

**IN THE NATIONAL COMPANY LAW TRIBUNAL,
MUMBAI BENCH, COURT – V**

CP / 15 (MB)/ 2024

In the matter of petition under Section 66 read with Section 52 of the Companies Act, 2013 and the Rule 2 of the National Company Law Tribunal (Procedure for Reduction of Share Capital of Company) Rules, 2016

AND

In the matter of Reduction of Share Capital of Candor Kolkata One Hi-Tech Structures Private Limited

Candor Kolkata One Hi-Tech Structures)
Private Limited)
CIN: U74899MH2005PTC281224)
A private limited company incorporated under)
the Companies Act, 1956, having its registered)
office at F-83, Profit Centre, Gate No 1)
Mahavir Ngr, Nr Pizza Hut, Kandivali (W))
Mumbai – 400076, Maharashtra, India) ... *Petitioner Company*

Order Dated: 07.06.2024

Coram:

Hon'ble Shri Sanjiv Dutt
Member (Technical)

Hon'ble Ms. Reeta Kohli
Member (Judicial)

Appearance :

For the Petitioner Company: Mr. Hemant Sethi a/w Ms. Devanshi Sethi,
Tanaya Sethi, i/b Hemant Sethi & Co., Advocates

ORDER

1. Heard Learned Counsel for the Petitioner Company and the representative from the Regional Director (WR). No objector has come before the Tribunal to oppose the Petition.
2. The Learned Counsel for the Petitioner Company submits that the Petitioner Company is authorised to undertake reduction of share capital under Article 40 of the Articles of Association in any manner as authorized by passing a special resolution, pursuant to which the Petitioner Company has decided for reduction of share capital of the Company to set off the aggregate of (i) the accumulated losses i.e., the debit balance in the profit & loss account of Rs. 2,77,79,87,549/- (Rupees Two Hundred and Seventy Seven Crore Seventy Nine Lakh Eighty Seven Thousand Five Hundred and Forty Nine only) as per the management certified unaudited financial statements of the company as on September 30, 2023 appearing in "Accumulated deficit" as part of

the “Other Equity”; and (ii) any additional balance of the accumulated losses (in excess of the balance appearing as on September 30, 2023) as on the date on which the order approving the petition for reduction of share capital of the Company is confirmed by the NCLT by way of utilization of available balance in the securities premium account of upto Rs. 10,41,97,70,190/- (Rupees One Thousand and Forty One Crore Ninety Seven Lakh Seventy Thousand One Hundred and Ninety only). **The said special resolution was unanimously approved by the equity shareholders of the Petitioner Company** at its extraordinary general meeting held on November 6, 2023. Copy of the special resolution is annexed as ‘**Annexure P-6**’ of the Company Petition.

3. Nature of Business:

The Petitioner Company is in the business of developing, operating and maintaining commercial real estate property in India. It is primarily involved in developing and leasing of investment property in IT/ITS Special Economic Zone (SEZ). The Company is developing a project in New Town, Rajarhat, Kolkata and co - developing a project in sector 21, Dundahera, Gurugram. The projects have been notified as Special Economic Zone (SEZ) by the Government of India. The main objects of the Petitioner Company as per Clause III (A) of the MOA of the Petitioner Company are:

- 1. To act as real estate developers, builders, colonisers, contractors, Town Planners in India and abroad and for that purpose to acquire, purchase, sell, own, develop, appropriate, construct or deal in any*

manner, for commercial and/or Non-commercial objectives land, properties, estates, buildings whether for commercial or for residential purposes, business centres, townships, industrial estates and complexes, hotels, hospitality, resorts, cottages, depots, warehouses, retail, shops, villas, condominiums, commercial complex, multi-storeyed flats and/or infrastructure facilities relating thereto and to build, construct, develop, operate, maintain all kinds of Hi-Tech commercial projects which includes IT/ITES projects, IT/ITES SEZ projects and SEZ projects.

