IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CP No.174 of 2014 (O&M)
Date of decision: 31.03.2015

In the matter of

SD BIO Standard Diagnostics Pvt. Ltd.

... Petitioner Company/Transferor Company

AND

Alere Medical Pvt. Ltd.
... Transferee Company

CORAM: HON'BLE MR. JUSTICE AMIT RAWAL

1. Whether reporters of local newspapers may be allowed to see judgment?
2. To be referred to reporters or not?
3. Whether the judgment should be reported in the Digest?

Present:- Mr. Gaurav Chopra, Advocate
for the petitioner.

Mr. Deepak Aggarwal, Advocate with
Mr. M.Jayakumar, Official Liquidator.

AMIT RAWAL J.

The present petition has been filed under Sections 391 and 394 of the Companies Act, 1956 for sanctioning of the Scheme of Amalgamation between petitioner-Transferor Company and Transferee Company. The Scheme of Amalgamation has been annexed as Annexure P-1.

The main objects of Transferor and Transferee Companies are detailed in the Memorandum and Articles of Association, which have been annexed as Annexure P-3 and

Annexure P-5, respectively.

The copy of the Resolution of Board of Directors of the Transferor and the Transferee Companies dated 05.09.2014, have been annexed as Annexures P-11 and P-12 respectively.

The authorized, issued, subscribed and Paid-Up Share Capital of petitioner-Transferor Company as on 31.03.2014 is as under:-

Particulars	Amount (in Rs.)
Authorised 5,00,00,000 (Five Crore) Equity Shares of Rs.10 each.	50,00,00,000
Issued, Subscribed and Paid-up 3,60,34,005 (Three Crore Sixty Lakh Thirty Four Thousand and Five) Equity Shares of Rs.10 each.	36,03,40,050

The authorized, issued, subscribed and Paid-Up Share Capital of the Transferee Company as per the provisional financial statement as on 31.03.2014 is as under:-

Particulars	Amount (in Rs.)
Authorised 10,00,00,000 (Ten Crore) Equity Shares of Rs.10 (Rupees Ten Only) each.	1,00,00,00,000
Issued, Subscribed and Paid-up 2,13,94,306 (Two Crore Thirteen Lakhs Ninety Four Thousand Three Hundred and Six) Equity Shares of Rs.10 (Rupees Ten only) each.	21,39,43,060

The petitioner had approached this Court vide Company

Petition No.166 of 2014 for dispensing with the meetings of Equity Shareholders and Un-Secured Creditors of the Company on the ground that more than 95% of Shareholders and Un-secured Creditors of the Transferor Company have consented to the Scheme of Amalgamation and there was no Secured Creditors of the Transferor Company. The First motion petition was disposed of vide order dated 17.10.2014.

On presentation of the second motion petition, this Court vide order dated 14.11.2014, while issuing notice to the Regional Director, Ministry of Corporate Affairs, Noida and the Official Liquidator for 09.02.2015 also ordered for publication of the petition in newspapers namely, “The Times of India” (English) and “Dainik Bhaskar” (Hindi), both Delhi/NCR editions and as well in the Official Gazette of Government of Haryana.

In compliance of the aforementioned order, affidavit of publication of notice in the newspapers and the Official Gazette, along with copies of publication have been filed.

The Regional Director has filed his report dated 06.02.2015 and has raised the following points of determination for consideration of this Court for sanctioning of Scheme of Amalgamation.

> *“5. That the Deponent craves leave to submit that as per clause 6.2 of Part -B of the Scheme it has been stated that Transferee Company shall account the*

amalgamation of the SD Bio as per the pooling of interest method as set out in the Accounting Standards 14 (AS-14).

6. That the Deponent craves leave to submit that as per clause 13 of Part-C of the Scheme it has been stated that on the scheme becoming effective, Transferor Company shall stand dissolved without being wound-up.

7. That the Deponent craves leave to submit that from the report of Registrar of Companies vide para 19 of his report has stated that the Transferee Company has not appointed Whole Time Company Secretary. Thus, there is a prima facie violation of Section 383A of the Companies Act, 1956. However, ROC has not stated from which date there was a violation of Section 383A of the Act. The said matter is being taken up separately with the Registrar of Companies, Delhi and Haryana.

