IN THE NATIONAL COMPANY LAW TRIBUNAL
AT JAIPUR

CORAM: SHRI DEEP CHANDRA JOSHI,
HON'BLE JUDICIAL MEMBER

SHRI RAJEEV MEHROTRA,
HON'BLE TECHNICAL MEMBER

CP(CAA) No. 3/230-232/JPR/2023
Connected with
CA (CAA) No. 10/230-232/JPR/2022

Section: Section 230-232 and other applicable provisions of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

In the matter of

M/S HINDUSTAN ZINC LIMITED

... Petitioner Company

Versus

BSE LIMITED & ORS.

... Respondents

MEMO OF PARTIES

M/S HINDUSTAN ZINC LIMITED
Registered office at Yashad Bhavan, Yashadgarh, Udaipur, Rajasthan -313004

...Petitioner Company

Versus

1. **BSE LIMITED**
   Registered Office at Phiroze Jeejeebhoy Towers, Dalal Street, Mumbai- 400001 Maharashtra

Sd/-

Sd/-

2. **NATIONAL STOCK EXCHNAGE OF INDIA LIMITED**
Registered Office at Exchange Plaza, Plot No. C/1, g Block, Bandra Kurla Complex, Bandra, Mumbai- 400051 Maharashtra

...Respondents

FOR THE PETITIONER	:	Arun Kathpalia, Sr. Adv. Sandeep Taneja, Adv. Mehul Shah, Adv. Prateek Kumar, Adv. Rushabh Gula, Adv.
FOR RESPONDENT	:	Vinay Kothari, Adv. Shashank Kasliwal, Adv. Diwakar Khaldwa, Adv.

Order Pronounced on: 16.07.2024

ORDER

Per: Shri Rajeev Mehrotra, Technical Member

1. This Company Petition has been filed by *M/s Hindustan Zinc Limited* ("Petitioner Company"), in terms of Rule 15 of the Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 ('Rules') for sanctioning the Scheme of Arrangement ('Scheme') contemplated between *M/s Hindustan Zinc Limited* and *its Shareholders*. The registered office of the Petitioner Company is situated in the State of Rajasthan, within the jurisdiction of this Bench.

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2. From the records, it is seen that the first motion Application seeking directions for convening/dispensing with the meetings of Equity Shareholders, Secured Creditors, and Unsecured Creditors of the Petitioner Company was filed before this Tribunal *vide CA(CAA)No. 10/230-232/JPR/2022.* Based on the Application moved under Section 230-232 of the Companies Act, 2013, directions were issued by this Tribunal *vide* Order dated 06.02.2023 wherein, the meeting of Equity Shareholders was directed to be convened however, the meetings of Secured and Unsecured Creditors of the Petitioner Company were directed to be dispensed with.

3. Thereafter, the Petitioner Company filed a second motion Petition before this Tribunal on 10.04.2023 within the prescribed time. Consequently, this Tribunal *vide* its Order dated 12.05.2023 issued the following directions:

   i. *The date of hearing of the Petition filed by the Petitioner Companies for the approval of the Scheme is fixed on 16.06.2023.*
   ii. *Notice of the hearing shall be advertised in two Newspapers, one English and One vernacular, having wide circulation in Udaipur, not less than fifteen days before the aforesaid date fixed for the hearing.*
   iii. *In addition to the above public notices, the Petitioner Company shall serve the notice of the Petition on the following Authorities, namely, Income Tax Authorities (indicating the respective PAN Nos.), ROC concerned, Official Liquidator and Regional Director (North Western Region), BSE, NSE, SEBI, RBI, Directorate General of Mines Safety, Central Electricity Regulatory Commission, Indian Bureau of Mines well as other Sectoral Regulators or authorities, if any, which may govern the working of the Company in the Scheme, at least thirty days before the date fixed for hearing of the above Petition.*

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iv. *Further, notices shall also be served to Objector(s) or the representative(s) as contemplated under Sub-section (4) of Section 230 of the Companies Act, 2013, if any, who may have made representations and who have desired to be heard directly or through their representatives, along with a copy of the Petition and the extracts filed therewith, at least fifteen days before the date fixed for hearing.*

v. *The Petitioner Companies shall, at least seven days before the date of hearing of the Petition, file an affidavit of service concerning said publication effected as well as service of notice on the authorities mentioned above including the Sectoral Regulator(s) as well as to Objectors, if any.*

vi. *Objections, if any, to the Scheme, contemplated by the Authorities to whom notice has been given, may be filed on or before the date of hearing fixed herein, failing which it may be considered by this Tribunal that there is no objection on the part of the Authorities to the approval of the Scheme, by this Tribunal, subject to other conditions being satisfied as may be applicable under the Companies Act, 2013 and Regulations/Rules framed thereunder.*

vii. *The Petitioner Companies shall comply with the proviso to Sub-Section (7) of Section 230 as may be applicable under the circumstances on or before the date fixed for hearing by filing a certificate of the Companies' Auditor.*

4. The Affidavit of Compliance was filed by the Authorised Signatory of the Petitioner Company *vide* Diary No. 1497/2023 dated 12.06.2023 along with the copies of newspaper cuttings evidencing publication of notice separately in two newspapers i.e., 'Financial Express' in English and 'Dainik Navajyoti' in Hindi, both dated 25.05.2023. Copies of proof of service of the notices sent by the Petitioner Company to the Statutory Authorities namely, (a) Registrar of Companies, Jaipur; (b) Official Liquidator, Jaipur; (c) The Reserve Bank of India, Jaipur; (d) Regional Director, NWR; (e)

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Income Tax Authorities, Udaipur; (f) Securities Exchange Board of India; (g) Bombay Stock Exchange ('BSE'); (h) The National Stock Exchange of India Limited ('NSE'); (i) The Director General of Mines Safety; (j) The Central Electricity Regulatory Commission, New Delhi and (g) The Indian Bureau of Mines, have also been annexed.

5. Before proceeding further with the Petition, it will be apposite to provide a brief overview of the Scheme of Arrangement. For reference, the relevant extracts of this Scheme are reproduced hereunder:

> ***"Preamble:***
>
> *The scheme of arrangement ("Scheme") provides for reorganization of the capital of the Company (as defined hereinafter), inter alia, providing for transfer of amounts standing to the credit of the General Reserves (as defined hereinafter) to the Retained Earnings (as defined hereinafter) of the Company, pursuant to the provisions of Section 230 and other applicable provisions of the Act (as defined hereinafter). This Scheme also provides for various other matters consequential thereto or otherwise integrally connected therewith.*
>
> ***Rationale of the Scheme:***
>
> a) *Over the years, the Company has built up significant reserves through transfer of profits to the reserves in accordance with provisions of the erstwhile Companies Act, 1956 and erstwhile rules notified thereunder, namely, the Companies (Transfer of Profits to Reserves) Rules, 1975.*
> b) *Steady growth in sales volume, balanced capital expenditure for continuing operations has helped the*

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Company achieve a strong track record of generating cash flows. With healthy business practices in place, the Company expects that it will continue its growth trajectory and its business operations will keep generating incremental cash flow over the coming years.

c) *The Company is of the view that the funds represented by the General Reserves are in excess of the Company's anticipated operational and business needs in the foreseeable future, thus, these excess funds can be utilized to create further shareholders' value, in such manner and to such extent, as the Board of the Company in its sole discretion, may decide, from time to time and in accordance with the provisions of the Act and other Applicable Law.*

d) *The Scheme is in the interest of all stakeholders of the company.*

Capital reorganization of the company:

4.1. Upon the Scheme becoming effective and with effect from Appointment Date, the amount of INR 10383,15,26,729 standing to the credit of the General Reserves, as appearing in the books of accounts of the company as on the Appointed Date, shall be reclassified, transferred to, and shall form part of the Retained Earnings of the Company for the previous financial years, arrived at after providing for depreciation in accordance with the provisions of the Act and remaining undistributed in the manner provided in the Act and other Applicable Laws.

4.2. Pursuant to the Scheme, there is no outflow of/ payout of funds from the Company and hence, the interest of the shareholders/ creditors is not adversely affected. For the removal of doubt, it is expressly recorded and clarified that the Scheme shall not, in any

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manner, involve distribution of capital reserves or revenue reserves and shall be in accordance with the accounting standards prescribed under provisions of Section 133 of the Act.

4.10 It is clarified that transfer of amounts standing to the credit of General Reserves to the Retained Earnings of the Company in the manner contemplated in Clause 4.1 above, should not entail or be deemed as any obligation on the Company for declaration or distribution of any dividend for the purposes of Section 123 of the Act, and the provisions of the said section and rules notified thereunder shall not be applicable.

