

**NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH
AHMEDABAD**



CP(CAA) No. 79 of 2019 in CA(CAA) No. 38/NCLT/AHM/2019

**Coram: HON'BLE Ms. MANORAMA KUMARI, MEMBER JUDICIAL
HON'BLE Mr. CHOCKALINGAM THIRUNAVUKKARASU, MEMBER TECHNICAL**

**ATTENDANCE-CUM-ORDER SHEET OF THE HEARING OF AHMEDABAD BENCH
OF THE NATIONAL COMPANY LAW TRIBUNAL ON 19.12.2019**

Name of the Company: Sun Pharmaceutical Industries Ltd

Section of the Companies Act : Section 230-232 of the Companies Act, 2013

S.NO.	NAME (CAPITAL LETTERS)	DESIGNATION	REPRESENTATION	SIGNATURE
1.	SWATI SOPARKAR	Advocate	Petitioner	
2.	S AURABH SOPARKAR SI. Advocate	SI. Advocate	" "	

ORDER

The Petitioner is represented through learned counsel.

The Order is pronounced in the open court vide separate sheet.


CHOCKALINGAM THIRUNAVUKKARASU
MEMBER TECHNICAL

Dated this the 19th day of December, 2019


MANORAMA KUMARI
MEMBER JUDICIAL

**NATIONAL COMPANY LAW TRIBUNAL
AHMEDABAD BENCH**

**CP(CAA) No. 79/NCLT/AHM/2019
in
CA(CAA) No. 38/NCLT/AHM/2019**

In the matter of:

**Sun Pharmaceutical Industries
Limited**

(CIN: L24230GJ1993PLC019050)

A company registered under the
Provisions of Companies Act, 1956 and
having its registered office at
SPARC,
Tandalja,
Vadodara – 390 012
Gujarat

....Petitioner De-merged
Company

Order delivered on 19th December, 2019

**Coram: Hon'ble Ms. Manorama Kumari, Member (J)
Hon'ble Mr. Chockalingam Thirunavukkarasu, Member (T)**

Appearance: Advocate Ms. Swati Soparkar is present for the Petitioner
Company

ORDER

[Per: Ms. Manorama Kumari, Member (Judicial)]

1. The instant petition is filed by the Petitioner De-merged Company under Section 230 and 232 read with Section 234 of the Companies Act, 2013 seeking sanction of this Tribunal to a Scheme of Arrangement in the nature of De-merger and transfer of two Specified Investment Undertakings of Sun Pharmaceutical Industries Limited, the Petitioner De-merged Company to two overseas Resulting Companies, viz. Sun Pharma (Netherlands) B.V., and Sun Pharmaceutical Holdings USA Inc. It is stated that both the Resulting Companies are directly or indirectly wholly owned subsidiaries of Sun Pharmaceutical Industries Limited, the Petitioner De-merged Company and are incorporated respectively under the provisions of laws of Netherlands and United States of

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America. Thus, the Scheme involves Out Bound Cross Border Arrangement.

2. The Petitioner De-merged Company is a listed public limited company, having its shares listed at BSE Limited and National Stock Exchange of India Limited. The Petitioner De-merged Company sought prior approval from SEBI through concerned stock exchanges and both the exchanges vide their observation letters dated 18th January 2019 conveyed that they had no adverse observations for the proposed Scheme of Arrangement. The copies of the aforesaid observation letters are placed on record along with the application being CA(CAA) No. 38 of 2019.
3. The Scheme of Arrangement envisages cross border arrangement. The Petitioner De-merged Company was required to comply with the provisions of Section 234 of the Companies Act, 2013, and Reserve Bank of India guidelines issued vide Notification No. FEMA.309/2018 – RB dated 20th March 2018 known as the Foreign Exchange Management (Cross Border Arrangement) Regulations, 2018. It is stated that Petitioner De-merged Company complied with the aforesaid guidelines and placed on record the Compliance Certificate dated 15th February 2019 from the Whole Time Director and Company Secretary of the Petitioner De-merged Company. It is submitted by the Petitioner De-merged Company that as per Rule 9 of the RBI Notification, the aforesaid compliance amounts to Deemed Approval from the RBI.
4. It is stated by the Petitioner De-merged Company that Petitioner De-merged Company is a leading pharmaceutical company in India, engaged in the business of development, manufacture, marketing, sale, trading, and export of various drug formulations and the manufacture of drugs and pharmaceutical products. On the other hand, both the Resulting Companies which are respectively directly and indirectly wholly owned subsidiary of the Petitioner De-merged Company, are engaged in holding strategic investments in overseas operating companies, and are also authorised to undertake financial activities including advancing loans and advances to the group companies, investing in debentures, arranging finances for subsidiaries' operations, etc. The Scheme of Arrangement is proposed with an objective to

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consolidate the holding structure of the overseas directly and/or indirectly wholly-owned subsidiaries of the Petitioner De-merged Company. It is envisaged that this will result in strengthening of the investment portfolio, synergistic benefits, faster decision making, strengthening the focus, enhancing the ability to deal with regulatory challenges, risks and policies and consolidating the financial, management and operational resources at overseas jurisdictions.

