

IN THE NATIONAL COMPANY LAW TRIBUNAL
BENGALURU BENCH, BENGALURU
(Through Physical Hearing/VC Mode (Hybrid))

C.P. (CAA) No.37/BB/2023

Application U/ss 230 to 232 of the Companies Act, 2013
& other applicable provisions of the Companies Act, 2013
R/w the Companies (Compromises, Arrangements
and Amalgamations) Rules, 2016

In The Matter Of

Fitternity Health E-Solution Private Limited

No.17 & 17 C BDA,
Sector 3, HSR Layout,
Bengaluru – 560 102.

... **Petitioner Company No.1/
Transferor Company**

Curefit Services Private Limited

No.17 & 17 C BDA,
Sector 3, HSR Layout
Bengaluru – 560 102.

... **Petitioner Company No.2/
Transferee Company**

Order delivered on: 28.06.2024

CORAM: Hon'ble Shri K. Biswal Member (Judicial)
Hon'ble Shri Manoj Kumar Dubey, Member (Technical)

Parties/Counsels Present:

For the Petitioner Companies : Shri R. Inbaraju

ORDER

Per: Manoj Kumar Dubey, Member (Technical)

1. This is a Second Motion Petition filed by Fitternity Health E-Solution Private Limited (for brevity, the "Petitioner Company No.1/Transferor Company") & Curefit Services Private Limited (for

brevity, the “Petitioner Company No.2/ Transferee Company”) on 06.09.2023 under Sections 230 to 232 of the Companies Act, 2013 (hereinafter referred to as the said Act) and other applicable provisions of that Act R/w Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, *inter alia* seeking for the sanction of Scheme of Amalgamation of Fitternity Health E-Solution Private Limited with Curefit Services Private Limited and their respective Shareholders and Creditors.

2. The Petitioner Companies filed First Motion Application under section 230 to 232 of the said Act, 2013 bearing C.A.(CAA) No.15/BB/2023 before this Tribunal. Based on such Application, necessary directions were issued vide Order dated 24.08.2023. Details of the first motion order are as under:

	Petitioner Company No.1	Petitioner Company No.2
Equity Shareholders	Dispensed	Dispensed
Preference Shareholders	Dispensed	No Preference Shareholders
Secured Creditors	No Secured Creditor	No Secured Creditor
Unsecured Creditors	Dispensed	Dispensed

3. This Tribunal vide order dated 12.10.2023, issued the following directions, namely;

“...4. The Petition be listed for hearing on 05.12.2023. At least 10 days before the date fixed for final hearing, the Petitioner Company shall publish the notice of final hearing of the Company Petition in two local newspapers viz. “Business Standard” in English Edition and translation thereof in “Kannada Prabha” in Kannada Edition, as per Rule 16 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016.

5. Notice be also served upon the Objector(s) or their representative as contemplated under sub-section (4) of Section 230 of the Companies Act, 2013 who may have made representation and who have desired to be heard in their representation along with a copy of the Petition and the Annexures filed therewith at least 15 days before the date fixed for hearing. It is to be specified in the notices

that the objections, if any, to the Scheme may be filed within thirty days from the date of the receipt of the notice, failing which it will be considered that there is no objection to the approval of the Scheme on the part of the objectors.

6. In addition to the above public notice, each of the Petitioner Company shall serve the notice of the Petition on the following Authorities namely, (a) Regional Director (South East Region), Hyderabad; (b) Registrar of Companies, Karnataka, Bengaluru; (c) Office of the Income Tax, Koramangala, Bengaluru (d) The Designated Nodal Officer – Principal Chief Commissioner of Income Tax, Karnataka & Goa; (e) the office of the Official Liquidator (f) the Reserve Bank of India along with the copy of this Petition by speed post immediately and to such other Sectoral Regulator(s) who may govern the working of the respective Companies involved in the Scheme as per Rule 8 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, with a direction that they may submit their representation, if any, within 30 (thirty) days from the date of receipt of such notice, failing which it will be presumed that the said Authority has no representation to make to the Scheme.

7. The Petitioner Company shall host notices of final hearing along with the copy of the scheme on their respective websites, if any.

8. The Petitioner Companies shall at least 7 days before the date of hearing of the Petition file an affidavit of service regarding paper publication as well as service of notices on the Authorities specified above including the sectoral regulator as well as the objectors, if any. The Petitioner Companies shall file compliance report with this Tribunal at least 10 (ten) days before the date fixed for final hearing and report to this Tribunal that the directions regarding the service of notices upon regulatory authorities and publication of advertisement of the notice of hearing in the newspapers have been duly complied with.