Accounting Treatment in the books of the Company:

5.1 Upon this Scheme becoming effective and with effect from the Appointed Date, the amount of INR 10383,15,26,729 standing to the credit of the General Reserves of the Company shall be reclassified and credited to the Retained Earnings of the Company.

5.2 For the removal of doubt, it is expressly recorded and clarified that the transfer of amounts standing to the credit of the General Reserves shall not, in any manner involve distribution of capital reserves or revenue reserves other than the general reserves.

Creditors:

The Creditors of the Company shall in no way be affected by the Scheme, as there is no reduction in the amount payable to any of the creditors, and no compromise or arrangement is contemplated with the creditors. Further, there is no outflow of cash from the company. Thus, the Scheme would not in any way adversely affect the operations of the Company or the ability of the Company to

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honour its commitments or to pay its debts in the ordinary course of business.

Compliance with Tax Laws:

The Scheme is in compliance with the applicable Tax Laws. Upon the Scheme becoming effective, the Company shall continue to pay Taxes in accordance with and subject to Applicable Law."

6. The National Stock Exchange of India Limited ('NSE') submitted its Reply/ Objections *vide* Dairy No. 1528/2023 dated 14.06.2023 on the following grounds:

6.1. The funds accumulated in the general reserve accounts cannot be used as per whims and fancies of the Petitioner Company.

6.2. The answering Respondent states that it has not given no objection earlier to the Scheme, however, it had only given limited no objection in terms of Regulation 11 and 94 of SEBI (Listing Obligations and Disclosure Requirement) Regulations, 2015. It is submitted in this regard that the Petitioner Company has grossly misinterpreted that the answering Respondent has given no objection to the Scheme.

6.3. The Scheme does not provide for treatment of the liabilities, which raises doubt on the methodology to be implemented by the Petitioner Company.

6.4. Further, the Scheme states that "*the Scheme does not provide for issuance of consideration to the shareholders*;" however, on perusal of the Scheme it shows that the consideration is destined to be

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transferred unto shareholders. Thus, the Company should be put to test to explain the sanctity of the Scheme.

7. The Bombay Stock Exchange Limited ('BSE') submitted its Reply/ Objections *vide* Dairy No. 1637/2023 dated 15.06.2023 on the following grounds:

7.1. The Petitioner Company has wrongly interpreted the proviso under Section 123 of the Companies Act, 2013. It is pertinent to note that in terms of Section 205(2A) of the erstwhile Companies Act, 1956, wherein it was mandatory for the companies to transfer a certain percentage of profits i.e. not exceeding ten percent to the reserves, which would be beneficial to both company as well as shareholders, as such reserves would be available to the company for ploughing them back for expansion or would be available for declaration of dividends in a lean year but now, in the present scenario even though such transfer is not mandatory but the language of the relevant provisos under Section 123(1) of the Companies Act, 2013 provides that:-

> "*123. Declaration of dividend.*
> *Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserve of the company.*
> *Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it*

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in previous years and transferred by the company to the reserves, such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf.
Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves."

Accordingly, the company may transfer to the free reserve such percentage of profit as it may consider appropriate. The second proviso provides that in case of inadequacy or absence of profits, the dividends may be declared from such free reserve in accordance with the Companies (Declaration and Payment of Divided) Rules, 2014. That such declaration of dividend shall not be made except in accordance with these Rules. Consequently, the limited freedom given to companies through the Companies Act, 2013, is with respect to whether or not profits may be transferred to reserves, and not an untrammelled right to utilize the already existing compulsorily transferred reserves in total disregard to the restrictions on usage as contained in the Companies (Declaration and Payment of Divided) Rules, 2014.

7.2. The present application / petition is liable to dismissed as the proposed Scheme of reorganisation of the capital, if permitted, will give liberty to the Petitioner Company, to use the money liberally which will be in complete disregard to the policies as contained in Companies (Declaration and Payment of Divided) Rules, 2014. It is submitted

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that the funds which were meant for restrictive use, as part of general reserve, would now be available for any purpose, including distribution as dividend, after transfer to Profit & Loss Account, which does not have any apparent restrictions on its use.

7.3. The amount forming a part of general reserve account of the Petitioner Company is more than 30% of its total revenues of financial year 2021-22 and as such, represents a significant portion of its existence and provides stability to it. It is further submitted that the amount constituting the General Reserves can be utilized by the Petitioner Company as and how it deems it fit and as such, the same adds to the ambiguity surrounding the utilization of funds to the tune of Rs. 103,83,15,26,729/- and is susceptible to misuse / inappropriate use.

7.4. The general reserve is a fund created out of undistributed profits. The purposes for which general reserve could be utilized does not envisage transfer of the general reserve to retained earnings or Profit & Loss Account for an unfettered and unrestricted use. It is well settled legal principle that "*what cannot be done directly cannot also be done indirectly*". Further, it is also well settled that if a particular procedure is prescribed, then that procedure alone needs to be followed. This was enunciated by Privy Council in the *Nazir Ahmad Vs. King Emperor*, wherein it was held that *"that where a power is given to do a certain thing in a certain way, the thing must be done in*

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that way or not at all. Other methods of performance are necessarily forbidden".

7.5. The freedom to transfer profits to reserves on a voluntary basis would be prospective in nature, after notification of the Companies Act, 2013. In this effect, the Petitioner Company is attempting to apply the provision for voluntary transfer to reserves, on a retrospective basis by transferring back the entire general reserve to Profit & Loss Account.

7.6. It is further submitted that as per the provision under Section 456(2)(c) of the Companies Act, 2013-

> *"(2) Notwithstanding the repeal under sub-section (1) of the repealed enactments-*
> *(c) any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction or exemption shall no be affected, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in, or from, the repleaded enactments."*

In light of the above provision, it is stated that the legislature never intended to completely remove the practices, restrictions, and exemptions mentioned under the provisions of the erstwhile Companies Act, 1956, and the rights accrued therein. It is further crystalized by the fact that Section 123 of the Companies Act, 2013, and the Companies (Declaration and Payment of Divided) Rules, 2014, carry the spirit of Section 205 of the Companies Act, 1956, and

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does not allow the companies to transfer or use the funds of reserve in untrammelled manner. That the prospective nature of Section 123 of the Companies Act, 2013, as well as the retention of restrictions on the payment of dividends out of accumulated reserves as enshrined in the Companies (Declaration and Payment of Divided) Rules, 2014, suggest that the legislature had not intended for unrestricted use of accumulated profits to pay dividends in this circumlocutory manner, and that such conduct is at variance with the spirit and intent of the law.

7.7. The general reserve is a free reserve to provide cushion to the creditors. Therefore, once the amount lying in general reserve is reclassified to retained earnings, the Board of Directors' approved resolution allows free hand to the directors to utilize the same in any manner. That the general reserve provides a cushion to the creditors of the company, be it bankers or other secured and unsecured creditors. The Petitioner Company has about 801 unsecured creditors towards whom the Petitioner Company has not provided any explanation as to how the Scheme will not affect them adversely. In such situation, general reserve provides at least some cushion to the bankers and other creditors.

7.8. The proposed Scheme does not specify any detail regarding how the shareholder value is intended to be created. Such vagueness of

purpose and conduct of the management with respect to the unfettered potential usage in an unprecedent manner as outlined in the preceding paragraphs, will not be in the interest of shareholders. It is hence submitted that the said proposed Scheme is in contravention to the Companies Act, 2013, and corresponding Rules and the principles of corporate governance whereby the rights and interests of the shareholders are given prime importance. In the instant Scheme, the Petitioner Company, by way of proposing reorganisation of funds from general reserve to retained funds/earnings, is jeopardising any liability towards the shareholders which may arise in future and may become difficult to settle due to the absence of general reserve.

7.9. The objective of the Scheme should be fair to the interest of all shareholders. Therefore, in the matter of *Wiki Kids Limited and other vs. The Regional Director and Others (Company Appeal (AT) No. 285 of 2017)*, the Hon'ble National Company Law Appellate Tribunal vide order dated December 21, 2017 stated: -

> *"The Tribunal below has enough expertise to look into the Scheme of Amalgamation and can also see whether it is not just and fair to all shareholders. It has a duty to act in public interest. In the matter of company, it needs to see if it is in the interest of all the shareholders and the company."*

In view of the above averment, the application filed by the Petitioner Company be dismissed as the same is not maintainable before this Hon'ble Tribunal.

