

IN THE NATIONAL COMPANY LAW TRIBUNAL, NEW DELHI
COURT-V

Item No.-301

CP (CAA) No.-90/230/232/ND/2022(2nd Motion)

IN THE MATTER OF:

Nestle India Ltd.

....Applicant

SECTION

U/s 230-232

Order delivered on 15.09.2023

CORAM:

**SHRI 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) No.-90/230/232/ND/2022(2nd Motion) stands allowed subject to directions.

Sd/-

**(DR. BINOD KUMAR SINHA)
MEMBER (T)**

Sd/-

**(P.S.N PRASAD)
MEMBER (J)**

NATIONAL COMPANY LAW TRIBUNAL
NEW DELHI BENCH
COURT-V

COMPANY PETITION NO. (CAA)-90(ND)/2022
CONNECTED WITH
COMPANY APPLICATION NO. CA (CAA)-30(ND)/2022

(Under Section 230(1)(b) of the Companies Act, 2013)

IN THE MATTER OF :

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

AND

In the Matter of:

NESTLE INDIA LIMITED

(CIN: L1522DL1959PLC003786)

PAN: AAACN0757G

Address: 100/101, World Trade Centre,
Barakhamba Lane, New Delhi- 110001.

... Petitioner Company

AND

ITS SHAREHOLDERS

Section: 230 to 232 of the Companies Act, 2013

Order Delivered on: 15.09.2023

CORAM

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

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

PRESENT

For the Applicant	:	Adv. Mr. Anirudh
For the Respondent	:	
For the RD	:	Ms. Shankari Mishra, Adv. Ms. Niharika Tanwar
For the OL	:	Adv. Ms. Hemlata Rawat
For I.T Department	:	Mr. Abhishek Maratha

ORDER

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

1. The present Second Motion Petition is filed on behalf of M/s. Nestle India Limited (CIN: L15202DL1959PLC003786) ('Petitioner Company') under Sections 230-232 of Companies Act, 2013 seeking sanction and approval of the Scheme of Arrangement between Nestle India Limited and its Shareholders ("Scheme"). A copy of the Scheme is annexed marked as ANNEXURE "1 in the present Application.

2. M/s. Nestle India Limited [Petitioner Company] is a public limited company incorporated in the State of Punjab on 28th March, 1959 under the Companies Act, 1956. The Petitioner Company was incorporated under the name of "Food Specialities Limited". The Petitioner Company shifted its Registered Office from the State of Punjab to the State of Union State of Union Territory of Delhi in terms of Certificate of Registration of the order of the Company Law Board confirming transfer of the Registered Office from one State to another dated 13th August, 1962 issued by the Registrar of Companies, Delhi. The name of the Petitioner Company was changed to Nestle India Limited in terms of fresh Certificate of Incorporation consequent upon change of name dated 29th March, 1990. The Petitioner Company is authorized to and engaged in the business of, inter alia, manufacture and sale of processed foods under several reputed brand names.

3. The Petitioner Company submitted that the Equity Shares of the Petitioner Company are listed on the BSE Limited. Further submitted that, as on 30th June 2022 the authorised share capital of the Petitioner Company is Rs. 1,000,000,000/- divided into 100,000,000/- equity shares of Rs.10/- each and the issued,

subscribed and paid-up capital of the Applicant Company is Rs.964,157,160 divided into 96,415,716 fully paid equity shares of Rs.10/- each.

4. The Petitioner Company submitted that the proposed scheme of arrangement of the Petitioner Company and its Shareholders would have the following benefits: -

- i. Upon this Scheme becoming effective and with effect from the Appointed Date, the entire amount of Rs.8,374.3 Million standing to the credit of the General Reserves of the Petitioner Company shall be reclassified and credited to the 'Retained Earnings' of the Petitioner Company, and subsequent thereto, such amounts credited to the 'Retained Earnings' of the Petitioner Company shall be reclassified as and constitute accumulated profits of the Petitioner Company for the previous financial years, arrived at after providing for depreciation in accordance with the provisions of the 2013 Act and remaining undistributed in the manner provided in the 2013 Act and other applicable laws. It is clarified that such amounts shall be available for utilisation by the Petitioner Company in relation to any Payout in the manner set out in Clause 5 of the Scheme.
- ii. Each Payout of the amount so credited (including the quantum, manner and timing thereof) shall be undertaken in accordance with the provisions of the 2013 Act, the Scheme and other Applicable Law, taking into account all relevant factors including applicable regulatory and fiscal considerations, the nature and quantum of each Payout and subject to payment of or deduction at source of applicable taxes.