5. Vide order dated 11th April 2019, passed in company application being CA CAA No. 38 of 2019, the Petitioner De-merged Company was directed to convene separate meetings of the Equity Shareholders and Unsecured Creditors of the Petitioner De-merged Company. The meeting of the Secured Creditors of the Petitioner De-merged Company was dispensed with in view of consent affidavit from the sole Secured Creditor.
6. Pursuant to the directions of this Tribunal, notices of the meetings were sent individually to all the Equity Shareholders and Unsecured Creditors of the Petitioner De-merged Company, together with a copy of the Scheme of Arrangement and the Explanatory Statement as well as all other required disclosures. The notice convening the meetings were also published in English daily as well as Gujarati daily 'Financial Express' Ahmedabad edition on 3rd May 2019. The affidavit dated 10th May 2019 was filed by the Chairman of the meetings before this Tribunal confirming the compliance of the directions of this Tribunal contained in its order dated 11th April, 2019. The aforesaid meetings were duly convened and held on 4th June 2019 and the Chairman of the meetings reported the result of the said meetings to this Tribunal vide affidavit dated 27th June 2019.
- 7.(i) Perusal of the affidavit submitted by the Chairman of the meeting confirms that the Equity Shareholders of the Petitioner De-merged Company approved the proposed Scheme by aggregate majority of 99.97% in value. This included the voting rights exercised by the Shareholders, either through remote e voting or by casting valid votes at the meeting.

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- 7.(ii) At the meeting of the Unsecured Creditors of the Petitioner De-merged Company, the proposed Scheme was unanimously approved by the Unsecured Creditors of the Petitioner De-merged Company, present and casting valid votes at the said meeting.
8. Vide order dated 11th April 2019 of this Tribunal, the Petitioner De-merged Company was also directed to serve Notice of the Scheme to the statutory authorities viz. (i) Central Govt. through the Regional Director, North-Western Region, (ii) Registrar of Companies, Gujarat, (iii) concerned Income Tax Authorities; (iv) the Securities and Exchange Board of India, (v) the BSE Limited; (vi) National Stock Exchange of India Limited as well as (vii) The Reserve Bank of India; along with Notice, Explanatory Statement and other required documents and disclosures. The notices were duly served upon all the aforesaid statutory authorities on or before 2nd May 2019. The affidavit dated 9th May 2019 confirming the compliance of the directions for service of Notice upon all the aforesaid statutory authorities along with the acknowledgments for the same was filed with this Tribunal on 13th May 2019. It is stated by the Petitioner De-merged Company that in response to the said notice, the representation dated 11th June 2019 was received from the Regional Director, North Western Region. Reserve Bank of India also sent a letter dated 8th July 2019 but did not express any opinion on the proposed Scheme of Arrangement. No other representation was received from any other statutory authority.
9. The instant petition was filed by the Petitioner De-merged Company on 8th July 2019 and the same was admitted by this Tribunal on 15th July 2019. The date of hearing was fixed as 22nd August 2019. Directions were issued by this Tribunal vide order dated 15th July, 2019 to publish Notice of Hearing of the Petition in the newspaper Financial Express, Ahmedabad Edition for both English and Gujarati daily, at least 10 days before the date of hearing of the petition. Further directions were also issued by this Tribunal to the Petitioner De-merged Company to serve notice of hearing of the petition upon the statutory authorities viz. (i) Central Govt. through Regional Director- North Western Region, and (ii) Registrar of Companies; (iii) Income Tax authorities.

