

IN THE NATIONAL COMPANY LAW TRIBUNAL: NEW DELHI
COURT – IV

ITEM No.1
CP(CAA)26/ND/2021

IN THE MATTER OF:

Donriver India Pvt Ltd
And
Ciena Communications

... Applicant

Order under Section 230-232 of Companies Act, 2013.

Order delivered on 24.05.2023

Coram:

Mr. P.S.N. PRASAD,
HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA,
HON'BLE MEMBER (TECHNICAL)

ORDER

Order pronounced in open Court vide separate sheets.

CP(CAA)26/ND/2021 stands allowed.

Sd/-

DR. BINOD KUMAR SINHA,
MEMBER (TECHNICAL)

Sd/-

P.S.N. PRASAD,
MEMBER (JUDICIAL)

IN THE NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-IV

COMPANY PETITION NO. (CAA)- 26 (ND)/2021
IN
COMPANY APPLICATION NO. CA (CAA)-121 (ND)/2019

IN THE MATTER OF:

SECTION 230 to 232 OF THE COMPANIES ACT, 2013
AND

IN THE MATTER OF SCHEME OF MERGER OF

M/S. DONRIVER INDIA PRIVATE LIMITED

...Petitioner No.1/Transferor Company

AND

M/S. CIENA COMMUNICATION INDIA PRIVATE LIMITED

... Petitioner No. 2/ Transferee Company

CORAM:

SH. P.S.N. PRASAD, HON'BLE MEMBER (JUDICIAL)

DR. BINOD KUMAR SINHA, HON'BLE MEMBER (TECHNICAL)

ORDER DELIVERED ON :24.05.2023

ORDER

PER: SH. P.S.N. PRASAD, MEMBER (JUDICIAL)

This Petition is preferred jointly by the Petitioner Companies under Section 230 to 232 of Companies Act, 2013 read with the Companies (Compromise, Arrangements and Amalgamations) Rules, 2016 for the purpose of the approval

of the Scheme of Amalgamation (hereinafter referred to as '**Scheme**' for brevity), as contemplated between the Companies, its Shareholders and Creditors. The copy of the Scheme has been placed on record. The Appointed date as fixed for the Proposed Scheme of Amalgamation is 01.04.2021. The details of the Companies proposed to be amalgamated, as placed on record are as under:-

- a) M/s. Donriver India Private Limited, (hereinafter referred to as "Petitioner Company No. 1 /Transferor Company") was incorporated on the 28.01.2016 under the provisions of the Companies Act, 2013 as a private limited company bearing CIN:U72300DL2016FTC290328 having its registered office situated at G-41, Ground Floor West Patel Nagar, New Delhi – 110008. The Petitioner Company No.1/ Transferor Company is engaged in the business of Information Technology and Information Technology Enabled Services.
- b) M/s. Ciena Communications India Private Limited, (hereinafter referred to as "Petitioner Company No. 2/Transferee Company) was incorporated on the 25.01.2010 under the provisions of the erstwhile Companies Act, 1956 as a private limited company bearing CIN: U74900DL2010PTC198324 and having its registered office situated at Kochhar & Co., Suite/Unit No. 1120-1121, 11th Floor DLF Tower A, Jasola District Center New Delhi – 110025. The Petitioner Company No.2 is engaged in the business of Information Technology and Information Technology Enabled Services.

2. The Petitioner Companies submit that the rationale for the present Scheme of Merger between the Petitioner Companies are as follows:-

- i) The merger will enable both the Companies to consolidate their business operations and provide significant impetus to their growth since both

Companies are engaged in the same line of business i.e., Information Technology and Information Technology Enabled Services.

- ii) The Merger will result in reduction in overheads, administrative, managerial and other expenditure and bring about operational rationalization, efficiency and optimal utilization of various resources.
- iii) The Merger will also consolidate the managerial expertise of the both the Companies thereby giving additional strength to the operations and management of the Transferee Company.

