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NCLAT SETTLES THE LAW ON MERGER OF AN LLP WITH A COMPANY

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Background

The Chennai Bench of the National Company Law Tribunal (NCLT) had sanctioned a merger of Real Image LLP, a limited liability partnership incorporated under the provisions of the Limited Liability Partnership Act, 2008, together with all its assets and liabilities, rights, title and interest in the immovable properties, on a going concern basis to Qube Cinema Technologies Private Limited a company incorporated under the provisions of Companies Act, 2013 (2013 Act) pursuant to provisions of section 230-232 of the Act.

Aggrieved by the said order, the Ministry of Corporate Affairs, represented by the Regional Director, South Zone at Chennai and Registrar of Companies, Chennai jointly filed an appeal before the NCLAT challenging the order passed by the Chennai bench of NCLT. The appeal was upheld, and the merger was rejected by the NCLAT.

Question before the NCLAT for its consideration

Whether amalgamation of an LLP with a company incorporated under the provision of the Act or erstwhile companies act was permissible under the provisions of section 230 to 232 of the 2013 Act?

Applicable law

Sections 230-232 of the 2013 Act provides for compromises, arrangements and amalgamations between 'companies' and its creditors and/or members. Further, Section 234 of the 2013 Act provides for provisions in relation to the merger or amalgamation between a company and a 'foreign company' or *vice a versa*. The expression 'foreign company' is defined to mean *any company or body corporate incorporated outside India whether having a place of business in India or not*. On a plain reading of the said provisions, a body corporate will include an LLP registered outside India and accordingly, a merger of an LLP registered outside India with a company incorporated in India would be permissible under the provisions of section 234 of the 2013 Act. It may be noted that under the erstwhile regime (Companies Act 1956), Section 394(4)(b) provided an inclusive definition of 'transferor company'. The expression 'transferor company' was defined to include *any body corporate, whether a company within the meaning of the Companies Act 1956 or not*.

The LLP Act also have similar provisions as under the 2013 Act relating to compromise, arrangement or reconstruction of LLPs. The LLP Act also provides for conversion from firms to a private company and vice versa.

The 2013 Act further provides that the LLP will be treated as a Company if it applies for registration as a Company under section 366 and once the LLP is registered as Company under the said provisions, then the Company can be merged into an Indian Company.

Decision of the NCLAT

The Chennai Bench of NCLT had previously held that the legislative intent behind enacting both, the LLP Act and the 2013 Act was to facilitate ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both the LLP Act and the Act provided for merger or amalgamation of two or more LLPs or companies. The absence of specific enabling provision for merger of an LLP with a company was a clear case of *casus omissus* (omission in law). Further, since section 234 of the 2013 Act permitted merger of foreign LLP with a company, it would be wrong to presume that the 2013 Act prohibited merger of an Indian LLP with an Indian company. There did not seem to be any express statutory bar to prohibit such a merger.

Basis the objections raised in the appeal and arguments placed by the Regional Director, South Zone and the Registrar of Companies, Chennai, the NCLAT observed that even though there is no express enabling provision for merger of LLP into a company directly under the 2013 Act, the legislature has enacted enabling provisions under the 2013 Act for registering the LLP as a company under section 366. This facilitates merger of such LLP registered as a company with another company subsequently.

Relying on the judgement of the Hon'ble Supreme Court in case of *Union of India Vs Rajiv Kumar ((2003) 6 Supreme Court Cases 516) (2003)*, the NCLAT held that the principal of *casus omissus* cannot be applied except in the case of clear necessity and when reason for it is found in the four corners of the statute itself. Since there is no such occasion to apply the principal of *casus omissus* in the present case, there is no question of prejudice or infringement of any constitutional rights of Real Image LLP to merge with the company.

Comment

In the past the Mumbai Bench of the NCLT had permitted a scheme of amalgamation (filed under section 394 of Companies Act, 1956) for merger of Vertis Microsystems LLP with Forgeahead Solutions Private Limited

Further, a similar scheme for amalgamation of a registered Indian partnership firm, with an Indian company was placed before the Ahmedabad Bench of the NCLT for its approval. The Ahmedabad Bench of the NCLT held that since a registered partnership firm did not fall within the ambit of the term 'company' as per the 2013 Act, it should not be permitted to be merged with a company.

In the present case, the NCLAT has denied the merger of an LLP with a company. This decision would limit the ability for direct mergers / arrangements / reconstruction amongst the companies, limited liability partnership / partnership firms, etc in future in India. However, the LLP can always follow the process for registration as a company under the applicable provisions of the 2013 Act and then seek merger with an Indian company in the permitted manner.

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