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8. The Petitioner Company *vide* Dairy No. 1785/2023 and Dairy No. 1786/2023 dated 19.07.2023 replied to the objections of BSE and NSE respectively and stated the following:

8.1. It is submitted that the Respondent No. 2 had previously issued no objection to the Scheme which is reproduced below:

> *"Based on the draft scheme and other documents submitted by the Company, including undertaking given in terms of Regulation 11 of SEBI (LODR) Regulations, 2015, we hereby convey our "No objection" in terms of Regulation 94 of SEBI (LODR) Regulations, 2015, so as to enable the Company to file the draft scheme with NCLT".*

8.2. The Respondent No. 1 had also previously issued no objection to the Scheme.

8.3. The Scheme provides for an amount of INR 10383,15,26,729/- standing to the credit of the General Reserve, as appearing in the books of accounts of the Petitioner Company as on the Appointed Date, shall be reclassified, transferred to, and shall form part of the Retained Earnings of the Petitioner Company for the previous financial year, arrived at after providing for depreciation in accordance with provisions of the 2013 Act and remaining undistributed in the manner provided in the 2013 Act and other Applicable Laws.

It is stated that Section 205(2A) of the erstwhile Companies Act, 1956 ('1956 Act') read with the Companies (Transfer of Profits to

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Reserves) Rules, 1975, mandated every company to transfer, in any financial year, a specific portion out of the profits of the company for that year arrived at after providing for depreciation, to the general reserves account of the company, before declaring any dividend to the shareholders.

After the repeal of the 1956 Act, and the introduction of the 2013 Act, the erstwhile provisions relating to the transfer of a portion of profits to the general reserves accounts of the company were done away with in light of the changing times and evolving law appreciating shareholders' rights. As on date, there are no corresponding provisions under the 2013 Act or Rules made thereunder, which mandate a company to transfer a portion of its profits to general reserves prior to payment of dividend or even continue to maintain a general reserves account. In other words, the legislature has acknowledged that the profits of a company belong to its shareholders and both the Board of Directors and shareholders of the company are best placed to decide the matter of utilization.

8.4. It is submitted that the amounts standing to the credit of the general reserves account of the Petitioner Company are nothing but a part of the post-tax profits of the Petitioner Company and are accumulated pursuant to the mandatory requirements of the erstwhile 1956 Act read with the Companies (Transfer of Profits to Reserves) Rules,

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1975. In other words, the amounts standing to the credit of the general reserves account of the Petitioner Company are nothing but the portion of profits of the Petitioner Company transferred to the said general reserves account before the profits were distributed to the shareholders in accordance with the provisions of the 1956 Act. Thus, the shareholders of the Petitioner Company are the indirect owner and beneficiary of the said funds lying therein.

8.5. With the repeal of the erstwhile 1956 Act read with the Companies (Transfer of Profits to Reserves) Rules, 1975 and in absence of any requirements under the 2013 Act or Rules made thereunder, the Board of Directors of the Petitioner Company and its shareholders have the discretion to transfer the amounts from the general reserves account to retained earnings account, and utilize the same for creating value for the shareholders. In order to create value for the shareholders, the first step is to transfer the amounts standing to the credit of the general reserves account of the Petitioner Company to the account from where it was transferred in the first place i.e. the retained earnings account. This is in line with the cardinal principle of company law that all profits of a company are for the benefit of shareholders, notwithstanding any statutory restrictions.

8.6. It is pertinent to note that the Petitioner Company does not have an unfettered right to use the said amounts being transferred. Such

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amounts can only be used for the purposes as provided for in the 2013 Act. It is needless to state that the Petitioner Company is bound by the provisions of the 2013 Act and undertakes to abide by the same.

8.7. The Respondents and SEBI are concerned with protecting the rights of the shareholders and ensuring that public money is protected whilst ensuring that the Petitioner Company complies with applicable law. Considering that this Hon'ble Tribunal was pleased to direct a meeting of the equity shareholders of the Petitioner Company vide its Order dated 06.02.2023, it is clear that the Scheme has been placed before the shareholders of the Petitioner Company for their consideration and approval. As can be seen from the report of the Chairperson of the meeting, the Scheme has been approved by 99.9970% of the shareholders of the Petitioner Company. It is pertinent to note that the Government of India holds 29.54% of the entire paid-up share capital of the Petitioner Company and has voted in favour of the resolution approving the Scheme. This Hon'ble Tribunal was pleased to dispense with meetings of the unsecured creditors of the Petitioner Company on the grounds that the unsecured creditors are not affected by the Scheme since there is no compromise contemplated with any of the creditors and the Scheme would not adversely affect the ability of the Petitioner Company to honour its commitments/ pay its debts in the ordinary course of business.

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Considering the Petitioner Company does not have any secured creditors, there was no question of this Hon'ble Tribunal directing meetings of the secured creditors of the Petitioner Company.

8.8. The Respondent No. 2's allegation that the Petitioner Company is silent with regards to the effect of the Scheme on the unsecured creditors on the Petitioner Company is baseless. The Petitioner Company has stated that no consideration is proposed to be issued pursuant to the Scheme, there is no reduction in the amount payable to any of the creditors, and there is no compromise or arrangement contemplated with the creditors. Hence, the Scheme does not and would not in any way affect the operation of the Petitioner Company or its ability to honour its commitments to pay its debts in the ordinary course of business. This is in fact recorded by this Hon'ble Tribunal vide its order dated 06.02.2023 in the Company Scheme Application.

8.9. It is submitted that various Tribunals as well as High Courts have set out that the word "arrangement" as provided for in Sections 391 to 394 of the 1956 Act and Sections 230 to 232 of the 2013 Act are to be given a wide import. The word "arrangement" contemplates all arrangements and not only reorganization of share capital. The word "arrangement" though not specifically defined under either the 1956 Act or 2013 Act, has a wide range and ambit. The Courts must allow companies the greatest freedom in devising schemes to suit their

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requirements and shall approve those schemes if they are fair to all whose interest are affected.

8.10. The Petitioner Company submits that there have been numerous schemes undertaken by various companies where amounts from the general reserves account have been transferred to the retained earnings account and these schemes have received sanction from various Benches of the Hon'ble NCLT as well as the High Courts. The Petitioner Company refers to the order in the case of *Nestle India Limited 2008[(2008) SCC OnLine 1123/ (2009) 147 Comp Cas 712]*, wherein the Hon'ble Delhi High Court was pleased to sanction a similar scheme where the said company sought to transfer funds lying in its general reserves account to the profit and loss account of the company for the purpose of being disbursed as special dividend to the shareholders.

8.11. In the matter of *International Paper AAPLM Ltd. and its members*, the Hon'ble Tribunal of Hyderabad Bench was pleased to sanction a scheme where the said company proposed to transfer an amount of funds lying in its general reserves account to its profit and loss account to enable the company to pay out to its members. The order sets out that the term arrangement is to be given wide import and in light of the 2013 Act, there is no mandatory requirement to retain said amounts to the general reserves. The order states that the proposed

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transfer is well within the four corners of "arrangement" and could be approved.

9. The Regional Director ('RD'), North-Western Region, Ministry of Corporate Affairs has submitted its representation bearing reference no. 230-232/ (658)/2023-24/2007 *vide* Dairy No. 2204/2023 dated 11.09.2023 stating as follows:

9.1. The Scheme does not envisage the transfer or vesting of any properties and/or liabilities as contemplated in Section 230 to 232 and other applicable provisions of the Companies Act.

9.2. The Company may be directed to put forth the status of various conditions precedent (specified in Clause 12 of the Scheme of Arrangement) before the Tribunal.

9.3. The Company may be directed to place on record the approvals of other Government Authorities and approval of major shareholder i.e., Government of India through President of India, holding 29.54% as per balance sheet as at 31.03.2022 before the Tribunal.

9.4. The Company may be directed to put forth the reason for transferring the amount from General Reserve to Retained Earnings, even if this is not a necessary requirement under the Companies Act 2013.

9.5. The Report of the Regional Director also includes the observations made in the Report of the ROC cum OL, which is annexed with the Report of Regional Director. In this regard, it is further submitted that

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the Company may be directed to clarify the observations made by the ROC in its report and place on record all relevant facts of the matter.

10. The Petitioner Company submitted an Affidavit in response to the Report of Regional Director *vide* Dairy No. 2367/2023 dated 29.09.2023, stating as follows:

10.1. The objection raised by RD that the Scheme does not envisage the transfer or vesting of any properties and/ or liabilities is factual in nature.