3. From the records, it is seen that the First Motion petition was filed by the Petitioner Companies for seeking directions for dispensing with the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors of all the Companies. This Tribunal, in the First Motion Application bearing No. CA (CAA)/121/(ND)/2019, vide Order dated 25.02.2020 dispensed with the requirement of convening the meetings of the equity shareholders, secured creditors and unsecured creditors of the all Petitioner Companies.

4. The Petitioner Companies submit that the Clause 5 of Part –II (Merger of Transferor Companies with Transferee Company) of the Scheme provides for issue of shares/consideration. The copy of the valuation report issued by M/s. Balwan Bansal, Registered Valuer regarding the share exchange ratio is annexed as Annexure-12 of the Copy Scheme Petition. The relevant extract of Clause 5.1 of the scheme is reproduced below:-

“5.1. Upon this Scheme becoming effective and in consideration for the transfer of and vesting of all the properties, assets and liabilities of the Transferor Company into the Transferee Company, the Transferee Company

shall without any further act or deed, issue and allot to the member(s) of the Transferor Company or to such of their respective heirs, executors, administrators or other legal representatives or other successors in title as may be recognized by the Board of Directors of the Transferor Company and approved by them whose names appear in the Register of Members of the Transferor Company as on the Record Date, shares in the share capital of the Transferee Company, on a proportionate basis, at par, credited as fully paid in lieu of shares held by them in the share capital of the Transferor Company, up to the extent indicated below, in the following ratio (the 'Share Exchange Ratio')

"One (1) equity share of the face value of Rs 10 each credited as fully paid up in the share capital of the Transferee Company for every 18 (Eighteen) fully paid up equity shares of the face value of Rs 10 each held in Transferor Company."

5. From the record, it is seen that the First Motion Application was filed by the Petitioner Companies for seeking directions for dispensing with the meeting of Equity Shareholders, Secured Creditors and Unsecured Creditors of all the Companies. This Tribunal, in the First Motion Application bearing No. CA (CAA)/121/(ND)/2019, vide order dated 20.03.2020 dispensed with the requirement of convening the meetings of the equity shareholders, secured creditors and unsecured creditors of both the Petitioner Companies.

6. Subsequent to the First Motion Order dated 20.03.2020, the Second Motion Petition was moved by the Petitioner Companies in connection with the Scheme of Merger for issuance of notices to the Central Government, Registrar of Companies NCT of Delhi & Haryana, Regional Director (Northern Region) MCA,

Income Tax Authorities, Official Liquidator, Reserve Bank of India other sectoral regulators who shall be affected by the proposed Scheme and to such other Objector(s), if any, and also for publication of notice in respect of the said Scheme. The said petition was admitted and directions were issued, vide Order dated 25.02.2021 of this Tribunal, requiring the Petitioner Companies to serve notices to the Central Government, Registrar of Companies NCT of Delhi & Haryana, Regional Director (Northern Region) MCA, Income Tax Authorities, Official Liquidator, Reserve Bank of India and other sectoral regulators likely to be affected by the said proposed Scheme and also to carry out necessary publication in the “Indian Express” English and “Jansatta” Hindi newspapers with respect to the said Scheme.

7. It is submitted by the Petitioners that in compliance of the above stated directions, the Petitioners duly filed an Affidavit of Service and Publication dated 05.04.2021 by confirming that the aforesaid Notices of the present Company Petition were published on 31.03.2021 in “Indian Express”, (English, Delhi Edition) and “Jansatta” (Hindi, Delhi Edition) newspapers. It is further submitted that the Petitioner Companies also served the Notices of the present Company Petition to all the statutory authorities.

8. It is submitted by the Petitioner Companies that the compliance with respect to accounting treatment has been made as certified by the Statutory Auditor’s Certificate dated 18.02.2020, certifying that the proposed accounting treatment included in the Scheme among the petitioner companies is in compliance with

the applicable Accounting Standards specified under the Section 133 of the Companies Act, 2013. The certificate from Statutory Auditor under Section 133 of the Companies Act, 2013 is annexed as Annexure 15(Colly.) to the Company Scheme Petition.