4. In pursuant to the aforesaid direction, the learned Counsel for Petitioner Company No.1 and Petitioner Company No. 2 has filed copies of proof of service of notices along with the paper publication of notice vide Diary No. 5912 dated 22.11.2023 and Diary No. 5913 dated 22.11.2023 respectively along with copies of newspaper publication in “Business Standard” (English), and “Kannada Prabha” (Kannada). Further, in another Affidavit filed by the Authorized Signatory of the Petitioner Companies, vide

diary no.6243 dated 13.12.2023, wherein it is stated that from the date of causing newspaper publication to till the date of filing this affidavit, neither the Petitioner Companies nor the Authorized Representative of the Petitioner Companies have received any objection from any person nor from any of the Objector(s) or their representative as contemplated under sub-Section (4) of Section 230 of the Act.

5. The main objects, dates of Incorporation, authorized, issued and paid-up share capital, rationale of the scheme and interest of employees have been discussed in detail in first motion Order dated 24.08.2023.
6. The Valuation Report for Amalgamation is attached as Annexure – 15 to the Petition.
7. The Board Resolution of Petitioner Company No.1 and Petitioner Company No.2 approving the Scheme is annexed as Annexure-11&12 of the Petition.
8. It is further submitted that the Certificate of Statutory Auditors of the Petitioner Companies, has been filed, stating that, the Accounting Treatment contained in Clause 12 of the Scheme of Amalgamation is in conformity with Ind AS 103 'Business Combinations' i.e. the applicable Accounting Standards specified U/s.133 of the Act, and Other Generally Accepted Accounting Principles. The said Certificate is attached as Annexure-14 to the Petition.
9. The Audited Financial Statements as on 31.03.2022 of the Petitioner Companies and the Unaudited Financial Statements as on 31.12.2022 & 31.03.2023 of the Petitioner Companies are attached as Annexures – 4, 5, 9 & 10 to the Petition and Annexures-1&2 of the compliance affidavit. As per the Scheme,

the “Appointed Date” means 01.04.2022 or such other date as the NCLT may direct.

10. In pursuant to the direction dated 12.10.2023, the Regional Director and the Registrar of Companies have filed their Common Report vide Diary No.869 dated 08.02.2024 by *inter alia* observing as under, vide para II:

- 1) **Para II(1) of the Common Report of RD & ROC:** As per the latest shareholders list attached to the last Annual Return filed as on 31.03.2023 of the Transferor and Transferee Companies, Curefit Healthcare Private Limited holds 99.99% Equity shares each in the Transferor and Transferee Companies and hence both the Transferor and Transferee Companies are Subsidiary Companies of Curefit Healthcare Private Limited. Further Curefit Healthcare Private Limited also holds 100% Preference Shares in the Transferor Company.
- 2) **Para II(2) of the Common Report of RD & ROC:** As per Para 1.3 of Part-A of the proposed scheme the appointed date has been stated as 01.04.2022. As per Company Master Data both the companies have filed Annual Returns and Balance Sheets for the year ended 31.03.2023. Since the appointed date is ante-dated beyond a year, the Tribunal may be pleased to direct the Petitioner Companies to change the appointed date from 01.04.2022 to 01.04.2023 and to furnish the amended copy of the scheme duly signed by the Directors of both the company and serve the amended copy to all the Regulatory Authorities, before the scheme is allowed.
- 3) **Para II(3) of the Common Report of RD & ROC:** As per para 4 of the reply furnished by the Company the total value of equity shareholders is Rs.1,67,64,020/- and preference share is Rs.3,29,09,760/- total aggregating to Rs.4,96,73,780/- (as on

01.04.2022). Whereas, as per Company Master Data the paid-up share capital of the Transferor Company is showing as Rs.4,97,33,780/- (difference of Rs.60,000/-). The Tribunal may be pleased to direct the Petitioner Transferor Company to clarify the same with supporting documents, duly certified.

- 4) **Para II(4) of the Common Report of RD & ROC:** As per para 4 of the reply furnished by the Company the total value of shareholders is Rs.7,48,29,230 (as on 01.04.2022). Whereas, as per Company Master Data the paid up share capital of the Transferee Company is showing as Rs.7,48,30,000/- (difference of Rs.770/-). The Tribunal may be pleased to direct the Petitioner Transferor Company to clarify the same with supporting documents, duly certified.
- 5) **Para II(5) of the Common Report of RD & ROC:** As per MCA Records, the Transferee Company has changed its name from Curefit Logistics Private Limited to Curefit Services Private Limited with effect from 30.01.2020.
- 6) **Para II(6) of the Common Report of RD & ROC:** As per MCA Records, the Transferor Company has shifted its Registered Office from the State of Maharashtra, Mumbai to the State of Karnataka with effect from 29.06.2022.
- 7) **Para II(7) of the Common Report of RD & ROC:** As per MCA records the Transferee Company has 2 open charges pending of Standard Chartered Bank amounting to Rs.50 Crores and Axis Trustee Services Limited amounting to Rs.16 Crores. The Tribunal may be pleased to direct the Petitioner Transferee Company to furnish No Objection Certificate from the concerned charge holder/s and to file the same before the NCLT before the scheme is allowed.
- 8) **Para II(8) of the Common Report of RD & ROC:** As per Clause

10.1 of Part C of the Scheme there is conversion of preference shares into equity shares of the Transferor Company. The Tribunal may be pleased to direct the Petitioner Companies to clarify to the Tribunal as to whether the preference shareholders of the Transferor Company have been given an option to obtain arrears of dividend in cash or accept equity shares equal to the value of dividend payable or otherwise to deal with said matter.

