



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK 'SMC' BENCH, CUTTACK**

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA No.14/CTK/2020
Assessment Year: 2015-16

Laxmi Real Infra (P) Ltd., Plot No.225, Cuttack Road, Laxmi Sagar, Chhak, Bhubaneswar.	Vs.	ITO, Ward -1(1), Bhubaneswar.
PAN/GIR No.AABCL 7346 Q		
(Appellant)	..	(Respondent)

Assessee by : Shri P.R.Mohanty, AR
Revenue by : Shri S.C.Mohanty, DR

Date of Hearing : 18 /12/ 2020
Date of Pronouncement : 08/1/2021

ORDER

This is an appeal filed by the assessee against the order of the CIT(A)-2 Bhubaneswar dated 18.3.2019 for the assessment year 2014-15.

2. The only issued involved in this appeal is that the Id CIT(A) erred in confirming the addition of Rs.31,05,900/- as income from other sources u/s.56(2)(viib) of the Act.

3. Facts in brief are that the assessee company is engaged in the business of Real Estate (Developer). During the course of assessment proceedings, the Assessing Officer noticed that the assessee has received total consideration of Rs.76,20,000/- including premium and has issued

equity shares for a consideration that exceeds the face value of the shares.

The assessee has issued equity shares as under:

Name of the entity	No.of shares allotted	Security premium	Face value	Total amount
M/s. Clubside Dealcom Pvt Ltd.	10,000	500	100	60,00,000
Sri Hiralal Patel	4,000	150	100	10,00,000
Sri Vasant Kumar Patel	2,480	150	100	6,20,000
Total:	16,480			76,20,000

4. On perusal of balance sheet, the AO noticed that the assessee company has shown Rs.76,20,000/- as unsecured loan in the name of the above persons as on 31.3.2015 and subsequently, in the assessment year 2015-16, has allotted equity shares to the above persons. He observed that since the assessee has issued equity shares against the outstanding unsecured loan and changed the nature of unsecured loan into share capital which exceeds the consideration of face value of shares and, therefore, provisions of section 56(2)(viib) of the Act are attracted. Therefore, the AO asked the assessee to furnish the fair market value of equity shares as per section 56(2)(viib) of the Act. Accordingly, the assessee company furnished the written submissions. Further, the AO asked the assessee to furnish the balance sheet of the company drawn up as on the date immediately preceding the valuation date of the shares, which was complied by the assessee. The AO noticed that in the balance sheet, the assessee has

shown Rs.76,20,000/- under the head "share application money pending allotment". On the basis of balance sheet drawn up as on 31.3.2015, the FMV u/s.56(2) (viib) of the Act r.w.r 11UA was calculated by the AO as under:

Statement of computation of FMV of Unquoted Equity Shares as on 30.03.2015

Particulars	Amount
Book Value of Assets (A) (Refer to Note No. 1)	3,53,83,598*
Book Value of Liabilities (L) (Refer to Note No.2)	3,29,23,611
Amount of paid up equity shares (PE) (Refer to Note No.3)	8,50,000
Paid up value of equity share (PV) (A-L)	100 24,59,987
Fair market value of unquoted equity share (A-L)/PE*PV)	289.41

Note No. 1- Calculation of Book value of Assets

Particulars	Amount
Total Value of Assets	3,54,24,902
Less:	16,304
Misc. Expenses to the extent not written off	25,000
Advance Tax	0
Tax Deducted at Source / TCS	0
Book value of Assets	3,53,83,598

Note No. 2- Calculation of Book value of Liabilities

Particulars	Amount
Total Value of Liabilities	3,54,24,902
Less:	8,50,000
Paid up share capital	15,59,986
Reserves & Surplus	91,305
Provision for Taxation	0
Amount set apart for Equity and Preference Dividend	0
Any amount representing provisions made for unascertained liabilities	
Any amount representing Contingent Liabilities	
Book value of Liabilities	3,29,23,611

Note No.3-Calculation of amount of paid up of equity shares

Particulars	Amount
Paid up share capital	Rs.8,50,000
Amount of paid up share capital	Rs.8,50,000

As per the above calculation sheet of FMV of unquoted equity shares arrived at is Rs.289.41 per share. From the above, it is clear that the company received Rs.600/- per share that exceeds the FMV to the tune of Rs.310.59 shares. However, as per the calculation sheet furnished by the company the FMV was Rs.1188/- per share.

