IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES "B", BANGALORE

Before Shri Chandra Poojari, AM & Shri George George K, JM

IT(TP)A No.299/Bang/2022 : Asst.Year 2017-2018

M/s.Biocon Biologics Limited (Formerly known as Biocon Biologics India Limited) Ground Floor, Tower 3, Semicon Park, Hosur Road, Electronics City S.O. Bangalore South – 560 100. **PAN : AAGCB7796M.**	v.	The Deputy Commissioner of Income-tax, Circle 1(1)(1) Bengaluru.
(Appellant)		(Respondent)

Appellant by : Sri.Padam Chand Khincha, CA
Respondent by : Sri.Manjunath Karkihalli, CIT-DR

Date of Hearing : 06.09.2022		**Date of Pronouncement : 13.09.2022**

O R D E R

Per George George K, JM :

This appeal at the instance of the assessee is directed against final assessment order dated 26.02.2022 passed u/s 143(3) r.w.s. 144C(13) of the I.T.Act. The relevant assessment year is 2017-2018.

2. The brief facts of the case are as follows:

The assessee, namely, Biocon Biologics Limited [successor. to Biocon Research Limited with appointed date 01.04.2019] is engaged in the carrying out Research and Development ("R & D") of drugs and drug delivery systems. For the relevant Assessment Year ("AY") 2017-18, the return of income was filed on 30.11.2017, declaring `Nil' income under the normal provisions of the I.T.Act and book losses as

per the provisions of section 115JB of the I.T.Act. After considering the taxes deducted at source, the assessee had claimed refund of INR 4,68,29,020 in the return of income.

3. The return of income was selected for scrutiny and notice u/s 143(2) of the I.T.Act was issued. During the course of assessment proceedings, reference was made to the Transfer Pricing Officer (TPO) for determination of Arm's Length Price ("ALP") of international transactions with its AE's. The TPO passed order u/s 92CA(3) of the I.T.Act (order dated 19.01.2021) proposing TP adjustment of Rs.2,31,00,871 on interest on delayed trade receivables. The AO issued the Draft Assessment Order ("Draft Order") dated 23.04.2021 as per the provisions of section 143(3) read with section 144C of the I.T.Act incorporating the TP adjustment proposed by the TPO.

4. Aggrieved, the assessee filed objections before the Dispute Resolution Panel (DRP). The DRP granted partial relief to the assessee. Consequent to the DRP's directions, the TP adjustment of Rs.2,31,00,871 was reduced to Rs.1,10,31,130. Further, the DRP also directed the AO to set off the TP adjustment with the brought forward losses as provided in the CFL Schedule of return of income.

5. Pursuant to the DRP's directions, the impugned final assessment order was passed on 26.02.2022. The A.O. after allowing the set off of the brought forward loss, arrived at total income at Rs.`Nil'.

6. Aggrieved by the final assessment order, the assessee has filed the present appeal before the Tribunal, raising following grounds:-

> *"Based on the facts and circumstances of the case and in law, Biocon Biologics Limited (Formerly known as Biocon Biologics India Limited) [Successor to Biocon Research Limited ("BRL")] (hereinafter referred to as "Biocon Biologics" or the "Company" or the "Appellant"), respectfully craves leave to prefer an appeal against the order passed by the Additional/Joint / Deputy / Assistant Commissioner of Income Tax / Income Tax Officer, National Faceless Assessment Centre, Delhi ("Ld. AO"), dated 26 February 2022 (received by the Appellant on 26 February 2022), under section 143(3) read with section 144C(13) read with section 144B of the Income Tax Act, 1961 ("the Act") in pursuance of the directions issued by Dispute Resolution Panel ("DRP"), Bangalore dated 26 January 2022 under section 144C(5) of the Act ("impugned order"), inter-alia on the following grounds, which are without prejudice to each other:*
>
> *That on the facts and circumstances of the case and in law:*
>
> *1. The impugned order of Ld. AO/ Transfer Pricing Officer ("TPO") and directions of Ld. DRP are based on incorrect appreciation of facts and incorrect interpretation of law and therefore, are bad in law.*
>
> *2. The Ld. AO/ DRP erred in making additions amounting to Rs. 1,11,67,553 to the income of the Appellant.*
>
> *3. Validity of assessment proceedings on non-existent entity*
>
> *For that upon facts and circumstances of the case,*
>
> *3.1 the Ld. AO was not justified in passing the final assessment order and the draft assessment order in the name and PAN of a non-existent entity despite having knowledge of the merger, rendering the final assessment order and the draft assessment order void.*
>
> *3.2 the Ld. DRP was not justified in holding that the defect in passing the draft assessment order was curable and in directing the Ld. AO to substitute the name of the amalgamated company in the final order since the draft*