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10. Pursuant to the aforesaid directions of this Tribunal contained in its order dated 15th July, 2019, notices were duly served by the Petitioner De-merged Company on the aforesaid statutory authorities on or before 29th July 2019 and publications were duly made in the newspapers on 25th July 2019. An affidavit of publication and service of notice of hearing dated 16th August 2019 confirming the same was filed before this Tribunal by the Petitioner De-merged Company.
11. Heard Mrs. Swati Soparkar, Ld. Advocate appearing for the Petitioner De-merged Company. It is stated by the Petitioner De-merged Company that representation in the form of an affidavit dated 11th June 2019 is received from the Regional Director, North Western Region with observations. The Petitioner De-merged Company filed its response to the representation of the Regional Director vide Additional Affidavit dated 16th August 2019. The following submissions are made by the Petitioner De-merged Company vide the said Affidavit:
- (i) The observations made vide para 2 a, b and c are factual statements pertaining to Service of Notice for the proposed Scheme, nature of the proposed Scheme and jurisdiction of the Regional Director and the rationale of the proposed Scheme and therefore, do not require any explanation.
 - (ii) Vide para 2 (d) it is observed by the Regional Director that Section 234 refers only to cross border mergers and amalgamations and that the same does not refer to De-mergers. In this regard it is submitted on behalf of the Petitioner De-merged Company that provisions of Section 234 are applicable to the Scheme of Arrangement, either in the nature of merger or De-merger and the Petitioner De-merged Company has therefore complied with the applicable rules framed by the Reserve Bank of India vide notification No. FEMA 389/2018-RB dated 20th March 2018 for the outbound cross border merger. Reliance is placed on the decision of this Tribunal in the Company Petition CP(CAA) No. 90 of 2018.
 - (iii) Para 2 (e) of the observations of the Regional Director pertains to applicability of legal provisions of Netherlands and USA to the respective Resulting Companies. The Petitioner De-merged Company

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submits that upon Scheme being sanctioned by this Tribunal and being made effective, both the Resulting Companies shall comply with the applicable provisions of the respective laws of Netherlands and USA.

- (iv) Vide para 2 (f) of the representation, it is observed by the Regional Director that Sun Pharmaceutical Industries Limited, the Petitioner De-merged Company, being a listed company shall be required to comply with SEBI circulars. In this regard, it is submitted by the Petitioner De-merged Company that the Petitioner De-merged Company has already complied with the provisions applicable to the listed companies and has already obtained required prior approval from the concerned stock exchanges vide observation letters dated 18th January 2019 and has further complied with the directions contained in the said observation letters. It is further submitted by the Petitioner De-merged Company that Petitioner De-merged Company undertakes to comply with further compliances upon Scheme being effective.
- (v) Vide para 2 (g), the Regional Director has observed that the Petitioner De-merged Company be directed to undertake the compliance of Section 2 (19 AA) of the Income Tax Act, so far as De-merger is concerned. It is submitted by the Petitioner De-merged Company that the proposed Composite Scheme does not fall within the purview of Section 2(19AA) and hence no benefit under Sec. 2 (19AA) of the Income Tax Act accrues to the Petitioner De-merged Company and therefore, no directions are required to be issued to the Petitioner De-merged Company for such compliance.
- (vi) Vide para 2 (h) of the representation, it is observed by the Regional Director that part of the share capital of the Petitioner De-merged Company is held by the Non Resident Indians/Foreign National/Foreign Body Corporate. The Regional Director has sought confirmation about the compliance of provisions of FEMA and RBI guidelines. In this regard, it is confirmed by the Petitioner De-merged Company that the Petitioner De-merged Company has so far made the compliance of all the applicable provisions of FEMA and RBI guidelines and further undertakes to comply with applicable

