Through Videoconference

NATIONAL COMPANY LAW TRIBUNAL
COURT - I, MUMBAI BENCH
*** *** ***

C.P. (CAA) 1015/MB/2020
connected with
C.A. (CAA) 1017/MB/2020

In the matter of

Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 read with Companies (Compromises, Arrangements and Amalgamations) Rules, 2016;

And

In the matter of

Scheme of Merger of Precious Trading and Investments Limited (First Petitioner Company/Transferor Company) with Sheth Developers Private Limited (Second Petitioner Company/Transferee Company) and their respective shareholders (Scheme)

PRECIOUS TRADING AND INVESTMENTS LIMITED,
Having its Registered Office situated at
Ground and 3rd Floor, Prius Infinity, Paranjape B Scheme,
Subhash Road, Vile Parle (E), Mumbai – 400 057
CIN: L51900MH1983PLC029176

... *First Petitioner/Transferor Company*

SHETH DEVELOPERS PRIVATE LIMITED,
Having its Registered Office situated at Ground and
3rd Floor, Prius Infinity, Paranjape B Scheme,
Subhash Road, Vile Parle (E) Mumbai – 400 057
CIN: U45200MH1993PTC070335

... *Second Petitioner/Transferee Company*

Order Dated: 22nd March, 2021

Coram:

Hon'ble Janab Mohammed Ajmal, Member (Judicial)

Hon'ble Shri V. Nallasenapathy, Member (Technical)

Appearance:

For the Petitioner(s)	:	Mr Hemant Sethi with Mr Ajit Singh Tawar i/b Ajit Singh Tawar & Co., Advocates
For Regional Director	:	Ms. Rupa Sutar, Deputy Director, Office of the Regional Director, MCA (WR), Mumbai
Official Liquidator (OL)	:	Mr V. P. Katkar, OL, High Court, Bombay

Per: Janab Mohammed Ajmal, Member (Judicial)

ORDER

The sanction of the Tribunal is sought under Sections 230 to 232 and other applicable provisions of the Companies Act, 2013 (the Act) to the Scheme of Merger (the Scheme) of Precious Trading and Investments Limited with Sheth Developers Private Limited and their respective shareholders.

2. We have heard the Learned Counsel for the Petitioner Companies, the representative of the Regional Director (Western Region), Ministry of Corporate Affairs, Mumbai and the Official Liquidator. No objector has come before the Tribunal to oppose the Scheme and nor any party has controverted any averments made in the Petition.

3. The Board of Directors of the Petitioner Companies in their respective board meetings held on 17th September 2019 approved the Scheme. On 3rd June 2020 the respective boards approved certain modifications thereto on the bases of which the present Petition is moved. The Appointed Date fixed under the Scheme is 1st April, 2019.

4. The First Petitioner Company is engaged in the business of investing in other companies. The Second Petitioner Company is engaged in the construction business as builders, contractors, erectors, constructors of buildings, houses, apartments, structures for residential, industrial, commercials, institutional or developments of Co-operative Housing societies etc.

5. The proposed Scheme of Merger will be beneficial to the Petitioner Companies and their respective shareholders, creditors, employees and other stakeholders with the following benefits:

    (a) The Transferor Company has been a loss-making entity. Its revenue for the year ending 31st March 2019 has been nil. It is primarily holding investments. This function can easily be carried out by the Transferee Company on its own. This would help by reducing an unnecessary layer thereby improving transparency. The revenue generation of the Transferee Company has been positive and upon merger as per the Scheme hereunder, the activities of the Transferor Company can be carried out by the Transferee Company.

    (b) Further, since the year 2001, no business activity (other than making of investment) has been undertaken by the Transferor Company. No trading activity has been undertaken on BSE by any of the Shareholders of the Transferor Company. Notwithstanding the listing of equity shares of the Transferor Company, its shareholders have not really enjoyed the benefit of listing. In particular, they have not enjoyed any liquidity in respect of their shareholding nor have they availed any significant appreciation in value of their shares. On the other hand, under the Scheme, they will be issued Redeemable preference shares of the Transferee Company which will effectively ensure that the shareholders are able to enjoy appreciation in value of investment held by the Transferor Company and will be assured of obtaining liquidity on redemption of preference shares in an assured timeframe, even earlier if an identified market maker is willing to acquire the preference shares. Thus, with this merger, the Transferor Company is unlocking the value of the shares for its Shareholders. Accordingly, if the Transferor Company is merged with the Transferee Company, there will not be any adverse effect on the Shareholders of the former. The Scheme is not in any manner prejudicial to the interest of the shareholders, creditors, employee or key managerial personnel or any stakeholder concerned or public at large.

(c) Both the Transferor Company and the Transferee Company have the same key managerial personnel. Accordingly, the business of the Transferor Company can be merged with the Transferee Company conveniently and can be carried on in conjunction more advantageously. No useful purpose is being served by operating two separate legal entities.

(d) In the above circumstance, the merger of the Transferor Company with the Transferee Company in accordance with this Scheme and the relevant provisions of the Act, read with the Rules would therefore enable the Parties to utilize the financial resources as well as the managerial, technical, distribution and marketing resources of each other and it would be beneficial for the effective management and controlled supervision of the Transferee Company, thereby protecting the interest of the Transferor Company.