assessment order was void ab initio.

3.3 the Ld. AO has erred in not referring to the various submissions filed by the Appellant with respect to the merger of BRL with the Appellant and passing the order without any application of mind which is in violation of law.

3.4 the Order passed by the Ld. AO is beyond jurisdiction and should be quashed as the learned AO has no jurisdiction to pass the assessment order assessing the income of a non-existent entity.

3.5 the assessment is bad in law as the same is on a non-existent entity and is void ab initio

Grounds relating to Transfer Pricing matters

4. Adjustment on account of imputation of notional interest on outstanding receivables from Associated Enterprises

Without prejudice to the ground 3 above, the Ld. AO/ TPO/ DRP has erred, in law and on facts:

4.1 in making an addition of INR 1,10,31,130 to the total income of the Appellant on account of notional interest imputed on outstanding receivables from Associated Enterprises ("AEs").

4.2 in considering the outstanding dues from AE to be in the nature of loan and not considering the business/commercial expediency of the arrangement.

4.3 in treating the outstanding dues from AE as a separate international transaction and not considering the same to be closely linked with the primary international transaction of provision of research services to AEs.

4.4 in not appreciating that when the primary international transaction of provision of research services to AEs has already been held to be at arm's length, there is no need to propose a separate addition on account of notional interest imputed on outstanding dues from AEs since the transaction is closely linked with the primary international transaction.

4.5 by not appreciating the facts that Assessee does not have a policy of charging interest from other unrelated parties in similar transactions nor has it paid any interest on its outstanding trade payable at year end to unrelated vendors.

4.6 Without prejudice to ground 4.1 to 4.5 above, the Ld. AO/ TPO/ DRP has erred, in law and on facts by adopting the SBI short term deposit interest rate to compute the notional interest on outstanding receivable as on 31 March 2017 instead of UBOR rate as initially specified during proceedings before the Ld. TPO.

Grounds relating to other matters

5. Disallowance of foreign exchange loss of Rs. 1,36,423 relating to fixed assets appearing in the intimation under section 143(1) of the Act

Without prejudice to the ground 3 above, the Ld. AO/ DRP has erred, in law and on facts, in:

5.1. disallowing the foreign exchange loss on fixed assets without proposing any adjustment and not issuing any show cause notice for the proposed variations as mandated by section 144B(1)(xvi) of the Act and passing the impugned Order, which is in violation of proceedings under the Faceless Assessment Scheme and in violation of the principles of natural justice.

5.2. not providing any reasons for disallowing the foreign exchange loss and without providing any opportunity of being heard to the Appellant.

5.3. disallowing the foreign exchange loss on fixed assets amounting to Rs.1,36,423, without appreciating the fact that the Appellant has disallowed the aforesaid amount in the tax computation, thereby resulting in double disallowance of the same amount.

5.4. Without prejudice to ground 5.1 to 5.3 above, the Ld. AO/ DRP has erred, in law and on facts, in not granting corresponding relief under section 10M of the Act on the enhanced profits arising due to disallowance of foreign exchange loss on fixed assets.