10.2. Further, it presented the status of conditions precedent (**specified in Clause 12 of the Scheme of Arrangement**) as on the date of filing of this Affidavit dated 29.09.2023.

10.2.1. Obtaining no-objection letter from the Stock Exchanges in relation to the scheme under Regulation 37 of the SEBI LODR Regulations;

In this regard, it is submitted that the NSE and BSE have issued their "no adverse observation" letter and "no objection" letter respectively dated 23.08.2022, to the Petitioner Company. Copies of these letters are annexed as Annexure B1 and Annexure B2.

10.2.2. *Approval of the Scheme with requisite majority of shareholders and/ or such other persons, as applicable or as maybe required under the Act and as may be directed by the Tribunal;*

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This Tribunal *vide* Order dated 06.02.2023 dispensed the meeting of secured and unsecured creditors and directed to convene the meeting of equity shareholders. The Scheme was approved by the requisite majority of the equity shareholders in the duly convened meeting. The Chairperson Report along with the Scrutinizer Report are annexed as Annexure C.

10.2.3. *The sanction and orders of the Tribunal, under Section 230 of the Act being obtained by the Company;*

The Petitioner Company states that it filed the captioned Company Petition before this Tribunal on 11.04.2023, seeking confirmation and approval of the proposed Scheme. The Tribunal admitted the captioned Company Petition by its order dated 12.05.2023 ("Second Motion Order"), and the matter has been listed for final hearing and disposal.

10.2.4. The Certified copy of the orders of the Tribunal being filed with the ROC by the company;

The Petitioner Company states that upon receipt of the final order passed by this Tribunal confirming and sanctioning the proposed Scheme, it will file the certified copy of the said final order with the Registrar of Companies, in accordance with the directions issued by this Tribunal and in compliance with the condition's precedent mentioned in the proposed Scheme.

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10.2.5. The requisite consent, approval or permission of Appropriate Authority which by Applicable Law may be necessary for the implementation of this Scheme.

The Petitioner Company states that:

a. Requisite observation letters on the Scheme have already been received from BSE and NSE; and

b. Notice under Section 230(5) of the Act and notice of hearing for the captioned Company Petition have already been issued by the Petitioner Company to the following regulatory authorities and sectoral regulators, in accordance with the directions issued by this Tribunal *vide* the First Motion Order and Second Motion Order, respectively:

- Concerned Income Tax Authority;
- Registrar of Companies-cum-Official Liquidator;
- Regional Director, North Western Region;
- BSE;
- NSE;
- Securities Exchange Board of India (SEBI)
- Reserve Bank of India (RBI)
- Directorate General of Mines Safety;
- Central Electricity Regulatory Commission, New Delhi; and

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- Indian Bureau of Mines.

The copies of the Affidavit of Service are annexed as Annexure E and Annexure F.

10.3. In relation to the RD's observation regarding approvals from other government authorities and the approval of the major shareholder, the Government of India (through the President of India, holding 29.54% as per the balance sheet as of 31.03.2022), it is submitted that the Board of Directors of the Petitioner Company, at their meeting held on 21.01.2022, unanimously approved the proposed Scheme. The Scheme provides for the reorganization of the capital of the Petitioner Company, including the transfer of amounts standing to the credit of the General Reserves to Retained Earnings pursuant to the provisions of Section 230 and other applicable provisions of the Act. The Scheme also addresses various other matters consequential thereto or otherwise integrally connected therewith.

On 21.01.2022, the Government of India had the following Nominee Directors on the Board of Directors of the Petitioner Company:

a) Ms. Nirupama Kotru;
b) Ms. Farida M Naik; and
c) Dr. Veena Kumari Dermal

All the aforesaid Nominee Directors accorded their consent to the Scheme at the meeting of the Board of Directors of the Petitioner

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Company held on 21.01.2022, for the purpose of approving the Scheme.

Thus, the requisite meeting of equity shareholders of the Petitioner Company seeking approval to the Scheme has been duly convened and held in accordance with the directions of this Tribunal specified in the First Motion Order and applicable provisions of the Act and SEBI LODR, the requirement of obtaining 'no objection' from the Ministry of Mines is not applicable in this case.

10.4. The Petitioner Company states that, the primary reason for the proposed arrangement under the Scheme, is to create value for the shareholders. The first step for creating value for the shareholders, is to transfer the amounts standing to the credit of the general reserves account of the Petitioner Company to the account from where it was transferred in the first place i.e. the retained earnings account. This is in line with the cardinal principle of company law that all profits of a company are for the benefit of shareholders, notwithstanding any statutory restrictions.

10.5. The Petitioner Company *vide* its letters dated 02.09.2022 has filed its response addressing the observations made by the SEBI on the Scheme in the observation letters issued by BSE and NSE.

10.6. It is submitted in respect to the RD's observation in regards to general reserve that it is created out of the company's profits and is not

available for distribution to shareholders as dividends. It is typically used to meet unforeseen liabilities or to finance future expansion plans. The Petitioner Company states that, the amounts standing to the credit of its general reserves account in the financial statements of the Petitioner Company are nothing but a part of the post-tax profits of the Petitioner Company and the mandatory provisions of retaining amounts as part of the general reserves account no longer apply under the Act and the Petitioner Company is free to utilize the same, provided it does so in accordance with the Act and rules made thereunder.

10.7. In respect to observation that the Scheme is framed to circumvent the provision of Section 123 of the Companies Act, 2013 and companies (Declaration and Payment of Dividend) Rules, 2014, the Petitioner Company states that there is plethora of judgments from benches of the Hon'ble NCLT as well as various High Courts which have set out that the word "arrangement" as provided for in Sections 391 to 394 of the 1956 Act and Sections 230 to 232 of the Act are to be given a wide import. The word "arrangement" contemplates all arrangements and not only reorganization of share capital. The word "arrangement" though not specifically defined under either the 1956 Act or 2013 Act, has a wide range and ambit. It is a settled principle that the Courts must allow companies the greatest freedom in devising schemes to

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suit their requirements and shall approve those schemes if they are fair to all whose interest are affected. The Petitioner Company in support cited the case of *Miheer H. Mafatlal vs. Mafatlal Industries Ltd. [AIR 1997 SC 506].*

10.8. Another observation that Articles of Association of the Petitioner Company do not provide for such reverse transfer/ reclassification of reserve to profit and loss account. The Petitioner Company states that, in the matter of *Hari Krishna Lohia vs. Hoolungooree Tea Co. Ltd. [AIR1969Cal312,]* it has been held that even if there is no express power in the memorandum of a company to amalgamate with another company, by virtue of a statutory power under Section 391 of the Companies Act, 1956, a court can always sanction a scheme of amalgamation if the statutory requirements are complied with.

10.9. Another observation that Revision/ Reclassification of financial statements is cloaked in the form of a Scheme. Hence, same falls under Section 131 of the Companies Act, 2013. It is stated that the Scheme is not a mechanism to revise or reclassify the financial statements of the Petitioner Company. The proposed Scheme is merely an "arrangement" providing for reorganisation of the capital of the Petitioner Company, inter alia, providing for transfer of amount standing to the credit of the General Reserves to the Retained

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Earnings pursuant to the provisions of Section 230 and other applicable provisions of the Act.

10.10. Regarding another observation that the approval of Board of Directors for the Scheme and subsequent general body resolution are *void ab initio* as they are passed in violation of section 131(1), 129(1) and 230-232 of the Companies Act, 2013, it is stated that in terms of Section 179(1)(i) of the Act, a company proposing any type of amalgamation, merger or reconstruction requires approval from its Board of Directors. The word 'reconstruction' akin to 'arrangement' carries wide import. Typically, approval from the Board of Directors under Section 179(l)(i) of the Act, is sought by companies proposing schemes of amalgamation/ schemes of arrangement etc. of any nature which are formulated under Sections 230 to 232 of the Act.

Therefore, in terms of 179(1)(i) of the Act, the Petitioner company has sought approval to the Scheme from its Board of Directors on 21.01.2022.

Further in view of the above, the Petitioner Company also states that, the resolution passed by its Board of Directors is not violative of Sections 131(1), 129(1) and Sections 230 to232 of the Act.

10.11. Another observation is that the Company came into a net debt position of approx. Rs. 1800 Cr. along with gross debt of Rs.11,841 Cr. as on March end due to the dividend payout of Rs. 31,910 Cr. during F.Y.

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2023. Further, the Company has retained earnings of Rs. 1700 Cr. Thus, to pay a higher dividend, the Company intends to transfer the general reserve of Rs. 10,384 Cr. into the profit and loss account, which could further increase the company's debt position due to very high dividend payouts, potentially endangering public interest in the long term. Therefore, the Scheme is not in the public interest.