9. The Official Liquidator has filed its report dated 14.03.2022 in which it has stated that upon considering the information submitted by the Petitioner Companies, the Official Liquidator is of the view that the affairs of the aforesaid companies do not appear to have been conducted in a manner prejudicial to the interest of its members or to the public interest in terms of the provisions of the Companies Act, 2013.

10. The Income Tax Department has not filed its report before this Tribunal despite repeated reminders. The Transferee Company in compliance of this Tribunal's order dated 06.01.2023 had filed additional affidavit dated 11.01.2023, wherein M/s. Ciena Communications India Private Limited (Transferee Company) undertakes that it shall fully cooperate with the Income Tax Authority in case any inspection or demand is raised or is outstanding against the Transferor Company. The Transferee Company further undertakes that the Transferee Company shall be fully responsible for clearing all the dues, interest, penalties, claims, fines or other penal actions, if any, in case any objections or queries are raised by the Income Tax Authority at any time after amalgamation of Transferor Company with Transferee Company. The Income Tax Returns and acknowledgments thereof, of both the Transferor Company as well as Transferee

Company for the last 3 Financial Years i.e., 2019-2020, 2020-2021 and 2021-2022 are also placed on record. The companies are tax compliant

11. The Regional Director vide his report dated 24.11.2021 has made certain observations with regard to the proposed scheme of Amalgamation among the Petitioner Companies. The Petitioner Companies had filed reply dated 22.03.2021 in response to the observations made by the Regional Director, under wherein the Petitioner Companies gave clarifications and undertaking to address the observations made by the Regional Director. The details of observations of the Regional Director in para 13 of its report and reply of the Petitioner Companies vide additional affidavit dated 03.04.2023 are summarised below:

Observations	Observations, of the Regional Director vide report dated 24.11.2022	Reply of the Petitioner Companies vide additional Affidavit dated 03.04.2023
13(i)	From the documents filed by the Company in MCA Portal it is found that the Transferor Company namely Donriver India Private Limited has violated the Provisions of section 173(1) of the Act in the financial year 2019-20 since they have not conducted the requisite number of Board Meetings as stipulated under section 173(1) of the Act. As per the	With reference to the observation made in Para 13(1) by the Regional Director, Northern Region, the Applicant hereby acknowledges the default under Sec 173 (1) of the Companies Act and the Transferor Company has filed the application for adjudication under Section 454 of the Companies before the

information available in MCA Portal (e-form MGT-7) it is reported by the Transferor Company that they have conducted only two Board Meetings during the financial year 2019-2020 i.e. on 17.06.2019 and 19.08.2019. During last 229 days (i.e. during the period from 20.08.2019 to 31.03.2020) no Board Meeting was conducted by the Petitioner Transferor Company. In a clarification letter dated 26.11.2020 filed with e-form MGT-7 the company has admitted such violation of the Act by stating that "the company has partially complied with the provisions of section 173(1) of the Act". The reason of such non-compliance has been stated therein that the company has filed a petition of merger, Which is not tenable since the compliance of provision of section 173 of the Act is an independent statutory provision which cannot overlap or supersede the provision of section 230 of the Companies Act, 2013.

Registrar of Companies for adjudication. The copy of application along with acknowledgement is enclosed and marked as Annexure-2 to the additional affidavit.