8. That the Deponent craves leave to submit that from the report of the Registrar of Companies, Delhi & Haryana has been received vide dated 28.01.2015 and Registrar of Companies vide para 31 of his report has stated that from the Balance Sheet as at 31.03.2014 of the Transferor Company that the auditors have given their adverse comments to the said accounts regarding non-compliance of the provisions of Section 297 and

211 (3A) & (3B) of the Companies Act, 1956 in respect on non-compliance of Accounting Standards-2 of the Act. Further, it has been observed from the disclosure of related party transactions in the Balance Sheet as at 31.03.2014 of the Transferee Company that there is a prima facie violation of Section 297 of the Companies Act, 1956 in respect of transactions entered into between related parties including the Transferor Company. The said matter is being taken up separately with the Registrar of Companies, Delhi & Haryana."

In response to the report/affidavit filed by the Regional Director, Northern Region, Mr. Lalit Kumar Saini, M.D.,of the petitioner-Transferor Company has given explanation vide affidavit dated 21.3.2015. The same is extracted herein below:-

3. Under paragraph 7 of said representation, the Regional Director has indicated that the Transferor//Petitioner Company is prima facie in violation of Section 383A of the Companies Act, 1956 on account of failure to appoint a whole time Company Secretary. In response to the same, I hereby submit that the statutory auditors indicated this fact in their audit report dated 27.09.2012 issued for the financial year 2011-12 which was discussed in length and explained in their Board Report. Subsequently, with the reasonable efforts our *management was able to identify and appoint a suitable candidate for the post of Company Secretary on 1.1.2013. The said Company Secretary continues to be on the rolls of Transferor Company as on date. The copy of Form 32 filed with the Registrar of Companies, NCT of Delhi along with copy of challan receipt evidencing the proof of filing in relation to the said appointment is annexed hereto as Annexure A-1.*

4. Under paragraph 8 of said representation, the Regional Director has referred the adverse comments of the statutory auditors provided in the audit report for the financial year ending on 31.03.2014 in relation to contraventions of Sections 297 & 211 (3A) & (3B) of the Companies Act, 1956. I hereby submit that, Petitioner Transferor Company sold its products worth Rs.30,69,619 (Rupees Thirty Lakh Sixty Nine Thousand Six Hundred and Nineteen only) to a group company at arm's length price. The petitioner Company after a detailed internal discussion assessed that there was a requirement to obtain prior approval of the Ministry of Corporate Affairs and is in the processing of taking appropriate steps for compounding of said non-compliance. Further, the statutory auditors in its report made observations in connection with certain discrepancies relating to recovery *of CENVAT credit. I would like to submit that said observations were discussed by the Board of Directors and addressed in their Board report with an explanation that only certain products manufactured by the company attracts Nil rate of excise duty, whereas other products are dutiable. Hence in view of the management, CENVAT credit can be availed. It is further submitted that no notices or proceedings have been initiated by the revenue authorities on the said issue. It is further submitted that Scheme shall not be read as a conclusion to such issues on availability of CENVAT credit and shall be determined in accordance with law.*

The Regional Director has submitted in its report that the above matter is being taken up separately by the Registrar of Companies, NCT of Delhi and Haryana.

5. Further, it is submitted that the Regional Director has already filed its representation in the proceedings filed by the Transferee Company pending before the Hon'ble Delhi High Court (CP No.748 of 2014 in CA(M) No.150/2014) wherein it has been clearly indicated in paragraph 14, that the Registrar of Companies has not opposed the Scheme. Copy of the representation filed by the Regional Director is annexed hereto as Annexure A-2.

6. In relation to the above mentioned observations, I further state that a show cause notice dated 25.2.2015 has also been issued by the Registrar of Companies, NCT of Delhi and Haryana for the said violation. In the said show cause attention has been invited to Section 621 A in terms of which the offence is compoundable. The copy of the Show cause notice issued by the Ministry of Corporate Affairs (assistant Registrar of Companies) is annexed hereto as Annexure A-3.