2. *To carry, the business of restaurants, food courts, hospitality, hotels, motels, inns, cafes, fast food outlet, chains, taverns, refreshment rooms, eating houses, canteens, caters, kitchen, boarding and lodging, rest houses, guest houses resorts, tea and coffee houses, soda fountains, beer house keepers, bars, clubs, club house, gym house, hearth clubs, natural cure centre, night clubs, cabarets, discotheque, pubs, opera live, banquets halls, dinning, apartment house keeper and provide all types of amenities, facilities, conveniences, refreshments, amusements, recreations, entertainment and gaming facilities at place(s) and to manufacture, process, handle or otherwise deal in all types, size, nature, dimension, uses and taste of foods and their products, groceries, dairies, bakeries , confectionary, poultry, live and dead stock, beverages alcoholic and nonalcoholic, distilled and undistilled, wines, beer, liquor, spirit, aerated mineral and artificial waters, drinks, soft drinks, hot drinks, juices, ice creams, provisions, spices and other goods, materials, substances, consumables and*

preparations connected thereto and to own, design, built, develop, promote, run, operate, manage, undertake furnish, improve, remodel, renovate, recondition, lease, hire, let on hire, organize, acquire, takeover, merge, de-merge and restructure such business, take away or home delivery based service in India or elsewhere, whether as owners, coowners, joint ventures, partnership, through subsidiary Companies, franchisee, franchisor or through sub-franchise and/or any other business model.”

4. The issued, subscribed, and paid-up share capital of the Petitioner Company as on September 30, 2023 is as under:

Authorized Share Capital	Amount in Rs.
40,00,000 equity shares of Rupees 10/- each	4,00,00,000
Total	4,00,00,000
Issued, Subscribed & Paid-Up Capital	
97,527 equity shares of Rupees 10/- each	9,75,270
Total	9,75,270

Subsequent to September 30, 2023, there has been no change in the issued, subscribed and fully paid-up share capital of the Petitioner Company.

5. The Learned Counsel for the Petitioner Company submits that **the rationale for reduction of share capital of the Petitioner Company** is as under:-

- a) *The Petitioner Company has been incurring losses. As at September 30, 2023, the accumulated losses of the Petitioner Company stood at Rs. 2,77,79,87,549/- (Rupees Two Hundred and Seventy Seven Crore Seventy Nine Lakh Eighty Seven Thousand Five Hundred and Forty Nine only). The accumulated losses are reflected as a debit balance under “Accumulated deficit” as part of the “Other Equity”.*
- b) *As against the accumulated losses, the balance sheet of the Petitioner Company also reflects an amount of Rs. 10,41,97,70,190/- (Rupees One Thousand and Forty One Crore Ninety Seven Lakh Seventy Thousand One Hundred and Ninety only) standing to the credit of securities premium account as part of the “Other Equity” as on September 30, 2023.*
- c) *The Petitioner Company believes that utilization of the securities premium account to set off the accumulated losses of the Petitioner Company would result in a fairer reflection of the “Other Equity” in the balance sheet. The right-sizing of the balance sheet is also likely to facilitate the efforts of the Petitioner Company while raising funds and distributing dividends to its shareholders from the profits earned by the Petitioner Company.*
- d) *Utilization of the securities premium account in the manner indicated above would be deemed to be a reduction of share capital of the Petitioner Company, which would therefore*

require compliance with section 66 read with section 52 of the Act.

6. Article 40 of the Articles of Association of the Petitioner Company authorizes the Petitioner Company to reduce its share capital from time to time by Special Resolution in any manner as authorized by law. The relevant extract of the said Article is reproduced as under:

“40 The Company may, by special resolution, reduce in any manner and with, and subject to, any incident authorized and consent required by law:

- (i) its share capital;*
- (ii) any capital redemption reserve account; or*
- (iii) any share premium account”*

7. The Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai, has filed a report dated June 3, 2024 *inter alia* making the following observations which are reproduced hereunder to which the Petitioner has filed its responses by way of an Affidavit in rejoinder dated June 5, 2024 and served the same upon the Regional Director on June 5, 2024.