- 9) **Para II(9) of the Common Report of RD & ROC:** As per the latest Audited Financial Statement for the Financial Year ending 31.03.2023, both the Transferor and Transferee Companies are loss-making entities.
- 10) **Para II(10) of the Common Report of RD & ROC:** As per note no. 18 and 19 of the Financial Statements for the Financial Year ending 31.03.2023, Transferor and Transferee Companies have undisputed statutory dues to the tune of Rs.10.50 lakhs and Rs.1.43 crores respectively. The Tribunal may be pleased to direct the Petitioner Companies to furnish an undertaking to Hon'ble NCLT to the effect that it will settle the statutory dues immediately, if not settled so far.
- 11) **Para II(11) of the Common Report of RD & ROC:** As per the Independent Auditor's Report of Transferee Company for the Financial Year ending 31.03.2023, the company has outstanding disputed Provident Fund payable to the tune of Rs.2.10 lakhs. The Tribunal may be pleased to direct the Transferee Company to furnish an undertaking to the NCLT to the effect that it will settle the dues as and when the claim is crystalized.
- 12) **Para II(12) of the Common Report of RD & ROC:** Clause 11 of Part C of the Scheme provides for Clubbing of Authorized

Capital wherein it is stated that the authorized share capital of the Transferee Company shall automatically stand increased without any payment of stamp duty and fees. This term in the Scheme is not in line with the provisions of Section 232(3)(i) of the Companies Act, 2013. The Tribunal may be pleased to direct the Petitioner Companies to comply with the provisions of the Section and pay the difference of fee, after setting off the fee already paid by the Transferor Company on its respective capital.

- 13) **Para II(13) of the Common Report of RD & ROC:** As per Section 240 of the Companies Act, 2013, the liability in respect of offences committed under the Companies Act by the Officers in default, of the Transferor Company prior to merger, amalgamation or acquisition shall continue after such merger, amalgamation or acquisition.
- 14) **Para II(14) of the Common Report of RD & ROC:** No Employees/workmen of Transferor Company to be retrenched/ terminated in the terms of amalgamation of Transferor Company with Transferee Company. The Tribunal may be pleased to see that the Transferee Company is complying with the same in letter and spirit and not retrenching the staff or employee of Transferor Company in the guise of surplus staff on account of merger and need to give a separate undertaking by the Transferee Company in this regard.
- 15) **Para II(15) of the Common Report of the RD & ROC:** With reference to this Directorate's letter dated 07.11.2023, issued to Pr. Commissioner of Income Tax, Bangalore, till date no reply/comments in the matter have been received by this Directorate. The Tribunal may obtain NOC of the Income Tax

Department in the matter or may obtain an undertaking from the Petitioner Companies that as and when the demand arises from the Income Tax Department, Petitioner Companies are ready to pay the said dues to the respective Income Tax Departments.

11. The reply affidavit to the Common Report of the RD & the ROC has been filed by the Petitioner Companies vide Diary No.1027 dated 15.02.2024, *inter alia* stating as under:

- 1) **Reply to para II (1) of the ROC & RD report:** It is submitted that Curefit Healthcare Private Limited is the holding Company for both Transferor Company and Transferee Company. The Transferor Company and the Transferee Company are wholly owned subsidiary of Curefit Healthcare Private Limited wherein the other shareholder is holding shares as a nominee on behalf of Curefit Healthcare Private Limited. Curefit Healthcare Private Limited holds 100% of the Transferor Company and Transferee Company either by itself or through its nominee shareholder.
- 2) **Reply to para II (2) of the ROC & RD report:** It is submitted that in accordance with the provisions of Section 232(6) of the Companies Act, 2013, the Petitioner Companies have determined 01st April, 2022 as the 'Appointed Date' given that the Petitioner Companies had filed the application for approval of the Scheme during the Financial Year 2022-23 before this Tribunal. In support of the above, the General Circular No. 09/2019 dated 21st August, 2019 issued by the Ministry of Corporate Affairs clarifies that a specific calendar date can be determined as the Appointed Date for a scheme and such Appointed Date may precede the date of filing of the application with the NCLT. The Circular further provides that

if the Appointed Date is significantly ante-dated beyond a year from the date of filing the application, the rationale for such Appointed Date is required to be justified and it should not be against the public interest.

It is also submitted that the application for approval of the Scheme was filed before this Tribunal on 24th March, 2023 and therefore, the Appointed Date determined in the Scheme (i.e., 1st April, 2022) is within the same Financial Year of filing this application. The Appointed Date of 01st April, 2022 shall not be prejudicial to the interests of its shareholders, creditors and the public. Accordingly, the Petitioner Companies respectfully requests this Tribunal to retain the Appointed Date of the Scheme as 01st April, 2022 in the interest of justice and equity. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company to give effect to the same is enclosed and marked as Annexure-3.