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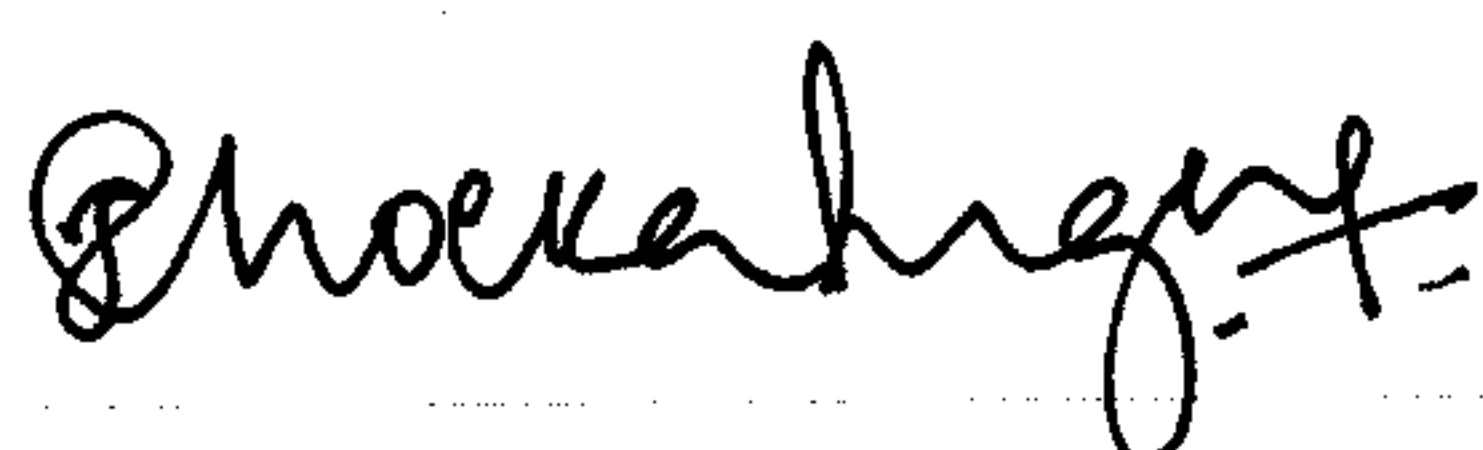
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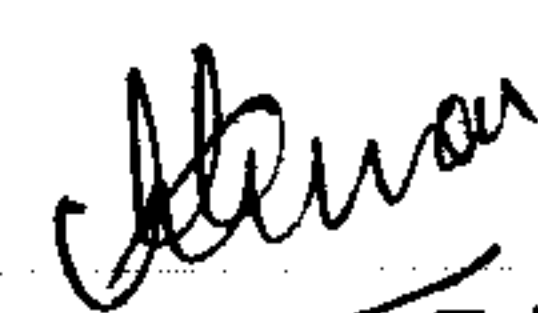
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provisions in future also. The notice under Section 230 (5) of the Companies Act, 2013 has been served upon the RBI and the RBI has filed its representation vide letter dated 8th July 2019, wherein no observation is made by the RBI with regard to any non compliance of the applicable provisions.

(vii) Vide para 2 (i) of the representation, the Regional Director has referred to the remarks of the auditors of the Petitioner De-merged Company for the financial year 2016-17 pertaining to the remunerations paid to its Managing Director and the Whole Time Director in excess of the limits prescribed/approved by the Government for previous financial years. In this regard, it is clarified by the Petitioner De-merged Company that on the representations made by the Petitioner De-merged Company, the Central Govt. had conveyed its approval for part of the remuneration paid in excess. The amounts paid in excess of such approvals were duly refunded by the Managing Director and the Whole Time Director to the Petitioner De-merged Company. Copy of the approval issued by Ministry of Corporate Affairs and certificate issued by the Chartered Accountant to this effect are placed on record along with the Additional Affidavit. It is submitted by the Petitioner De-merged Company that the issue thus stands resolved and no such remarks were made by the Auditors of the Petitioner De-merged Company for the subsequent financial years.

(viii) Vide Para 2 (j), the Regional Director refers to the discrepancy between the number of Secured Creditors of the Petitioner De-merged Company as per the MCA Portal and the contention of the Petitioner De-merged Company. In this regard, it is clarified by the Petitioner De-merged Company that record on MCA Portal is not updated. As per the current records of the Petitioner De-merged Company, the Petitioner De-merged Company has no outstanding Secured Loans from any Creditors and the only Secured Creditor is the government department having lent funds for a Research contract with the Petitioner De-merged Company. The said Secured Creditor has given its consent on affidavit which is already placed on record. Copy of the C.A. certificate confirming that there is only one





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Secured Creditor of the Petitioner De-merged Company is placed on record.

- (ix) Vide Para 2 (k), the Regional Director refers to the inquiry initiated by Registrar of Companies, as per the instructions received from the Ministry with regard to the complaint received through SEBI. It is stated by the Petitioner De-merged Company that these allegations are baseless. The Petitioner De-merged Company has undertaken to provide all the required information sought for in this regard to the satisfaction of the Ministry. The Petitioner De-merged Company has further undertaken to comply with the applicable RBI guidelines with regard to its investments in foreign companies. It is further submitted by the Petitioner De-merged Company that the said proceedings are independent of the proposed Scheme of Arrangement and the sanction of the Scheme shall have no implication to such enquiry proceedings. The present Scheme does not seek to absolve the Petitioner De-merged Company or its directors from any such proceedings.
12. It is submitted that Reserve Bank of India has not made any representation but vide the letter dated 8th July 2019 addressed to NCLT has indicated that the said authority is not inclined to vet the proposed Scheme of Arrangement on individual basis. The said authority has commented that the Petitioner De-merged Company is required to abide by the applicable rules and regulations. Perusing the communication and considering the compliance certificates presented by the Petitioner De-merged Company and considering the fact that RBI has not raised any specific objection with regard to the issue of prior approval or to the proposed Scheme, we are of the view that there is implied Deemed Approval to the Scheme from RBI. In the facts and circumstances, the Petitioner De-merged Company is hereby directed to comply with the applicable rules and regulations under FEMA and other RBI guidelines.
13. It is stated that no representation is filed by the concerned Income Tax Authorities till date for the Petitioner De-merged Company. On the basis of the records of the Petitioner De-merged Company as on 31st March 2019, there is no undisputed outstanding demand for income