5. In response to above FMV calculation sheet, the assessee furnished written submission as under:

"

First of all let us examine schedule III, part-I of the Companies Act. The liability, side of the Balance Sheet Part-I is depicted as below.:

LIABILITY SIDE

(1)EQUITY AND LIABILITIES:

(1) Share Holders Funds

- (a) Share Capital
- (b) Reserves & Surplus
- (c) Money Received against share warrants

(2) SHARE APPLICATION MONEY PENDING ALLOTMENT

(3) NON-CURRENT LIABILITIES:

- (a) Long Term Borrowings
- (b) Deferred Tax Liabilities
- (c) Other Long-Term Liabilities

(4) CURRENT LIABILITIES:

- (a) Short Term borrowings
- (b) Trade Payables
- (c) Other current liabilities
- (d) Short term provisions

ASSET SIDE

The details of Asset side not quoted here as not required in this context.

From the above table it is seen that "SHARE APPLICATION PENDING ALLOTMENT" is shown as a separate head like Share Holders Fund but not taken anywhere in the Liability Part. In the above Table point 1 and 2 are taken as EQUITY PART and point 3 and 4 are taken as LIABILITY PART.

It is always presumed that when the applicant for shares have agreed to take the shares at a premium and made a commitment the same is not considered as LIABILITY. And if you see the POST FACTO, the same have been allotted on the same day (30/03/2015) and resolution was passed and filed with Registrar of companies.

Nowhere in this context has been explained that SHARE APPLICATION MONEY PENDING ALLOTMENT will be considered as liability.

Note -2 calculation of book value of liabilities

Total value of Liabilities in the Liabilities side of	Rs. 3,54,24,902/-
Less:	
Paid up share Capital	Rs. 8,50,000/-
Reserves & Surplus	Rs. 15,59,986/-
Provision for taxation	Rs. 91,305/-

	Rs.1,01,21,291.00
Liabilities	Rs.2,53,03,611.00

Hence finally

1. The Book value of Assets	= A =	3,53,83,598/-
2. Total Value of Liabilities	= L =	2,53,03,611/-
3. Amt. of Paid up Equity Share	= PE=	8,50,000/-
4. Paid value of Equity Share	= PV =	100/-
A-L	= 1,00,79,987.00	FMV = $\frac{1,00,79,987 \times 100}{8,50,000} = 1,186.00$

6. On consideration of above, the Assessing Officer invoked the provisions of section 56(2)(viib) of the Act and without treating the share

application money as cessation of liability after allotment in the same financial year, calculated the FMV as required U/s 56(2)(viib) of the I.T. Act and Rule 11(UA) of the I.T. Rules at Rs. 310.59 per share instead of FMV as provided by the assessee at Rs. 1188/- per share and made an addition of Rs. 31,05,900/- to the total income towards income from other sources being excess money received exceeding the FMV of the shares in contravention of the provision of Sec 56(2)(viib).

7. Aggrieved, the assessee filed appeal before the CIT(A). The Commissioner of Income Tax (Appeals) vide impugned order rejected the contentions of assessee and confirmed the addition. Hence, the assessee is in appeal before the Tribunal.