In this respect, it is submitted that the Petitioner Company is an operating listed company with a good repute in the market. Some key financial highlights of the Petitioner Company are stated below:

Financial Year	*Gross Revenue from operations* (in INR Cr)*	*Net Profit (in INR Cr)*	*General Reserves (in INR Cr)*
2022-23	*34,098*	*10,520*	*10,383*
2021-22	*29,440*	*9,630*	*10,383*
2020-21	*22,629*	*7,980*	*10,383*

**Includes other operating income.*

It is evident form the above table that, the Petitioner Company is a highly profitable company with sufficient profits and reserves. Even after effectiveness of the Scheme, the Petitioner Company will be in a position to service its debt in ordinary course of business.

10.12. In respect to observation that the related legal fees/ expenses of the office of the Regional Director for submitting this Report and representing the matter on behalf of the Central Government i.e. this Directorate, may kindly be paid by the Petitioner Company to the

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Central Government. Therefore, this Hon'ble NCLT may be pleased to direct the Petitioner Company to pay such amount of legal fees/ cost to the Central Government which may be considered appropriate by this Hon'ble NCLT.

The Petitioner Company undertakes to pay related legal fees/ expenses to the office of the Regional Director for submitting this Report and representing the matter on behalf of the Central Government i.e. this Directorate, as may be directed by this Hon'ble Tribunal.

11. The Regional Director submitted an Affidavit in Reply- Supplementary Report *vide* Dairy No. 2878/2023 dated 04.12.2023 reiterating the earlier submissions.

12. The Petitioner Company filed an Affidavit and an Additional Affidavit in response to the Affidavit in Reply- Supplementary Report *vide* Dairy No. 64/2024 and 98/2024 dated 05.01.2024 and 10.01.2024 respectively, reiterating the earlier submissions. In the Additional Affidavit it is submitted that the Petitioner Company *vide* its letter dated 29.12.2023 bearing reference no. 2(8)/2018-Secy ("Request Letter") sought formal confirmation from the Ministry of Mines, Government of India on the following points: *i) votes cast by the Nominee Directors of the Government of India at the meeting of the Board of Directors of the Petitioner Company convened and held on 21.01.2022 for approving the Scheme; and ii) votes cast by the*

Government of India on behalf of the Hon'ble President of India at the stakeholders meeting of the Petitioner Company convened and held on 29.12.2023. In response to the Request Letter of the Petitioner Company, the Ministry of Mines, Government of India *vide* its letter dated 02.01.2024 ("Response Letter") has responded to the said Request Letter. In the Response Letter, the Ministry of Mines, Government of India has formally confirmed the following:

A. The Government Nominee Directors appointed on the Board of Petitioner Company voted in favour of the Scheme; and

B. *Shri Sanjeev Verma*, Director, Ministry of Mines, Government of India was nominated as the President Nominee and he voted in favour of the scheme/ agenda.

Copy of the Response Letter is annexed as Annexure B.

13. The Petitioner Company submitted an Additional Affidavit, referenced as Dairy No. 787/2024 dated 01.04.2024, which included the relevant portion of the Annual Report for the financial years ending on 31.03.2022 and 31.03.2023. Additionally, it submitted the standalone financial statements for the financial years ending on 31.03.2023 and 31.03.2022. Details relating to the profit after tax of the Petitioner Company are provided below:

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Particulars	*Amount in INR in Crores (as on financial years ended as on 31.03.2023)*	*Amount in INR in Crores (as on financial years ended as on 31.03.2022)*	*Amount in INR in Crores (as on financial years ended as on 31.03.2021)*
Profit after tax	*10,520*	*9,630*	*7,980*

14. In response to the Additional Affidavit of the Petitioner Company, the Respondent No. 2 filed an Additional Reply *vide* Dairy No. 1153/2024 dated 06.05.2024 stating as follows:

14.1. The Respondent No. 2 has given reference to Section 465 of the Companies Act, 2013, and stated that, though Section 205 of the Companies Act, 1956, which provides for maintaining of general reserves account by the company has not been incorporated in the Companies Act, 2013, does not *ipso facto* mean that the same stands repealed. Section 465 of the Companies Act, 2013, makes it clear that any practice, liability, existing usage, custom, privilege, restriction etc. shall not stand repealed, if the same is not inconsistent with the provisions of 2013 Act.

14.2. The answering Respondent relied upon Section 6 of General Clauses Act, 1897 which states that unless there is inconsistency qua provisions of erstwhile law with the new law, the provisions of erstwhile law shall stand as is. It states that the requirement of

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maintaining General Reserve Account for the companies established under 1956 Act has not been done-away-with nor has it been barred by the enactment of the Companies Act, 2013.

14.3. The Scheme of Arrangement is favourable to only one shareholder and is not in public interest, as the main promoter of the Petitioner Company is *Vedanta Limited* which holds 64.92% equity shares. The Government of India holds 29.54% and rest approx. 6% is held by general public. Thus, the Petitioner Company has placed on record the subject Scheme for the utilisation of funds present in its general reserve account for creating value for only 1 shareholder i.e., *Vedanta Limited*. Further, out of Rs. 1,03,83,00,00,000/- (Rupees Ten Thousand Three Hundred and Eighty-Three Crores Only), approx. more than 6,500 crores will stand transferred to *Vedanta Limited*, and enabling subsequent transfer to *Vedanta Resource Limited* ('*UK Entity*').

14.4. It is stated that there is an apprehension that subject Scheme has been bought to fore to virtually route money out of India. The grounds of said apprehension are stated by the answering Respondent are as follows:

14.4.1. It is submitted that the main promoter company of Petitioner Company is '*Vedanta Limited*.' It is also recognised as immediate holding company of the Petitioner Company. Further, *UK Entity*

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is recognised as 'intermediate holding company' and '*Volcan Investments Limited*' ('*Bahamas Entity*') is recognised as 'ultimate holding company'.

14.4.2. The UK holding company- *Vedanta Resourced Limited* has accumulated debt of more than USD 11.8 billion. Thus, there exist a reasonable chance to tantamount to routing of monies outside India for the benefit of one shareholder.

14.5. The Petitioner Company has an exposure of Rs. 12,477 crores (Rupees Twelve Thousand Four Hundred and Seventy-Seven Crores Only) towards income tax liability. The Company has not made any provision for the exposure of said liability of the income tax.

15. The Petitioner Company has filed Additional Affidavit *vide* Dairy No. 1181/2024 dated 08.05.2024 stating as follows:

15.1. The total borrowings of the Petitioner Company as on 31.03.2024 were as follows:

Sr. No.	***Financial Year***	***Amount in INR in Crore***
1.	*31.03.2023 (includes long term and short-term borrowings)*	*11,841*
2	*31.03.2024 (includes long term and short-term borrowings)*	*8,456*

15.2. The Petitioner Company has repaid borrowings worth INR 3,385 crore (i.e., INR 11,841 crore – INR 8,456 crore) during the financial

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year ended as on 31.03.2024. Also, the secured borrowing availed by the Petitioner Company in the nature of repurchase liability of INR 1,505 crore as on 31.03.2023, was fully repaid in June 2023.

15.3. The Petitioner Company as on 31.03.2024, has availed secured borrowing in the nature of repurchase liability of INR 1,504 crore. In this regard the Petitioner Company submitted the following:

A. "Repurchase liability is in the form of repurchase obligation commonly known as repo borrowing is a short-term arrangement between a borrower and the lender, whereby, the borrower sells the marketable securities to the lender and agrees to repurchase those securities back at some later date at pre-agreed price. It is a simple arrangement, whereby marketable securities are provided to lender as collateral against which lender provides funds to the borrower;

B. Under the repurchase obligation, the maturity date is fixed i.e. date on which securities will be repurchased and interest will be paid along with principle and included in pre-agreed price;

C. Any repurchase obligation transaction entered between a borrower and lender needs to be reported on F-Trac platform of The Clearing Corporation of India Limited. At the first instance, the marketable securities provided as collateral are sold to the lender with an agreement to purchase back the said securities at a pre agreed price and, the sell and buy trades in connection with the same are reported on the trading platform of the relevant stock exchange where the trade is executed;

D. At the time of deal reporting, the opposite trade i.e. purchases back of the marketable securities by the borrower from the lender after payment of principle amount and interest thereon trading platform of the relevant stock exchange where the trade is executed, is also reported;

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E. Once both the aforesaid transfers of marketable securities between borrow and lender are executed, the relevant stock exchange settles the transaction by transferring the marketable securities back to borrower's account and the principal amount and interest thereon is transferred to investor's account;

F. Considering the fact that, the borrower has already transferred marketable securities to the lender, it is secured transaction from lender's point of view. Further, in case of default by the borrower on maturity date, the 2nd leg of the repo borrowing will not be settled (i.e. transfer of marketable securities from the lender back to the borrower), and lender will retain the marketable securities and sell the same on the exchange platform to recover its dues."