- 3) **Reply to para II (3) of the ROC & RD report:** It is submitted that in case of Petitioner Company No.1/ Transferor Company, the paid up value of equity shares is Rs.1,67,64,020/- and preference shares is Rs.3,29,69,760/- total aggregating to Rs.4,97,33,780/- (as on 01.04.2022). The preference share has inadvertently been mentioned by ROC/RD as Rs.3,29,09,760/- instead of Rs.3,29,69,760/- resulting in a difference of Rs.60,000/-. Further, as per para 4 of the reply furnished by Petitioner Company No. 1/ Transferor Company the total value of equity shareholders is Rs.1,67,64,020/- and preference share is Rs.3,29,69,760/- total aggregating to Rs.4,96,73,780/- (as on 01.04.2022).
- 4) **Reply to para II (4) of the ROC & RD report:** It is submitted that the total paid up value of equity shares is

Rs.7,48,29,230/-. As per para 4 of the reply furnished by Petitioner Company No. 2/ Transferee Company the total paid up value of equity shares is Rs.7,48,29,230/- (as on 01.04.2022) and the same details are showing in the master data of the Petitioner Company No. 2/ Transferee Company.

- 5) **Reply to para II (5) of the ROC & RD report:** It is submitted that the statement made in the RD/ROC Report is true.
- 6) **Reply to para II (6) of the ROC & RD report:** It is submitted the registered office of the Transferor Company was shifted from the state of Maharashtra to Karnataka vide order of Regional Director bearing the date 02.06.2022.
- 7) **Reply to para II (7) of the ROC & RD report:** It is submitted that holding company of the Transferee Company i.e., Curefit Healthcare Private Limited has issued debenture to certain debenture holders wherein Axis Trustee Services Limited was appointed as a Trustee for such debenture holders. Axis Trustee Services Limited is not a secured creditor of the Transferee Company and therefore there was no requirement of obtaining the NOC from Axis Trustee Services Limited by the Transferee Company. Further, the charge with respect to the secured creditors being Standard Chartered Bank was created post 31st January 2023 which was the cut-off date for the determination of the Secured Creditors. As the Transferee Company had no secured creditors as on the Cut-off date, the question of obtaining NOC was not arrived at that time. Copy of the CA certificate confirming the same is enclosed herewith and marked as Annexure-5 for reference.
- 8) **Reply to para II (8) of the ROC & RD report:** It is submitted that there is no conversion of preference shares to equity shares being contemplated and only the consideration to be

issued to the preference shareholders of the Transferor Company shall be in the form of equity shares of the Transferee Company. The Transferor Company and the Transferee Company have duly obtained the consent affidavit from the preference shareholders of Transferor Company for the allotment of the equity shares of the Transferee Company. Swap ratio for the purpose of issuance of shares to the preference and equity shareholders of the Transferor Company has been derived on the basis of the valuation report obtained by the Transferor Company and the Transferee Company which factors into consideration the total value of the preference shares of the Transferor Company for issue of the equity shares of the Transferee Company. The entire consideration shall be paid in the form of the equity shares of the Transferee Company and no consideration shall be discharged by the Transferee Company in cash.

- 9) **Reply to para II (9) of the ROC & RD report:** It is submitted that the statement made in the RD/ROC Report is true.
- 10) **Reply to para II (10) of the ROC & RD report:** It is submitted that all the undisputed statutory dues of the Transferor Company and the Transferee Company are being settled in accordance with the statutory timeline. Considering the above, the undisputed statutory dues as set out in the financial statements of the Transferor Company and Transferee Company for the year ended March 2023 has been duly paid or will be paid within the statutory timeline. Further, all the statutory dues of the Transferor Company shall become the statutory dues of the Transferee Company from the date of sanction of the Scheme by the NCLT and the

Transferee Company will settle the same as and when the same is crystallized. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company to give effect to the same is enclosed and marked as Annexure -3.

- 11) **Reply to para II (11) of the ROC & RD report:** It is submitted that that all the disputed Provident Fund dues of the Transferee Company shall be settled as when the same are crystallized. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company to give effect to the same is enclosed and marked as Annexure-3.
- 12) **Reply to para II (12) of the ROC & RD report:** It is submitted that as per Clause 11 of the Scheme, the filing fees and stamp duty already paid by the Petitioner Company No.1/Transferor Company and on its authorized share capital shall be utilized and applied to the increased share capital of the Petitioner Company No.2/Transferee Company and shall be deemed to have been, so paid by the Petitioner Company No. 2/Transferee Company on such combined authorized share capital and the difference of fees if any after setting off the fees paid by the Transferor Company shall be paid by the Transferee Company pursuant to Section 232(3)(i) of the Companies Act, 2013 for increase in the authorized share capital to that extent and the Transferee Company undertake to file the amended Memorandum and Articles of Association with the Registrar of Companies. An Undertaking Affidavit to this effect by the Petitioner Company No. 2/ Transferee Company is enclosed and marked as Annexure -3.
- 13) **Reply to para II (13) of the ROC & RD report:** It is submitted that there are no liabilities pending against the officers of the Petitioner Company No.1/Transferor Company.

