IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV
CA (CAA)/91/ND/2022

[Under Sections 230(1)(b) of the Companies Act, 2013 read with Companies (Compromise, Arrangements ad Amalgamation Rules, 2016)]

IN THE MATTER OF SCHEME OF ARRANGEMENT

BETWEEN

M/s. Aviat Networks (India) Private Limited
CIN: U30007DL2000PTC256351
Reg. off: 401, Ansal Pragati
Deep Building, Laxmi Nagar
District Centre, Delhi -110092

... Applicant Company

AND

Its respective shareholders

Coram:
SH. P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)
DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

Order Delivered on:15.03.2023

ORDER

PER: DR. BINOD KUMAR SINHA, HON'BLE MEMBER (T)

1. Under Consideration is the Company Scheme Application filed by M/s. Aviat Networks (India) Private Limited ('Applicant Company') under Sections 230(1)(b) of the Companies Act, 2013 read with the Companies (Compromises, Arrangements and Amalgamations) for the purpose of approving the proposed Scheme of Arrangement ('Scheme') between **M/s. Aviat Networks (India) Private Limited ('Applicant Company' and its Shareholders.** The copy of the proposed scheme of Arrangement is placed on record of this Tribunal.

2. M/s. Aviat Networks (India) Private Limited ('Applicant Company') having CIN: U30007DL2000PTC256351 incorporated on 17.05.2000 and having paid up share capital of Rs.61,89,03,580/- divided in 6,18,90,358 equity shares of Rs.10 each. The Applicant Company has its registered office situated at 401, Ansal Pragati Deep Building, Laxmi Nagar, District Centre, Delhi -110092 and is engaged in the business of manufacturing, designing, programming, developing in all kinds of chips, devices, appliances and other substances in connection with the chip designing.

3. The Learned Counsel for the Applicant Company submits that the rationale for the Scheme of Arrangement between the applicant company with its shareholder is as follows : -

   (i) The Company being a cost plus entity, its operations do not require much investment in capital. During the previous years, on account of continuous losses incurred by the Company, the value represented by the share capital of the Company has been substantially eroded. As on March 31, 2022, the total accumulated losses in the Company are Rs.44,61,23,628/- (Rupees Forty-Four Crore Sixty-One Lakhs Twenty-Three Thousand Six Hundred Twenty-Eight Only). It must be noted that on account of synergies achieved by the merger of M/s. Aviat Networks (India) Private Limited with M/s. Telsima Communications Private Limited under Section 233 of the Companies Act, 2013 by order dated 15th September 2021 of the Regional Director (NR), the Company has become profitable entity and will be able to sustain and increase its profits in the years to come. Consequently, the share capital of the Company is not adequately represented by the available assets. Considering the above, the Company, in order to present latest and fair view of its state of affairs, proposes to write off the accumulated losses lying in the books of the Company as at March 31, 2022 against the paid-up share capital of the Company as on March 31, 2022 and pay-off paid-up share capital which is in excess of the wants of the Company to the shareholders of the Company in

accordance with Section 230-231 of the Companies Act, 2013 read with The Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 and other applicable provisions.

4. The Learned Counsel for the Applicant Company submits that the Board of Directors of the Applicant Company in its Board Meeting held on 01.09.2022 have approved the proposed Scheme of Arrangements. The certified copy of Board Resolution approving the Scheme of the respective Applicant Company are annexed as **'Annexure 6' at page no. 160-163** to the Company Scheme Application.

5. The Learned Counsel for the Applicant Company submits that the Appointed Date for the Scheme of Arrangement means opening of business on April 01, 2022 or such other dates may be determined by the Board of the Company or NCLT. The copy of the proposed Scheme of Arrangement between the Applicant Company and its shareholders is annexed as '**Annexure 1' at page no. 24 - 39** to the Company Scheme Application.

6. The Applicant Company have placed on record their Memorandum of Association ('MoAs), Article of Associations ('AoAs), MCA Master Data. The Applicant Company further placed on record the Audited Balance Sheet as on 31.03.2022 and the same is annexed as '**Annexure 5' at page no. 126 - 159** to the Company Scheme Application.

7. The Applicant Company have further placed on record the Net Worth certificate and certificate dated 01.09.2022 of statutory auditors regarding conformity of accounting treatment in the scheme in consonance with Section

133 of the Companies Act, 2013. The said certificates are annexed as '**Annexure 13' at page no. 203 and 'Annexure 14' at page no. 204 - 206** respectively to the Company Scheme Application.

