



### **NCLT: Sanctions Future Retail Ltd.'s Composite Scheme of Arrangement, notes Regional Director's observation on Taxation & Accounting Standard compliance, relies on undertaking & Auditor's Certificate**

#### **Case Details:**

1. Case Name: In the matter of Heritage Foods Ltd., Heritage Foods Retail Ltd., Future Retail Ltd. and their respective shareholders.
2. Order passed by Shri B.S.V Prakash Kumar, Judicial Member, NCLT Mumbai
3. Order dated May 11, 2017.

#### **Facts of the case, NCLT's final decision and its basis:**

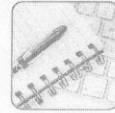
1. The sanction of NCLT was sought under Section 230 read with 232 and Section 52 and 66 of Companies Act, 2013 to the Composite Scheme of Arrangement among Heritage Foods Ltd. ('Transferor Company'), Heritage Foods Retail Ltd. ('Transferee Company' or 'Demerged Company'), Future Retail Ltd. ('Resulting Company' or 'Petitioner Company') and their respective shareholders and creditors;
2. Petitioner Company submitted that it operates multiple retail formats in the Indian consumer market under different brand names, which includes Big Bazaar, FBB, Food Bazaar, Foodhall, Home Town and eZone;
3. The Composite Scheme of Arrangement involving Transferor Company, Transferee Company and Petitioner Company would have the following benefits: (i) Facilitate each business to be effectively integrated for achieving growth for each for the verticals independently, (ii) Enhance management focus and operational flexibility, (iii) Facilitate Investment by strategic player, (iv) Create a platform to enhance financial flexibility to pursue growth, (v) Consolidation of the retail operations of the Petitioner Company and the Transferee Company, (vi) Unlocking of value, (vii) Synergies expected to bring in cost savings;
4. Petitioner Company submitted that it has approved the said Scheme by passing the Board Resolution which is annexed to the Company Scheme Petition. Petitioner Company stated that it has complied with all requirements as per the directions of the NCLT and has also filed the necessary affidavits of compliance. It has also undertaken to comply with all statutory requirements, if any, as required under Companies Act, 2013.

5. The Regional Director ('RD'), in his report, has stated that the Scheme is not prejudicial to the interest of the shareholders and public. However, the RD stated, in his report, that the tax implication, if any, arising out of the scheme is subject to the final decision of Income Tax Authorities. He has also stated that the approval of Scheme by NCLT may not deter the Income Tax Authority to scrutinize the tax returns filed by the Transferee Company after giving effect to the Scheme.
6. W.r.t. the Regional Director's observations, Petitioner Company stated that it will comply with all the applicable provisions of the Income Tax Act, 1961 and all the tax issues arising out of the Schemes will be met and answered in accordance with the law. It also stated that Transferor Company and Transferee Company have obtained certificate from their respective statutory auditors confirming that the Accounting treatment contained in the Scheme is in compliance with all the applicable Accounting Standards.
7. Petitioner Company also submitted that utilization of the Securities Premium Account and paid-up equity share capital of the Transferee Company shall be reduced by a prescribed amount and NCLT has requisite powers for reduction of share capital. It further submitted that Transferor Company has obtained certificate from its Statutory Auditors confirming the accounting treatment in compliance with all applicable Accounting Standards;
8. Petitioner Company also confirmed that it shall comply with all the conditions given by NSE and BSE in its NOC;
9. NCLT stated that "From the material on record, the Scheme appears to be fair and reasonable and is not in violation of any provisions of law and not in contrary to public policy. None of the parties concerned have come forward to oppose the Scheme"

### **SEBI: Directs Company & its directors to refund money raised from 'Public Issue' of shares without compliance of Cos. Act & ICDR Regulations, relies on Apex Court's Sahara ruling**

#### **Case Details:**

1. Case Name: In Respect of ESBI Infrastructure Company Ltd. and its directors
2. Order passed by S Raman, Whole-time Member, SEBI
3. Order dated May 12, 2017



**Facts of the case:**

1. SEBI received a complaint against ESBI Infrastructure Company Ltd. ('ESBI' / 'Company'). It was alleged that the Company had collected huge amounts of money from the public by way of debentures, preference shares etc.;
2. SEBI obtained necessary information regarding the company and its directors/promoters. It issued letters to company and directors/promoters for furnishing prescribed information/documents in connection with the issue of shares/debentures. Some of the directors replied to the SEBI's communication;
3. SEBI relied on ESBI's Balance Sheet and P&L A/c and noted the change in the share capital of the company. SEBI observed that ESBI had issued 22,930 preference shares to 42 investors on March 31, 2012 and had issued 18,67,300 equity shares to 70 investors during the period 2011-2012 (on 3 separate dates);
4. With respect to the offer of equity Shares by ESBI Infrastructure to 70 investors, the issue for determination was whether the mobilization of funds by ESBI, is in accordance with the provisions of SEBI Act, Companies Act, 1956 / 2013 and SEBI (Issue of Capital & Disclosure Requirements) Regulations, 2009 ('ICDR Regulations');

**Final Decision and its basis:**

1. SEBI relied on Supreme Court's ruling in Sahara India Real Estate Corporation Limited Vs SEBI and noted that it has jurisdiction over various provisions of the Companies Act, 1956, in the case of public companies, whether listed or unlisted, when they issue and transfer securities;
2. SEBI referred the provisions of Section 67 of Companies Act, 1956 (relating to 'Construction of reference to offering shares or debentures to the public, etc.') and relied on Supreme Court's ruling (in Sahara India Real Estate Corporation Limited Vs SEBI), wherein it was held that "In India that any share or debenture issue beyond 49 persons, would be a public issue attracting all the relevant provisions of the SEBI Act, regulations framed thereunder, the Companies Act, pertaining to the public issue."
3. While applying the various provisions of the Companies Act, 1956, SEBI observed that offer of equity Shares by ESBI during FY 2011-2012, will prima facie qualify as a public issue under the first

proviso to Section 67(3) of the Companies Act, 1956. SEBI also stated that "In this regard, it is pertinent to note that by virtue of Section 55A of the Companies Act, 1956, Section 67 of that Act, so far as it relates to issue and transfer of securities, shall also be administered by SEBI."

4. SEBI stated that ICDR Regulations operate as reasonable safeguards for investors who subscribed or intend to subscribe in the public issues of securities. SEBI observed that ESBI Infrastructure has not complied with the relevant Regulations of ICDR Regulations in respect of the public issue. SEBI also observed that the directors who were in charge and responsible for the day to day affairs and business of the company during the period of issue of shares by the company are also liable for the non-compliance of ICDR Regulations;
  5. SEBI stated that it has a statutory duty to protect the interests of investors in securities market and promote the development of, and to regulate, the securities market. SEBI referred to the provisions of SEBI Act and stated "Violations committed by ESBI Infrastructure and its directors/promoters by raising money from the public through the issue of equity shares without complying with the relevant provisions of the Companies Act, 1956 and SEBI Act/Regulations, it becomes necessary for SEBI, as the regulator for the securities market, to intervene and issue suitable directions including restraining the Company and its directors/promoters from carrying on activities in contravention of the law." SEBI concluded that "There is no other alternative but to take recourse through an interim action against ESBI Infrastructure and its Directors/Promoters, for preventing the company from further carrying on with its fund mobilizing activity under the Offer of equity Shares"
  6. SEBI also directed ESBI Infrastructure, its promoters and directors to jointly and severally refund the money collected from investors through the issue of equity shares, along with interest of 15% p.a. within prescribed time, supported by a Certificate of two independent Chartered Accountants to the satisfaction of SEBI;
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