5. The Petitioner Company further submits that the appointed date under the Scheme is the opening of business on 1st January, 2022 or such other date as may be determined by the Board of Directors of the Petitioner Company or by this Tribunal.
6. The Learned Counsel for the Petitioner Company submits that the background and rationale to the present Scheme of Arrangement is as follows:-
- a) The Petitioner Company has demonstrated consistent growth, sustained improvement in profitability and cash generation over the years. The key financial highlights for the past five years demonstrated strong operating performance of the Petitioner Company and the same is represented below:-

Parameter / Financial Year ²	2017	2018	2019	2020	2021
Sales (Rs. in Millions)	101,351	112,162	122,953	132,902	146,337
Profit Before Tax (% of Sales)	18.1%	21.7%	21.8%	21.2%	19.7%
Profit After Tax (% of Sales)	12.1%	14.3%	16.0%	15.7%	14.7%
Return on Average Equity	36.6%	45.3%	70.4%	105.8%	104.5%
Operating Cash Flow (Rs. in Millions)	18,178	20,525	22,953	24,545	22,714
Earnings Per Share (Rs.)	127.1	166.7	204.2	216.00	222.50
Dividend Per Share (Rs.)	86.0	115.0	342.0	200.0	200.0
Capital Expenditure (Rs. in Millions)	1,959	1,628	1,522	4,741	7,308
Capex as % of Sales	1.9%	1.5%	1.2%	3.6%	5.0%
Dividend Payout Ratio	67.7%	69.0%	167.4%	92.6%	89.9%



- b) The Petitioner Company has built up significant reserves amounting to Rs.8,374.3 Million [Rs. 837.43 crores] (as per the Audited Annual Accounts as on 31 December 2021) from its retained profits by way of transfer to its General Reserves, comprising of the amounts transferred to General Reserves in accordance with the statutory requirement applicable until financial year ended 31 December 2014 for the Petitioner Company. The Petitioner Company has not transferred any amounts to the General Reserves after the financial years commencing from 1" January 2015. It is submitted that while the excess reserves can be profitably utilised for the Petitioner Company's overall growth strategy, the Board of the Petitioner Company is of the view that after considering the foreseeable investments required for such opportunities over the next few years, barring unforeseen circumstances and considering the track record of the Petitioner Company, the Petitioner Company is confident of meeting its on-going and future capital expenditure programmes and working capital requirements through generation of own funds and other financing options.
7. From the case papers and other records, it is seen that the First Motion application was filed before this Tribunal by the Applicant vide CA(CAA)30/230-232/ND/2022. This Tribunal by way of order dated 30th May 2022 had allowed the CA (CAA) 30/230- 232/ND/2022 and directed convening of the meeting of the Equity Shareholders of the Petitioner Company, to consider the Scheme and the requirement of convening the meeting of the Secured Creditors and Unsecured Creditors of the Petitioner Company was dispensed with.

8. The Chairperson for the Meeting of the Equity Shareholders of the Petitioner Company had submitted the Chairperson's report dated 30.07.2022 before this Tribunal, wherein it was submitted that the meeting of equity shareholders was conducted on 25.07.2022 at 4:00 p.m. through video conferencing. It was further submitted that the quorum was not present at the commencement of the meeting and accordingly, the meeting was adjourned by 30 minutes, thereafter, the meeting re-started at 4:30 P.M and the members present in the meeting constituted the quorum and meeting was called. It was further submitted that in term of the Scrutinizer Report, 1497 equity shareholders of the Petitioner Company, representing 99.77% in number and 99.99% in value of the Equity Shareholders voted and decided that the proposed Scheme of Arrangement should be approved and agreed to. The Chairperson's Report on the meeting of the Equity Shareholders of the Petitioner Company along with Scrutinizer's Report has been annexed as Annexure 9 of this present Company Scheme Petition.
9. The Petitioner Company have placed on record the copy of the Statutory Auditor's Certificate on the accounting treatment proposed in the Scheme of arrangement being in accordance with the Accounting Standards prescribed under Section 133 of the Companies Act, 2013.
10. The Petitioner Company have stated that the Bombay Stock Exchange (BSE) Limited has issued no objection letter dated 16.12.2021 for filing of the Scheme and the same has been annexed as Annexure-11 to the Company Scheme Petition. The relevant para of the BSE observation Letter dated 16.12.2021 is reproduced herein below:-