8. The Learned Counsel for the Applicant Company submits that the Applicant Company is a subsidiary of Foreign Company namely M/s. Telsmia Corporation, USA. The Learned Counsel for the Applicant Company further submits that below are the salient features of the proposed scheme of Arrangement between the Applicant Company and its Shareholders:-

(a) Upon this Scheme becoming effective and with effect from the Appointed date, out of the accumulated losses as mentioned above of Rs. 44,61,23,628 /- (Rupees Forty-Four Crore Sixty-One Lakhs Twenty-Three Thousand Six Hundred Twenty-Eight Only) (the resultant amount of accumulated losses after aforementioned write- off shall be Rs. 8 only), an amount amounting to Rs. 44,61,23,620/- (Rupees Forty Four Crore Sixty One Lakhs Twenty Three. Thousand Six Hundred Twenty Only) shall stand written off, and Rs. 12,27,79,960/- (Rupees Twelve Crore Twenty Seven Lakh Seventy Nine Thousand Nine Hundred Sixty only) shall be utilized for paying-off the share capital which is in excess of the wants of the Applicant Company to the shareholders of the Applicant Company. The above-mentioned amount of Capital reduction allocated for paying-off the shareholders shall be done at a premium of Rs 10/- per equity share and the total amount to be paid to shareholders (net off taxes) of the Applicant Company after the said Capital reduction shall be Rs.24,55,59,920/-(Rupees Twenty Four Crore Fifty Five Lakh Fifty Nine Thousand Nine Hundred Twenty only) ie, 1,22,77.996 (One Crore Twenty Two Lakh Seventy Seven Thousand Nine Hundred Ninety Six) equity shares of Rs. 10/- each along with a premium of Rs. 10/- per share.

(b) Accordingly, subsequent to obtaining the necessary approvals, sanctions, and permissions and upon this Scheme becoming effective, the issued, subscribed and paid-up share capital of the Applicant Company shall stand reduced from the present value of Rs. 61,89,03,580/- (Rupees Sixty One Crore Eighty Nine Lakh Three Thousand Five Hundred and Eighty only) divided into 6,18,90,358 (Six Crore Eighteen Lakh Ninety Thousand Three Hundred and Fifty Eight only) equity shares of face value of Rs. 10/- (Rupees Ten only) per equity share to Rs.5,00,00,000/- (Rupees Five Crore only) divided into 50,00,000 (Fifty Lakh only) equity shares of Face value of Rs. 10/- (Rupees Ten only).

(c) The above-mentioned Payout to the shareholders (including the manner and the timing thereof) and the writing off of the accumulated losses of the Applicant Company shall be undertaken in accordance with the provisions of the 2013 Act, the Scheme and any other applicable law, taking into account all relevant factors including applicable regulatory and fiscal considerations and subject to payment or deduction at source of the applicable taxes.

9. The Learned Counsel for the Applicant submits that Mr. Naveen Singal, a registered valuer under IBBI has provided a comprehensive share valuation report of the Applicant Company showcasing the true value of the shares of the Applicant Company. The share valuation report as provided by Mr. Naveen Singal is annexed hereto and marked as **'Annexure-7' at page no. 204 - 206** respectively to the Company Scheme Application. The relevant part of the Share Valuation report is reproduced herein below:-

"Capital reduction by setting off the accumulated losses against the paid up capital. On the approval of the scheme, the number of shares will get reduced to 1.75 cr shares. Basis the said, number of shares, the fair value per Equity Share is Rs.20 (Rupees twenty only)."

10. The Applicant Company had placed on record the convenience chart summarizing the position of the shareholders and creditor of the Applicant Company. The convenience chart is as below:-

List of Shareholders as on 31st August 2022

S.No	Name	Address	No. of shares held.	Residential Status	Consent on Scheme obtained
1.	Telsima Corporation, USA	200 Parker Drive, Suite C100A, Austin, Texas 78728, USA	6,18,90,338	Non-resident	Yes
2.	Atul Kumar Gupta	B-128 Opp. Park Rampuri, Surya Nagar, Ghaziabad-201011, Uttar Pradesh	20	Resident	Yes
	Total		**6,18,90,358**		

List of Secured creditors as on 31st August 2022

S.No	Name	Address	Amount	Consent on Scheme obtained
1.	Nil			
	Total		**Nil**	

List of Unsecured creditors as on 31st August 2022

S.No	Name	Address	Amount	Consent on Scheme obtained
1.	Aviat U.S. Inc	200 Parker Drive, Suite C100A, Austin, Texas 78728, USA	25,42,57,367	Yes
2.	Telsima Corporation, USA	200 Parker Drive, Suite C100A, Austin, Texas 78728, USA	2,07,09,092	Yes
	Total		**27,51,66,459**	

11. The Learned Counsel for the Applicant Company submits that the Applicant Company has 2 (Two) Equity Shareholders and that the Applicant Company has procured the consent affidavits, in writing agreeing to the proposed Scheme from 2 (Two) Equity Shareholders holding 100% of the Equity Share Capital of the Applicant Company. The Chartered Accountant certified list of the Equity Shareholders of the Applicant Company as on 31.08.2022 is annexed as **'Annexure -8' at page no. 176-177** and the consent affidavits executed by both the Equity Shareholders of the Applicant Company are

annexed as **'Annexure A-9' at page no. 285 -298** to the Company Scheme Application.