15.4. The Petitioner further states that in connection with the said repurchase liability of INR 1,504 crore availed by the Petitioner Company as on 31.03.2024, the Petitioner Company has provided marketable security worth INR 2,117 crore as collateral to its lenders. The Petitioner annexed the screenshot of F-Trac Platform of The Clearing Corporation of India Limited, evidencing the transaction details of the repo borrowing transaction executed between the Petitioner Company and Standard Chartered Bank ('Lender'). Thus, the repo transaction executed between the Petitioner Company and its Lender are secured in nature as the marketable securities worth INR 2,117 crore have already been provided to the lender against borrowings of INR 1,504 crore. Therefore, the sanction of scheme

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does not adversely affect the rights of the secured lenders of the Petitioner Company.

15.5. The net worth of the Petitioner Company as on 31.03.2024 is INR 15,233 crore and current assets aggregating to INR 12,693 crore. The Petitioner Company has strong and robust net worth and the current assets of the Petitioner Company are more than the long term and short-term borrowings of the Petitioner Company combined.

15.6. **The Petitioner Company further undertakes to maintain a minimum net worth of INR 5,000 crores at all time after the sanction of the Scheme.**

16. The Petitioner filed Affidavit in Rejoinder *vide* Dairy No. 1270/2024 dated 16.05.2024 dealing with the submissions of Respondent No. 2 in the Additional Reply which was filed by the latter *vide* Dairy No. 1153/2024 dated 06.05.2024 stating as follows:

16.1. The provisions of Section 465 of Companies Act, 2013, provides for repeal of the 1956 Act. The provisions of Section 205(2A) of the 1956 Act have not survived the repeal of 1956 Act. In addition, Section 6 of General Clauses Act, 1897 has no relevance to the present issue.

16.2. There is no provision prohibiting reclassification of the general reserve to the retained earning account under the 2013 Act. The Petitioner Company does not have unfettered right to use the said amount and can be utilised for the purpose as provided in the 2013

Act. The Petitioner Company undertakes to abide by the provisions of Companies Act 2013.

16.3. The contention of Respondent No. 2 that the Scheme will benefit only one shareholder is wholly misplaced, as presently, the Scheme only contemplates transfer from general reserves to retained earnings. It is very natural that the better value generated for each shareholder, would be in proportion to their respective shareholding. The assumption of Respondent No. 2 that the entire sum transferred from general reserve to retained earnings would be distributed to the shareholders is not in consonance with the Scheme.

16.4. The alleged routing of funds is not relevant to the present Company Scheme Petition. The Government of India has three nominee directors on the Board of the Petitioner Company and holds 29.54% of the shareholding of the Petitioner Company and the Scheme is duly approved by the Board and by the shareholders of the Company. The routing of funds allegation, if any, can and would be tested by the appropriate authority at the relevant time, if at all such routing of funds as alleged, takes place. These arguments of the Respondent No. 2 are fictitious and based on assumptions, thus liable to be rejected.

16.5. The Petitioner Company submits in respect of tax exposure allegation of the Respondent No. 2 that the said exposure of INR 12,447 crores is in connection with demands raised by the Income Tax Department

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on account of remeasurement of certain tax incentives, under Sections 80IA an 80 IC of the Income Tax Act, 1961. Based on the favourable orders from Income Tax Appellate Tribunal relating to AY 2009-10 to AY 2012-13, AY 2017-18 and AY 2018-19, the Commissioner of Income Tax (Appeals) has allowed these claims for AY 14-15 to AY 15-16, which were earlier disallowed and has granted refund of amounts deposited under protest. The Income Tax Department has filed an appeal before the Hon'ble Rajasthan High Court in financial year 17-18 (for AY 2009-10 to AY 2012-13) which is yet to be admitted. For the AY 2017-18 and AY 2018-19, the ITAT orders were received in November 2022 and the Petitioner Company understands that Income Tax Department will be filing appeal.

16.6. The company's liability cannot be seen in isolation to its assets; however, the net worth of the company has to be seen. As on 31.03.2024, the net worth of the Petitioner Company is INR 15,233 crores, the non-current assets aggregating to INR 21,211 crores and current assets aggregating to INR 12,693 crores.

17. The Respondent No. 2 filed Written Submissions *vide* Dairy No. 1476/2024 dated 07.06.2024, reiterating the earlier contentions. The following judgements have been relied upon:

a. *Hindustan Lever Employees Vs. Hindustan Lever Limited and Ors. SLP (C) No. 11006 of 1994*

b. *Lakshmiji Sugar Mills Company and Ors. Vs. Union of India and Ors. Co. Appeal Nos. 28-29/2006*
c. *Vedanta Limited Vs. Registrar of Companies Company Appeal (AT) Nos. 181 and 182 of 2022.*

18. The Petitioner Company filed Written Submissions *vide* Dairy No. 1479/2024 dated 10.06.2024 reiterating the earlier contentions. In addition to the judgments cited in the pleadings, the Petitioner referred to the following judgments where the Scheme provides for the transfer of amounts from the general reserves to the retained earnings, which have also received approval from BSE Limited, NSE Limited, and SEBI:

a. *Prime Securities Limited; NCLT Mumbai Bench- C.P. (CAA) No. 1084 of 2020.*
b. *Hindustan Unilever Limited; NCLT Mumbai Bench- TCSP No. 151 of 2017.*
c. *Miheer H Mafatlal & Ors. [MANU/SC/2143/1996]*

In addition, the Petitioner Company submitted it has robust financial health, as demonstrated in the table below:

	2018	2019	2020	2021	2022	2023	2024
Revenue from Operations (Rs Cr)	22,519	21,118	18,561	22,629	29,440	34,098	28,932
Profit before tax (Rs Cr)	12,257	10,456	8,390	10,574	14,234	15,288	10,307
Profit after tax (Rs Cr)	9,276	7,956	6,805	7,980	9,629	10,511	7,759
Share Price (High)	340	336.35	291.80	334.25	407.90	383.00	344.00
Share Price (Low)	227	243.00	122.00	151.70	274.30	242.40	285.00
Sales (Rs in Millions)	2,25,190	2,11,180	1,85,610	2,26,290	2,94,400	3,40,980	2,89,320

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19. The Respondent No. 1 filed Written Submissions *vide* Dairy No. 1536/2024 dated 19.06.2024 reiterating the earlier contentions.

20. We have heard the learned counsels for the parties and perused the averments made in the Petition, Reply, Written submissions, and Reports and the document enclosed therein.

21. The Petitioner Company approached this Tribunal for approval of a Scheme which provides for reorganization of the capital of the Company, *inter alia*, providing for transfer of amounts standing to the credit of the General Reserves to the Retained Earnings of the Company, pursuant to the provisions of Section 230 and other applicable provisions of the Act.

22. The Petitioner through the Order dated 06.02.2023, was directed to convene the meeting of Equity Shareholders. The following resolution as set out in the notice, calling the said meeting for approving the scheme was placed before the equity shareholders at the Meeting:

> *"RESOLVED THAT pursuant to the provisions of Section 230 and other applicable provisions of the Companies Act, 2013, the rules, circulars and notifications made thereunder (including any statutory modification9s) or re-enactment(s) thereof, for the time being in force), securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, as amended from time to time and the provisions of the Memorandum and Articles of Association of the Company and subject to the approval of Hon'ble jurisdictional National Company Law Tribunal ('NCLT') and subject to such other approvals, permissions and sanctions of regulatory and other authorities, as may be necessary and subject to such conditions and modifications as may be deemed appropriate by the Company, at any time and for any reason whatsoever, or which may otherwise be considered*

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necessary, desirable or as may be prescribed or imposed by the NCLT or by any regulatory or other authorities, while granting such approvals, permissions and sanctions, which may be agreed to by the Board of Directors of the Company (hereinafter referred to as the "Board", which term shall be deemed to mean and include one or more Committee(s) constituted/ to be constituted by the Board or any other person authorised by it to exercise its powers including the powers conferred by this Resolution), the arrangement embodied in the Scheme of Arrangement between Hindustan Zinc Limited and its shareholders ("Scheme"), be and is hereby approved.