“In the light of the above, we hereby advise that we have no adverse observations with limited reference to this matters having a bearing on listing/de-listing/continuous listing requirements within the provisions of Listing Agreement, so as to enable the Company to file the scheme with the Hon’ble NCLT. “

11. Further, the Petitioner Company submitted that, no investigation proceedings have been instituted or are pending against the Petitioner Company under Sections 210 to 226 of the 2013 Act or under the Insolvency and Bankruptcy Code, 2016.
12. The Petitioner Company submitted that the arrangement as proposed in the Scheme would result in benefit to the shareholders of the Petitioner Company and the Scheme shall not in any manner be prejudicial or adversely affect the interests of the concerned shareholders and other stakeholders or the general public at large. Further the present Scheme does not provide for reduction in share capital of the Petitioner Company. The Scheme also does not involve or provide for any corporate debt restructuring of the Petitioner Company.
13. This Tribunal vide order dated 29.08.2022 directed the Petitioner Company to (a) Advertise the notice of hearing in the newspapers namely “Business Standard” (English, Delhi Edition) and “Jansatta” (Hindi, Delhi Edition) and (b) issue individual notices to the (i) Regional Director, Northern Region of Ministry of Corporate Affairs, (ii) Registrar of Company, NCT of Delhi & Haryana (iii) Income Tax Department, (iv) Registrar of Companies NCT of Delhi and Haryana, (ROC) (v) Official Liquidator, and (vi) Bombay Stock Exchange Ltd (BSE).

14. The Petitioner Company had submitted an affidavit of Publication and Service dated 07.10.2022 proving the publication of notice of hearing in the newspapers namely “Business Standard” (English, Delhi Edition) and “Jansatta” (Hindi, Delhi Edition) on 28.09.2022. Further, the proof of service of notice to the Sectoral regulators are also attached with the affidavit. The same is taken on record.

15. Pursuant to the notice issued, the Regional Director (“RD”) in its report dated 24.11.2022 had made certain observations with regard to the proposed scheme of Arrangement among the Petitioner Company and its Shareholders. The Petitioner Company had filed reply vide affidavit dated 14.12.2022 in response to the observations made by the Regional Director, under wherein the Petitioner Companies gave clarification and undertaking to address the observations made by the Regional Director. The details of the same are summarised below:

Observation	Observation of the Regional Director (RD) vide report dated 24.11.2022	Reply of the Petitioner Company vide affidavit dated 14.12.2022
1.	Considering that huge amount of out flow is involved, pursuant to the proposed scheme, the creditors ought to have been made part of the scheme. Therefore, proposed scheme ought to have been between the company, its shareholders and creditors. The company may be accordingly asked to	The present Scheme is between the Petitioner Company and its shareholders under Section 230(1)(b) of the 2013 Act and there is no compromise or arrangement proposed in the Scheme under Section 230(1)(a) of the 2013 Act. This Hon'ble Tribunal has taken on record the above and has also accordingly, by an order dated 30 th may, 2022 dispensed with the

	include the creditors.	requirement of convening the meeting of the Unsecured Creditors of the Petitioner Company since the Scheme does not provide for any compromise or arrangement with the Unsecured Creditors of the Petitioner Company.
2.	Though the company has produced a Chartered Accountant's Certificate that the scheme is in accordance with the Accounting Standards. However, it may be additionally required to clarify the nature of such compliance	In terms of the accounting treatment as provided in the Scheme at Clause 6.1, an amount of Rs.8,374.3 million (Rs.837.43 crores) standing to the credit of the General Reserves of the Petitioner Company shall be reclassified and credited by the Petitioner Company to the Retained Earnings of the Petitioner Company. In this regard, the Statutory Auditors of the Petitioner Company has issued Certificate dated 8th October, 2021, to the effect that the accounting treatment in the Scheme is in compliance with the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 and Circulars issued thereunder and the applicable accounting standards notified by the Central Government under Section 133 of the 2013 Act. Accordingly, there is no further clarification required in this regard.