8. Shri P.R. Mohanty appearing on behalf of the assessee submitted that during the financial year 2013-2014 relevant to assessment year 2014-15, there was a loan by the Company to the tune of Rs. 60 lakhs from Clubside Deal Com Pvt. Ltd., which was subsequently converted to share application pending allotment during the financial year 2014-2015 relevant to assessment year 2015-2016. During the financial year 2014-15 the company wanted to issue shares at a premium. The above Clubside Deal Com Pvt. Ltd. was interested to take shares in the company at a premium along with Sri Harilal Patel and Sri Vasant Kumar Patel. Further, the Id. AR of assessee referred to the list of allottees of shares and the return of allotment filed with Registrar of Companies in the prescribed form under the

provisions of the Companies Act, 1956 and these facts are not disputed by either party. He submitted that the only dispute is regarding the valuation of FMV as required U/s 56(2)(viib) of the I.T. Act and Rule 11(UA) of the I.T. Rules although both parties employ the same methodology i.e., $FMV = \underline{(A - L)} \times (PV)$ but differ in calculating the Value of L which represents the value of total Liability as the AO includes the amount of Rs. 76,20,000/- in the Liability and the assessee excludes the same as the shares are already allotted and transaction is complete and in absence of any further action the liability ceases to exist. This inclusion & exclusion by the AO & assessee gives rise to FMV of shares at Rs. 310.59 & Rs. 1188/- per share respectively.

9. Replying to above, Id DR supported the orders of lower authorities.

10. On careful consideration of the rival submissions, I observe that the Assessing Officer noticed that the assessee has received total consideration of Rs.76,20,000/- including premium and has issued equity shares for a consideration that exceeds the face value of the shares. The contention of the assessee is that in the relevant assessment year, the company wanted to issue shares at a premium and the company M/s. Clubside Deal Com Pvt. Ltd. was interested to take shares in the company at a premium along with Sri Harilal Patel and Sri Vasant Kumar Patel. But the effective dispute is regarding the valuation of FMV as required U/s 56(2)(viib) of the I.T. Act and Rule 11(UA) of the I.T. Rules although both parties employ the same

methodology i.e., $FMV = \frac{(A - L)}{PE} \times (PV)$ but differ in calculating the Value of L which represents the value of total Liability as the AO includes the mount of Rs. 76,20,000/- in the Liability and the assessee excludes the same as the shares are already allotted and transaction is complete and in absence of any further action the liability ceases to exist. This inclusion & exclusion by the AO & assessee gives rise to FMV of shares at Rs. 310.59 & Rs. 1188/- per share respectively. But the A.O. presuming the value of premium to be higher wanted the fair Market Value of shares as required u/s. 56 (2)(viib) of the I.T. Act. and Rule 11 (UA) of I.T, Rules. Accordingly, the assessee made the valuation of shares and furnished the same to the AO as follows:

Valuation of FMV as on 30/03/2015 as per Rule II (UA)

A-	Total value of Assets	Rs.	3,54,24,902/-
	Less: Misc. Exp. To the extent not written off	Rs.	16,304/-
	Advance Tax	Rs.	25,000/-
		Rs.	<u>41.304/-</u>
	Book Value of Assets (A)		<u>3.53,83,598/-</u>

L- Value of Liabilities:

And the Fair Market Value of shares as per formula in Rule-11 (UA)

FMV = $\frac{(A-L)}{PE} \times (PV)$

PE.

$$= \frac{(35383598 - 25303611)}{8,50,000/-} \times 100$$

$$= \frac{1.00.79,987 \times 100}{8,50,000/-} = 1,186/-$$

All the above valuation have been taken on the basis of schedule - III of the Companies Act.2013 (Specifically the value of liability)

But the AO has made a mistake in calculating the Liability figurer:-

He has calculated the Liability as follows: .

Total value of Liabilities in Liability side of Balance Sheet =	3,54,24,902,00
Less: Paid up share Capital	8,50,000/-
Reserves & Surplus	15,59,986/-
Provision for Taxation	91,305/-
	<u>Rs. 25,01,291/-</u>
	Rs. 3.29.23.611/-

The AO also mentioned that the amount of Rs. 76,20,000/- is only unsecured loan against which equity shares are allotted during FY 2014-2015. But the fact is that, the amount was shown under the head unsecured loan during the FY 2013-2014, but subsequently during the FY 2014-2015, it was converted into share application money pending allotment after receiving confirmation from the parties and also the shares were allotted within the financial year itself. Therefore, AO misunderstood that the unsecured loan has been converted into equity.