(e) Further, as on date, there is no outstanding liability in the books of Transferor Company. Thus, its merger with the Transferee Company, would not have any adverse effect on the Transferee Company.

(f) The merger under this Scheme will be beneficial to the Petitioner Companies, in the following manner:

   (i) facilities such as manpower, office space and other infrastructure could be better utilized by the Transferee Company and duplication of facilities could be avoided resulting in optimum use of facilities to the advantage of the Transferee Company;

   (ii) employees of the Transferor Company would be provided an opportunity to be gainfully employed by the Transferee Company;

   (iii) pursuant to the Scheme, the liabilities of the Transferor Company would be duly discharged by the Transferee Company;

   (iv) the unutilised assets of the Transferor Company could be put to better use by the Transferee Company;

   (v) the Transferee Company will be able to ensure better turnover and profits and would ultimately contribute substantially to the future business expansion and will be able to exploit the market to the fullest possible extent;

   (vi) the merger will reduce compliance costs, i.e., listing fees, audit fees, for the Transferor Company;

   (vii) significant reduction in the legal, regulatory reporting and compliances;

   (viii) balance sheet of the Transferee Company will become stronger;

   (ix) simplification of corporate structure by reducing the number of

legal entities and reorganizing the legal entities in the group structure;

(x) the merger will provide significant impetus to the growth of the Transferee Company. It will lead to synergies of operations and a stronger and wider capital and financial base for future growth/expansion of the Transferee Company;

(xi) to increase the efficiency of combined business by pooling of resources and their optimum utilisation, thereby availing synergies from combined resources;

(xii) to consolidate business for cost control; and

(xiii) the Scheme will create enhanced value for shareholders and allow a focused growth strategy which would be in the best interest of all the stakeholders. The proposed restructuring will also provide flexibility to the investors to select investments best suited to their investment strategies and risk profile.

6. The Company Petition is filed in consonance with sections 230 to 232 of the Act and the order dated 14th July, 2020 passed in C.A. (CAA) 1017/MB/2020 by this Tribunal.

7. The Petitioner Companies have complied with all requirements as per directions of the Tribunal and have filed necessary affidavits of compliance with this Tribunal. Moreover, the Petitioner Companies undertake to comply with all statutory requirements, if any, under the Act and the Rules made there under. The undertaking given by the Petitioner Companies is accepted.

8. The Regional Director (Western Region), Ministry of Company Affairs, Mumbai, has filed its Report dated 31st August, 2020 *inter alia* stating therein that save and except as stated in para IV (a) to (l) of the Report, the Scheme is not prejudicial to the interest of shareholders and public. In response to the observations made by the Regional Director, the Petitioner Companies have given necessary undertakings and clarification *vide* their Affidavit dated 11th November, 2020. The observations made by the Regional Director and the clarifications and undertakings given by the Petitioner Companies are summarized below:

Sr. No. Para (IV)	RD Report / Observation dated 31st August, 2020	Response of the Petitioner Companies
(a)	*In compliance of AS-14 (IND AS-103), the Petitioner Companies shall pass such accounting entries which are necessary in connection with the scheme to comply with other applicable Accounting Standards such as AS-5(IND AS8) etc.*	As far as observations made in paragraph IV (a) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel undertake that it shall pass necessary accounting entries in connection with the Scheme as per AS -14 (IND AS-103) as well as comply with other applicable Accounting Standards such as AS-5 (IND AS-8), etc., to the extent applicable.
(b)	*As per Definition of the Scheme,* ***"Appointed Date"** means April 1, 2019 or such other date as may be fixed or approved by the NCLT* ***"Effective Date"** means the date on which the certified or authenticated copies of the order(s) sanctioning the Scheme, passed by the NCLT is filed with the ROC. Any references in this Scheme to the "date of coming into effect of this Scheme" or "effectiveness of the Scheme" or "Scheme taking effect" shall mean the Effective Date.* *In this regard, it is submitted that Section 232 (6) of the Companies Act, 2013 states that the scheme under this section shall clearly indicate an appointed date from which it shall be effective and the scheme shall be deemed to be effective from such date and not at a date subsequent to the appointed date. However, this aspect may be decided by the Hon'ble Tribunal taking into account its inherent powers.* ***Further, the Petitioners may be asked to comply with the requirements as clarified vide circular no. F. No. 7/12/2019/CL-I dated 21.08.2019 issued by the Ministry of Corporate Affairs.***	As far as observations made in paragraph IV (b) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel undertake that the Scheme shall be effective from 1st day of April, 2019. Further, the Appointed Date is not based on the occurrence of a trigger event which is key to the proposed scheme. Accordingly, the circular no. F. No. 7/12/2019/CL-1 dated 21.08.2019 issued by the Ministry of Corporate Affairs is not applicable to the present Scheme of Merger by Absorption.