7. It is submitted that the Transferor Petitioner Company is taking appropriate remedial measures and the Transferee Company in its Reply filed in response to the Representation/Affidavit of the Regional Director before the Hon'ble Delhi High Court (CP No.748/2014 in CA(M) No.150 of 2014) has clearly stated that any proceedings that may be initiated by or against the Transferee Company will be continued and carried on by or against the Transferee Company upon sanctioning of the Scheme of Amalgamation. The Transferee Company has further undertaken not to reply or seek any waiver in such proceedings on account of sanction of the Scheme of Amalgamation. The copy of the representation filed by the Transferor Company before the Hon'ble Delhi High Court is annexed hereto as Annexure A-4.

8. I further stated that neither the Regional Director nor the Registrar of Companies have opposed the Scheme as reflected in the representation filed by the Regional Director. Hence, I humbly submit that this Hon'ble Court may be pleased to sanction the Scheme with or without modifications, as it deems fit.”

Similarly, Official Liquidator has submitted his report dated 30.03.2015 and raised following points of determination:-

1. From the perusal of Audited Financial Statements, Auditor’s report & books of Accounts of last five years produced before us, the Company has following financial and profitability position on various dates :

<u>Balance Sheets</u>

(Rs. in Lacs)

Particulars	**Audited 31.03.2010**	**Audited 31.03.2011**	**Audited 31.03.2012**	**Audited 31.03.2013**	**Audited 31.03.2014**
Sources of funds					
Share Capital	853.40	853.40	853.40	853.40	3,603.40
Reserve & Surplus	-	(288.16)	(637.73)	(1,925.29)	(3,781.68)
Non-Current Liabilities	2.85	2.11	2,277.01	2,298.21	2,301.35
Current Liabilities	3,135.05	5,791.07	7,072.57	10,827.28	13,103.92
Total	**3,991.30**	**6,358.42**	**9,565.25**	**12,054.30**	**15,226.99**
Application of funds					
Fixed Assets	555.06	761.66	1,462.94	1,568.13	2,082.86
Current Assets, Loans & Advances	3,436.24	5,596.76	8,102.31	10,486.17	13,144.13
Total	**3,991.30**	**6,358.42**	**9,565.25**	**12,054.30**	**15,226.99**
Trade Receivable	1,539.19	3,354.01	5,209.47	6,837.29	8,386.20
Trade Payable	3,051.46	5,460.12	6,959.11	10,485.36	12,497.05
Long Term borrowings	-	-	22,640.00	22,640.00	22,640.00

From above it may be observed that the company never generated any surplus revenue since commencement of its operations. Reserves and surplus was negative (Rs. 288.16 Lacs) in the year ended 31.03.2011, which piled up to Rs. 3781.68 Lacs. Thus, net worth of the company has already eroded.

Both trade receivable and payable have shown an increasing trend, more than 20% in the year 2013-14.

Share capital of Rs. 2750 lacs raised during the year 2013-14 to meet with piled up loses of the company.

The company has taken unsecured loan in the nature of compulsorily convertible debentures from one company covered in the register maintained under section 301 of the Act during the year ended 31st March, 2012 to the tune of Rs. 2264 Lacs.

The Company has not created any charges for this loan because principal amount is not required to be repaid in view of the nature of compulsorily convertible debentures.

CENVAT credit of Rs. 1113.85 Lacs has been wrongly availed and is not recoverable. Consequently based on prudence in accordance with AS-1, the company should have reversed the aforesaid amount by charging off to inventory sold off in the previous years. Had this amount been charged to Profit & Loss account, the negative balance of Rs. 3781.68 Lacs of Reserve & Surplus would have been increased to Rs. 4895.53 Lacs against the paid up Share Capital of Rs. 3603.40, resulting in negative net worth of Rs. 1292.13 Lacs.

Profit & Loss Accounts

(Rs. in Lacs)

Particular	Audit 31.3.10	Audit 31.3.11	% Change	Audit 31.3.12	%* Change	Audit 31.3.13	% Change	Audit 31.3.14	% Change
Income	6745.51	9779.05	**44.97**	8795.72	**(10.06)**	9623.38	**9.41**	10824.58	**12.48**
Expenditure	6080.08	9857.89	**62.13**	9151.04	**(7.17)**	10611.85	**15.96**	13010.97	**22.61**
Profit/ (Loss) before Tax	**566.82**	**(153.42)**	**-**	**(356.75)**	**-**	**(1285.74)**	**-**	**(2186.39)**	**-**
Less: Taxes	82.85	-	-	-	-	-	-	-	-
Loss after tax	**483.93**	**(155.92)**	**-**	**(349.57)**	**-**	**(1287.56)**	**-**	**(2186.39)**	**-**

As said earlier the Company has not earned any profit for the last four years. The loss has increased from Rs. 155.92 Lacs in 2010 to Rs. 2186.39 Lacs in 2014 resulting in total erosion of net worth of the Company.