11. AO has written that, as per Rule 11UA, there is no provision to deduct pending share application money while calculating the FMV of unquoted equity shares. However, there is also no provision that it will not be deducted, because it is in the nature of equity and not of the nature of liability. In this context, I am of the view that it is the prerogative of

assessee as to how much capital is to be raised based on its long term and short term funding requirements for the purpose of running its business. The capital has been raised by issuing certain number of shares at certain price, which is again within the domain of assessee to decide. The assessee in captioned case issued shares at premium based on the value arrived at by an independent valuer prescribed under the law using the prescribed methodology. It is a well settled legal position that Revenue authorities cannot dictate the terms as to how a prudent businessman/assessee should have conducted its business. The revenue authorities cannot decide whether assessee should have collected premium on its shares or not. It is completely the businessman's discretion, business requirement and investor's willingness which determines the premium that should be collected on issue of shares.

12. Ld A.R. submitted that the provisions of section 56(2)(viib) aimed to check the menace of unaccounted money and are anti- abuse provisions. These provisions have no applicability to genuine business transactions. The genuineness and creditworthiness of the strategic investors is not even doubted either by AO or by CIT (A). The provisions of section 56(2)(viib) require that in case of closely held company, the shares should be issued at its fair market value to resident investors based on notified valuation formula by a notified expert. The provisions of section 56(2) and section 68 are in the nature of anti-abuse measures aimed at preventing the malafide

transactions intended to avoid tax liability and to tackle the problem of black money and were never intended to be made applicable on genuine, bonafide and purely commercial transactions.

13. The Ld AR relied on various judicial precedents wherein the assessee highlighted that the bonafide business transactions cannot be taxed under 56(2)(vii) and that the provisions of section 56(2) were to strike at the generation and use of unaccounted money and was never intended the honest and bonafide transactions where consideration for transfer was correctly disclosed by the assessee. Before me, Id A.R. also relied on the decision of this Bench in the case of ITO vs M/s. Ashoka Industries Ltd in ITA No.304/CTK/2018 for A.Y.2013-14 order dated 10.8.2020, wherein, it has been held as under:

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"6. Ld Departmental Representative (DR) submitted that since Rule 11UA(2) was inserted w.e.f. 29.11.2012 and the assessee had received the consideration amount towards issue of shares prior to 21.11.2012, the provisions of Rule 11UA(2) were not applicable in the case of the assessee and, therefore, the market value of the shares was required to be determined as per Rule 11 UA(1)(c)(b) and not as per Rule 11UA(2), Ld DR submitted that, accordingly, the AO adopted the fair market value of the shares at Rs.49.22 per share and taxed the excess receipt of Rs.130.78 as income of the assessee to be taxed u/s.56(2)(viib) as income from other sources.

7 . Ld DR further submitted that the Id CIT(A) was not right in holding that the assessee is entitled to value the share as per provisions of Rule 11UA (2) w.e.f 29.11.2012 especially when the assessee had received the consideration amount towards issue of shares prior to 29.11.2012 on 21.11.2012. Ld DR strenuously

submitted that the Id CIT(A) was not right and justified in granting relief to the assessee. Therefore, the impugned order may kindly be set aside by restoring the order of the Assessing officer.