(c)	*As mentioned on para 11 in table above regarding the complaint pending against the Transferee Company, petitioner may be asked to clarify about the same.*	As far as observations made in paragraph IV (c) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel submit that the Transferee Company has compounded the offence against the complaint vide SRN Z01396871. The compounding order dated 4th November, 2004 is annexed and marked as Annexure A to the Affidavit in Reply to the Report of Regional Director. It is further stated the post effectiveness of the Scheme, the Transferee Company will continue to remain in existence and no prejudice will be caused to any concerned parties.
(d)	*Petitioner Company have to undertake to comply with section 232(3)(i) of Companies Act, 2013, where the transferor company is dissolved, the fee, if any, paid by the transferor company on its authorised capital shall be set-off against any fees payable by the transferee company on its authorised capital subsequent to the amalgamation and therefore, petitioners to affirm that they comply the provisions of the section.*	As far as observations made in paragraph IV (d) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel undertake to comply with the provisions of Section 232(3)(i) of the Companies Act, 2013 as regards to Combination of the Authorised Share Capital.
(e)	*The Hon'ble Tribunal may kindly seek the undertaking that this Scheme is approved by the requisite majority of members and creditors as per Section 230(6) of the Act in meetings duly held in terms of Section 230(1) read with subsection (3) to (5) of Section 230 of the Act and the Minutes thereof are duly placed before the Tribunal.*	As far as observations made in paragraph IV (e) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel state that by the order delivered on 14th July, 2020 in C.A. (CAA) 1017/MB/2020, scheme was approved by the majority of equity shareholders as per Section 230(6) of the Act in meetings duly held in terms of Section 230(1) read with sub section (3) to (5) of Section 230 of the Act and the meeting of preference shareholders of the Transferee Company was dispensed with on the basis of consent affidavits. This Hon'ble Tribunal in its order delivered in C.A. (CAA) 1017/MB/2020 directed that the meetings of Creditors of

		the First Petitioner Company were not required to be held as there were no Secured Creditors and Unsecured Creditors whereas the meeting of creditors for the Second petitioner Company were not required to held since the Scheme is in accordance with the provisions of section 230(1)(b) of the Companies Act, 2013 as it is an arrangement between Petitioner Companies and their respective Shareholders.
(f)	***In view of the observations made by the ROC, Mumbai mentioned on para No. 12 in the table above****, Hon'ble Tribunal may decide on merits.*	As far as observations made in paragraph IV (f), the Petitioner Companies through its Counsel state that the registered office of both the Companies is situated in Mumbai, Maharashtra. Hence, the jurisdiction is Hon'ble National Company Law Tribunal, Mumbai Bench.
(g)	*The main objects in the Memorandum of Associating of the Transferor company contains the Real Estate activity (To purchase, Sell, develop, take in exchange or on lease, hire or otherwise acquire or sale, or working on the same, any real and personal estate etc.,) Hence, the petitioner company may be directed to comply/clarify the applicability of (RERA) Real Estate Regulation and Development Act, 2016 with Maharashtra Rules and Regulation 2017.*	As far as observations made in paragraph IV (g) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel state that the Transferee Company have served notice upon Maharashtra Real Estate Regulatory Authority through speed post on 28th July 2020, however, no comments were received. The Transferee Company through its Counsel further undertakes to comply with the applicable provisions of Real Estate Real Estate Regulation and Development Act, 2016 read with Maharashtra Rules and Regulation 2017. The Petitioner Companies through its counsel further state that the Transferor Company is not involved in the business of Real Estate, hence, the question applicability of Real Estate Regulation and Development Act, 2016 with Maharashtra Rules and Regulation, 2017 does not arise.

(h)	*The Transferee Company have non-resident equity shareholders, accordingly, the Share Exchange price and price per share arrived should be minimum of fair price determined as per FEMA guidelines. Hence, valuer should certify that the price per share is as per FEMA guidelines.*	As far as observations made in paragraph IV (h) of the Report of Regional Director is concerned, the Transferee Company through its Counsel submits that it doesn't have any non-resident equity shareholders. Hence, FEMA guidelines are not applicable to the Transferee Company.
(i)	*As the Transferor Company is listed with BSE, hence, the petitioner be directed to file an affidavit to the extent that it has complied with the standard directions issued by BSE vide letter No. DCS/AMAL/AJ/R37/1060/2017-18 dated 08.03.2018.*	As far as observations made in paragraph IV (i) of the Report of Regional Director is concerned, the First Petitioner Company which is a listed company through its Counsel submits that it has complied with the directions issued vide letter No. DCS/AMAL/JR/R37/1681/2019-20 dated 17.02.2020. In the RD report the circular reference number given is wrongly mentioned as DCS/AMAL/AJ/R37/1060/2017-18 dated 08.03.2018.
(j)	*Hon'ble NCLT may kindly direct the petitioners to file an affidavit to the extent that the Scheme enclosed to Company Application & Company Petition, are one and same and there is no discrepancy/any change/changes are made;*	As far as observations made in paragraph IV (j) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel undertake that the Scheme enclosed to Company Application & Company Petition, is one and same and there is no discrepancy/any change/changes are made.
(k)	*It is observed that the Petitioner companies have not submitted a admitted copy of the Petition, and Minutes of Order for admission of the Petition. In this regard, the Petitioner has to submit the same for the record of Regional Director.*	As far as observations made in paragraph IV (k) and (l) of the Report of Regional Director is concerned, the Petitioner Companies through its Counsel state that a copy of Chairman's Report; admitted copy of Petition and a copy of minutes of order for admission of Petition, has been filed with the office of Regional Director on 20th October 2020.
(l)	*It is observed that the Petitioner companies have not submitted a Chairman's Report, admitted copy of the Petition, and Minutes of Order for admission of the Petition. In this regard,*	

	the Petitioner has to submit the same for the record of Regional Director.	