The Appellant submits that each of above grounds is independent and without prejudice to one another.

The Appellant craves leave to add, alter, amend, vary, omit or substitute any of the aforesaid grounds of appeal at any time before or at the time of hearing of the appeal, so as to enable the Hon'ble Tribunal to decide on the appeal in accordance with the law."

7. The learned AR submitted that the assessment has been completed on a non-existing entity, inspite of repeated intimation to the Assessing Officer, and therefore, the same is bad in law. In this context, the learned AR relied on the following case laws:-

(i) Maruti Suzuki India Ltd. (2019) 416 ITR 613 (SC)

(ii) Intel Technology India (P) Ltd. 380 ITR 272 (Kar.)

(iii) eMudhra Ltd. v. ACIT (2020) 117 taxmann.com 550 (Kar.)

8. The learned Departmental Representative, on the other hand, relied on the judgment of the Hon'ble Apex Court in the case of PCIT v. Mahagun Realtors (P.) Ltd. reported in (2022) 443 ITR 194 (SC) and the finding of the DRP.

9. In the rejoinder, the learned AR submitted that the case law relied on by the learned DR is not applicable to the facts of the present case, since sufficient intimation have been made to the A.O. about the merger of Biocon Research Limited with Biocon Biologics India Limited, during the course of assessment proceedings. In this context, the learned AR took us through various intimations issued by the assessee to the A.O.

10. We have heard rival submissions and perused the material on record. Biocon Research Limited and the assessee had filed an application before the National Company Law Tribunal (NCLT) with regard to approval of scheme of amalgamation / merger of Biocon Research

Limited with the assessee. The application was approved by the NCLT vide order dated 01.04.2020 with appointed date being 01.04.2019. This was intimated to the jurisdictional A.O. vide email dated 15.05.2020. The NCLT approval and the communication to the A.O. are placed on record at pages 377 and 395 respectively, in the paper book filed by the assessee. During the course of scrutiny proceedings, the fact of merger was intimated vide submissions dated 19.02.2021 as well as subsequent submissions filed at various intervals. The assessee had also requested the A.O. to reissue notices issued in the name of the assessee instead of Biocon Research Limited. However, no new notices were issued by the A.O. in the name of the assessee and draft assessment order was passed in the name of the non-existing entity, i.e., Biocon Research Limited. The DRP in its order dated 26.01.2022, directed the AO / TPO to pass the final assessment order in the name of Biocon Biologics Limited (the assessee). However, the final assessment order was still issued in the name of Biocon Research Limited. The assessee summarized the detail of communication in a chronological order with regard to the merger. For ready reference, the same is reproduced below:-

Particulars	Date of order / submission	Filed with
NCLT approval	04.02.2020	AO and DRP
Email intimation	15.05.2020	Jurisdictional AO
Submission before the AO	19.02.2021	NFAC
Submission before the AO	08.03.2021	NFAC

Submission before the AO	15.04.2021	NFAC
Objection with the DRP	27.05.2021	DRP

11. The Hon'ble Apex Court in the case of Maruti Suzuki India Limited (supra), after referring to various judicial pronouncements, had concluded that the assessment order passed on a non-existing company, i.e., the amalgamated company having ceased to exist as a result of approval scheme of amalgamation, is a substantive illegality and void. It was concluded by the Hon'ble Apex Court that this nullity cannot be rectified u/s 292B of the I.T.Act, even if the concerned assessee had participated in the said proceedings. Similar view has been taken by the following judicial pronouncements:-

(i) Intel Technology India (P) Ltd. 380 ITR 272 (Kar.)

(ii) eMudhra Ltd. v. ACIT (2020) 117 taxmann.com 550 (Kar.)

(iii) Spice Enfotainment reported in 247 CTR 500 (SC).