<p>13(ii)</p>	<p>From the reply dated 22.03.2021 of the Petitioner Companies, it is found that the entire paid-up capital of the Transferor Company are held by two foreign Body Corporate namely Donriver Holding LLC and Ciena International, Inc. two USA based companies. As per the scheme for purchase consideration the Transferee Company will issue shares to the shareholders of the Transferor Company who are Foreign Body Corporates, hence on approval of the scheme the shares which will be issued to the Body Corporates of foreign origin, that falls under the purview of FEMA which is regulated by Reserve Bank of India (RBI). The scheme is silent about the entitle facilities provided under FEMA to the Petitioner Companies to issue such shares to two Foreign Body Corporates.</p>	<p>With reference to the observation made in Para 13(2) by the Regional Director, Northern Region, the Applicant submits as under:</p> <p>a. That there will be no repatriation of consideration by the Transferee Company through normal banking channel after approval of the scheme of merger.</p> <p>b That only shares will be issued as per the share swap ratio as determined by the registered valuer pursuant to the provisions of the Companies Act, 2013 and Consolidated FDI Policy under the Foreign Exchange Management Act, 1999.</p> <p>c. That following are conditions of Para 4 of the Annexure-4 of the consolidated FDI Policy regarding Acquisition of shares under Scheme of Merger/Demerger/Amalga</p>
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		<p>mation:</p> <p>"Mergers/demergers/amalgamations of companies in India are usually governed by an order issued by a competent Court on the basis of the Scheme submitted by the companies undergoing merger/demerger/amalgamation. Once the scheme of merger or demerger or amalgamation of two or more Indian companies has been approved by a Court in India, the transferee company or new company is allowed to issue shares to the shareholders of the transferor company resident outside India, subject the conditions that:</p> <ul style="list-style-type: none">(i) the percentage of shareholding of persons resident outside India in the transferee or new company does not exceed the sectoral cap, and(ii) the transferor company or the
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transferee or the new company is not engaged in activities which are prohibited under the FDI policy.

Note: Government approval would not be required in case of mergers and acquisitions taking place in sectors under automatic route

d. That this is submitted that the issue of shares to the shareholders of the Transferor Company falls under permitted sectors and under automatic route where FDI is permitted upto 100%:

e. That this is submitted that the issue of shares to the shareholders of the Transferor Company after merger does not fall under prohibited sectors, namely:

- Lottery
- Gambling
- Chit Fund
- Nidhi Company,
- Trading in Transferable

		<p>Development Rights:</p> <ul style="list-style-type: none"> • Real Estate Business • Manufacturing of cigars, cheroots, cigarillos and • cigarettes, of tobacco or of tobacco substitutes • Activities/sectors not open to private sector investment. Eg (i)Atomic Energy and (ii) Railway operations. <p>f. In view of the above submissions, this is submitted that the issue of shares to the shareholders of the Transferor Company falls under automatic route where FDI is permitted upto 100% and hence, no approval from the Reserve Bank of India is required in this matter.</p>
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12. This Tribunal in its order dated 11.04.2023 after hearing the arguments advanced by the Authorised Representative of the petitioners. Proxy-Counsel for the RD as well as Proxy-Counsel for the OL noted as follow:-

“Proxy Counsel for the RD has submitted that they are satisfied with the response to the observations No. 1. With regard to response to observation No.

2, that is, approval under FEMA, the said approval is required only when capital is repatriated or shareholders have been paid some kind of dividend or work benefit, who are the non-resident foreign shareholders. Therefore, we all are satisfied with the reply given by the Authorised Representative.”

13. In view of the foregoing facts and discussion and upon considering the approval accorded by the Members and Creditors of the petitioner Companies to the proposed Scheme and also in the view of the fact that no sustainable objections have been raised by the Office of the Regional Director, Income Tax Department or any other interested party, there does not appear to be any impediment in granting sanction to the proposed Scheme of Amalgamation.
14. Accordingly, in sequel to the above facts and circumstances, sanction is hereby granted to the Scheme of Amalgamation proposed by the Petitioner Companies under Section 230 to 232 of the Companies Act, 2013.
15. The sanctioned Scheme of Amalgamation shall be binding on the Transferor Company and Transferee Company/Resulting Company (the Petitioner Companies) and their Shareholders and Creditors. The Petitioner Companies shall remain bound to comply with the statutory requirements in accordance with law.
16. Notwithstanding the above, if at any stage any deficiency is found or violation committed qua any enactment, statutory rule or regulation is found to be committed, the sanction granted by this Tribunal to the Scheme will not come in the way of action to be taken, albeit, in accordance with law, against the concerned persons, Directors and Officials of the Petitioner Companies.
17. While approving the Scheme as above, it is clarified that this Order should not be construed as an order in any way granting exemption from payment of Stamp Duty, Taxes or other statutory dues, if any, and payment in accordance with law or in respect to any permission/compliance with any other