8. Replying to above and supporting to the order of the Id CIT(A), Id counsel for the assessee drew our attention towards para 2.2 of the order of the Id CIT(A) and submitted that as per the decision of ITAT Jaipur Bench in the case of M/s. Safe Decore (P) Ltd (supra), the assessee cannot be denied the benefit of discounted free cash flow method only because the consideration amount was received much before insertion of Rule 11UA(2), which came into force. Id AR submitted that the ITAT Jaipur Bench in the case of Safe Decore (P) Ltd.(supra) has categorically held that since shares were issued at less than the fair market value calculated as per discounted free cash flow method, nothing is taxable u/s.56(2)(viib) of the Act. Id counsel also pointed out that since shares have been issued by the assessee at Rs.180/- per share as against the fair market value of Rs.189/- determined as per discounted free cash flow method, no addition is required to be made in the hands of the assessee u/s.56(2)(viib) of the Act. Therefore, the findings recorded by Id CIT(A) may kindly be upheld.

9. We have heard the rival submissions and perused the relevant materials placed on the record of the Tribunal. In this case, the assessee had issued 2,00,000 equity shares of face value of Rs.10/- to One M/s. Enbee Resources Pvt Ltd., on 7.1.2003 at Rs.180/- per share which included premium of Rs.170/- per share. It is the explanation of the assessee that since the fair market value as per the valuation in accordance with Rule 11ua (2)(B) was Rs.189/- and the assessee had issued shares at Rs.180/- including premium of Rs.170/-, which is less than the fair market value, no amount was required to be taxed as income from other sources u/s.56(2)(viib) of the Act. As per Rule 11UA(1)(c)(b) of the Rules, it is the prerogative of the assessee to estimate the fair market value of the shares issued by it adopting one method out of two methods i.e. discounted cash flow method or book value method. The revenue authorities cannot force the assessee to adopt particular method for valuing the fair market value of the share especially when Rule 11UA(1)(c)(b) provides that it is the option of the assessee to chose any method either discounted or book value method for estimating the fair market value of the shares issued by it during the relevant financial period. In this case, the assessee has adopted the discounted free cash flow method as prescribed under Rule 11UA (2)((b) of the Act.

10. We also find that the Jaipur Bench of ITAT in the case of Safe Decore Pvt Ltd., (supra) has held that the assessee cannot be denied the benefit of discounted free cash flow method only because the consideration amount was received much before Rule 11UA(2) came into force, which is one of the method to be adopted by the assessee for valuing the fair market rate. The above decision has been followed by the Id CIT(A) in the impugned order in deleting the addition. We also find that in the present case shares have been issued by the assessee at Rs.180/- per share as against the fair market value of Rs.189/- determined as per discounted free cash flow method and, therefore, no addition is required to be made in the hands of the assessee u/s.56(2)(viib) of the Act. Therefore, we find no infirmity in the impugned order of the Id CIT(A) to interfere. Accordingly, we uphold the findings of the Id CIT(A) and reject the ground of appeal of the revenue."

14. In the present case at hand, the assessee had allotted the shares at a rate of Rs.600/- per share and Rs.250/- per share, which is well within the limits of the fair market value of the shares. Therefore, the provisions of section 56(2) (viib) of the Act are not attracted. Further, the AO has computed the fair market value of unquoted equity shares as on 30.3.2015 u/s.56(2)(viib) r.w.r 11UA of the I.T.Rules at Rs.289.41 per share as against the FMV adopted by the assessee at Rs.1188/-. The value adopted by the assessee is as per the liability side of the balance sheet, wherein, the assessee had deducted Rs.76,20,000/- placed under the head " share application money pending allotment", which is not disputed by the Id D.R. Therefore, I am of the considered view that the FMV adopted by the assessee at Rs.1188/- per share is correct and, accordingly, allow the appeal of the assessee.

14. In the result, appeal of the assessee is allowed.

Order pronounced on 08/1/2021.

Sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 08 /1/2021

B.K.Parida, SPS (OS)

Copy of the Order forwarded to :

1. The Appellant : Laxmi Real Infra (P) Ltd., Plot No.225, Cuttack Road, Laxmi Sagar, Chhak, Bhubaneswar
2. The Respondent. ITO, Ward -1(1), Bhubaneswar.
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT-1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack