

IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT  
CHANDIGARH

C.P. NO. 5 of 2014  
Connected with CP No.171 of 2013  
Date of Decision: 30.06.2014

IN THE MATTER OF :

Scheme of Amalgamation Between Telcordia Technologies India Private Limited and Ericsson India Private Limited and their respective Shareholders

AND

IN THE MATTER OF :

Telcordia Technologies India Private Limited

... Petitioner/Transferor Company

WITH

Ericsson India Private Limited

... Transferee Company

**CORAM:- HON'BLE MR. JUSTICE RAJIV NARAIN RAINA**

Present: Mr. Deepak Suri, Advocate,  
for the petitioner.

Mr. Sachin Jain, Advocate,  
for Official Liquidator.

1. To be referred to the Reporters or not?
2. Whether the judgment should be reported in the Digest?

**RAJIV NARAIN RAINA, J.**

Rejoinder filed by Mr. Sachin Jain, Advocate is taken on record.

This is a Second Motion Petition. The First Motion Petition, C.P No.171 of 2013 was allowed on December 18, 2013 by this Court accepting the prayer for dispensation of convening of meetings of Equity Shareholders of petitioner/Transferor Company i.e. Ericsson India Private Limited and

Ericsson India Global Services Private Limited since the Transferor Company did not have any secured or unsecured creditors. Notice of the present petition was issued to the Regional Director and Official Liquidator and was also directed to be published in the Financial Express (English), Jansatta (Hindi) both Delhi Editions and in the Official Gazette of State of Haryana. Affidavit of publication has been filed. The Regional Director has filed his objections and has stated that "at the time of Appointed Date there are different shareholders and approval/consent given by shareholders who are shareholders at present".

Mr. Suri explains that this objection is not sufficient to non-suit the Second Motion Petition. It is only an observation made by the Regional Director calling upon the Transferee Company to give undertakings for meeting all compliances from the Reserve Bank of India as required under FEMA for above transactions involving foreign banks/entities. Mr. Suri representing the Transferor Company further points out to para.5.1.12 of the scheme of merger of the two companies where it is recorded that the Transferee Company shall remain under obligation towards Income Tax Department, Sales Tax Department and Service Tax etc. from the Appointed Date. However, insofar as compliances of Reserve Bank of India as required under FEMA are concerned, undertakings by way of affidavits have been filed before the Company Court which are taken as good and sufficient to guard the interests of Reserve Bank of India. Be that as it may, the Chartered Accountants appointed by this Court has submitted a report in which the following view has been expressed:-

*"We are of the opinion that affairs of the Telcordia Technologies India Private Limited (The Transferor Company) were designed to set off*

*"Carry Forward and Set off of Accumulated Losses and Unabsorbed Depreciation" of the Transferor Company against profits of the profit making Transferee Company in a manner prejudicial to the interest of the revenue and public at large."*

The Official Liquidator in his objections dated April 28, 2014 has reiterated the view of the Chartered Accountant.

Mr. Suri points out that under Section 72-A of the Income Tax Act, 1961, carry forward and set off of accumulated losses and unabsorbed depreciation are allowed only if the following conditions are satisfied:

- the Transferor Company should be a Company owning an industrial undertaking.
- the Transferor Company should have continuously held on the date of amalgamation at least three-fourths of the book value of fixed assets held by it two years prior to the date of merger etc.

Since the above conditions are not satisfied in the instant case, the Transferee Company is not eligible to carry forward and set off accumulated losses and unabsorbed depreciation of the Transferor Company. Therefore, it was never the intention to carry forward and set off the accumulated losses and unabsorbed depreciation of the Transferor Company. Hence the question of not disclosing the same to this Court does not arise.

The Transferee Company has explained in para.4(v) as follows:-

*"4(v) The submission of Official Liquidator in relation to claiming of short term capital loss & consequently claiming excess income tax refund by the Transferor Company is not only incorrect and baseless but also does not reflect the correct understanding of the Income Tax laws. As per the provisions of Section 71 of the Income Tax Act, 1961, losses arising on the sale of short term capital assets i.e. Short term capital loss ("STCL") cannot be set off against business profits. Therefore, the Transferor Company has not set off its STCL against its business profits and thus, the refund of income*

*tax is not on account of STCL. The same can be corroborated from the computation of income for the Financial Year 2012-13. The computation of income is enclosed herewith as Annexure A-1*

*Accordingly, it is submitted that income tax refund has not arisen on account of set off of STCL. It has arisen on account of excess tax deposited by Transferor Company by way of tax deducted at source as against its actual tax liability.*

*As stated herein above, by virtue of Section 72A, STCL of the Transferor Company cannot be carried forward pursuant to Scheme by the Transferee Company. Thus, pursuant to the scheme such STCL will not be eligible to transferred to the Transferee Company and will become a dead loss.*

*Further, the sale of the assets by the Transferor Company to the Transferee Company is for a price commercially agreed between the Transferor and Transferee companies and not in a manner prejudicial to the interest of the revenue. Also, all applicable taxes were paid on such sale of assets. The sale of assets resulted in STCL which could neither be set off (and has, in fact, not been so set off) against business profits of Financial Year 12-13 nor is eligible to be carried forward pursuant to Scheme as per the provisions of the Income Tax Act, 1961 and hence is nothing but a dead loss.”*

Mr. Jain appearing for the Official Liquidator submits that liabilities of Transferor Company pass on to the Transferee Company. They remain bound to make compliances of the law. He submits that short term capital loss can only be adjusted with short term capital gains or long term capital gains and these cannot be adjusted against business profits of the Transferee Company. Therefore, the opinion expressed by the Chartered Accountants cannot be seen as an obstruction to the Second Motion Petition. In any case, the Transferor and Transferee Company are not claiming short term capital loss and unabsorbed depreciation in view of the bar contained in Section 72-A of the Income Tax Act. It is always open to the taxation authorities to scrutinize the records of both the companies and

to act thereon in accordance with law.

There appears to be no further impediment in the Second Motion Petition and the same is allowed. The Transferor Company shall stand dissolved without being wound up. The formal order be drawn by the Registry and its certified copy be filed with the Registrar of Companies within 30 days from the receipt of the same. Citation be published in the Financial Express (English), Jansatta (Hindi) both Delhi Editions and the Official Gazette of the State of Haryana.

Any person interested shall be at liberty to apply to the Court for any direction(s) as per law.

**30.06.2014**  
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**(RAJIV NARAIN RAINA)**  
**JUDGE**