3.	Refer to the Key audit matters in the auditor's report for the year ended 31 December, 2021 filed with application, regarding Revenue, Provision for contingencies and Provisions for defined benefit pension plan.	The Petitioner Company states that there are no qualification, reservation or adverse remark made in the Auditor's Report for the financial year ended 31 December, 2021. It is further stated that matters with respect to revenue recognition have been set out at Notes 2 and 35 to the audited accounts of the Petitioner Company for the financial year ended 31st December, 2021. Further, matters with respect to provisions for contingencies have been clearly set out at Notes 22, 26 and 38 and matters with respect to the provisions for defined benefits pension plan have been set out at Note 36 to the audited accounts of the Petitioner Company for the financial year ended 31st December, 2021. The said audited accounts of the Petitioner Company have been drawn up in accordance with applicable accounting standards..
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16. We have gone through the report submitted by the RD as well as response of the Petitioner Company with respect to observation in the report. We are of the view that the response of the Petitioner Company has clarified the observations raised by the RD in its report. Further, the observations of the

Regional Director have not shown any specific adverse impact on the public interest by sanction of the proposed Scheme of Arrangement.

17. The Official Liquidator has filed its report dated 12.10.2022, wherein it was submitted that, "since by way of the proposed scheme, the Petitioner Company is not going to wound up by the Liquidator, no report/representation under Section 230(5) of the Companies Act, 2013 and Rule made thereunder are required from the Official Liquidator".
18. The Income Tax Department vide its report dated 06.02.2023 had submitted that they have no objection to the proposed Scheme of Arrangement, however, the Department/Revenue reserves its right to initiation and/or continue any proceedings or recover any demand payable by the Petitioner Company, if it comes to the knowledge of the Department.
19. The Petitioner Company had filed its written submissions dated 20.04.2023 wherein the Petitioner Company submitted that in terms of Section 123(3) of the Companies Act, 2013, the Petitioner Company has preferred the Scheme under Section 230(1)(b) of the Act for the transfer of funds from its General Reserves to the Retained earnings, and consequent pay out to its shareholders. It was further submitted that under the second proviso to Section 123(1) of the Companies Act, 2013 a company can only declare dividend out of its accumulated profits earned by it in previous years and transferred to reserves if there is "an inadequacy or absence of profits." In the present case, the Petitioner is a profit making entity and therefore, it would not be able to utilize a portion of its General Reserves for pay out to its shareholders without the approval of its shareholders and accordingly, the present Scheme has been proposed under Section 230(1)(b) of the Companies Act, 2013.

20. To buttress its averments, the petitioner Company has also placed reliance on the judgements **(i) In re: Nestle India Limited [(2009) 147 Co. Cases 712]**, **(ii) In re: Hindustan Unilever Limited [TCSP No. 151 of 2017, NCLT, Mumbai judgement dated 30.08.2018, and (iii) In re: Britannia Industries Limited [C.P.(CAA) N. 55/KB/2021; NCLT Kolkata, judgement dated 07.05.2021]**, submitting that the arrangements similar to that as provided in the present Scheme have been sanctioned by the Hon'ble Delhi High Court and coordinate Benches of NCLT.
21. In this petition, it has also been affirmed that no proceeding for inspection, inquiry or investigation under the provisions of the Companies Act, 2013 or under provisions of Companies Act, 1956 is pending against the Petitioner Companies.
22. Certificates of Statutory auditor of the petitioner company, has been placed on record to the effect that Accounting Treatment proposed in the Scheme of Arrangement is in Compliance with SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015 and circulars issued thereunder and all the applicable Accounting Standards notified by the Central Government under the Companies Act, 2013.
23. It is 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 is not supposed to look into the merit of their Commercial decision as the Tribunal is supposed to evaluate the Scheme to ensure that the proposed Scheme is in the interest of the Shareholders and not against the public interest.

24. This Tribunal observed that the present Scheme of Arrangement is approved by shareholders being 99.77% in number and 99.99% in value. The Petitioner Company has demonstrated a positive track record in generation of operating cash. The Petitioner Company had consistent record of declaring dividend to its shareholders in the past five years. The Petitioner Company for the Financial Year ended 31.12.2021 had a profit after tax of Rs.2,144.86 crores and as per the unaudited Financial Results of the Petitioner Company for the period ended 30.09.2022, the Petitioner Company had a profit after tax of Rs.1,778.40 crores. Further, there is no provision in the Companies Act, 2013 that prohibits the reclassification and crediting/transfer of amounts lying in 'General Reserves' to the 'Profit and Loss Account'.
25. On perusal of Scheme we observe that Clause 4.1 to 4.2 of the Scheme of Arrangement provides for Reclassification and Utilization of the General Reserves and Clause 5 of the Scheme provides for pay out of retained earnings to the Shareholders. The Clauses 5.1 and 5.2 of the Scheme of Arrangement provide for the manner of pay out to the shareholders stipulating that each pay out shall be in accordance with the provisions of the Companies Act, 2013 and other Applicable Laws. The relevant clauses of the Scheme of Arrangement are extracted below for ready reference:-