RESOLVED FURTHER THAT the board be and is hereby authorised to do all such acts, deeds, matters and things, as it may, in its absolute discretion deem requisite, desirable, appropriate or necessary to give effect to this Resolution and effectively implement the arrangement embodied in the Scheme and to make any modifications or amendments to the Scheme at any time and for any reason whatsoever, and to accept such modifications, amendments, limitations and/ or conditions, if any, which may be required and/ or imposed by the NCLT while sanctioning the arrangement embodied in the Scheme or by any other authorities under law, or as may be required for the purpose of resolving any questions or doubts or difficulties that may arise including passing of such accounting entries and/ or making such adjustments in the books of accounts as considered necessary for giving effect to the Scheme, as the Board may deem fit and proper."

23. The meeting of the equity shareholders of the Petitioner Company was held on 29.03.2023, under the Chairmanship of *Justice (Ret.) Dinesh Kumar Chandra Somani*. The Chairperson's Report along with Scrutinizer's Report has been submitted to this Tribunal *vide* Dairy No. 873/2023 dated 05.04.2023. The Scrutinizer's Report clearly sets out the result of the above-mentioned Meeting and the voting thereat. Accordingly, the requisite majority of equity shareholders in number, representing more than three-

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fourths in value, present and voting (through remote e-voting as well as e-voting at the meeting), are of the opinion that the Scheme should be approved and agreed to. The summary of the result of the above-mentioned meeting and the voting thereat is as under:

i) **Voted in favour of the resolution:**

a) In terms of voters (**by number**):

Number of equity shareholders voted in favour of the resolution	**Total votes received**	**% of total number of valid voters who casted in favour of the resolution**
1,447	1,530	94.58%

b) In terms of votes (**by value**):

Number of votes in favour of the resolution	**Total votes received**	**% of total votes casted in favour of the resolution**
414,36,26,273	414,37,49,226	99.9970%

ii) **Voted against the resolution:**

a) In terms of voters (by number):

Number of equity shareholders voted in favour of the resolution	**Total votes received**	**% of total number of valid voters who casted in favour of the resolution**
83	1,530	5.42%

b) In terms of votes (by value):

Number of equity shareholders voted in favour of the resolution	**Total votes received**	**% of total number of valid voters who casted in favour of the resolution**
1,22,953	414,37,49,226	0.0030%

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iii) **Invalid votes**

Number of votes in favour of the resolution	Number of invalid votes casted by them
0	0

24. The Tribunal observed that the proposed Scheme has been approved by shareholders being 94.58% in number and 99.9970% in value, which is far more than the statutory requirement prescribed under Section 230 of the Act. Therefore, this requirement is duly satisfied by the Petitioner Company.

25. Before proceeding further, it is important look into the Reports and submissions made before this Tribunal by various regulatory and statutory authorities. The submissions/ allegations made by NSE, BSE, SEBI, RD and ROC with respect to the proposed Scheme are broadly on the similar line of length.

26. The first major allegation made by the Respondents was that the Petitioner Company has misinterpreted the provisions of Companies Act, 2013 and such an arrangement of transfer of General Reserve to Retained Earning is not allowed within the provisions of the Companies Act, 2013.

27. In this respect it is important to refer the relevant provisions of the Companies Act 1956, Companies Act, 2013 and Rules made thereunder:

> *"**Section 205 of Companies Act 1956: Dividend to be paid only out of profits.***
> *(2A) Notwithstanding anything contained in sub-section (1), on and from the commencement of the Companies (Amendment) Act, 1974 (41 of 1974), no dividend shall be declared or paid by a company for any financial year out of the profits of the company*

for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), except after the transfer to the reserves of the company of such percentage of its profits for that year, not exceeding ten per cent, as may be prescribed:
Provided that nothing in this sub-section shall be deemed to prohibit the voluntary transfer by a company of a higher percentage of its profits to the reserves in accordance with such rules as may be made by the Central Government in this behalf."

*"**Rule 2 of Companies (Transfer of Profits to Reserves) Rules, 1975:***
Percentage of profits to be transferred to reserves- No dividend shall be declared or paid by a company for any financial year out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2) of section 205 of the Act, except after the transfer to the reserves of the company of a percentage of its profits for that year as specified below: - ……"

*"**Section 123 of the Companies Act 2013: Declaration of Dividend.***
(1) No dividend shall be declared or paid by a company for any financial year except--
(a) out of the profits of the company for that year arrived at after providing for depreciation in accordance with the provisions of sub-section (2), or out of the profits of the company for any previous financial year or years arrived at after providing for depreciation in accordance with the provisions of that sub-section and remaining undistributed, or out of [both:]
[Provided that in computing profits any amount representing unrealised gains, notional gains or revaluation of assets and any change in carrying amount of an asset or of a liability on measurement of the asset or the liability at fair value shall be excluded; or]
(b) out of money provided by the Central Government or a State Government for the payment of dividend by the company in pursuance of a guarantee given by that Government:

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Provided that a company may, before the declaration of any dividend in any financial year, transfer such percentage of its profits for that financial year as it may consider appropriate to the reserves of the company:

Provided further that where, owing to inadequacy or absence of profits in any financial year, any company proposes to declare dividend out of the accumulated profits earned by it in previous years and [transferred by the company to the free reserves], such declaration of dividend shall not be made except in accordance with such rules as may be prescribed in this behalf:

Provided also that no dividend shall be declared or paid by a company from its reserves other than free reserves:

[Provided also that no company shall declare dividend unless carried over previous losses and depreciation not provided in previous year or years are set off against profit of the company for the current year.]

(2) For the purposes of clause (a) of sub-section (1), depreciation shall be provided in accordance with the provisions of Schedule II.

[(3) The Board of Directors of a company may declare interim dividend during any financial year or at any time during the period from closure of financial year till holding of the annual general meeting out of the surplus in the profit and loss account or out of profits of the financial year for which such interim dividend is sought to be declared or out of profits generated in the financial year till the quarter preceding the date of declaration of the interim dividend:]

Provided that in case the company has incurred loss during the current financial year up to the end of the quarter immediately preceding the date of declaration of interim dividend, such interim dividend shall not be declared at a rate higher than the average dividends declared by the company during immediately preceding three financial years.]

(4) The amount of the dividend, including interim dividend, shall be deposited in a scheduled bank in a separate account within five days from the date of declaration of such dividend.

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(5) No dividend shall be paid by a company in respect of any share therein except to the registered shareholder of such share or to his order or to his banker and shall not be payable except in cash:
Provided that nothing in this sub-section shall be deemed to prohibit the capitalisation of profits or reserves of a company for the purpose of issuing fully paid-up bonus shares or paying up any amount for the time being unpaid on any shares held by the members of the company:
Provided further that any dividend payable in cash may be paid by cheque or warrant or in any electronic mode to the shareholder entitled to the payment of the dividend.
(6) A company which fails to comply with the provisions of sections 73 and 74 shall not, so long as such failure continues, declare any dividend on its equity shares."

*"**465. Repeal of Certain Enactments and Savings.***
(1) The Companies Act, 1956 and the Registration of Companies (Sikkim) Act, 1961 (hereafter in this section referred to as the repealed enactments) shall stand repealed:.....
(2) Notwithstanding the repeal under sub-section (1) of the repealed enactments,---
(a) anything done or any action taken or purported to have been done or taken, including any rule, notification, inspection, order or notice made or issued or any appointment or declaration made or any operation undertaken or any direction given or any proceeding taken or any penalty, punishment, forfeiture or fine imposed under the repealed enactments shall, insofar as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;
(b) subject to the provisions of clause (a), any order, rule, notification, regulation, appointment, conveyance, mortgage, deed, document or agreement made, fee directed, resolution passed, direction given, proceeding taken, instrument executed or issued, or thing done under or in pursuance of any repealed enactment shall, if in force at the commencement of this Act, continue to be in force, and shall have effect as if made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act;

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(c) any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure or existing usage, custom, privilege, restriction or exemption shall not be affected, notwithstanding that the same respectively may have been in any manner affirmed or recognised or derived by, in, or from, the repealed enactments;

(d) .....;

(e) any jurisdiction, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not in existence or in force shall not be revised or restored....."