Para No	Observations of the report of the Regional Director dated June 3, 2024	Response / Undertaking / Submission of the Petitioner Company
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6	<p>ROC, Mumbai in his Report No ROC/JTA/Sec.66/2022-23/1087 dated 08.05.2024, inter alia mentioned that there is no complaint / prosecution / investigation filed / pending against the company. Further the ROC, Mumbai has made observation in para no.23 of his report that,</p> <p>1) Interest of the creditors and minor shareholders / stakeholder should be protected.</p>	<p><u>Response to observations in sub-paragraph (1) of paragraph (6):</u></p> <p>The Petitioner Company submits that the adjustment / set off, of securities premium account would not have any impact on shareholding pattern or the capital structure of the Petitioner Company. The proposed reduction will be for the benefit of the Petitioner Company and its equity shareholders. The proposed reduction of share capital also does not envisage cash payout to any shareholder or any sacrifice on the part of any creditor. Accordingly, the reduction of share capital should not result in any adverse impact on the creditors.</p> <p>Accordingly, the Petitioner Company submits that the stipulation as contained in sub-paragraph (1) of paragraph (6) above stands fulfilled.</p> <p><u>Response to observations in paragraph sub-paragraph (2) of paragraph (6):</u></p>
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	<p>2) Hon'ble NCLT, Mumbai Bench may decide the matter on its merits.</p>	<p>It is humbly submitted that the above observation of ROC is factual and is not required to be traversed.</p>
<p>7(A)</p>	<p>Reduction of capital is allowed from Securities Premium u/s 52(1) of the Companies Act, 2013, if company fulfils the conditions u/s 66 of the Companies Act, 2013.</p>	<p><u>Response to observations in sub- paragraph (A) of paragraph (7):</u> The Petitioner Company submits that proposed utilization of securities premium account amounts to reduction of capital of the Petitioner Company by virtue of the provisions of Sections 52 and 66 of the Act. As Section 52 of the Act expressly provides that provisions of the said Act relating to the reduction of share capital of a Company shall, except as provided in Section 52 apply even for adjustment of securities premium account as if it were the paid-up share Capital of the Company. Utilization in the aforesaid circumstances as proposed would attract provisions of Sections 66 of the Act for which the Petitioner</p>

		<p>Company is required to seek approval of the shareholders by a special resolution in terms of Section 66 of the Act. The said special resolution was unanimously approved by the equity shareholders of the Petitioner Company in its Extraordinary General Meeting held on November 6, 2023. Further, the Petitioner Company has not accepted any deposits as defined in Section 2(31) of the Act read with the Companies (Acceptance of Deposits) Rules, 2014 from public and, therefore, question of the Company being in any arrears in repayment of the deposits or interest thereon does not arise.</p> <p>Hence, the reduction fulfills the conditionalities provided in Section 66 of the Act.</p>
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7(B)	<p>The tax implication if any arising out of the proposal for reduction is subject to final decision of Income Tax Authorities. The approval of the Company Petition by this Hon'ble Court may not deter the Income Tax Authority to scrutinize the tax return filed by the Company after giving effect to the proposed reduction. The decision of the Income Tax Authority is binding on the petitioner Company.</p>	<p><u>Response to observations in sub-paragraph (B) of paragraph (7):</u></p> <p>The Petitioner Company submits that the tax implications, if any, arising out of the proposal for reduction is subject to final decision of the Income Tax Authorities. The approval of the company petition by this Hon'ble Tribunal may not deter the Income Tax Authority to scrutinize the tax return filed by the Petitioner Company after giving effect to the proposed reduction.</p>
7(C)	<p>Applicant to submit an Affidavit to the effect that the interest of the creditors and all stakeholders and Government Revenue</p>	<p><u>Response to observations in sub-paragraph (C) of paragraph (7):</u></p> <p>The Petitioner Company has made the following averment in the Petition:</p>