PART B - RECLASSIFICATION AND UTILISATION OF THE GENERAL RESERVES AND PAYOUT TO MEMBERS

4. Reclassification and utilisation of the General Reserves

- 4.1. The General Reserves of the Company, amounting to Rs. 8,374.3 Million (as on the 31 December 2020) have been, primarily, built up over the years through the transfer of profits to the reserves by the Company (prior to declaration of dividend) in accordance with the provisions of the erstwhile Companies Act, 1956 and the erstwhile rules notified thereunder, namely, the Companies (Transfer of Profits to Reserves) Rules, 1975.
- 4.2. Upon this Scheme becoming effective and with effect from the Appointed Date, the entire amount of Rs. 8,374.3 Million standing to the credit of the General Reserves of the Company shall be reclassified and credited to the 'Retained Earnings' of the Company, and subsequent thereto, such amounts credited to the 'Retained Earnings' of the Company shall be reclassified as and constitute accumulated profits 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. It is clarified that

**(Clause 4 of the Scheme of Arrangement between M/s. Nestle
India limited and its Members)**

such amounts shall be available for utilisation by the Company in relation to any Payout in the manner set out in Clause 5 below.

5. Payout of Retained Earnings to Members

- 5.1. Upon the Scheme becoming effective and subsequent to the reclassification of the amounts standing to the credit of the General Reserves and credit thereof to the Retained Earnings pursuant to Clause 4 of the Scheme, the amount so credited shall be available for Payout to the Members of the Company, from time to time, by the Board, at its sole discretion, in such manner, quantum and at such time as the Board may decide (each such event constituting a "Payout").
- 5.2. Each Payout of the amount so credited (including the quantum, manner and timing thereof) shall be undertaken in accordance with the provisions of the Act, the Scheme and other Applicable Law, taking into account all relevant factors including applicable regulatory and fiscal considerations, the nature and quantum of each Payout and subject to payment of or deduction at source of applicable taxes.

**(Clause 5 of the Scheme of Arrangement between M/s.
Nestle India limited and its Members)**

26. 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.

27. Consequently, considering the submission of the Petitioner Company, Scheme of Arrangement, judgements relied upon and also the clarification of the Petitioner Companies with respect to the observations of the Regional Director, we find no impediment in approving the present Scheme of Arrangement subject to compliance to applicable provisions of the Companies Act, 2013 and other applicable law including applicable regulatory and fiscal considerations and deduction and payment of taxes in respect of each pay out as envisaged in the Proposed Scheme. Accordingly, sanction is hereby granted to the Scheme of Arrangement under Section 230 to 232 of the Companies Act, 2013 with the following directions: -

- (i) The 'appointed date' as fixed in the Scheme is 1st January, 2022
- (ii) Since the Scheme involves reclassification and transfer of entire amount of General Reserve of the Applicant Company to Retained Earnings of the Applicant Company

and no new shares are to be issued by the Applicant Company pursuant to the Scheme, the Shareholding Pattern of the Applicant Company shall not undergo any change due to the proposed Scheme of Arrangement.

- (iii) Any pay out, other than as dividend to the existing Shareholders shall require prior approval by the Shareholders through Annual General Meeting/Extra-Ordinary General Meeting, and will be subject to payment of all applicable taxes.
- (iv) The Petitioners shall however remain bound to comply with the statutory requirements in accordance with all applicable law.
- (v) 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 petitioners.
- (vi) 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 in respect to any permission/compliance with any other requirement which may be specifically required under any law.
- (vii) To comply with all applicable Tax Legislations and has to pay taxes consequent to the sanction of the Scheme of Arrangement.
- (i) To comply with the applicable and relevant Accounting Standards and Regulations pursuant to the proposed Scheme of Arrangement.

28. 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.
29. 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.

Sd/-

**(DR. BINOD KUMAR SINHA)
MEMBER (TECHNICAL)**

Sd/-

**(SH. P.S.N. PRASAD)
MEMBER (JUDICIAL)**