12. The Learned Counsel for the Applicant Company submits that there are 'Nil' Secured Creditors in the Applicant Company. Therefore, the requirement of convening and holding such meeting of Secured Creditors of the Applicant Company does not arise. The certificate of the chartered accountant certifying Nil list of the Secured Creditors of the Applicant Company as on 31.08.2022 is annexed as **'Annexure A-10' at page no. 189** to the Company Scheme Application.

13. The Learned Counsel for the Applicant Company submits that there are '2' ('two') Unsecured Creditors aggregating to the value of Rs.27,51,66,459/- as on 31.08.2022 in the Applicant Company and the the certificate of the chartered accountant certifying list of the Unsecured Creditors of the Applicant Company No.1 as on 31.08.2022 is annexed as '**Annexure A-11' at page no. 190-191** to the Company Scheme Application. The Learned Counsel for the Applicant Company sought dispensation of the meeting of the unsecured creditors of the Applicant Company in view of the fact that Unsecured Creditors holding not less than 90% value of the total credit provided to the Applicant Company had given their no-objection to the proposed scheme of Arrangement. The copy of the No objection by of affidavit by the Unsecured Creditors of the Applicant Company is annexed as '**Annexure A-12' at page no. 192-202** to the Company Scheme Application. Further, it is submitted that the Net Worth certificate issued by the Auditors of the Applicant Company showcase that the Applicant Company will remain solvent and will be able to meet its obligations/commitments in the normal course of business.

14. This Tribunal vide order dated 11.10.2022, had directed the Applicant Company to satisfy this Tribunal that the present Company Application is maintainable under Sections 230-232 of the Companies Act, 2013 with the supporting judgments.

15. The Applicant Company had submitted written arguments on 19.11.2022, wherein it was submitted that the proposed Scheme of arrangement is broadly divided in two fold (i) Utilizing the excess Share Capital of the Company (ii) writing off the accumulated losses as mentioned in the books of the Applicant Company and pay-off the Shareholders of the Applicant Company. Section 230 of the Companies Act, 2013 envisages the scope for filling of a Composite Scheme under which an Applicant can simultaneously file for two different types of reorganization of share capital under one application. Therefore it was submitted that the present Company Application is filed under Section 230 of the Companies Act, 2013 read with Section 66 of the Companies Act, 2013 and the Companies ((Compromise, Arrangements ad Amalgamation Rules), 2016. To support the Contentions, reliance is placed on **Maneckchowk and Ahmedabad Manufacturing Company Limited [1969 SCC OnLine Guj 22] as well as R. Systems International Limited [(2018) SCC OnLime NCLAT 321].**

16. Heard. Record perused thoroughly. On a perusal of the proposed scheme of arrangement and the submissions made by the Learned Counsel of the Applicant Company, we observe that the proposed Scheme of Arrangement claimed to be contemplated in terms of Section 230(1)(b) of the Companies Act, 2013 does not envisage transfer or vesting of any of the properties and/ or liabilities of the Company to or in any Persons as contemplated in Sections 230 to 232 and other applicable provisions of the Act, and therefore, it does not relate to amalgamation or merger or demerger of companies in terms of Sections 230 to 232 of the Act. Whereas the Proposed scheme of Arrangement seeks approval for reduction of share capital by writing off the accumulated loss of Rs.44,161,23,260/- and further utilizing Rs.12,27,79,960/- towards paying the paid-up share capital which is in excess of the wants of company to the shareholders which is being paid at a premium of Rs.10/- per equity share and the total amount to be paid to the shareholders of the Company after capital reduction shall be Rs.24,55,59,920/- i.e., in respect of 1,22,77,996 shares at Rs.10/- each

along with premium of Rs.10/- each per equity share, thereby involving outflow of cash. Resultantly, the paid-up share capital of the Company shall be reduced to Rs.5 crore divided into 50 Lakh equity shares with face value of Rs.10 /- per equity share.