An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company to give effect to the same is enclosed as Annexure-3.

14) **Reply to para II (14) of the ROC & RD report:** It is submitted that upon the Scheme becoming effective, no employees/workmen of Transferor Company will be retrenched/ terminated in the terms of the amalgamation of the Transferor Company with the Transferee Company. Clause 6 of the Scheme of Amalgamation already provides for safeguarding the interest of the employees / workmen of the Transferor Company upon the Scheme becoming effective, ensuring their continuity in the Transferee Company both in letter and in spirit. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company to give effect to the same is enclosed and marked as Annexure- 3.

15) **Reply to para II (15) of the ROC & RD report:** It is submitted that the Petitioner Companies have submitted their reply to the Income Tax Department letter on January 19, 2024, Acknowledgment copies of the said reply affidavit to the IT letter submitted to the NCLT and proof of service of sending the said reply affidavit to Income Tax Department and Regional Director office are enclosed as Annexure-6. Since the Transferee Company shall remain in existence after the Scheme becoming effective, the demand arises from the Income Tax Department, if any, as imposed will be settled as and when the same is crystallized. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company is enclosed and marked as Annexure-3.

12. The Official Liquidator (OL) has filed his report vide diary no.323 dated 16.01.2024 wherein it has been pointed out as under:

- 1) Transferor Company and Transferee Company are registered in the state of Karnataka and both are private companies.
- 2) The appointed date proposed is 01.04.2022. The scheme may be allowed from 01.04.2023 or any other alternative date deem fit. It may be noted that the Transferor Company has filed the Balance sheets as at 31.03.2023.
- 3) The Authorized Share Capital of Transferor Company is of Rs.1,97,50,000/- (19,75,000/- equity share of Rs.10/- each) and Rs.3,31,00,000/- (16,55,000 Compulsorily Convertible Cumulative Preference shares of Rs.20/- each) and Paid-up capital is Rs.1,67,64,020/- ((16,76,402 equity share of Rs.10/- each) and Rs.3,29,69,760/- (16,48,488 Compulsorily Convertible Cumulative Preference shares of Rs.20/- each) total amounting to Rs.4,97,33,780/-. No Key Managerial Personal (KMP) are required to be appointed in the company.
- 4) There are no cross holding between the Transferor and Transferee Companies, but both the companies are wholly owned subsidiary of Curefit Healthcare Private Limited.
- 5) The sale consideration is fixed as per in the following:
 - a) “1 (One) fully Paid-up equity shares of face value of INR 1/- (Rupee one only) each of Curefit Services Pvt. Ltd. shall be issued and allotted for every 5 (five) fully paid-up equity sales of face value of INR 10/- (Rupees Ten only each to the shareholder of Fitternity Health E- Solution Pvt. Ltd.”
 - b) “1 (One) fully Paid-up equity shares of face value of INR 1/- (Rupee one only) each of Curefit Services Pvt. Ltd. shall be issued and allotted for every 5 (five) fully paid up preference share of face value of INR 20/- (Rupees Twenty only) each of preference shareholders of Fitternity Health E- Solution Pvt. Ltd.

- 6) The fresh shares will be issued to Curefit Healthcare Private Limited holding company of both the Transferor Company and Transferee Company.
- 7) The Transferee Company has to change its Authorized share Capital structure as preference shares will be issued to Curefit Healthcare Private Limited. The present Authorized Capital of Transferee Company does not allow for issuance of preference shares.
- 8) The Tribunal has dispensed with the meeting of equity, preference shareholders and unsecured creditors of the Transferor Company as per the information provided by the Transferor Company.
- 9) The new share will be issued to a foreign entity, holding company of both Transferor Company and Transferee Company. Hence, applicable FEMA compliance is required to be done.
- 10) In the Transferor Company there are 1058 unsecured creditors as at 31.01.2023. Though the NCLT dispensed with the meeting of creditors, interest of all creditors to be taken care. Transferee Company has obtained consent of 90.56 % of creditors numbering 5 they are nothing but group entities of the Petitioner Companies.
- 11) The petitioner need to settle the MSME dues if any as per MSME Act.
- 12) The Transferor Company is a loss-making company with negative EPS.
- 13) Rs.229.42 lakhs is receivable from the Transferee Company as at 31.03.2022. Needs to explain the accounting treatment an extinguishment by Transferee Company in its account up on merger.