2. No litigation has been pending against the company and certificate from Management has been duly provided in this regard. No Allegation or complaint has been leveled against the Company as verified from compliance report filed with Registrar of Companies.
3. The Company has taken unsecured loan in the nature of compulsorily convertible debentures from one Company covered in the register maintained under section 301 of the Act during the year ended March 31, 2012. The maximum amount involved during the year end on 31.03.2014 and the yearend balance of debentures outstanding is Rs. 2264.00 Lacs.
4. The Company doesn't have any branches, hence Audit as required under section 228 is not required.
5. Change in Shareholding & Directorship has been duly verified

from the resignation/ consent letters, Extract of Transfer and records produced before us.

6. Company has not made any revaluation of assets as can be observed from Audited financial statement produced before us.
7. The Company has neither accepted any deposit from public U/s 58A & 58 AA of the Companies Act nor is the provisions of any Special Statue (Chit fund) applicable to the company as verified from Auditor's report.
8. The Directors of the company has not derived any undue benefit, directly or indirectly from the Company so far, and there is no qualification by the Auditors of the company in this context so far.
9. No instance of substantial items of bad-debts written off comes to our notice during scrutiny of Accounts**.**
10. As noticed from books of Accounts and Annual Accounts, the Company has filed the income tax returns properly and have paid tax.
11. Keeping in regard to the books and records examined, Auditor's report and analyzing the affairs of the Company, we confirm that the working of the Company and management was fair and no instance of fraud has been noticed or reported during the year **except as mentioned above at point no. 4, qualification of the auditors given on page no. 12 & 13 and our observation on share exchange ratio as consideration given on page no. 11**, which can be prejudicial to the interest

of the Shareholders of the Company or to Public Interest.

1. That from the Auditor's Report of M/S SD Bio Standard Diagnostics Pvt. Ltd. as on 30 September, 2014 it was observed that :

(a) The Company sold products aggregating Rs. 3,069619 during the year ended March 31, 2013 to a private company in which an-ex-director of the Company was a director for which prior approval by the shareholders and the Central Government was not obtained in accordance with Section 297 of the Companies Act, 1956. The Company has not yet applied to the Central Government for the approval of eh aforesaid transaction. The Company has also not made any provision in the books of account for the aforesaid non-compliance. In absence of any order from the Central Government, we are unable to comment on the extent of adjustment(s) that may be required to the financial statements. The above matter was also a subject matter of qualification for the previous year ended March 31, 2013

(b) The Company has recognized CENVAT Input Credit balance aggregating Rs. 111,384,976 AT THE YEAR END INCLUDEED UNDER Short term loans and advances (Note 17 to the financial statement) which has been availed but not yet utilized on products manufactured by the Company which are chargeable at Nil rate of excise duty . In our opinion, based on our understanding of the applicable excise, and is not recoverable. Consequently based on prudence (in accordance with AS 1-Disclosure of Accounting Policies) the Company should have reversed the aforesaid amount by charging off the portion attributable to inventory sold off in the4 previous years. Also the Company should have recoded the amount in 'Inventory' being the CENVAT credit attributable to raw materials not yet used in the manufacture of finished goods and also on raw materials and services utilized in manufacture of finished products which are part of inventory as at the balance sheet date and have not been sold during the year. This has also resulted in provide for non-refundable duties and taxes to be include as part of cost of inventories. Consequential adjustments on each aforesaid impacted line items in the financial statements and earning/loss per equity share is presently not ascertainable.