9. The undertakings filed by the Petitioner Companies in response to the said report are accepted.

10. The Official Liquidator has filed its report on 17th November, 2020 wherein certain observations made by M/s. R. D. Kundalia & Co., Chartered Accountants have been captured and clarifications in that regard have been provided by the Petitioners. The relevant extracts from the Chartered Accountant's Report and the Petitioners' clarifications to that effect have been reproduced herein under.

A. Para 6.1 and Para 9.9 of the Report.

Relevant Extract from the Chartered Accountant's Report:

i. *"……As per income tax records demand of Rs.12,78,211/- for the AY: 2007-08 has been raised on Oct 18, 2008. Against this outstanding demand Company has filed reply denying the liability many times latest being reply dated Jan 8, 2020. However, the same has not been entertained as yet. The Audit Report of PTIL is also silent about this demand. It has also filed its TDS returns during these periods. Demand status report under TRACES has not been provided by Company.*

ii. *Company has not provided any explanation in Financial Statement regarding outstanding liability towards income tax pertaining to AY: 2007-08 under notes to the accounts or contingent liabilities. Also the Auditor Report mainly CARO point on statutory dues is silent about this outstanding demand."*

Clarification given by the First Petitioner/Transferor Company.

The Petitioners through their Counsel undertake to comply with all applicable provisions of the Income Tax Act and all issues arising out of the same will be met and answered in accordance with law and tax liabilities, if any, would be

borne by the Transferee Company. The Income Tax Authorities are at liberty to examine tax implications.

B. Para 7 of the Report

Relevant Extract from the Chartered Accountant's Report:

i. *"As observed under Secretarial Auditor's Report of March 31, 2019, Company has not filed various E-forms as applicable under Companies Act, 2013 and under SEBI Regulation, 2015.*
The current status is awaited."

Clarification given by the First Petitioner/Transferor Company.

1. The Petitioner Companies through their Counsel submit that the relevant extract of the Company's Secretarial Audit Report dated 3rd September, 2019 highlighting certain observations is as under:

   "During the period under review the First Petitioner Company has generally complied with the Secretarial Standards issued by the Institute of Company Secretaries of India. Further, the First Petitioner Company, has generally complied with provisions of the Companies Act and Rules framed there under Regulation and Guidelines except the following observations:

   i. *The Company has not filed E-form DIR-12 for vacation of Office by Director and for appointment of Additional Director at Board Meeting held on 1 October, 2018.*
   ii. *The Company has not filed Form MGT -14 for approval of Director Report and consolidated financial statement at Board meeting held on 4 September, 2018 and approval of the limits for the loans/guarantee/security by the Company in terms of the provision of Section 185 of the Companies Act, 2013 at Annual General Meeting held on 29th September, 2018.*
   iii. *Composition of Nomination, Remuneration and Compensation Committee is not in compliance with the provisions of Section 178 of Companies Act, 2013 for the last quarter.*

iv. There has been delayed submission of Annual Report by the Company under Regulation 34 of SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015.

v. The Company has also delayed in dissemination of disclosure of information with respect to execution of pledge Agreement under Regulation 30 of the SEBI (Listing Obligations and Disclosures Requirements) Regulations, 2015."

2. The Petitioners through their Counsel submit and clarify that the present status of each of the above observations made in the Secretarial Audit Report is as under:

    i. The First Petitioner Company has filed the requisite Form DIR-12 paying applicable fee including additional fee.

    ii. The First Petitioner Company inadvertently failed to file the Forms MGT-14 for the said meetings. It had duly filed Form MGT-15 with the Registrar of Companies within time, disclosing therein the business transacted in the annual general meeting and the result thereof. It has since filed an application with the Central Government in e-Form CG-1 vide SRN R74112822 and e-Form CG-1 vide SRN R74116823 for condonation of delay in filing Forms MGT-14 for approval of Director's Report and consolidated financial statement at the Board meeting held on 4th September, 2018 and for approval of the limits for the loans/guarantee/security by the Company in terms of the provision of Section 185 of the Act at the Annual General Meeting held on 29th September, 2018 respectively.

    iii. The non-compliance was with respect to the last quarter of financial year 2018-19. The NRC Committee was reconstituted subsequently and the First Petitioner Company is in compliance with the provisions of Section 178 of the Act.

    iv. There was a delay in submission of annual report under Regulation 34 of SEBI (Listing Obligation and Disclosure Requirement) Regulations, 2015. However, the same was submitted by the First

Petitioner Company after paying necessary penalty to BSE for the same.

v. Inadvertently, there was a delay in disclosure of information to the BSE. However, the requisite information was duly disseminated by the First Petitioner Company to BSE immediately when the default came to the notice of the First Petitioner Company.

C. Sub-para 5 of Para 8.1 of the report.

Relevant Extract from the Chartered Accountant's Report:

i. "With due respect to the statutory auditors, we state that despite the fact that the Company has made losses in all the five years under examination, there is no remark (i) on 'the Going Concern Status' vide Standards on Auditing (SA 570); and (ii) under the heading "Emphasis of Matter" vide SA 207 in respect of non-receipt of interest on loans given."

Clarification given by the First Petitioner/Transferor Company.