17. The statutory Auditor of the Company in its Audit Report for the Financial Statements as on 31.03.2022 had reported the following "Emphasis on Matter", as extracted below:-

> We draw attention to the following matters in the notes to the financial *statements:*
>
> a) We draw attention to Note 23 in the financial statement which indicates that the company has accumulated losses and its net worth has been substantially eroded. During the year, after amalgamation the company business has turned profitable. Accordingly, the financial statements of the Company have been prepared on a going concern basis for the reasons stated in the said Note.
>
> b) We draw attention to Note 30 in the financial statement which indicates that the company has long outstanding dues to be paid to Telsima Corporation, USA amounting to Rs.19,609,701 and Aviat U.S. Inc, USA amounting to Rs.240,948,896. As represented to us the company has appointed consultants to pursue the case before the Enforcement Directorate and the company had already made an ad-hoc provision on account of this uncertainty in the financial statement. The impact of outcome on the financial statement is not ascertainable at this stage and we are unable to comment on that.

18. Section 230 of the Companies Act, 2013 relates to power to make Compromise or make Arrangement and Section 66 of the Companies Act, 2013 relates to the Reduction of Share Capital. At this juncture it will be relevant to refer Section 230 of the Companies Act, 2013 as well as Section 66 of the Companies Act, 2013 in order to appreciate the relevance as well as scope of both the Sections. The same are reproduced below:-

"230. Power to compromise or make arrangements with creditors and members —

(1) Where a compromise or arrangement is proposed—

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them, the Tribunal may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Tribunal directs.

Explanation —For the purposes of this sub-section, **arrangement includes** a re-organization of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods."

(2) **The company or any other person, by whom an application is made under sub-section (1), shall disclose to the Tribunal by affidavit—**

(a) all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company and the pendency of any investigation or proceedings against the company;

(b) reduction of share capital of the company, if any, included in the compromise or arrangement;

(c) any scheme of corporate debt restructuring consented to by not less than seventy-five per cent. of the secured creditors in value, including—

(i) a creditor's responsibility statement in the prescribed form;

(ii) safeguards for the protection of other secured and unsecured creditors;

(iii) report by the auditor that the fund requirements of the company after the corporate debt restructuring as approved shall conform to the liquidity test based upon the estimates provided to them by the Board;

(iv) where the company proposes to adopt the corporate debt restructuring guidelines specified by the Reserve Bank of India, a statement to that effect; and

(v) a valuation report in respect of the shares and the property and all assets, tangible and intangible, movable and immovable, of the company by a registered valuer.

(3)**********

(4) **********

(5) **********

(6)

(7) An order made by the Tribunal under sub-section (6) shall provide for all or any of the following matters, namely: —
(a) where the compromise or arrangement provides for conversion of preference shares into equity shares, such preference shareholders shall be given an option to either obtain arrears of dividend in cash or accept equity shares equal to the value of the dividend payable;
(b) the protection of any class of creditors;
(c) if the compromise or arrangement results in **the variation of the shareholders' rights, it shall be given effect to under the provisions of section 48;**
(d) if the compromise or arrangement is agreed to by the creditors under sub-section (6), any proceedings pending before the Board for Industrial and Financial Reconstruction established under section 4 of the Sick Industrial Companies (Special Provisions) Act, 1985 shall abate;
(e) such other matters including exit offer to dissenting shareholders, if any, as are in the opinion of the Tribunal necessary to effectively implement the terms of the compromise or arrangement:
(8) The order of the Tribunal shall be filed with the Registrar by the company within a period of thirty days of the receipt of the order.
(9) The Tribunal may dispense with calling of a meeting of creditor or class of creditors where such creditors or class of creditors, having at least ninety per cent value, agree and confirm, by way of affidavit, to the scheme of compromise or arrangement.
(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.
(11) Any compromise or arrangement may include takeover offer made in such manner as may be prescribed:
Provided that in case of listed companies, takeover offer shall be as per the regulations framed by the Securities and Exchange Board.
(12) An aggrieved party may make an application to the Tribunal in the event of any grievances with respect to the takeover offer of companies other than listed companies in such manner as may be prescribed and the Tribunal may, on application, pass such order as it may deem fit.

Explanation.—For the removal of doubts, it is hereby declared that the provisions of section 66 shall not apply to the reduction of share capital effected in pursuance of the order of the Tribunal under this section.

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"66. Reduction of share capital.
(1) Subject to confirmation by the Tribunal on an application by the company, a company limited by shares or limited by guarantee and having a share capital may, by a special resolution, reduce the share capital in any manner and in, particular, may—

(a) extinguish or reduce the liability on any of its shares in respect of the share capital not paid-up; or
(b) either with or without extinguishing or reducing liability on any of its shares,—
(i) cancel any paid-up share capital which is lost or is unrepresented by available assets; or
(ii) pay off any paid-up share capital which is in excess of the wants of the company,
alter its memorandum by reducing the amount of its share capital and of its shares accordingly:
Provided that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon.
(2)***