In our opinion, except for the indeterminate effects of the matter 6(b) described in in the Basis for Qualified Opinion paragraph above, the balance Sheet, Statement of Profit and loss, and Cash Flow statement dealt with by this report comply with the Accounting standards notified under the Companies Act, 1956 read with the General Circular 15/2013 dated September 13, 2013 of the Ministry of Corporate Affairs in respect of Section 133 of the Companies Act, 2013

(c) The company has taken unsecured loan in the nature of compulsorily convertible debentures, from one company covered in the register maintained under section 301 of the Act during the year ended March 31, 2012. The maximum amount involved during the year and the yearend balance of debentures outstanding is Rs. 226,399,940.

(d) In our opinion and according to the information and explanations given to us, except for adequate internal controls over invoicing for a customer in respect of sale of goods for which the Management has taken remedial measure subsequent to the year end, and having regard to the explanation that, except for certain items of inventory/fixed assets which are of special/ proprietary nature for which suitable alternative sources do not exist, there is an adequate internal control system commensurate with the size of the Company and the nature of its business for the purchase of inventory, fixed assets and for the sale of goods. Further, on the basis of our examination of the books and records of the Company, and according to the information and explanations given to us. We have neither come across nor have informed of any continuing failure to correct major weaknesses in the aforesaid internal control system.

(e) The accumulated losses of the Company exceeds fifty percent of its net worth as at March 31,2014 and it has incurred cash losses in the financial year ended on that and in the immediately preceding financial year.

(f) The Company issued unsecured compulsorily convertible during the year ended March 31,2012, aggregating Rs. 226,399,940 which are outstanding at the year-end, in respect of which it is not required to create security of charge.

(g) Capital and other commitments

Other commitments

Bank guarantees issued and outstanding at year end Rs.75643321 (Previous Year Rs. 61,001,225)

(h) Revenue from operations

Sale of products	**Year ended 31.3.2014 (Rupees)**	**Year ended 31.3.2013 (Rupees)**
Sale of products	864612202	894946549
Manufactured goods Traded goods	265450276	143016812
Less Excise duty	67186736	82447667
	1062875742	955515694
Other operating revenue	1211801	508501
Scrap Sale	1064087543	956024195

Revenue from operations (net)

The company is engaged in the business manufacture and sale of In Vitro Diagnostic kits only and hence, further break up of sale as required in a accordance with the Guidance Note on Revised Schedule VI has not been disclosed.

(i) Estimated value of contracts in capital account (net of capital advances of Rs. 8991573 (Previous year Rs. 7798739) remaining to be executed Rs. 7964072 (Previous Year Rs. 490500)

(j) The company is changed in the business of selling manufacturing and trading of In-Citro Diagnostics kits. As the company operates in a single business and geographical segment, the reporting for primary and secondary segment disclosure prescribed by paragraphs 39 to 51 of accounting standard 17 segment reporting have not been provided in these financial statements.

(k) In view of there not being any virtual certainty, at the Balance Sheet date, of realizations of unabsorbed depreciation/carry forward of losses under the Income Tax Act, 1961, against sufficient future taxable income, Deferred tax assets (net) has not been recognized.

(l) For the year ended March 31, 2013, the company had undertaken a transfer pricing study and obtained the prescribed certificate of the Accountant to comply with the said transfer pricing regulations which did not envisage any liability. For the year ended March, 31, 2014 the company will carry out a similar study to comply with the said regulations and accordingly adjustments if any arising from the transfer pricing study shall be accounted for as and when the study is completed. The management confirm that all international term and at arm's length basis as per chapter X o the income Tax Act, 1961

2. That M/S Tarsem Garg & Co., Chartered Accountant has stated in his report that the working of the Company and management was fair and no instance of fraud has been noticed or reported during the year **except qualification of the auditors and our observation on share**

exchange ratio as consideration, which can be prejudicial to the interest of the Shareholders of the Company or to Public Interest.

3. *That in view of the observations of the Chartered Accountant and Auditor the Official Liquidator most respectfully submits that the working of the Company and management was fair and no instance of fraud has been noticed or reported during the year* ***except qualification of the auditors and our observation on share exchange ratio as consideration****, which can be prejudicial to the interest of the Shareholders of the Company or to Public Interest."*

Report of the Official Liquidator has also been accompanied by the report of Chartered Accountant. On going through the report of Official Liquidator, it is evident that whatever observations have been noticed by the Chartered Accountant have been extracted/reproduced in his report.