- 14)The Transferor Company has huge related party transactions. Needs to comply the provisions of Section 188 of Companies Act, 2013.
- 15)No Employees/workmen of Transferor Company to be retrenched/terminated in the terms of amalgamation of Transferor company with Transferee Company. The Tribunal may kindly see that Transferor or Transferee will not retrench Swap the staff or employee of Transferor Company in the guise of surplus staff on account of merger. Need to give a separate undertaking by the Transferee Company in this regard.
- 16)As per the records of this office, the other two scheme purposed between group of companies are pending C.A.(CAA) 14/BB/2023 and C.A. (CAA)18/BB/2023.
13. The reply to the OL has been filed by the Petitioner Companies vide diary no.678 dated 31.01.2024, *inter alia* stating as under:
- i. **Reply to para 1 of the OL report:** It is submitted that the statement made in the OL Report is true.
 - ii. **Reply to para 2 of the OL report:** It is submitted that in accordance with the provisions of Section 232(6) of the Companies Act, 2013, the Petitioner Companies have determined April 1, 2022 as the 'Appointed Date' given that the Petitioner Companies had filed the application for approval of the Scheme during the Financial Year 2022-23 before this Tribunal. The General Circular No. 09/2019 dated August 21, 2019 issued by the Ministry of Corporate Affairs clarifies that a specific calendar date can be determined as the Appointed Date for a scheme and such Appointed Date may precede the date of filing of the application with the NCLT. The Circular further provides

that if the Appointed Date is significantly ante-dated beyond a year from the date of filing the application, the rationale for such Appointed Date is required to be justified and it should not be against the public interest. It is also submitted that the application for approval of the Scheme was filed before this Tribunal on March 24, 2023 and therefore, the Appointed Date determined in the Scheme (i.e., April 1, 2022) is within the same Financial Year of filing this application.

It is submitted further that the Appointed Date of April 1, 2022 shall not be prejudicial to the interests of its shareholders, creditors and the public. Accordingly, the Petitioner Companies requests this Tribunal to retain the Appointed Date of the Scheme as April 1, 2022 in the interest of justice and equity.

- iii. **Reply to para 3 of the OL report:** It is submitted that the statement made in the OL Report is true.
- iv. **Reply to para 4 of the OL report:** It is submitted that the statement made in the OL Report is true.
- v. **Reply to para 5 of the OL report:** It is submitted that the statement made in the OL Report is true.
- vi. **Reply to para 6 of the OL report:** It is submitted that the statement made in the OL Report is true.
- vii. **Reply to para 7 of the OL report:** It is submitted that pursuant to this Scheme of Amalgamation there is no issuance of any Preference Shares. According to the swap ratio/consideration as provided in the Scheme, the Transferee Company has to issue equity shares to the shareholders (including preference shareholders) of the Transferor Company. Thus, the Scheme envisage the

issuance of Equity shares in lieu of the Preference Shares held by the existing preference shareholders of the Transferor Company. Thus, there is no necessity to have enabling provision for issuance of Preference shares nor have requirement for having Preference Share Capital in the Authorized Capital. However, in case the Transferee Company opts to issue Preference Shares in the future, the Transferee Company will follow the provisions of Companies Act, 2013 and shall duly have enabling provision for such issuance in its Authorized Capital.

- viii. **Reply to para 8 of the OL report:** It is submitted that the statement made in the OL Report is true.
- ix. **Reply to para 9 of the OL report:** It is submitted that as already provided in the statement given in paragraph no. 4 of the OL Report the Transferor Company and Transferee Company are wholly owned subsidiary of Curefit Healthcare Private Limited, which is an Indian company (company incorporated in India). Thus there are no issuance of any shares to the Foreign Companies pursuant to this Scheme of Amalgamation. Further the Company does not have any foreign Shareholding as on Appointed Date and as on the date of filing of response and therefore, there shall be no issuance of shares to any foreign entity. Thus the requirement of compliance with FEMA regulations does not arise. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company is enclosed and marked as Annexure 3.
- x. **Reply to para 10 of the OL report:** It is submitted that before the Tribunal that the Petitioner Companies have complied with the provisions of Section 230(9) of the

Companies Act, 2013 which requires that 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 in value, agree and confirm, by way of affidavit, to the Scheme. The meeting of the Creditors of the Transferor Company was dispensed by the Tribunal. With respect to the Transferee Company, the Transferee Company have duly obtained the Consent Affidavits from those Creditors constituting 90% in value of the total Creditors of the Transferee Company and complied with the requirements as provided under the law. However, it is further submitted that the consent affidavit so obtained and constituting the major portion of the creditors are the Group Company itself and thus there are no other major creditors whose interest will be affected pursuant to this Scheme. Further, the Transferee Company hereby further undertakes to confirm that the interest of the other creditors will also be taken and thus shall ensure that their dues/ payments will be made as and when the mandate arises. Since the major creditors comprising 90% in value is constituting 5 creditors in number and who are the group companies itself, the Transferee Company had obtained the Consent Affidavit from them. Thus, the interest of the other creditors of the Transferee Company and the interest of the Creditors of the Transferor Company whose meeting has been dispensed with by the Tribunal will definitely be taken care as the Transferee Company will still be in existence after effecting the Scheme of Amalgamation. An Undertaking affidavit of the Petitioner Company No.2/

Transferee Company to give effect the same is enclosed as Annexure-3.