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19. On a mere reading of Section 230 of the Companies Act, 2013 it is clear that pursuant to Section 230 of the Act, a company may propose for compromise or arrangement with its creditors or its members which may include reduction of share capital of the company, variation in the rights of shareholders, conversion in shares and other consequential or incidental effects thereto. Moreover on a harmonious construction of Section 230(1) with Section 230(2)(c) of the Companies Act, 2013, it is clear that the reduction of share capital of the Company may be included in the compromise or arrangement and in that case the provisions of Section 66 of the Companies Act,2013 would not be required to be followed separately. For example, in case of a demerger, there is a reduction of capital in the Demerged Company and an increase of capital in the Resultant Company. Since, such reduction/ increase will be included in a larger transaction of Demerger/Merger, no separate compliance to provision of Section 66 would be required but by no legal interpretation merely writing off of accumulated losses and paying off Share Capital not required by the company can fall within the ambit of Sections 230-232 in view of specific provisions of Section 66 of the Companies Act, 2013 to deal with transactions in the nature of reduction of Capital. In other words, only reduction of capital cannot be done in the garb of Section 230 of the Companies Act, 2013 as section 66 of the Companies Act, 2013 makes specific provision for reduction of share capital simpliciter without it being part of any scheme of Compromise and Arrangement

as envisaged under the provisions of Section 230-232, as there are different mandatory conditions for eligibility to seek approval of the Tribunal under Section 66 of the Companies Act, 2013 ('Reduction of Share Capital') and under Section 230-232 of the Companies Act, 2013 ('Compromise or Arrangement').

20. For example, one of the mandatory conditions under the provisions of Section 66 of the Companies Act, 2013 is that no such reduction shall be made if the company is in arrears in the repayment of any deposits accepted by it, either before or after the commencement of this Act, or the interest payable thereon whereas a scheme under Section 230 can be approved subject to the consent of the Equity Shareholders, Secured Creditors and Unsecured Creditors.

21. Another mandatory condition provided under Section 230(2)(a) of the Companies Act, 2013 is that the Applicant Company must disclose to the Tribunal by affidavit, the fact about the pendency of any investigation or proceedings against the Company. No such affidavit disclosing the pendency of investigation or proceeding has been filed. However, on a perusal of the Auditor's report and Financial Statements of the Applicant Company as on 31.03.2022, it is evident that the Applicant Company is in arrears of payment with respect to its overseas entities within Aviat Networks Inc. (USA) Group and the Enforcement Directorate has issued notices to the Applicant Company for non-compliance under FEMA. The relevant part of the audited financial statements as on 31.03.2022 and Notes No. 24 and 30 therein are reproduced overleaf:-

Note 24 of the Audited Financial Statements

24. Related party disclosures

A. Name of related parties and nature of relationship:

Ultimate Holding Company: Aviat Networks Inc., USA
Holding Company: Telsima Corporation, USA
Fellow subsidiary: Aviat Networks (S) Pte. Ltd.
Fellow subsidiary: Aviat U.S. Inc.

B. Transactions with related parties along with the related balances are presented below.

(Amount in thousands)

Particulars	Holding Company		Subsidiary		Total	
	March 31, 2022	March 20, 2021	March 31, 2022	March 20, 2021	March 31, 2022	March 20, 2021
Subscription to Right Issue	**-**	**50**	**-**	**-**	**-**	**50**
-Telsima Corp, USA	-	50	-	-	-	50
Rendering of services*	**-**	**-**	**77,993**	**24,842**	**77,993**	**24,842**
-Aviat Networks (S) Pte. Ltd.	-	-	77,993	24,842	77,993	24,842
Reimbursement of expenses*	**-**	**-**	**2,305**	**641**	**2,305**	**641**
-Aviat Networks (S) Pte. Ltd.	-	-	2,305	641	2,305	641
Purchase of equity shares	**-**	**-**	**-**	**0**	**-**	**0**
-Aviat Networks India Pvt. Ltd.	-	-		0	-	0
Trade payables	**19,610**	**19,023**	**240,949**	**233,855**	**260,559**	**252,878**
-Telsima Corp, USA	19,610	19,023	-	-	19,610	19,023
-Aviat U.S. Inc	-	-	240,949	233,734	240,949	233,734
-Aviat Networks (S) Pte. Ltd.	-	-	-	121	-	121
Trade receivable	**-**	**-**	**61,879**	**55,799**	**61,879**	**55,799**
-Aviat Networks (S) Pte. Ltd.	-	-	61,879	55,799	61,879	55,799

C. Remuneration to key managerial personnel

Particular	March 31, 2022	March 20, 2021
Mr. Atul Kumar Gupta, Director	2,160	1,072
Mr. Surendra Singh, Company Secretary	216	216
Total	2,376	1,288

* Excluding GST. The above amount includes unbilled revenue.