From the perusal of the report of the Official Liquidator, Chartered Accountant has also given observations that from the scrutiny of the books of record, Company has paid tax and filed income tax returns and further submitted that Amalgamation is not prejudicially to the interest of the Shareholders, public on which Creditors and Income Tax Department. However, explained reservation regarding share exchange ratio determined by the evaluator.

Similarly, affidavit of Mr. Lalit Kumar Saini, M.D.of Transferor Company dated 30.3.2015 has been filed to the report dated 27.03.2015 of the Official Liquidator, the petitioner-Transferor

Company has given its comments from paragraphs 4 to 12 which are extracted herein below:-

> *"4. With regard to the observation on share exchange ratio, it is submitted that the valuation exercise was carried out by an independent expert M/s Deloitte Haskins & Sells, Chartered Accountants to ensure the fairness of the transaction. Vide their report dated 01.09.2014, the independent expert recommended the fair equity share exchange ratio for the proposed merger of the Petitioner Company into the Transferee Company after detailed exercise as follows:*
>
> > *10 (Ten) equity shares of Alere Medical Private Limited of Rs.10 (Rupees Ten Only) each fully paid up for every 29 (Twenty Nine) equity shares of SD Bio Standard Diagnostics Private Limited of Rs.10 (Rupees Ten Only) each fully paid up.*
>
> 5. *The proposed Scheme of Amalgamation has incorporated the aforementioned recommendations of share exchange ratio which has been approved by the Board of Directors of the both the Petitioner Transferor Company and the Transferee Company vide board resolutions dated 05.09.2014. It is further submitted that the shareholders holding 99.9% equity shares of the Petitioner Transferor Company have consented to the*

proposed Scheme of Amalgamation as is duly recorded in the Order dated 17.10.2014 passed by this Hon'ble Court in CP No.166 of 2014. Similarly, the Unsecured Creditors representing 96.9% in value have also given their no objection to the proposed Scheme of Amalgamation. The Petitioner Transferor Company neither has any public shareholder nor any Secured Creditors.

6. It is further submitted that the shareholders holding 99.9% equity shares of the Transferee Company have also consented to the proposed Scheme of Amalgamation as is duly recorded in the Order dated 13.11.2014 passed by this Hon'ble Delhi Court in CA (M) No.150 of 2014. Similarly, the Unsecured Creditors representing 88% in value have also given their no objection to the proposed Scheme of Amalgamation. The Transferee Company neither has any public shareholder nor any Secured Creditors.

7. Furthermore, I state that neither the Petitioner Transferor Company nor the Transferee Company has received any objections from any person whatsoever in respect of the proposed Scheme of Amalgamation. The copy of affidavit dated

04.03.2015 submitted by the Transferee Company in CP No.748 of 2014 in CA(M) No.150 of 2014 with the Hon'ble Delhi High Court evidencing that no objections have been received, had been placed on record before this Hon'ble Court vide CA No.212 of 2015.

8. ***I*** *further submit that the exchange ratio of the shares of the Transferee Company to be allotted to the shareholders of the Transferor/Petitioner Company has been worked out by M/s. Deloitte Haskins & Sells, a recognized firm of chartered accountants who are experts in the field of valuation and in the absence of any mistake having being pointed out by the Official Liquidator in the said valuation, which has been consented to by the shareholders and unsecured creditors of both the Petitioner Transferor and Transferee Company, the contention of the Official Liquidator that the proposed Scheme may be prejudicial to the interest of the shareholders or to Public interest cannot be sustained.*

9 *Under paragraph 4 of the said report, the Official Liquidator while relying on the Chartered Accountant's Report has referred to the adverse comments of the statutory auditors of the Petitioner Transferor Company provided in their audit report for the financial year ending* *on 31.03.2014 in relation to contravention of sections 297 & 211(3A) & (3B) (dealing with non-compliance of Accounting Standards) of the Companies Act, 1956. I hereby submit that the Petitioner Transferor Company sold its products worth Rs.30,69,619 (Rupees Thirty Lakh Sixty Nine Thousand Six Hundred and Nineteen only) to a group company at arm's length price. The Petitioner Company after a detailed internal discussion assessed that there was a requirement to obtain prior approval of the Ministry of Corporate Affairs and is in the processing of taking appropriate steps for compounding of said non-compliance. Further, the statutory auditors in its report made observations in connection with certain discrepancies relating to recovery of CENVAT credit. I would like to submit that said observations were discussed by the Board of Directors and addressed in their Board report with an explanation that only certain products manufactured by the company attracts Nil rate of excise duty, whereas other products are dutiable. Hence in view of the management, CENVAT credit can be availed. It is further submitted that no notices or proceedings have been initiated by the revenue authorities on the said issue. It is further submitted that Scheme shall not be read as a conclusion to such issues* *on availability of CENVAT credit and shall be determined in accordance with law.*