- xii. **Reply to para 11 of the OL report:** It is submitted that upon the approval of the Scheme, all the outstanding MSME payables of the Petitioner Company No.1/Transferor Company will be settled within the timeline as permitted by law. An Undertaking affidavit of the Petitioner Company No.2/ Transferee Company to give effect the same is enclosed as Annexure-3.
- xiii. **Reply to para 12 of the OL report:** It is submitted that the statement made in the OL Report is true.
- xiii. **Reply to para 13 of the OL report:** It is submitted that the statement made in the OL Report is true and correct. As provided in Clause 5.8 of the Scheme, all inter-party transactions between the Transferor Company and Transferee Company shall be considered as intra-party transactions for all purposes. It is hereby clarified that all the inter-company balances, if any, between the Transferor Company and Transferee Company, appearing in the books of account of the Transferor Company and Transferee Company shall not be taken over by the Transferee Company and stand cancelled without any further act or deed, upon this Scheme becoming effective.
- xiv. **Reply to para 14 of the OL report:** It is submitted that the Petitioner Company No.1/ Transferor Company has no material related party transactions with its related parties during the Financial Year 2022-23, except for those disclosed in the financial statement for the FY 2022-23. Further, by virtue of exemption granted to the private limited companies covered under Section 2(76)(viii) of the

Companies Act, 2013, the provisions of Section 188 of the Companies Act, 2013 and rules framed thereunder shall not be applicable to both the Petitioner Company No.1/ Transferor Company and the Petitioner Company No.2/ Transferee Company. The copy of the Private limited Company exemption notification No. G.S.R. 464(E) vide dated 05th July, 2015 is enclosed as Annexure-5.

An undertaking affidavit given by the Transferor Company to confirming the said transactions were entered into on an arm length basis and thus the transactions are in compliance with the requirements of Section 188 of the Companies Act, 2013, and the same is enclosed as Annexure – 6.

- xv. **Reply to para 15 of the OL report:** It is submitted that upon the Scheme becoming effective, no Employees/Workmen of Transferor Companies will be retrenched/ terminated/ Swap due to the terms of the amalgamation of the Transferor Companies with the Transferee Company.

It is also submitted that Clause 6 of the Scheme of Amalgamation has already provided for safeguarding the Interest of the Employees / workmen of the Transferor Company upon the amalgamation becoming effective, ensuring and thus ensures their continuity in the Petitioner Company No.2/ Transferee Company both in letter and in spirit. An Undertaking affidavit in this regard by the Petitioner Company No. 2/ Transferee Company is enclosed as Annexure – 3.

- xvi. **Reply to para 16 of the OL report:** It is submitted that there are multiple Scheme of Arrangement / Amalgamation

of the Group Companies as stated in the above Application numbers are filed before this Tribunal, it is submitted that all the Schemes are independent in nature and there are no overlapping of those Schemes with each other nor any of the Companies involved in this Scheme are party to the other Scheme as stated in the above said Applications.

14. The Income Tax Department has filed its report vide diary no.6149 dated 08.12.2023 by *inter alia* observing as under:

Regarding Transferee Company

- (i) The Transferee Company Curefit Services Pvt. Ltd. (PAN:AAGCC6845A) is assessed to tax in this office. As per our records, details of proceedings pending against the above entity are as under:

Sl. No.	Assessment Year	Type of proceedings
01	2022-23	Assessment proceedings u/s 143(3) of IT Act, 1961

The Hon'ble Members may kindly note of the pending proceeding as mentioned above while deciding Scheme of Amalgamation and Merger in the subject case.

- (ii) The Transferee would also be held responsible for any demand or liability which may arise in the name of the Transferor Company. In this regard, an undertaking may be obtained from the Transferee Company.

Regarding Transferor Company

- (i) Jurisdiction over the Transferor Company namely Fitternity Health E-Solution Pvt. Ltd. does not lie with this office and hence outstanding demand and pending proceedings cannot be ascertained. Therefore, no objection may be obtained from the respective Jurisdictional Assessing Officers in the case of

Transferor Company.

15. The reply to the Income Tax Department Report has been filed by the Petitioner Companies vide diary No.438 dated 22.01.2024 *inter alia*, observing as under:

Regarding Transferee Company

(i) Reply to para 1 of the Income-Tax Department

report: It is submitted that since Curefit Services Private Limited being the Transferee Company shall remain in existence after the Scheme becoming effective, the outstanding demand, if any, as imposed on the conclusion of the assessment proceedings will be settled as and when the same is crystallized. An undertaking Affidavit duly signed by the Authorized Signatory of Petitioner Company No.2/Transferee Company is enclosed as Annexure-2.

