

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY SCHEME PETITION NO. 434 OF 2014
CONNECTED WITH
COMPANY SUMMONS FOR DIRECTION NO. 396 OF 2014.

Capgemini India Private Limited

...Petitioner

Mr. Virag Tulzapurkar, Senior Advocate, along with Mr. Munaf Virjee and Mr. Manhar S. Saini, instructed by M/s. DSK Legal for the Petitioners.

Mr. Jimmy Avasia along with Mr. C.J. Joy and Mr. K.R. Chaudhari for the Regional Director.

CORAM: S.J. KATHAWALLA, J.

Date: 28th April, 2015.

PC.:

1. The Petitioner has filed the above Petition seeking sanction of the Scheme of Arrangement (hereinafter referred to as "the Scheme") with its Equity Shareholders (hereinafter referred to as "the Shareholders"), in accordance with the provisions of Section 391 read with Sections 100 to 103 of the Companies Act, 1956 (hereinafter referred to as "the Act"), from this Court. As per the Scheme, the Petitioner Company is proposing to purchase not more than 221,231 Equity Shares of the Company either in physical form or dematerialized form of Rs. 100/- each fully paid up, representing 30% of the issued, subscribed and paid up share capital. There is no compulsory purchase. An option, is given to the equity shareholders under the Scheme. The manner and procedure of purchasing the equity shares as provided in Clause 4.2 of the Scheme is reproduced below:

"The Company shall send an option form to the Shareholders within 5 (five) days from the Effective Date. To exercise the option, as per clause 4.1, the Shareholders will have to return the duly filled-in option forms to the Company within 10 (ten) days from the date of dispatch of such option forms to the Shareholders by the Company. The Company shall within 15

(fifteen) days of the receipt of the option forms and documents mentioned therein complete the verification of the option forms along with the relevant supporting documents received from the Shareholders. The Company shall purchase Equity Shares only from Shareholders whose option forms and supporting documents are verified by the Company and considered to be valid. The consideration payable for the purchase of Equity Shares shall be discharged by the Company within 30 (thirty) days of the receipt of the valid option forms from the Shareholders”.

2. The Petition has been admitted vide order dated July 25, 2014 passed by this Court. Pursuant thereto, the Petitioner Company served notices of final hearing upon (I) the Regional Director, Western Region, Ministry of Corporate Affairs (hereinafter referred to as “the Regional Director”), (ii) Registrar of Companies, Mumbai, Maharashtra, (iii) concerned Income Tax Authority within whose jurisdiction the Petitioner Company's assessment are made (hereinafter referred to as “the IT Authority”),(iv) all the unsecured creditors and has also issued a public notice in two local newspapers viz. “Free Press Journal” in English language and translation thereof in “Navashakti” in Marathi language. No objection has been raised by the IT Authority.

3. In response to the notice of final hearing, the Regional Director has filed an affidavit on 1st October, 2014 (hereinafter referred to as “the said Affidavit”) raising various objections and opposing sanction of the Scheme. The Petitioner Company has filed an Affidavit dated 8th October, 2014, in reply to the said Affidavit.

4. The entire case of the Regional Director revolves around his contention that the buyback of shares must be effected only under Section 77A of the Companies Act, 1956/Section 68 of the Companies Act, 2013. According to the Regional Director if a buyback of shares is effected under Section 77A/Section 68, then the distributed income of the company as defined in

Section 115QA of the Income Tax Act would be charged to tax, and it is for this reason that the company is not following the procedure prescribed under Section 77A/Section 68 and has opted for the procedure under Section 391 which would not attract such a tax under Section 115QA of the Income Tax Act. According to the Regional Director by this colourable device the company is evading its liability to pay tax.

5. One of the contentions raised by the Petitioner is that in view of the circular dated 15th January 2014, the Regional Director has no locus in respect of tax matters, particularly when the Income Tax Authorities have not raised any objection. This aspect has been considered in detail by this Court in the case of *Casby CFS Pvt. Ltd.*¹ and it has been held that the Regional Director has the requisite locus standi to raise all objections in respect of a scheme including objections pertaining to taxation laws. He can do so even if the Income Tax Authorities do not raise any objection. It has been held that this is the duty and obligation of the Regional Director. In view of the aforesaid decision of this Court the objection of the Petitioner with regard to the locus of the Regional Director is untenable and deserves to be rejected.