1. The Petitioners through their Counsel clarify and submit that as per SA 570, based on the audit evidence obtained, the auditor shall conclude whether, in the auditor's judgment, a material uncertainty exists related to events or conditions that, individually or collectively, may cast significant doubt on the entity's ability to continue as a going concern. The Counsel for the Petitioners submit that merely reporting of small operating losses over the years, does not give rise to material uncertainty that casts significant doubt on the entity's ability to continue as a going concern.
2. The First Petitioner Company is engaged in investing activity. In case of investment entities, the source of income mainly is not the operating cash flows but, appreciation in the value of its investments. The Chartered Accountant (CA) in his report has considered that the fair value of the First Petitioner Company as per the valuation report of the registered valuer is Rs. 295.47 crores as against the book net worth of Rs. 10.80 crores. Thus,

the net worth of the First Petitioner Company has appreciated more than 29 times.

3. That the current liabilities and provisions of the First Petitioner Company as on 31st March, 2019 was only Rs. 67,000. To meet these liabilities the First Petitioner Company had sufficient cash balance of Rs. 75,000. This position has further improved, and as on 31st January, 2020 the outstanding current liabilities have reduced to Rs. 13,000 whereas the cash balance has increased to Rs. 42.02 lakhs. Even in terms of short-term liquidity position, the First Petitioner Company has sufficient liquidity.
4. It is further submitted that adverse inference cannot be drawn on the going concern status of an investing entity like the First Petitioner Company, merely on basis of non-existence of annual profits or reporting of small operating losses. The going concern status of First Petitioner Company cannot be questioned with sufficient short-term liquidity and long-term appreciated assets. Besides, in all previous Annual General Meetings its shareholders have approved accounts unanimously without any concern on the 'going concern status' of the First Petitioner Company.

D. Sub-para (f) and (g) of Para 8.2.6 of the Report

Relevant Extract from the Chartered Accountant's Report:

i. "The exercise of valuation is generally undertaken by adopting Income Approach, Market Approach and Net Assets Approach. The Income Approach includes a number of models on valuation, namely, Discounted Cash-flow Basis (DCF), Maintainable Profits Basis and Dividend Discount Model. The captioned valuation of shares has been made on the Discounted Cash flow basis only. The rejection of other methods has not been clarified by the learned Valuers.

ii. Valuation aspects:

Terms of Preference Share redemption of Sheth Shelters Private Limited (SSPL) was not available for verification from MCA database. Forms

related to issue of preference share by SSPL to PTIL were not available for verification."

Clarification given by the First Petitioner/Transferor Company.

1. The Petitioners through their Counsel submit and clarify that para 8.2.6 of the Report is titled *"Valuation of Shares of Transferor and Transferee Companies and Exchange Ratio"*. The exchange ratio is not within the scope of audit/review conducted by the CA. It has been reported as part of Para 8.2 under the heading "PARTICULARS REGARDING SHARE CAPITAL, RESERVES, LIABILITIES, ETC". The audit/review is concerned with the financial statements and affairs of the First Petitioner Company and not with the exchange ratio for the merger which ratio has already been approved along with the Scheme by the shareholders. The Petitioners give below the reasons why the observations are unjustified. As per the valuation report of the Registered Valuer Mr. Paras K Savla, the equity shares of the First Petitioner Company are valued using Net Asset Method. With respect to rejection of Market Price Method and Discounted Cash Flow (DCF) Method of valuation, relevant extract from the report of the valuer is as under:

 "B) Income Approach -In our view, cash is like a raw-material for the Investment Company and hence traditional approach of valuation through Discounted Cash Flows (DCF) has its drawbacks while conducting valuation. Thus, I have not considered DCF as a valuation methodology in this case.
 C) Market Approach - In the present case, although: PTIL is a listed entity on BSE, it is not frequently and actively traded in the open market. Hence, the value per share of PTIL based on the market price is not considered. As the company does not have an established track record, all the key financial indicators are not completely reliable for valuation purpose thus, a steady state of operations and profitability was not achieved as on valuation date. Accordingly, the Market Approach was not considered appropriate for the determination of the fair value of the business."

2. In view of the above, the CA's remark that the valuation has been done using DCF method is not correct as far as valuation of shares of First Petitioner Company is considered. Further, in valuing the shares of First Petitioner Company using Net Asset Approach, the fair value of investments made by First Petitioner Company is determined on the following basis as can be discerned from the relevant extract of the report of the valuer.

   "1. Sheth Developers and Realtors (P) Ltd is an associate company of PTIL. I have been informed that SDRIL has filed an application for Capital Reduction and same is pending before Hon'ble Mumbai NCLT. The fair value of investment in equity shares of SDRIL has not been valued by the registered valuer as on the valuation date. However, SDRIL has obtained a valuation report dated 19.01.2019 on the fair value of its equity shares from R V Shah and Associates, Chartered Accountants as on 31.12.2018. Valuation is based on DCF method of valuation which seems reasonable. Said valuation report was issued for the purpose of capital reduction and considering this fact, investment in SDR1L has been valued at the same value i.e., Rs. 207.29, as provided in the above-referred valuation report.
   2. Since the investment is of only 1 equity share in SSPL, the same is considered as immaterial and is valued at cost.
   3. PTIL has invested in 4,38,400 6% Redeemable Non-Cumulative Non-Participating Preference shares of SSPL of Rs 10 each and Rs 190 premium. The same represents the recoverable amount of redemption. Accordingly, the value of the investment is considered as Rs. 200 per preference share."