requirement, which may be specifically required under any law will be made. Further the approval of the Scheme would in no manner affect the tax treatment of the transactions under the Income Tax Act, 1961 or serve as any exemption or defense for the Petitioner Companies against tax treatment in accordance with the provisions of Income Tax Act, 1961.

18. This tribunal further directs with respect to Transferor companies (Petitioner Company No. 1) and Transferee Company (Petitioner Company No. 2) that:
- (i) Upon the sanction becoming effective from the appointed date of amalgamation i.e., 01.04.2021, the Transferor Company shall stand dissolved without undergoing the process of winding up.
 - (ii) All benefits, entitlements, incentives and concessions under incentive schemes and policies that the Transferor Company is entitled to including under Customs, Excise, Service Tax, VAT, Sales Tax, GST and Entry Tax and Income Tax laws, subsidy receivables from Government, grant from any governmental authorities, direct tax benefit/exemptions/deductions, shall, to the extent statutorily available and along with associated obligations, stand transferred to and be available to the Transferee Company as if the Transferee Company was originally entitled to all such benefits, entitlements, incentives and concessions;
 - (iii) All contracts of the Transferor Company, which are subsisting or having effect immediately before the Effective Date, shall stand transferred to and vested in the Transferee Company and be in full force and effect in favor of the Transferee Company and may be enforced by or against it as fully and effectually as if, instead of the Transferor Company, the Transferee Company had been a party or beneficiary or obliged thereto;
 - (iv) All the employees of the Transferor Company shall be deemed to have become the employees and the staff of the Transferee Company with effect from the Appointed Date, and shall stand transferred to the Transferee Company without any interruption of service and on the terms and conditions no less favorable than those on which they are engaged by the

Transferor Company, as on the Effective Date, including in relation to the level of remuneration and contractual and statutory benefits, incentive plans, terminal benefits, gratuity plans, provident plans and any other retirement benefits;

- (v) All liabilities of the Transferor Company, shall, pursuant to the provisions of section 232(4) and other applicable provisions of the Companies Act, 2013, to the extent they are outstanding as on the Effective Date, without any further act, instrument or deed stand transferred to and be deemed to be the debts, liabilities, contingent liabilities, duties and obligations etc. as the case may be, of the Transferee Company and shall be exercised by or against the Transferee Company, as if it had incurred such liabilities.
- (vi) All proceedings now pending by or against the Transferor Company be continued by or against the Transferee Company.
- (vii) Any person interested or effected shall be at liberty to apply to this Tribunal in the above matter for any directions that may be necessary.

19. Further, the Petitioner Companies shall within thirty days of the date of the receipt of this Order, cause a Certified Copy of this Order to be delivered to the Registrar of Companies for registration and on such Certified Copy being so delivered, the Transferor Company shall be dissolved and the Registrar of Companies shall place all documents relating to the Transferor Company on the file kept by him in relation to the Transferee Company and the files relating to both the Petitioner Companies shall be consolidated accordingly.

20. In compliance with the requirement of Section 232 (7) of the Act, the transferee company shall until the full implementation of the Scheme of Amalgamation shall file a statement every year in the Form CAA 8 along with the required fees

with the Registrar of Companies as prescribed in the Companies (Registration offices and fees) Rules 2014 within 210 days from the end of each financial year.

The Company Petition bearing **(CAA) 26 (ND)/2021 is allowed in the above terms.**

Sd/-
(DR. BINOD KUMAR SINHA)
MEMBER (T)

Sd/-
(P.S.N. PRASAD)
MEMBER (J)