6. The Petitioner has submitted that it is open to the Petitioner to follow either the procedure under Section 77A/Section 68 or the procedure under Section 391 read with Sections 100 to 104 to effectuate the buyback of shares and there is no compulsion for the Petitioner to follow only the procedure prescribed by Section 77A/Section 68. In any event, under Section 77A/Section 68 a company can buyback only 25% of the total paid up capital and free reserves of the company whereas under the Scheme the company proposes buyback of 30% of its paid up capital and free reserves, which is not possible under Section 77A/Section 68. Consequently the only manner in

1 Decided on 19th March, 2015 in CSP Nos. 137 and 138 of 2014.

which the company can buyback the said shares is by following the procedure under Section 391 read with Sections 100 - 104 of the 1956 Act. In support of its contentions the Petitioner has relied upon the decision of the Division Bench of this Court in the case of *SEBI V/s. Sterilite Industries (India) Limited*².

7. The Division Bench of this Court in the case of *Sterilite Industries (supra)* has held that a Company may either follow the procedure under Section 391 read with Sections 100 to 104 of the 1956 Act or the procedure under Section 77A (now Section 68). It is not mandatory for a company to buy back its shares only by following the procedure prescribed by Section 77A. In this regard paragraphs 22 and 23 of the Sterilite decision are relevant and the same are reproduced below for convenience :

“22. The opening words of section 77A, viz. “notwithstanding anything contained in this Act, but subject to the provisions of sub-section(2) of this section and section 77B, a company may purchase its own shares or other specified securities ...” shows that section 77A is a facilitating provision which enables companies to buy-back their shares without having to approach the court under section 391 and sections 100 to 104 subject to compliance with the provisions of sub-sections(2), (3) and (4). Prior to the introduction of section 77A, the only manner in which a company could buy-back its shares was by following the procedure set out under sections 100 to 104 and section 391 which required the calling of separate meetings of each class of shareholders and creditors as well as (if required by the court) the drawing up of a list of creditors of the company and obtaining of their consent to the scheme for reduction. The legislative intention behind the introduction of section 77A is to provide an alternative method by which a company may buy-back upto 25 per cent of its total paid-up equity capital in any financial year subject to compliance with sub-sections (2), (3) and (4). It does not supplant or take away

2 (2003) 45 SCL 475

any part of the pre-existing jurisdiction of the company court to sanction a scheme for such reduction under sections 100 to 104 and section 391.

23. The submission of the appellants that the non obstante clause in section 77A gives precedence to that section over the provisions of sections 100 to 104, section 391 is misconceived. The non obstante clause in section 77A namely “notwithstanding anything contained in this Act...” Only means that notwithstanding the provisions of section 77 and sections with the conditions mentioned in that section without approaching the court under sections 100 to 104 or section 391. There is nothing in the provision of section 77A to indicate that the jurisdiction of the court under section 391 or 394 has been taken away or substituted. It is well settled that the exclusion of the jurisdiction of the court should not readily be inferred, such exclusion should be explicitly or clearly implied. There is nothing in the language of section 77 that gives rise to such an inference. We are, therefore, inclined to hold that section 77A is merely an enabling provision and the court’s powers under sections 100 to 104 and section 391 are not in any way affected. The conditions provided in section 77A are applicable only to buy-back of shares under section 77A. The conditions applicable to sections 100 to 104 and section 391 cannot be imported into or made applicable to a buy-back under section 77A. Similarly the conditions for a buy-back under section 77A cannot be applied to a scheme under sections 100 to 104 and section 391. The two operate in independent fields”.

4. However it is necessary to note that the above was the position in law under the 1956 Act in view of the language of the provisions of Section 391 and Section 77A of that Act. In the 2013 Act Sub-section 10 of Section 230 provides as follows :-

“10. No compromise or arrangement in respect of any buy-back of securities under this section shall be sanctioned by the Tribunal

unless such buy-back is in accordance with the provisions of section 68.”