Note 30 of the Audited Financial Statements

The Company enters into various transactions with the overseas entities within Aviat Networks Inc. (USA) Group. In respect of certain transactions, the Company is yet to comply with the provisions of Foreign Exchange Management Act (FEMA) regulations. The amount due to be paid to Telsima Corporation USA of Rs.19,610 thousand (March 31, 2021- Rs.19,023 thousand) and Aviat U.S. Inc., USA of Rs.240,949 thousand (March 31, 2021- Rs.233,734 thousand; refer Note-1) which is outstanding for more than one year

Enforcement Directorate has issued notices to the company for non-compliance under FEMA for which the company has appointed consultants to pursue the case and the company had already made an ad-hoc provision of Rs.49,646 thousand on account of this uncertainty in the financial statement. The ultimate impact of outcome on the financial statement is not ascertainable at this stage."

22. The Applicant Company has not placed before this Tribunal the affidavit disclosing pendency of proceedings before Enforcement Directorate for non-compliance of FEMA; No affidavit showing how the proposed reduction of share capital of the company part of a scheme of compromise or arrangement which is a mandatory requirement as envisaged in Section 230(2)(a) and (b) of the Companies Act, 2013 has been filed.

23. Adverting to the factual matrix of the present case, we observe that the Applicant Company seeks the outflow of Rs.24,55,59,920/- by utilizing Rs.12,27,79,960/- towards paying the paid-up share capital which is in excess of the wants of company to the shareholders at a premium of Rs.10/- per equity share thereby involving outflow of cash. In the light of the emphasis of matter as raised by the Statutory Auditor of the Company and as understood from reading the financial statements, it is seen that the Applicant Company is still recovering from the losses and building its net worth which was earlier eroded, still the Applicant Company is of the view that it has paid up share capital in the excess of the current requirement of the Company despite the fact that the Applicant Company is in a continuous default of repayment of the liability to its foreign group entities in non-compliance of the FEMA provisions. It is pertinent to reiterate that the Applicant Company is a foreign wholly owned subsidiary of M/s. Telsima Corporation USA to whom the Applicant Company has long outstanding dues amounting to Rs.19,609,701/-. All this, raises serious concern as to the financial health of the Applicant Company.

24. Further, the aforesaid discussed factors raise red-flags as to the intention as well as the eligibility of the Applicant Company to seek the reduction of Share Capital under Section 66 of the Companies Act, 2013 and the rules made thereunder because of the mandatory requirements of placing the list of creditors not earlier than fifteen days prior to the date of filing of an application or no default in repayment of deposits.

25. As has been observed earlier, the explanation below Section 230(12) clarifies that if a Scheme of Compromise or Arrangement approved by this Tribunal also requires reduction of capital, compliance to provisions of Section 66 shall not be required, therefore, a presumption cannot be drawn merely on the basis of the Explanation provided under Section 230(12) of the Companies Act, 2013, that it shall give a straight ticket to the Applicant Company to seek reduction of Capital under Section 230 of the Companies Act, 2013, whereas a specific provision for reduction of Capital under Section 66 of the Companies Act, 2013 is very much in force because such an interpretation shall render Section 66 of the Companies Act, 2013 as otiose which cannot be the intention of the Legislature. The Explanation below Section 230(12) of the Companies Act, 2013 will be applicable in the case of Reduction of Share Capital only and only in the scenario where pursuant to the order of this Tribunal approving such compromise or arrangement results in reduction of the share capital of the company, as the same, can be inferred from specifically reading Section 230(1) with 230(2)(c) of the Companies Act, 2013. However, in the case before us, the proposed reduction of capital is a well thought corporate action and not consequential to any scheme of arrangement or compromise.

26. The term Compromise and Arrangement, Re-organization and Reduction of Capital are not defined in the Companies Act, 2013 or the rules made thereunder. Therefore, in order to better appreciate the provisions, we would like to refer the meaning of the terminology as defined in the Major Law Lexicon dictionary.

> **"Compromise: Arrangement-**
> "Compromise" is an expression which implies the existence of a dispute such as relating to rights, which it seeks to settle, but the word "arrangement" is a term of very wide import, and its meaning is not to be limited to something analogous to a compromise. All modes of reorganizing the share capital, takeover of shares of one company by another including interference with preferential and other special rights attached to shares can properly form part of an arrangement with members.
> (Hindustan Commercial Bank Ltd. v. Hindustan General Electric Corporation, AIR 1960 Cal 637.)

Re-organisation of the Company:-

Re-organisation of Company is a amalgamation or readjustment when one company acquires another by way of merger or a single company divides into two or more entitles or a company makes substantial change in its restructure."

Reduction of capital:-

The diminution or extinguishment of the share capital of a company. Normally this requires the consent of the Court.