	<p>are protected as well as statutory dues are paid off.</p>	<p><i>“27. It is clarified that the proposed reduction of share capital does not involve extinction, reduction or diminution of any liability in respect of unpaid share capital, if any. It is also clarified that the reduction of share capital does not involve cancellation of any paid-up share capital which is lost or is unrepresented by available assets. The proposed reduction of share capital would not in any way adversely affect the ability of the Petitioner Company to honor its commitments or prejudicially affect the rights of the creditors of the Petitioner Company.”</i></p> <p>The reduction of capital does not call for sacrifice on the part of any creditor and would not in any way adversely affect the ability of the Petitioner Company to honor its commitments or prejudicially affect the rights of the creditors of the Petitioner Company. Further, the reduction of capital will not have any adverse impact on the ability of the Petitioner Company to pay its statutory</p>
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		<p>dues regularly in accordance with the relevant regulations and will also not affect prejudicially interests of Governmental Revenue or any other stakeholders.</p> <p>Accordingly, the Petitioner Company submits that the stipulation as contained in sub-paragraph (C) of paragraph (7) above stands fulfilled.</p>
7(D)	<p>It is observed that, the company has corporate body shareholders namely Brookfield India Real Estate Trust (The Holding Entity) holding 100% shares, but the Company has not filed Form BEN-2 declaring name of the Beneficial Owner of the shareholding as its shareholders on 06.11.2023 in compliance of section 90 of the CA, 2013,</p>	<p><u>Response to observations in sub-paragraph (D) of paragraph (7):</u></p> <p>The Petitioner Company humbly submits that Brookfield India Real Estate Trust is a listed Real Estate Investment Trust ('REIT') regulated by and registered with Securities and Exchange Board of India ('SEBI') and holds 100% shares in the Petitioner Company.</p> <p>As per sub-rule (e) of Rule 8 of Companies (Significant Beneficial Owners) Amendment Rules, 2019 ('SBO Rules'), the provisions of Section 90 of the Act and SBO Rules shall not be</p>

	<p>thus the Petitioner Company shall undertake to comply with the requirements of Section 90 of the CA, 2013 and Companies (Significant Beneficial owners) Rules, 2018.</p>	<p>applicable where the share of the reporting company are held “by SEBI registered Investment Vehicles such as mutual funds, alternative investment funds, REIT’s, infrastructure Investment Trust regulated by the SEBI.”</p> <p>Accordingly, the Petitioner Company is not required to file Form BEN-2 in accordance with the provisions of Section 90 of the Act and SBO Rules.</p>												
7(E)	<p>The petitioner Company is engaged in the business of Real Estate Business; therefore, petitioner company may be directed to place on record prior approval of RERA.</p>	<p><u>Response to observations in sub-paragraph (E) of paragraph (7):</u></p> <p>The Petitioner Company is in the business of developing, operating and maintaining commercial real estate property in India. Therefore, it is not required to be registered with the Real Estate Regulatory Authority. Accordingly, no intimation or approval is required from the Real Estate Regulatory Authority.</p>												
7(F)	<p>The Petitioner Company be directed to place on record of the Tribunal, the</p>	<p><u>Response to observations in sub-paragraph (F) of paragraph (7):</u></p> <p>(a) Build-up of loss balances:</p> <p style="text-align: right;"><i>(Rupees in millions)</i></p> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Particular</th> <th>Closing balance</th> <th>FY 2021-</th> <th>FY 2022-</th> <th>For the period</th> <th>FY 2023-</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>	Particular	Closing balance	FY 2021-	FY 2022-	For the period	FY 2023-						
Particular	Closing balance	FY 2021-	FY 2022-	For the period	FY 2023-									

complete details of the accumulated losses till date giving years wise particulars. The petitioner company be directed to place on record the justification as to why the company should continue to spite of continues losses in the business and place on record the current financial position as subject application u/s 66 was filed in December 2023.		as on March 31, 2021	22	23	April 1, 2023 to September 30, 2023	24
	Profit / (Loss)	(2,105)	(515)	(95)	(63)	(321)
					Closing balance as on September 30, 2023 (2,778)	Closing balance as on March 31, 2024 (3,035)

A copy of the audited financial statements of the Petitioner Company as on March 31, 2024 is attached as Annexure I to the rejoinder affidavit.