This provision may have an impact on the law as laid down by this Court in the Sterilite case. However, at present Section 230 has not come into force and hence this question does not arise for consideration in this case and hence the same need not to be considered. At present the law as laid down in Sterilite Industries prevails and will be applicable to the present case.

5. In the circumstances it is open to a company to buy back its own shares by following the procedure prescribed under Section 77A/Section 68 or by following the procedure prescribed under Section 391 read with Sections 100 to 104 of the 1956 Act. The contentions of the Regional Director are therefore clearly contrary to the prevailing legal position.

6. According to the Regional Director if the Scheme is sanctioned it will amount to evasion of income tax and outflow of foreign exchange to the tune of Rs.248 crores and therefore on this ground the Scheme should be rejected. The Regional Director has not furnished any particulars in support of the aforesaid contention. Be that as it may, if the law permits a company to buy back its shares in more than one way, the company cannot be compelled to follow only the method that results in payment of income tax. It is well settled that an assessee can always manage his affairs in a manner so as to avoid payment of tax. In the present case since it is legally permissible for the company to buy back its shares by following the procedure under Section 391 read with Sections 100 to 104 of the 1956 Act, the fact that the same may not attract income tax will not amount to it being a device to evade tax.

7. Even the argument of the Regional Director that foreign exchange amounting to Rs.248 crores will be drained away if the Scheme is sanctioned, is of no avail once it is held that the procedure adopted by the company is

permissible in law. Moreover, the Regional Director has not shown that the law prohibits the transfer of shares by a non-resident to resident. In fact, he does not dispute that the same is permissible. The Petitioner has placed on record RBI's Circular No.49 dated 4th May 2010 which provides that shares of an unlisted Indian company can be transferred by a non-resident to a resident under the general permission of the RBI if the transfer price does not exceed the fair market value as determined by a Chartered Accountant or a SEBI registered Merchant Banker as per the DCF method. In the present case the transfer price has been arrived at in accordance with the aforesaid circular of the RBI. The Regional Director has not disputed the fair market value of the shares so determined. In these circumstances it is clear that the buyback of shares under the Scheme is in accordance with the RBI Guidelines and that being so, there is no question of there being any draining away of foreign exchange.

8. In view of the above and particularly the fact that in law the Petitioner is entitled to buy back its own shares by means of a scheme under Section 391 read with Sections 100 – 104 of the 1956 Act, the scheme cannot be said to be a colourable device to evade income tax. It is a legally permissible procedure which the Petitioner is entitled to follow to buy back its shares.

9. In support of his contention that the Scheme is a device to evade tax, the Regional Director relies heavily upon the decision of the Hon'ble Gujarat High Court in the case of *Wood Polymer Limited v/s. Bengal Hotels Pvt. Ltd.*³ This decision has been considered by this Court along with the later decision of the Hon'ble Supreme Court, in the case of *AVM Capital Services Pvt. Ltd. and*

3 (1977) 47 CC 597

*others*⁴ where it has been held that the said decision is no longer good law. As such the decision in the case of Wood Polymer can be of no assistance to the Regional Director.

10. In any event the Petitioner has stated that the issues relating to income tax that may arise out of the Scheme may be left open to be dealt with and decided by the Income Tax Authorities in accordance with the law. The statement is accepted. Consequently nothing survives in the objections of the Regional Director.

11. As already held hereinabove, there is nothing illegal in the Scheme and the same is legitimate and permissible in law.

12. In the circumstances I pass the following order:

(a) The Scheme of Arrangement as proposed is sanctioned with a clarification that the issues relating to Income-tax that may arise out of the Scheme are left open to be dealt with and decided by the Income-tax Authorities in accordance with law.

(b) The Petitioner to pay costs of Rs. 10,000/- to the Regional Director within a period of four weeks from the date of this order.

(c) Filing and issuance of the drawn up order is dispensed with.

(d) All authorities concerned to act on a copy of this order along with Scheme attached thereto, duly authenticated by the Company Registrar, High Court (O.S.), Bombay.

(S.J. KATHAWALLA, J.)