10. Further, it is submitted that the Regional Director has already filed its representation in the proceedings filed by the Transferee Company pending before the Hon'ble Delhi High Court (CP No. 748/2014 in CA(M) No. 150/2014) wherein it has been clearly indicated in paragraph 14 that the Registrar of Companies has not opposed the Scheme and the Regional Director has expressed agreement with the report of the Registrar of Companies. The copy of response submitted by the Regional Director before the Hon'ble Delhi High Court has been placed on record before this Hon'ble Court vide CA No. 212 of 2015.

11. In relation to the above mentioned observations, I further state that a show cause notice dated 25.2.2015 has also been issued by the Registrar of Companies, NCT of Delhi & Haryana for the said violation. In the said show cause attention has been invited to section 621A in terms of which the offence is compoundable. Even otherwise, subsequent to the issuance of the aforementioned show cause notice, in the report dated 2.3.2015 submitted by the Regional Director in CP No.748 of 2014 in CA (M) No.150 of 2014 with the

Hon'ble Delhi High Court, it had been stated that the Registrar of Companies or the Regional Director had not opposed the scheme. Even at the time of hearing of the petition of the Transferee Company, before the Hon'ble Delhi High Court, as recorded in the Order dated 23.3.2015 the Regional Director as well as the Registrar of Companies had raised no objections to the Scheme of Amalgamation.

12. It is submitted that the Transferee Company in its Reply filed in response to the Representation/Affidavit of the Regional Director before the Hon'ble Delhi High Court (CP No. 748/2014 in CA(M) No. 150/2014) has clearly stated that any proceedings that may be initiated by or against the Transferee Company will be continued and carried on by or against the Transferee Company upon sanctioning of the Scheme of Amalgamation. The Transferee Company has further undertaken not to rely or seek any waiver in such proceedings on account of sanction of the Scheme of amalgamation. The copy of the representation filed by the Transferor Company before the Hon'ble Delhi High Court is The copy of affidavit dated 04.03.2015 submitted by the Transferee Company in CP No.748 of 2014 in CA (M) No.150 of 2014 with the Hon'ble Delhi High Court, had been placed *on record before this Hon'ble Court vide CA No.212 of 2015.”*

The petitioner-Transferor Company has given an explanation that Shareholders holding 99.9% equity shares of the Transferor Company given consents to the proposed Scheme of Amalgamation and no objection has been received from any person regarding the proposed Scheme of Amalgamation.

As regard the objection qua exchange ratio of shares of Transferee Company proposed to be allotted to the Shareholders of Transferor-Petitioner Company, it has been stated that said exchange ratio has been worked out by the Valuers who are experts in the field of evaluation and no such mistake has been pointed out by the Official Liquidator in regard to the said evaluation which had been consented by the Shareholders and Un-secured Creditors of both petitioner-Transferor Company and Transferee Company and therefore, the proposed scheme cannot be prejudicially to the interest of Shareholders or to the public interest.

The Regional Director has referred to the adverse comments of the statutory auditors provided in the audit report for the financial year ending on 31.3.2014 in relation to the contravention of Section 297 & 211(3A) & (3B) of the Companies Act, 1956. Petitioner-Transferor Company in this regard has stated that it had sold its product worth ₹30,69,619/- to a group company at arm's length price and therefore, after a detailed internal discussion, there was a requirement to obtain prior approval of the Ministry of Corporate Affairs and is in the process of taking appropriate steps for compounding of said non-compliance.

As regards, discrepancies relating to recovery of CENVAT credit, it has been pointed out that the Board of Directors had addressed the said issue within an explanation that only certain products manufactured by the company attracts Nil rate of excise duty, whereas, other products are dutiable and in view of Management, CENVAT Credit can be availed. However, no notices or proceedings have been initiated by the Revenue Authorities.