3. With respect to availability of forms related to issue of preference shares by SSPL to First Petitioner Company on MCA database, the Petitioners submit that since the shares were issued in 2004, the data is not available in the MCA database and that the investment made in 2004 is also outside the scope of audit/review. The Petitioners undertake that if required the First Petitioner Company can present physical copy of the share certificates issued for verification.

4. Further, with regard to method of valuation of 10% redeemable cumulative non-convertible preference shares of the Transferee Company proposed to be issued on merger, the valuer in his report read with addendum thereto has stated as under:

   > *"The valuation techniques applicable to valuation of preference shares are not same as those applicable to valuation of equity shares. In the format prescribed by BSE (which contemplates valuation of equity shares only), no specific methodology applicable to valuation of preference shares was available hence the value of the preference shares was mentioned under NAV method. As a matter of fact, the valuation of preference shares has a unique method and is actually a combination of NAV and / or income approach as explained above and can be categorised under either category in the prescribed format."*

5. Thus, using net asset approach as well as income approach, the valuer has arrived at the same value for the proposed preference shares. The above valuation by the registered valuer and the exchange ratio arrived at on the basis of said valuation has also been accepted as fair by registered Merchant Banker Arihant Capital Private Limited in their fairness report. The Shareholders have also unanimously approved scheme including valuation.

E. <u>Para 9.4 and Para 9.11 of the Report</u>

Relevant Extract from the Chartered Accountant's Report:

i. *"……Based on verification of documents including financial statements we understand that:*

   1. The funds of the Company were invested in to associated companies via subscription to equity shares or preference shares.

   2. The Company had invested a sum of Rs.876.80 Lakhs in Non-Cumulative Preference Shares of M/s Sheth Shelter Pvt Ltd (SSPL) having coupon rate of 6%. However, in past five years SSPL had-not earned any profit and hence not distributed any dividend. Moreover,

being a non-cumulative in nature the Company has no-right to receive dividends of any past years.

3. The Company had invested a sum of Rs.76.88 Lakhs into equity shares of M/s Sheth Developers & Realtors (I) Ltd [SDRIL]. Since, the SDRIL had not declared any dividend on equity shares in past 5 years the Company has not earned any revenue income from the said investment.

Accordingly, Company's resources were invested in to an assets not generating regular revenue income. On the other hand Company continued to incur administrative expenditure which resulted in to losses in past five years".

ii. *Further in Point 2 of Para 9.11 of the report in arriving at the prima facie opinion that the affairs of the Company have been carried out in a manner prejudicial to the interest of the Company or its Member or public interest, the CA has considered as under:*

"The Board of Directors of the Company made an investment in preference shares and equity shares of the Company which have not given any revenue income in the entire span of five years."

<u>Clarification given by the First Petitioner/Transferor Company.</u>

1. The Petitioners through their Counsel submit that as mentioned above, the First Petitioner Company is engaged in the activity of investing. Return on investment comprises not only of revenue return (like interest, dividend) but also capital appreciation in the value of investment. With respect to investment in preference shares of SSPL, though during the period under review (five years i.e. from April 2014 to March 2019) SSPL has not made substantial profits, the First Petitioner Company however, has positive net worth of Rs. 10.56 crores as on 31st March, 2019. The value of investment by the First Petitioner Company in preference shares of SSPL has not eroded. In the books of accounts the investments are not impaired. The fair

value of the said investment as per the registered valuer's report is also Rs.8.76 crore. Besides, the investment was made much earlier than the period covered by the audit/review. Accordingly, the investment has wrongly been commented upon. The investment was made in 2004 after following all provisions of the then applicable Companies Act, 1956. This proposition is not doubted by the auditor. The investment was disclosed as required by the Companies Act and accounting standards. No shareholder has commented upon the investment or suggested any alternate investment. Hence, the comment made in hindsight on the commercial wisdom of the investment is unwarranted. The comments are beyond the scope of the audit/review.

2. The audit/review is concerned with financial affairs, and compliance of law and procedure (which is not questioned). It (the audit/review) is not intended to be a review of the commercial wisdom of corporate decisions unless there is any reason to doubt the *bona fide* of the investment. No such doubt or basis for any such doubt exists or is referred to in the report. There are no developments with reference to the investment in Preference shares in the five years under audit/review.
3. With respect to investment in equity shares of SDRIL, it is emphasized that the said investment has appreciated significantly. As against cost/book value of Rs. 76 lakhs, the fair value of this investment as adopted by the registered valuer in his valuation report is Rs. 285.43 crores. Thus, though no dividend has been received from this investment, there is huge return on capital invested of more than 370 times. Even the shortfall in cash flow has in fact, been made good in 2019-20 when the capital reduction by SDRIL yielded a huge amount of Rs. 147.90 crore to the Company. This more than makes up for all the past losses.