The extinguishment or reduction of shareholders' liability on any of the shares of a corporate enterprise in respect of the share capital not fully paid up or the cancellation of paid-up share capital of a company which is not represented by available assets. It also refers to the return of any paid-up share capital in excess of requirements.

27. On a mere reading of the Companies Act, 2013, we observe that Section 66 of the Companies Act, 2013 providing for the Reduction of Capital is covered under Chapter-IV (Share Capital and Debentures) whereas Section 230 providing for Compromise and Arrangement is covered under Chapter-XV (Compromises, Arrangements and Amalgamations) which clearly shows the legislative intent of demarcating the line of difference between the Reduction of Capital and Compromise and Arrangement.

28. We reiterate for the sake of clarity, that Section 230 of the Companies Act, 2013 being a complete code can have reduction of share capital as a consequence of Compromise or Arrangement between the Company and its Members or Creditors but when there is no compromise or arrangement between the Company and its Members or Creditors, the compliance process as laid down under Section 66 of the Companies Act, 2013 cannot be skipped and the same are to be complied in true spirit and sense.

29. The proposed scheme of reduction filed by the Applicant Company under Section 230(1)(b) solely provides for reduction of share capital through writing off the accumulated losses and further utilizing the excess share capital of the Applicant Company by paying off the share capital which is in excess of the

requirement of the Company and therefore, squarely falls under Section 66 of the Companies Act, 2013.

30. As regard to the reliance placed by the Applicant Company on the case **Maneckchowk and Ahmadabad Manufacturing Company Ltd.) [1969 SCC Online Guj. 22]** wherein the scope of Section 391 of the erstwhile Companies Act, 1956 (Similar to Section 230 of the Companies Act, 2013) was discussed by the Hon'ble Court. In fact, the judgment **Maneckchowk (supra)** also clearly carves out that for reduction of share capital, the procedure prescribed under Section 100 of the erstwhile Companies Act, 1956 have to be followed. The relevant part of the judgment is reproduced herein below:-

> "The nature of compromise that can be entered into under section 391 is not defined. The definition of reorganization of capital is an inclusive definition which would not exclude reduction of share capital or increase of share capital which would also be a kind of reorganization of the share capital of a company. If section 391 was subject to other provisions of the Act every time the scheme of compromise and arrangement is put forth for the sanction of the court, if it includes things for which specific provisions are made and that will have to be gone through before the scheme is sanctioned, it would result in unnecessary duplication of procedure and would be cumbersome. On the contrary, it appears that if the creditors and members of the company arrive at a certain compromise which the court considers fair, it can be sanctioned under section 391 despite the fact that for some of those things included in the compromise another procedure is prescribed in the Companies Act and a which has not been carried out. It, therefore, appears that section 391 is a complete code which provides for sanctioning of thescheme of compromise and arrangement. If such a scheme of compromise and arrangement includes increase of share capital, it can be done as a part of the reorganization of the share capital, which would be part of the arrangement that would be brought about between the company and its members. **In case of reduction of share capital, in view of rule 85, the procedure prescribed under section 100 and onwards will have to be gone through.** Looking at the matter from a slightly different angle, it appears that section 391 is a special provision for sanction of a scheme of reconstruction of companies, of amalgamation of companies and for a scheme of compromise and arrangement. The scheme of compromise and arrangement, or for that matter even the

scheme of amalgamation of two companies, may envisage reorganisation of share capital of one or the other company. **The Companies Act no doubt makes provision for reduction of share capital simpliciter, increase of share capital simpliciter, or fresh issue of capital simpliciter without its being part of any scheme of compromise and arrangement. The scheme of compromise and arrangement can be brought about only between the company which is liable to be wound up under the Companies Act and its members or creditors.** The special provision contained in section 391, namely, sanction of the scheme of compromise and arrangement would in my opinion exclude general provisions for reduction of share capital or for issue of fresh capital. It is well settled that a special provision should be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply: vide South India Corporation (P.) Ltd. v. Secretary Board of Revenue ([1964] 15 S.T.C. 74; A.I.R. 1963 S.C. 207) and C. Rajgopalachari v. Corporation of Madras ([A.I.R. 1964 S.C. 1172), Therefore, it appears that the provisions contained in section 391 is a complete code. As a necessary corollary, if the scheme of compromise and arrangement includes reorganization of share capital except reduction of share capital, it can be sanctioned as a part of the scheme of compromise and arrangement. **In the case of reduction of share capital as part of the scheme of compromise and arrangement, rule 85 will have to be given full effect."**

31. Further, we observe that the facts of the present case are distinguishable from the facts of the judgment **Maneckchowk (supra)** as in the relied case, it was held that increase of share capital can be done as a part of the reorganization of the share capital, which would be consequential to the arrangement that would be brought about between the company and its members, however, in the present case there is no arrangement or compromise between the parties and what is sought is only a simpliciter reduction of share capital for which specific provision is available under Section 66 of the Code, 2016. Therefore, the citation relied upon by the Applicant Company cannot be helpful in the present case.