Learned counsel for the petitioner has drawn attention of this Court that para No.10 of the Scheme of Amalgamation which provides that Transferor Company in case of litigation/suits or recovery proceedings, which are to be initiated may be initiated against Transferee Company and any payment and expenses made thereto shall be liability of the Transferee Company.

For the sake of brevity, para No.10 of the Scheme of Amalgamation read as under:-

> *10. Legal Proceedings*
>
> *10.1 If any suit, appeal or other proceeding or whatever nature by or against SD Bio is pending, the same shall not be abate or be discontinued or in any way be prejudicially affected by reason of or by anything contained in this Scheme, but the said suit, appeal or*

other legal proceedings may be continued, prosecuted and enforced by or against Alere India, as the case may be, in the same manner and to the same extent as it would or might have been continued, prosecuted and enforced by or against SD Bio as if this Scheme had not been made.

10.2 In case of any litigation, suits, recovery proceedings which are to be initiated or may be initiated against SD Bio, Alere India shall be made party thereto, and any payment and expenses made thereto shall be liability of Alere India."

In response to the report of the Regional Director, petitioner-Transferor Company stated in affidavit dated 21.3.2015 that show cause notice dated 25.02.2015 had been issued by the Registrar of Companies, NCT of Delhi and Haryana for the violation of Sections 297 and 211(3A) & (3B) of the Companies Act, 1956 for non-compliance of Accounting Standard-2 of the Act. Copy thereof has been annexed as Annexure A-3 and it has been further submitted that Transferor Company is in the process of taking remedy or measure.

It has been further submitted that similar Scheme of Amalgamation has been filed in the High Court of Delhi at New Delhi and Regional Director, Northern Region has also submitted his report before the High Court of Delhi vide Company Petition No.748 of

2014, wherein it has been stated that any proceedings that may be initiated by or against the Transferor Company will be continued and carried on by or against the Transferee Company upon sanctioning of this Scheme of Amalgamation and the Transferee Company by way of an affidavit filed in the High Court of Delhi undertook that the Transferee Company shall not rely or seek waiver in such proceedings on account of sanction of the Scheme of Amalgamation. The copy thereof has been annexed as Annexure A-4 and thus, it has been prayed that neither any Regional Director nor Registrar of the Companies, NCT of Delhi has opposed the Scheme of Amalgamation, the Scheme of Amalgamation may be sanctioned with or without modification.

The explanation by way of affidavits submitted in response to the report of the Official Liquidator and the Regional Director sufficiently meets with queries raised by the Regional Director or Official Liquidator.

For the reasons mentioned above and keeping in view the procedural requirements under Sections 391 and 394 of the Companies Act, 1956 and as well as relevant affidavits and rules and due consideration of the report of the Regional Director, Ministry of Corporate Affairs, Noida and that of the Official Liquidator and the affidavits of the Managing Director of the petitioner-Transferor Company filed in response to the report of the aforementioned authorities, the Scheme of Amalgamation of the Transferor Company with the Transferee Company is hereby sanctioned. The Transferor Company shall be dissolved without being wound up. All statutory compliance shall be met with as has been undertaken in the affidavits in response to the reports of Regional Director and Official Liquidator.

The Scheme of Amalgamation shall be binding on Transferor Company and Transferee Companies, their respective shareholders, Creditors and all concerned.

Let the formal order of sanction of Scheme of Amalgamation be drawn in accordance with law and certified copy of the same be filed with the Registrar of Companies within 30 days from the receipt of copy of the same.

Copy of this order be published in “The Times of India” (English Version) and 'Dainik Bhaskar” (Hindi Version) both Delhi/NCR Editions and as well as in the Official Gazette of State of Haryana.

Any interested person shall be at liberty to apply to this Court for any directions as per law.

Learned counsel for the petitioner-Transferor Company states that the petitioner-Company would voluntarily deposit a sum of ₹30,000/- in the Common Pool Fund Account of the Official Liquidator within one month. Statement is accepted.

The Company Petition is disposed of accordingly.

(AMIT RAWAL)
JUDGE

March 31, 2015
savita