12. The learned DR strongly relied on the judgment of the Hon'ble Apex Court in the case of PCIT v. Mahagun Realtors (P.) Ltd. (supra). In the case of relied on by the learned DR, the assessee, namely, Mahagun Realtors Private Limited (MRPL) was amalgamated with other group companies, i.e., Mahagun India Private Limited (MIPL) with appointed date on 01.04.2006 and the Hon'ble Delhi High Court approved the said scheme on 10.09.2007. The Revenue authorities issued notice on 02.05.2009 for filing the return of income pursuant

to a search operation and in response MRPL did not initially file return of income. Subsequently, the return of income was filed in the name and PAN of amalgamating company, i.e., MRPL. Further, against the specific item in the return of income requiring of reporting of information of business reorganization such as amalgamation etc., it was mentioned "not applicable". The assessment order passed by the A.O. in the said case in the name of MRPL represented by MIPL. Against the above mentioned assessment order, MRPL filed appeal before the first appellate authority. The CIT(A) provided relief to MPRL on merits. On further appeal by the Revenue, the Tribunal quashed the assessment order on the ground that the company in whose name the assessment order was passed, was not in existence when the assessment order was passed, as it had amalgamated. The view taken by the ITAT was affirmed by the Hon'ble Delhi High Court by relying on the judgment of the Hon'ble Apex Court in the case of Maruti Suzuki India Limited (supra). On further appeal by the Revenue, the Hon'ble Apex Court held that although on amalgamation, the amalgamating company cease to exist, the business / undertaking of amalgamating company continues with the amalgamated company. The Hon'ble Apex Court distinguished the earlier rulings of the Hon'ble Apex Court in the case of Maruti Suzuki India Limited (supra) and Spice Infotainment (supra) for the following reasons:-

- Mahagun Realteors (P.) Ltd. (MRPL) did not intimate the fact of amalgamation prior to the issue of the assessment order.

- Mahagun Realtors (P.) Ltd. did intimate Tax Authorities about amalgamation, it was for subsequent assessment years and not for the assessment year under consideration.
- Mahagun Realtors (P.) Ltd. itself undertook various compliances such as furnishing of tax returns, correspondences with the Tax Authority, filing of appeal before appellate authorities etc. in the name of the amalgamating company, which had ceased to exist.

13. The Hon'ble Apex Court further held that whether corporate death of an entity upon amalgamation per se invalidates an assessment order ordinarily cannot be determined on bare application of corporate law provisions but would depend on the terms of amalgamation and the facts of each case. It was further held that the assessment order was issued in the name of Mahagun Realtors (P.) Ltd. represented by amalgamated company and it was only for the first time before the Tribunal that the objection was raised on validity of assessment in the name of the tax payer in view of amalgamation.

14. However, the facts in the present case is distinguishable. The A.O. in the instant case had passed the assessment order in the name of Biocon Research Limited, even though sufficient intimation have been made to the A.O. about the merger of Biocon Research Limited with Biocon Biologics Limited during the course of assessment proceedings. The intimation in this regard is tabulated (supra). As it can be seen from the above, the A.O. was diligently informed about the amalgamation during the course of assessment

proceedings and prior to the passing of the draft assessment order / final assessment order, hence, the ratio of the judgment in the case of Maruti Suzuki India Limited (supra) and Spice Infotainment (supra) continues to apply and the assessment order in the name of amalgamated company is treated as null and void. It is ordered accordingly.

15. Since we have decided the legal issue and quashed the assessment order, the other grounds are not adjudicated and are left open.

16. In the result, the appeal filed by the assessee is partly allowed.

Order pronounced on this 13th day of September, 2022.

Sd/-	**Sd/-**
(Chandra Poojari)	**(George George K)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Bangalore; Dated : 13th September, 2022.
Devadas G*

Copy to :
1. The Appellant.
2. The Respondent.
3. The DRP-1, Bengaluru.
4. The Pr.CIT, Bengaluru.
5. The DR, ITAT, Bengaluru.
6. Guard File.

Asst.Registrar/ITAT, Bangalore