(ii) Reply to para 2 of the Income-Tax Department

report: It is submitted that the Transferee Company will continue and control the assessment proceedings undertaken by the Income Tax Dept. for the business and operation conducted by the Transferor Company prior to the Appointed Date and settle the demand, if any, arising from such assessment proceedings. An undertaking Affidavit duly signed by the Authorized Signatory of Petitioner Company No.2/Transferee Company is enclosed as Annexure-2.

Regarding Transferor Company

- (i) It is submitted that pursuant to Clause No.9 of the proposed Scheme of Amalgamation, upon the Scheme become effective, all the pending proceedings against Fitternity Health E-Solution Pvt. Ltd., the Transferor

Company shall be continued against the Transferor Company. An undertaking Affidavit duly signed by the Authorized Signatory of Petitioner Company No.2/Transferee Company is enclosed as Annexure-2.

16. Intimation of Scheme of Amalgamation was sent to all relevant statutory authorities/regulators. Wherever no response has been received from the said authorities/regulators, it is deemed that they have no objection to the proposed Scheme.
17. It is submitted that the Affidavits of the Authorized Representative of the Petitioner Companies have been filed on 06.09.2023 stating that there are no investigation proceedings pending against the Petitioner Companies or its Directors under the Companies Act, 2013 & 1956 and IBC, 2016 or under any other statutes.
18. It is also submitted that the Affidavits of the Authorized Representatives of the Petitioner Companies have been filed stating that the present Composite Scheme is filed under Section 230 to 232 of the Companies Act, 2013 and thus the Composite Scheme does not contemplate Corporate Debt Restructuring nor envisage any buy back of shares under Section 68 of the Companies Act, 2013.
19. It is also submitted that the Affidavit on 06.09.2023 of the Authorized Representatives of the Petitioner Companies have been filed stating that Petitioner Companies are not regulated by any Sectoral Regulators to whom the Petition and Scheme needs to be intimated/filed before or after filing of the Company Petition under Section 230 of the Companies Act, 2013.
20. Heard the learned Counsels for the parties. We have carefully perused the pleadings of the parties and entire materials on record.
21. In view of the above discussion, we conclude that the objections/observations to the Scheme received from RD/ROC,

OL and IT Dept. have been adequately replied by the Petitioner Companies and hence there is no impediment in approval of the Scheme.

22. **The Scheme of Amalgamation in question annexed as Annexure-13 is approved** and we hereby direct that the same is to be binding on all the shareholders and creditors of the Transferor Company as well as the Transferee Company. While approving the Scheme, it is clarified that this order should not be construed as an order in anyway granting exemption from payment of any stamp duty, taxes, or any other charges, if any, and payment in accordance with law or in respect of any permission/compliance with any other requirement which may be specifically required under any law.

AND THIS TRIBUNAL DOES FURTHER ORDER:

- (i) That the Petitioner Companies do, within 30 days after the date of receipt of this Order, cause a certified copy of this Order to be delivered to the Registrar of Companies, Karnataka for registration and on such certified copies being so delivered the Transferor Company shall be dissolved without undertaking the process of winding up. The concerned Registrar of Companies shall place all documents relating to the Transferor Company registered with him on the file relating to the said Transferee Company and the files relating to Transferor and Transferee Companies shall be consolidated accordingly, as the case may be;
- (ii) That the Transferee Company shall deposit an amount of Rs.75,000/- in favour of "Pay and Accounts Officer, Chennai in respect of the Regional Director, South East Region, Ministry of Corporate Affairs, Hyderabad" and Rs.25,000/-in favour of 'The Prime Minister's National Relief Fund', within a period of four weeks from the date of receipt of certified copy of this Order;

- (iii) That the Petitioner Companies are directed to comply with all the undertakings given by them in their reply filed to the ROC/RD, OL & IT report;
 - (iv) That the Petitioner Companies are directed to make compliance to the provisions of Section 170A of the Income Tax Act, 1961 within the stipulated period of time;
 - (v) That any person interested shall be at liberty to apply to this Tribunal in the above matter for any directions that may be necessary;
 - (vi) The approval/sanctioning of the Scheme shall not be construed as an exemption from any of the provisions under the Income Tax Act, 1961 or the Companies Act, 2013 and that the authorities under both the Acts, are at liberty to take appropriate action, in accordance with law, if so advised.
23. As per the directions, Form No.CAA-7 of the Companies (Compromises, Arrangements and Amalgamations) Rules, 2016, formal orders be issued on the petitioner company on filing of the Schedule Property i.e., (i) freehold property of the Transferor Company and (ii) leasehold property of the Transferor Company by way of affidavit.
24. **Accordingly, C.P. (CAA) No.37/BB/2023 is disposed of.**
25. The learned Counsel for the Petitioner Companies is directed to serve a copy of this Order to all the Statutory Authorities within ten days from the date of receipt of copy of this order.
26. Copy of this Order be communicated to the Counsel for the Petitioner Companies.

Sd/-
(MANOJ KUMAR DUBEY)
MEMBER (TECHNICAL)

Sd/-
(K. BISWAL)
MEMBER (JUDICIAL)