32. As regard to the reliance placed by the Applicant Company on the case **R. Systems International Limited [(2018) SCC OnLine NCLAT 321**] after bestowing our thoughtful consideration, we are persuaded by the decision of the Hon'ble NCLAT in **Brillio Technologies Pvt. Ltd. vs. RoC [Company Appeal (AT) No. 293 of 2019;judgement dated 19.04.2021]** which is later to the case cited wherein while discussing on the issue whether the Petition for reduction of capital filed under Section 66 of the Code, 2016 dismissed by NCLT on the ground that there is an arrangement between the company and its shareholders, therefore is non maintainable under Section 66 of the Act, however, it may be filed under Section 230-232 of the Act, held as follows:-

> **"We hold that Section 66 of the Companies Act, 2013 makes provision for reduction of share capital simpliciter without it being part of any scheme of compromise and arrangement**. The option of buyback of shares as provided in Section 68 of the Act, is less beneficial for the shareholders who have requested the exit opportunity.
> **********
> With the aforesaid **we are of the view that the Tribunal has erroneously held that the Application for reduction of share is not maintainable under Section 66 of the Act,** consent affidavits from the creditors is mandatory for reduction of share capital, SPA cannot be utilized for making payment to non-promoter shareholders, consent from 171 non-promoter shareholders who are not traceable is required, selective reduction of shareholders of non-promoter shareholders is not permissible. The Tribunal has dismissed the Application on untenable grounds. Therefore, we hereby set aside the impugned order passed by the Tribunal.
> Thus, **the reduction of equity share capital resolved on 04.02.2019 by the special resolution set out in Paragraph 11 of the Petition is hereby confirmed."**

33. The **Hon'ble High Court of Gujarat (India) in Re: Elitecore Technologies (P.) Ltd. Vs. High Court of Gujarat (India) [2013 (176) CompCas 297(Guj)]** while dealing with the objections raised by the Regional Director on the scheme of demerger on the ground that there is no mechanism in the provisions of the Companies Act, 1956, to devise and/or reduce the authorised share capital of any company and to give credit in respect of fees and stamp duty already paid, to any other company under the circumstance; and there is no provision in the

Companies Act, 1956, for decrease/reduction in the authorised share capital of a company, it was held that:-

> "Section 391 is a complete code in itself and once the scheme of arrangement falls squarely within the four corners of this section, it can be sanctioned, even if it involves doing acts for which the procedure is specified in the other sections of the Companies Act. It is submitted that it is now established and accepted in a number of cases by various High Courts and this court that the principle of single window clearance permits all other formal requirements of the Companies Act, such as approval of change of objects or any other alteration of the memorandum of association and all other consequential or incidental changes required for implementing the scheme, to be formalised in a single petition.
> The principle of law laid down by the courts in these judgments, namely, that section 391 is a complete code and the principle of single-window clearance permits all other formal requirements of the Companies Act, required for implementing the scheme to be formalised in a single petition would, in the view of this court, apply to cases of demerger as well as amalgamation."

34. Thus, the ground/ provision that scheme of Compromise or Arrangement may include Section 66 of the Companies Act, 2013 has no relevance to assume that Section 230 of the Companies Act, 2013 is an alternative to Section 66 of the Companies Act, 2013 and the procedure required to be followed under Section 66 of the Companies Act, 2013 be bypassed in the garb of application under Section 230 of the Companies Act, 2013.

35. In our opinion, the above quoted observations in the citations referred above, squarely apply to the present case and the Applicant Company had failed to show how the proposed scheme of reduction of share capital falls under the meaning of Compromise or Arrangement to get it covered under the provisions of Section 230-232 of the Companies Act, 2013.

36. Suffice it to conclude that there is no substance in the grounds urged by the Applicant Company in its written submission regarding the maintainability of the present Company Scheme Application filed under Section 230 of the Companies Act, 2013 seeking approval for the two specific actions namely (i) writing off the accumulated losses as mentioned in the books of the Applicant

Company (ii) Utilizing the excess Share Capital of the Company by paying-off the Shareholders of the Applicant Company at a premium of Rs.10/- per equity share, both of which are clearly covered under Section 66(1)(b)(i) and Section 66(1)(b)(ii) as the manner for reduction of Share Capital.

37. Accordingly, the present application i.e., **C.A(CAA)/91/ND/2022 being devoid of merits, stands dismissed.** No orders as to costs.

File be consigned to records.

Sd/-	**Sd/-**
(DR.BINOD KUMAR SINHA)	**(SH. P.S.N PRASAD)**
MEMBER (T)	**MEMBER (J)**