28. The provisions of Section 205(2A) of the Companies Act, 1956, read with the Companies (Transfer of Profits to Reserve) Rules, 1975, provides for creation of general reserve account as a mandatory requirement *qua* distribution of dividends, however Section 123 of the Companies Act, 2013, which corresponds to Section 205, does not provide for creation of general reserve account as a mandatory requirement and is instead left optional on the companies to transfer any amount to general reserve before declaring any dividend in any Financial Year. The provisions of Section 465 of the Companies Act, 2013, provides for repeal of 1956 Act. Respondent No. 2 alleged that the General Reserve stands in the nature of a 'liability' under the balance sheet of the Company thus, Section 465(2)(e) of the Companies Act, 2013, preserve Section 205(2A) of Companies Act, 1956. The funds transferred to the general reserves account, though shown in the liability side of the balance sheet, are profits of the company and belong to the

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shareholders of the Company, thus the said interpretation of the Respondent No. 2 does not hold water.

29. We have also gone through the Judgments relied upon by the Petitioner Company *(i) Nestle India Limited 2008[(2008) SCC OnLine 1123/ (2009) 147 Comp Cas 712], (ii) Prime Securities Limited; NCLT Mumbai Bench- C.P. (CAA) No. 1084 of 2020, (iii) Hindustan Unilever Limited; NCLT Mumbai Bench- TCSP No. 151 of 2017, (iv) International Paper AAPLM Ltd. and its members [NCLT-Hyderabad Bench- CP No. 416 of 2016]* wherein arrangements similar to that as provided in the present Scheme have been sanctioned by the coordinate Benches of NCLT.

30. In *Miheer H Mafatlal & Ors. [MANU/SC/2143/1996]* the Apex Court has *inter alia* held the following: -

> *"28A.... It is the commercial wisdom of the parties to the scheme who have taken and informed decision about the usefulness and propriety of the scheme by supporting it by the requisite majority vote that has to be kept in view by the Court. The Court certainly would not act as a court of appeal and sit in judgment over the informed view of the concerned parties to the compromise as the same would be in the realm of corporate and commercial wisdom of the concerned parties. The Court has neither the expertise nor the jurisdiction to delve deep into the commercial wisdom exercised by the creditors and members of the company who have ratified the scheme by the requisite majority. Consequently, the Company Court's jurisdiction to that extent is peripheral and supervisory and not appellate. The Court acts like an umpire in a game of cricket who has to see that both the teams play their game accordingly to the rules and do not overstep the limits. But subject to that how best the game is to be played is left to the players and not to the umpire.*

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9. Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the Court are found to have been met, the Court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the Court there would be a better scheme for the company and its members or creditors for whom the scheme is framed. The Court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the Court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

31. It is a settled law that a scheme of arrangement is a commercial contract between parties to the scheme and is binding on the shareholders. Moreover, the word "arrangement" as provided in Section 230-232 of the Companies Act, 2013, is to be given the widest import and is not *res integra*. The word arrangement contemplates all arrangements and not only reorganisation/ reclassification of share capital. Additionally, it is also a settled law that the shareholders of the Petitioner Company are the best judges of their interest, being fully conversant with market trend. Therefore, this Tribunal cannot look into commercial decision of the shareholders. Rather, the Tribunal's role is to evaluate the Scheme to ensure that the proposed Scheme is in the interest of the shareholders and not against public interest.

32. Another major contention of the Respondent No. 2 is that the proposed Scheme would be beneficial to only one shareholder i.e., *Vedanta Limited* and not serve the public interest. In addition, the proposed Scheme has been floated with the intention to route money outside India. In this regard the

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Petitioner submitted that the Scheme only provides for transfer of funds from general reserves to retained earnings. To the contrary, the Petitioner contended that the allegations raised by Respondent No. 2 are based on mere apprehension as the proposed scheme only provides for transfer of funds from general reserves to retained earnings and the proposed Scheme does not provide for distribution of funds in any aspect.

On pursual of the Scheme, it appears that the value generated for each shareholder would be in proportion to their respective shareholding which is in consonance with the settled principal of law. At the same time, the fact cannot be neglected that besides *Vedanta Limited*, the Government of India also holds 29.54% shareholding in the Petitioner Company which, through its three Nominee Directors, had approved the Scheme of Arrangement. Thus, the contention of the Respondent No. 2 that the Scheme is floated with the motive to benefit promoter shareholder and not in public interest is not tenable.

33. Further, the question of routing of funds arises after the distribution of the funds, however, at this point of time, it would be pre-mature to look into the allegations made by the Respondent No. 2. Moreover, the basic principle cannot be neglected that the companies are bound by the applicable laws of the land, whether it would be the provisions of Companies Act or any other applicable provisions as and when applicable.

34. Herein the undertaking given by the Petitioner Company through an Affidavit plays an important role wherein they undertake to comply with the applicable provisions of the law with respect to the distribution of funds. The additional undertaking given by the Petitioner Company to maintain a minimum net worth of INR 5,000 crores at all time after the sanction of the Scheme brings more confidence towards the said arrangement between the Petitioner Company and its shareholders. Therefore, we are satisfied with the submissions made by the Petitioner Company and uphold its contentions.

35. We are satisfied with the reply of the Petitioner Company in respect to the allegation/ submissions of the Respondent No. 2 that the former has an exposure of Income Tax liability. We uphold the contention of the Petitioner Company that debt cannot be seen in isolation to its assets. The Financials of the Company appear to be strong which can be seen from the financials placed before this Tribunal.

36. In respect to the other allegations/ observations of the authorities/ Respondents, we believe that the clarifications given by the Petitioner Company are adequate and do not require our intervention.

37. It has also been affirmed in the Petition that the Scheme is in the interest of the Petitioner Company and its shareholders. In view of the foregoing, upon considering the approval accorded by the members of the Petitioner Company to the proposed Scheme, there appears to be no impediment in sanctioning the present Scheme.

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38. Consequently, considering the submissions of the Petitioner Company, Scheme of Arrangement, judgements relied upon and the clarification of the Petitioner Company with respect to the observations of the authorities, we find no impediment in approving the present Scheme of Arrangement subject to compliance of applicable provisions of the Companies Act, 2013, and other applicable laws. Accordingly, sanction is hereby granted to the Scheme of Arrangement under Section 230 to 232 of the Companies Act, 2013 with the following directions: -

a. The Appointed Date shall mean the Effective Date as provided in the Scheme.

b. The Petitioner Company shall comply with all the undertakings given by it.

c. The Petitioners shall remain bound to comply with the statutory requirements in accordance with all applicable law.

d. Notwithstanding the above, if there is any deficiency found or, violation committed, *qua* any enactment, statutory rule or regulation, the sanction granted by this Tribunal to the Scheme will not come in the way of action being taken in accordance with the law, against the concerned persons, directors and officials of the Petitioner.

e. While approving the Scheme as above, we further clarify that this order should not be construed as an order in any way granting exemption from taxes or any other charges if any, and payment in accordance with law or

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in respect to any permission/compliance with any other requirement which may be specifically required under any law.

f. To comply with all applicable Tax Legislations and has to pay taxes consequent to the sanction of the Scheme of Arrangement.

g. To comply with the applicable and relevant Accounting Standards and Regulations pursuant to the proposed Scheme of Arrangement.

h. Any person interested shall be at liberty to apply to the Tribunal in the above matter for any directions that may be necessary.

i. The Petitioner Company shall deposit an amount of ₹2,50,000/- (Rupees Two Lakhs Fifty-Thousand Only) to be paid in favour of "*The Prime Minister's National Relief Fund*" and also ₹2,50,000/- (Rupees Two Lakhs Fifty-Thousand Only) to be paid in the Online Miscellaneous Fee Account of the Ministry of Corporate Affairs within a period of four weeks from the date of receipt of the certified copy of this Order.

j. The Petitioner Company shall deposit an amount of ₹2,50,000/- (Rupees Two Lakhs Fifty-Thousand Only) to be paid in favour of the Office of the Regional Director, North-Western Region, Ministry of Corporate Affairs, Ahmedabad within a period of four weeks from the date of receipt of the certified copy of this Order for legal cost and expenses.

k. The Copy of Scheme of Arrangement filed with the Petition shall form an integral part of this Order.

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39. Further, the Petitioner Company shall within thirty days of the date of the receipt of this order, submit a certified copy of this order along with the sanctioned Scheme of Arrangement to the Registrar of Companies for registration along with Form INC-28.

40. All the concerned authorities to act on a copy of this order along with the sanctioned Scheme duly certified by the Registry.

The petition stands disposed of in the above terms.

Let copy of the order be served to the parties.

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DEEP CHANDRA JOSHI,
JUDICIAL MEMBER

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RAJEEV MEHROTRA,
TECHNICAL MEMBER