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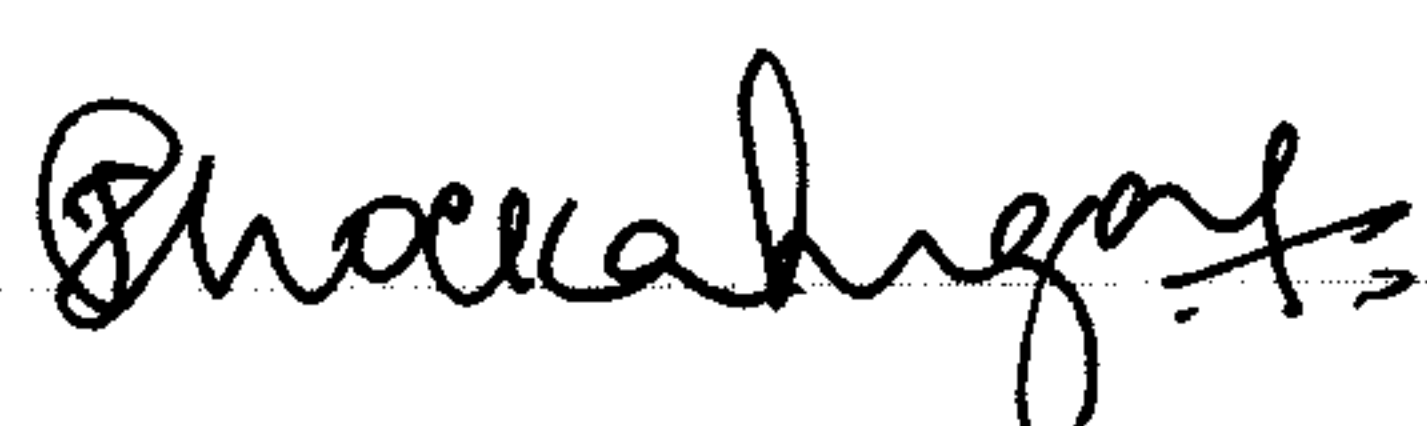
tax. The details of the disputed income tax demands and the status before the respective authorities is placed on record. It is further confirmed that as and when the said demands are crystallized, the Petitioner De-merged Company will be liable to make payment towards such demands from the respective income tax authorities. The Petitioner De-merged Company undertakes to abide by all the applicable provisions of the Income Tax Act.

14. In compliance with the proviso to sub-section (7) of Section 230, the Petitioner De-merged Company has annexed with the petition the certificate of Chartered Accountant dated 20th December 2017, confirming that the accounting treatment envisaged under the said scheme of Arrangement is in compliance with the applicable Accounting Standards notified by Central Govt. in section 133 of the Companies Act, 2013 as **Annexure-'G'**.

15. While going through the provisions as enshrined in the Companies Act, 2013 - Sections 230, 232 and 234 of the Companies Act, 2013 it is evident that provisions of **Section 230** as well as **Section 232** which relate only to the Indian companies, contain the words "**compromise**" and/or "**arrangement**" which is inclusive of the term "**demerger**" "being the crux of the present company petition.