The Petitioner Company submits that, its shareholders have unanimously resolved to set off the aggregate of (i) the accumulated losses i.e., the debit balance in the profit & loss account of Rs. 2,77,79,87,549/- (Rupees Two Hundred and Seventy Seven Crore Seventy Nine Lakh Eighty Seven Thousand Five Hundred and Forty Nine only) as per the management certified unaudited financial statements as on September 30, 2023 appearing in “Accumulated deficit” as part of the “Other Equity”; and (ii) any additional balance of the accumulated

		<p>losses (in excess of the balance appearing as on September 30, 2023) as on the date on which the order approving the petition for reduction of share capital of the Petitioner Company is confirmed by the NCLT by way of utilization of available balance in the securities premium account of upto Rs. 10,41,97,70,190/- (Rupees One Thousand and Forty One Crore Ninety Seven Lakh Seventy Thousand One Hundred and Ninety only).</p> <p>Upon approval of the petition by the Hon'ble NCLT, the Petitioner Company shall draw up financial statements as on the date of the order approving the petition for reduction of share capital, and the accumulated losses as per such financial statements shall be set off by way of utilization of available balance in the securities premium account of upto Rs. 10,41,97,70,190/- (Rupees One Thousand and Forty One Crore Ninety Seven Lakh Seventy Thousand One Hundred and Ninety only).</p>
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		<p>(b) Explanation for the losses and the present petition:</p> <p>The Petitioner Company owns and operates ‘Candor TechSpace’ in Sector 21, Gurugram and is in the process of developing a new project in New Town, Rajarhat, Kolkata. The present losses are largely attributable to depreciation and finance costs. With the completion of the new project, the Petitioner Company shall see a steady increase in revenues, and expects to become profitable in the current year. The Petitioner Company therefore believes that utilization of the securities premium balance to set off the accumulated losses would result in a fairer reflection of the “Other Equity” in the balance sheet. The right-sizing of the balance sheet is also likely to facilitate the efforts of the Petitioner Company while raising funds and distributing dividends to its shareholders from the profits earned by the Petitioner Company.</p>
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8. The observations made by the Regional Director on behalf of the Central Government have been explained by the Petitioner Company in Para 7 above. Further heard, Mr. Altap Shaikh, Authorised Representative of the Regional Director, MCA (WR) Mumbai, who was present at the time of final hearing.
9. Considering the entire facts and circumstances of the case and report filed by Regional Director, rejoinder affidavit filed by the Petitioner Company in response to Regional Director's observations and on perusal of the documents placed on record, the Company Petition is allowed.
10. The Petitioner Company undertakes to file the certified copy of the order and form of minutes duly certified by the Designated Registrar of this Tribunal with the Registrar of Companies within 30 days from the date of receipt of the certified Order from the Registry of this Tribunal.
11. The Petitioner Company is directed to publish the notices about registration of order and minutes by the concerned Registrar of Companies, Mumbai, Maharashtra in two newspapers namely "Business Standard" in English language and translation thereof in "Navshakti" in Marathi language both having circulation in the State of Maharashtra within 30 days of registration of the Order.
12. All concerned regulatory authorities to act on production of certified copy of this order duly signed by Designated Registrar of this Tribunal.

ORDER

"The balance in the securities premium account of Candor Kolkata One Hi-Tech Structures Private Limited is henceforth reduced by setting of (i) the accumulated losses i.e., the debit balance in the profit & loss account of Rs. 2,77,79,87,549/- (Rupees Two Hundred and Seventy Seven Crore Seventy Nine Lakh Eighty Seven Thousand Five Hundred and Forty Nine only) as per the management certified unaudited financial statement of the Company as on September 30, 2023 appearing in the debit balance under "Accumulated deficit" as part of the "Other Equity" and (ii) any additional balance of the accumulated losses (in excess of the balance appearing as on September 30, 2023) as on the date on which the order approving the petition for reduction of share capital of the Company is passed by the NCLT. "

13. Ordered Accordingly. CP /15 (MB)/ 2024 is allowed.

SD/-

Sanjiv Dutt
(Technical Member)
/Abhay/

SD/-

Reeta Kohli
(Judicial Member)