may be.

(5) The Central Government may, for the purposes of this Act, by notification in the Official Gazette, specify such conditions as it considers necessary to ensure that the demerger is for genuine business purposes.

(6) Where there has been reorganisation of business, whereby, a firm is succeeded by a company fulfilling the conditions laid down in clause (xiii) of section 47 or a proprietary concern is succeeded by a company fulfilling the conditions laid down in clause (xiv) of section 47, then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the predecessor firm or the proprietary concern, as the case may be, shall be deemed to be the loss or allowance for depreciation of the successor company for the purpose of previous year in which business reorganisation was effected and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly :

Provided that if any of the conditions laid down in the proviso to clause (xiii) or the proviso to clause (xiv) to section 47 are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the successor company, shall be deemed to be the income of the company chargeable to tax in the year in which such conditions are not complied with.

(6A) Where there has been reorganisation of business whereby a private company or unlisted public company is succeeded by a limited liability partnership fulfilling the conditions laid down in the proviso to clause (xiib) of section 47, then, notwithstanding anything contained in any other provision of this Act, the accumulated loss and the unabsorbed depreciation of the predecessor company, shall be deemed to be the loss or allowance for depreciation of the successor limited liability partnership for the purpose of the previous year in which business reorganisation was effected and other provisions of this Act relating to set off and carry forward of loss and allowance for depreciation shall apply accordingly :

Provided that if any of the conditions laid down in the proviso to clause (xiib) of section 47 are not complied with, the set off of loss or allowance of depreciation made in any previous year in the hands of the successor limited liability partnership, shall be deemed to be the income of the limited liability partnership chargeable to tax in the year in which such conditions are not complied with.

(7) For the purposes of this section,—

(a) "accumulated loss" means so much of the loss of the predecessor firm or the proprietary concern or the private company or unlisted public company before conversion into limited liability partnership or the amalgamating company or the demerged company, as the case may be, under the head "Profits and gains of business or profession" (not being a loss sustained in a speculation business) which such predecessor firm or the proprietary concern or the company or amalgamating company or demerged company, would have been entitled to carry forward and set off under the provisions of section 72 if the reorganisation of business or conversion or amalgamation or demerger had not taken place;

(aa) "industrial undertaking" means any undertaking which is engaged in—

(i) the manufacture or processing of goods; or

- (ii) the manufacture of computer software; or
 - (iii) the business of generation or distribution of electricity or any other form of power; or
 - (iiia) the business of providing telecommunication services, whether basic or cellular, including radio paging, domestic satellite service, network of trunking, broadband network and internet services; or
 - (iv) mining; or
 - (v) the construction of ships, aircrafts or rail systems;
- (b) "unabsorbed depreciation" means so much of the allowance for depreciation of the predecessor firm or the proprietary concern or the private company or unlisted public company before conversion into limited liability partnership or the amalgamating company or the demerged company, as the case may be, which remains to be allowed and which would have been allowed to the predecessor firm or the proprietary concern or the company or amalgamating company or demerged company, as the case may be, under the provisions of this Act, if the reorganisation of business or conversion or amalgamation or demerger had not taken place;
- (c) "specified bank" means the State Bank of India constituted under the State Bank of India Act, 1955 (23 of 1955) or a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959 (38 of 1959) or a corresponding new bank constituted under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970) or under section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1980 (40 of 1980).

18. On perusal of the abovesaid provision, this Bench observes that the unabsorbed depreciation and losses can only be carried forward by the Transferee Company only on meeting certain conditions as stipulated under Section 72A (2) of Income Tax Act 1961.

19. Now, we would like to examine whether the Scheme proposed by the Applicant is Compliant to the provisions of Section 72A of Income Tax Act 1961. In this regard, we refer to the Clause 12 of the Scheme, which provides for Compliance of the Tax Laws. The said Clause 12 is reproduced below -

12. COMPLIANCE OF TAX LAWS

- a. This scheme has been drawn to comply with the conditions related to merger as specified under Section 2(1B) and all other relevant provisions of the Income Tax Act, 1961.
- b. If any terms or provisions of the scheme is/ are found to be or interpreted to be inconsistent with any of the said provisions of the Income Tax Act, 1961, whether as a result of any amendment of law or any judicial interpretation of law or for any other reason whatsoever, the scheme shall stand modified to the extent necessary to comply with the provisions of the Income Tax Act, 1961. Any such modification will, however, not affect other parts of the Scheme.

20. From the above, it is observed that though the Scheme is stated to be compliant of Section 2(1B) and all other relevant provisions of the Income Tax Act, however, we find nothing expressly stated in the Scheme by the Applicant Company as regards to compliance of the Section 72A of the Income Tax Act, 1961.

21. Further, we observe that Section 72A(2)(b) of the Income Tax Act, 1961 has imposed certain conditions with regard to carrying forward of the business and holding assets of the Amalgamating Company/Transferor Company for 5 years. At this juncture, we would like to visit the Scheme again in order to examine whether the Scheme fulfils these conditions. The relevant extracts relating to conduct of business of the Company are reproduced below –

8. CONDUCT OF BUSINESS BY TRANSFEROR COMPANY AND TRANSFEREE COMPANY

8.1 From the Appointed Date until the Effective Date, the Transferor Company-

- a. Shall possess of all its assets and properties referred to in Clause 2 above, in trust for the Transferee Company.
- b. Shall be deemed to have carried on business and activities for and on behalf of and for the benefit and on account of the Transferee Company. Any income or profit accruing to the Transferor Company and all costs, charges, expenses or loss arising or incurred or suffered by the Transferor Company shall, for all purposes and intents, be treated as the income, profits, costs, charges, expenses or loss, as the

case may be, of the Transferee Company.

8.2 Any corporate action by Transferor Company on or after the Appointed Date until the Effective Date shall, upon the Scheme became effective, be treated as having been taken by the Transferee Company without any further application, act or deed etc. and shall be dealt with accordingly.

8.3 Notwithstanding anything contained in sub-clause '8.1' and '8.2' above, the Transferor Company as well as the Transferee Company shall conduct their respective businesses till the effective date of amalgamation.

22. On perusal of the above, it is observed that the Scheme in Clause 8.3 specifies that *the Transferor Company as well as the Transferee Company shall conduct their respective Businesses till the effective date of amalgamation* which effectively means till the Scheme is approved. However, there is neither any mention nor any undertaking in the Scheme that the Transferee Company shall not dispose of all the assets and shall hold at least three-fourths of the book value of fixed assets of the amalgamating/transferor company for at least five years and it shall continue the business of the Transferor Company for next five years.


23. We therefore, find that the Scheme proposed by the Applicant is not compliant to the provisions of Section 72A of the Income Tax Act, 1961. Hence, we cannot allow the carry forward and set off of loss and unabsorbed depreciation of Transferor Company in the Transferee Company, which is a condition stipulated in the Scheme under consideration.

24. In view of the above, the Scheme being non-compliant of Section 72A of the Income Tax Act, 1961, we have no reason to differ with the recommendation of the Income Tax Department as noted in Para 12 above.

25. **The application is accordingly Dismissed.**



**(L.N. GUPTA)
MEMBER (T)**



**(BACHU VENKĀT BALARAM DAS)
MEMBER (J)**