Moreover, it is also evident that the provisions of **Section 234** which relate to the cross border mergers of Indian companies with foreign companies and vice versa, mention only about the words "**merger**" and/or "**amalgamation**" and **do not seem to contain the words "compromise" and/or "arrangement" and/or "demerger"** and hence it may be construed that the provisions of **Section 234 of the Companies Act, 2013 do not permit the "compromise" and/or "arrangement" and/or "demerger" of the Indian companies with foreign company and vice versa.** In other words, it can be said that the provisions of **Section 234 of the Companies Act, do not provide for or rather restrict the demerger of the Indian companies with foreign company.**

In addition to the above, it is pertinent to mention that **Rule 25A of the Companies (Compromises, Arrangements and Amalgamations)**





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Rules, 2016 in which the detailed procedure and requirements are enumerated with respect to the cross border mergers, **is silent on “demergers” and mentions only “mergers” and “amalgamations”.**

Further, as per Clause (a) of the Sub Rule (2) of the aforementioned Rule 25A, it is mentioned that the transferee company shall ensure that valuation is conducted by valuers who are members of a recognized professional body in the jurisdiction of the transferee company i.e. the foreign company and further that the said valuation is in accordance with the internationally accepted principles on accounting and valuation. However, on perusal of the record, no such valuation report is attached as required in terms of the aforementioned provisions.

Moreover, it is of utmost importance to mention that the Foreign Exchange Management (Cross Border Merger) Regulations, 2018 are applicable to the mergers and amalgamations of the Indian Companies with the foreign companies only. Further, it is pertinent to note that the **draft regulations, which were prepared in the month of April, 2017** had the definition of “Cross border merger” which is as follows:
“Cross border merger” means any merger, demerger, amalgamation or arrangement between Indian company(ies) and foreign company(ies) in accordance with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 notified under the Companies Act, 2013.

However, when the said regulations were notified by the Reserve Bank of India vide **Notification No. FEMA. 389/2018-RB dated 20.03.2018**, the definition of “Cross border merger” included therein is as follows:

“Cross border merger” means any merger, amalgamation or arrangement between an Indian company and foreign company in accordance with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016 notified under the Companies Act, 2013.

On perusal of both the definitions as mentioned above, it is very much evident that the **definition of “Cross border merger” which**

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consisted of “demerger” as per the draft regulations was specifically deleted/excluded from the notified regulations. Thus, it is crystal clear that the word “demerger” was intentionally removed from the draft regulations and it was not to be allowed in the cases of cross border mergers of the companies with foreign companies. Had the “demerger” with respect to the foreign companies been intended to be allowed, the word “demerger” would not have been specifically deleted in the notified regulations.

In this regard, it is to be mentioned that, a statute is to be expounded according to its obvious meaning. It is a cardinal rule of interpretation of statute that statutory expressions should be interpreted in their primary and ordinary sense. Once the meaning is clear and plain, it is not the province of a Court to san its wisdom or its policy and substitute its opinion.

The function of the Court is to administer the law and not to legislate it. If any provision of law is clear beyond all ambiguity, it is to be implemented regardless of the fact that it causes hardship to a particular party.

It is a well-recognized cannon of interpretation of statutes that nothing is to be added to or subtracted from a statute.

Therefore, it may be noted that although the doors have now been opened for Indian companies for outbound mergers, the law is still silent on cross border demergers. While it was possible for a foreign company to transfer its undertaking/business to an Indian company under the 1956 Act, as Section 394 applied to demergers as well as mergers, Section 234 of the Act only refers to “mergers and amalgamations” without any express mention of demergers.

16. Considering the entire facts and circumstances of the case and on perusal of the Scheme and the documents placed on record, it is crystal clear that Section 234 of the Companies Act, 2013 does not permit “Cross border demergers” as represented by the Regional Director, North Western Region in Para 2(d) of his representation dated 11th

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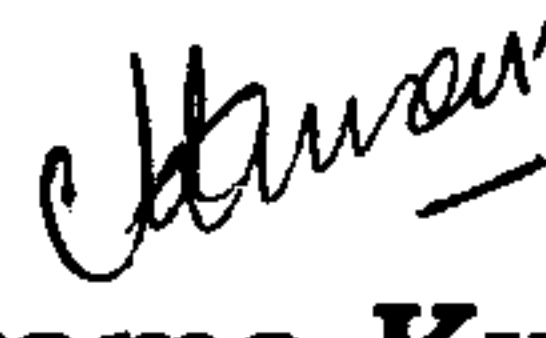
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June, 2019. As a result, the petition being CP(CAA) No. 79 of 2019 is hereby disallowed.

17. The legal fees/expenses of the office of the Regional Director are quantified at Rs. 25,000/- in respect of Petitioner De-merged Company. The said fees to the Regional Director shall be paid by the Petitioner De-merged Company.

18. CP (CAA) No. 79 of 2019 is disposed off accordingly.


Chockalingam Thirunavukkarasu
Member (Technical)


Ms. Manorama Kumari
Member (Judicial)

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