<u>F. Paras 9.2, 9.7, 9.10 and 9.11 of the Report</u>

Relevant Extract from the Chartered Accountant's Report:

i. The CA has stated in Para 9.11 his prima facie opinion drawn from the investigation as under:

> *"Due to the following extra ordinary circumstances:*
>
> *(i) Investing the resources of the Company in non performing Companies.*
>
> *And*
>
> *(ii) Prejudicial loan transactions with related parties*
>
> *We are prima facie of the view that the affairs of the Company have been carried out in a manner prejudicial to the Company or its Member or public interest."*

Clarification given by the First Petitioner/Transferor Company

1. With regard to the observations made in Para 9.2, 9.7, 9.10 and 9.11 of the Official Liquidator, the Petitioners through their Counsel submit and clarify that the CA in his report in Para 9.1 has mentioned that they have not found any serious allegations or complaints against the Company. In absence of any such allegations, a *prima facie* view that the affairs of the First Petitioner Company are carried out in a manner prejudicial to the interest of its members and public is misconceived and arbitrary. Further, as indicated by the CA the view is *prima facie*. A conclusion can only be arrived at after understanding the facts and the justifications from the company/management. *Prima facie* views deserve to be ignored.
2. The explanations to specific observations of the CA with respect to investment in preference shares of SSPL and loan given to related parties are as under:

   I. Investment in preference shares of SSPL and equity shares of SDRIL.

   a. In Para 9.11 Point 3, the CA has specifically emphasized on the terms of preference shares of SSPL and observed as under:

   > *"Moreover, the preference shares of Sheth Shelters Private Limited (SSPL) were non-cumulative in nature and were*

acquired @ 200/- per share (Rs.190/- paid towards share premium). The said preference shares were to be redeemed at Rs.200/- per share only. In other words, this investment has neither earned any revenue income in form of Dividend as the SSPL had not made any profit nor was there or will be any capital appreciation as the shares would be redeemed at a price at which they were acquired, that is, @ 200/- per share."

b. *Further, in Para 9.7, with respect to investments made by the First Petitioner Company the CA states:*

   "Under the facts and circumstances as mentioned above, we are of the view that a question on merits of decision to invest in associated Companies ought to be examined."

Clarifications given by the First Petitioner/Transferor Company

a. The Petitioners through their Counsel submit that the *prima facie* view of the CA on the grounds that the First Petitioner Company has not received any dividend from the investment made in preference shares of SSPL and equity shares of SDRIL, the First Petitioner Company reiterates that the CA ought to have considered the capital appreciation in the value of the investments and should not draw adverse conclusion merely because no dividend income is earned from these investments.
b. Also, it ought to be considered that the investment in preference shares of SSPL was made far back in 2004. One cannot examine the viability of an investment in hindsight. One ought to consider the same at the time when investments made.
c. Investment in the preference shares of SSPL in 2004 is outside the scope of the audit/review. In any case, the investment was made in compliance with relevant provisions of the Company Law applicable at that time. The proposal of investment in the preference shares was considered in the interest of the First Petitioner Company based on

the proposed projects of SSPL. Thus, the investment was *bona fide* one made with the objective of furtherance of business of the First Petitioner Company. Any investment with opportunity of return also has associated risk of loss in value. In any case, as mentioned above, no provision of impairment has been made on investment in preference shares of SSPL.

d. Therefore, the Petitioners submit that the observation on the *merits of decision to invest in associated Companies ought to be examined* is wrong and unjustified. The investment has yielded appreciation in the net worth by 29 times. It could not be questioned.

II. Loans granted to related parties.

i. The CA in his report in Para 9.7 with respect to loan granted to related party has stated as under:

"Question as to why interest free loan was granted for a long period of five years requires to be examined to find out the deriving of undue benefit by the Directors or other vested interest, if any. In fact, the said loan is sans the authority of Company in so far as no resolution for the years 2014-15, 2015-16 and 2016-17 had been passed. Resolution has been passed in the year 2017-18. In fact, we are informed that such loan was granted as far back as in the year 2002-03."

Clarifications given by the First Petitioner/Transferor Company

a. In this respect, the Petitioners through its Counsel submit and clarify that the loan outstanding up to 31st March, 2017 were granted to SSPL. The loan was advanced prior to the commencement of the Act. Against the said outstanding loan of Rs.10.61 crores, the Company had received interest free funds of Rs. 9.08 crores from Second Petitioner Company (as on 31st March, 2015). Thus, the major portion of the interest-free loan granted was

financed from the interest-free funds availed from the principal shareholder/another group entity. The funds of the Company to that extent have not been used to grant the interest-free loan and therefore, the said loans are not prejudicial to the interest of the First Petitioner Company.

b. The loan granted to SSPL was outstanding prior to introduction of the Act. As no loan was taken post the Act up to FY 2017-18, no resolution under Section 185 or Section 186 of the Act was required in 2014-15, 2015-16 or 2016-17. The observation challenging that the loan was without the authority of the Company is therefore incorrect. Any conclusion drawn on the basis of the incorrect observation has to be ignored *inter alia* as being without any basis.

c. The loan given to SSPL was wholly repaid during FY 2017-18. Thus, no loss has been caused to the Company and no prejudice can be alleged.

d. In FY 2017-18, the First Petitioner Company granted a separate loan to Second Petitioner Company of Rs. 1.43 crore. Due approval of shareholders of the Company under Section 185 of the Act had been obtained at the time of grant of loan to Second Petitioner Company.

e. Further, the said loan has been repaid by Second Petitioner Company in instalments. As observed by the CA in his report, the loan outstanding as on 31st March, 2019 was Rs. 1.26 crore. The said loan was further repaid during FY 2019-20 and the balance outstanding as on 31st January, 2020 was only 0.29 crore.

