

NCLT allows amalgamation of LLP into Company - holds there is no express bar in law

July 31, 2018

In brief

In a recent ruling¹, the Chennai bench of the National Company Law Tribunal (Tribunal), has allowed amalgamation of an LLP into a company holding that there does not appear any express legal bar to allow the merger of an Indian LLP with an Indian Company and the legislative intent behind enacting the Limited Liability Partnership Act, 2008 (LLP Act, 2008) and the Companies Act, 2013 was to facilitate the ease of doing business and to create a desirable business atmosphere for companies and LLPs.

In detail

Background

- The petition for consideration before the Tribunal pertained to a proposed Scheme of Amalgamation between Transferor LLP and Transferee Company on a going concern basis pursuant to section 230 to 232 of the Companies Act, 2013.
- The Scheme provided that the whole of the undertaking of the Transferor LLP, comprising of its business, all assets and liabilities of whatsoever nature and wherever situated, including all rights, title and interest in the immovable properties shall be transferred to the Transferee Company as a going concern.
- The Regional Director,

Southern Region (RD) and the Official Liquidator (OL) have submitted that the Scheme of amalgamation was not prejudicial to the interests of the members, employees and creditors of both the Transferor LLP and the Transferee Company.

Issue before the Tribunal

Whether a LLP can be allowed to amalgamate with a private limited company under a Scheme of Amalgamation filed before the Tribunal pursuant to section 230 to 232 of the Companies Act, 2013?

Submissions by the Transferor LLP and the Transferee Company

- The wording used in sections 60 to 62 of the LLP Act, 2008, as well as sections 20 to 234 of the Companies Act, 2013, dealing with mergers,

amalgamation and arrangements, is almost identical, and empowers the Tribunal to sanction the scheme proposed by an LLP or Company.

- Under section 394(4)(b) of the Companies Act, 1956, there was no bar for a transferor, in a Scheme of Amalgamation, to be a body corporate, including an LLP. The underlying rationale being to ensure that the resultant company in a Scheme of Amalgamation is only a company and such prohibition was not imposed on the transferor. However, section 232 of the Companies Act, 2013 does not contain the clause as stipulated under section 394(4)(b) of the Companies Act, 1956.
- Further, section 234 of the

¹ CP/ 123/ CAA/ 2018 (TCA/ 157/ CAA/ 2017)]

Companies Act 2013 permits the merger of a foreign company into a company registered under the Companies Act, 2013, or vice versa. The definition of “foreign company” under the ambit of the said section includes a body corporate incorporated outside India, including a foreign LLP.

Tribunal’s ruling

- The Tribunal held that the legislative intent behind enacting both the LLP Act, 2008, and the Companies Act, 2013, was to facilitate the ease of doing business and create a desirable business atmosphere for companies and LLPs. For this purpose, both the Acts have provided for the amalgamation of two or more LLPs and Companies, respectively.
- The absence of a specific provision in the Companies

Act, 2013, similar to section 394(4)(b) of the Companies Act, 1956, is a clear case of *casus omissis* (omission from the law).

- There does not appear any express legal bar to allow the merger of an Indian LLP with an Indian Company. As the intention of the Authorities was to permit merger of a foreign LLP with an Indian Company, it would be wrong to presume that the Companies Act, 2013 prohibits the merger of an Indian LLP with an Indian Company.
- The Tribunal found the proposed Scheme of Amalgamation to be fair and reasonable and not contrary to public policy or violative of any provisions of law.
- Therefore, the Tribunal sanctioned the Scheme for amalgamation of the Transferor LLP with the

Transferee Company.

- Further, the Tribunal also ruled that the Transferor LLP should be dissolved without winding up from the date of filing of the certified copy of the Tribunal Order with the Registrar of Companies.

The takeaways

The decision of the Tribunal, allowing the merger of an Indian LLP into an Indian Company is a welcome move. However, the tax neutrality of such mergers shall continue to be a key question, as there are no specific provisions of the Income Tax Act, 1961 providing for exemptions to the parties to the Scheme as provided in case of mergers between companies.

Let’s talk

For a deeper discussion of how this issue might affect your business, please contact your local PwC advisor

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