f. It is submitted that as both investments and loans are fully explained. As the making of the investment and the grant of loans has been carried out in full compliance of all statutory provisions and there is no finding to the contrary, the CA was unjustified in observing in para 9.10 that *"In view of our comments in the*

preceding questions and paragraphs, on the basis of our examination and explanations submitted to us by the Transferor Company from time to time and on the basis of our scrutiny of the books of account for the periods under review, question of misapplication, misappropriation and breach of trust on the part of the management of the Transferor company ought to be examined/investigated." It is clear that there is no misapplication, (all transactions are fully compliant and transparently disclosed), no misappropriation (loans have been repaid and there is no loss of value in any investment, rather there has been tremendous appreciation), and consequently there has been no question of breach of trust. No such examination/investigation as suggested is warranted.

g. On the basis of the fact that fair value of the First Petitioner Company is much higher than its book net worth and the First Petitioner Company has in fact realized a huge amount of Rs.143.90 crore, a question on the management's integrity towards their responsibility of protection and enhancement of the wealth of the shareholders is not justified. All creditors have been paid or are fully provided for. All shareholders were fully aware of and have appreciated and accepted all transactions of the Company. The Financial Statements have been unanimously approved by the Shareholders at each of Annual General Meetings. Therefore, the CA was totally unjustified and wrong in concluding that "*We are prima facie of the view that the affairs of the Company have been carried out in a manner prejudicial to the Company or its Member or public interest*".

h. The Petitioners through their Counsel submit that the merger of First Petitioner Company into Second Petitioner Company deserves

to be accepted as being in the best interest of all stakeholders of both Petitioner Companies.

11. Upon going through the observations/objections of the CA and Report of the Official Liquidator and reply filed by the Transferor Company, we hold as below:
    a. As far as the objection of the CA regarding the Income Tax liability of Rs.12,78,211/- for AY 2007-08 is concerned, we are satisfied with the clarification given by the First Petitioner/Transferor Company that the said liability would be borne by the Transferee Company.
    b. The observation of the CA regarding the non-filing of E-forms in DIR-12, MGT-14 etc., we are satisfied with the explanation given by the First Petitioner/Transferor Company and hence this would not come in the way of approval of the Scheme.
    c. The objection of the CA regarding the failure of the Statutory Auditor for making no remark on the going concern status etc. would not affect the approval of the Scheme.
    d. With respect to the objection of the CA regarding the valuation, we are of the view that the shareholders in their commercial wisdom have accepted the said valuation. Hence there is no scope for interference by this Bench.
    e. With regard to the objection of the CA that the funds of First Petitioner/Transferor Company were invested into the Associate Companies and the affairs of the First Petitioner/Transferor Company are managed in a manner prejudicial to the interest of the company or its members or to the public interest, we find that there being no violation of any statutory provisions or such investments/loans being neither uncommon nor *per se* illegal, the objections of the CA cannot be sustained.

f. The *prima facie* opinion of the CA that the affairs of the First Petitioner/Transferor Company have been carried out in a manner prejudicial to the interest of the company or its members or to the public interest, does not stand legal scrutiny. We are of the view that the observations of the CA are wholly misdirected and deserve to be ignored. They would not hinder approval of the Scheme.

g. The approval of the Scheme is without prejudice to the liability, if any, of the First Petitioner/Transferor Company which upon amalgamation would stand transferred to the Transferee Company.

12. From the material on record, the Scheme appears to be fair and reasonable and does not violate any provisions of law and is not contrary to public policy or public interest. The clarifications provided by the Companies are justified and are accepted.

13. Since all the requisite statutory compliances have been fulfilled, C.P. (CAA) 1015/MB/2020 is made absolute in terms of prayer made in the Petition. Hence ordered.

ORDER

The Petition be and the same is allowed subject to the following.

i. The Scheme, placed at Page Nos. 248 to 288 (Annexure – F) of the Company Petition with the Appointed Date fixed as 1st April, 2019 is hereby sanctioned. It shall be binding on the Petitioners and all concerned including their respective Shareholders, Secured Creditors and Unsecured Creditors/Trade Creditors and Employees.

ii. The Transferor Company be dissolved without being wound up.

iii. The Registrar of this Tribunal shall issue the certified copy of this order along with the Scheme forthwith. The Petitioners are directed to file a copy of this Order along with a copy of the Scheme with the Registrar of Companies concerned, electronically in E-Form INC-28, within 30 days from the date of receipt of the Order from the Registry.

iv. The Petitioner Companies to lodge a copy of this Order and the Scheme duly authenticated by the Registrar of this Tribunal, within 60 days from the date of receipt of the Order, with the Superintendent of Stamps concerned, for the purpose of adjudication of stamp duty, if any, payable.

v. The Petitioner Companies shall comply with the undertakings given by them.

vi. The Petitioner Companies shall, within 15 days hereof, issue newspaper publications with respect to the approval of the Scheme, in same newspapers in which previous publications were issued.

vii. The Petitioner Companies shall take all consequential and statutory steps required under the provisions of the Companies Act, 2013 in pursuance of the scheme.

viii. All concerned shall act on a copy of this Order along with Scheme duly authenticated by the Registrar of this Tribunal.

ix. Any person interested shall be at liberty to apply to the Tribunal in the above matter for any direction that may be necessary.

Sd/-	Sd/-
V. Nallasenapathy	Janab Mohammed Ajmal
Member Technical	Member Judicial