

**आयकर अपीलीय अधिकरण “एफ” न्यायपीठ मुंबई में।**  
**IN THE INCOME TAX APPELLATE TRIBUNAL**  
**“F” BENCH, MUMBAI**

**माननीय श्री पवन कुमार गडाले, न्यायिक सदस्य एवं**  
**माननीय श्री मनोज कुमार अग्रवाल, लेखा सदस्य के समक्ष।**  
**BEFORE HON’BLE SHRI PAVAN KUMAR GADALE, JM AND**  
**HON’BLE SHRI MANOJ KUMAR AGGARWAL, AM**  
(Hearing through Video Conferencing Mode)

1. आयकरअपील सं./ I.T.A. No.7000/Mum/2019  
(निर्धारण वर्ष / Assessment Year: 2013-14)  
&  
2. आयकरअपील सं./ I.T.A. No.6999/Mum/2019  
(निर्धारण वर्ष / Assessment Year: 2015-16)

<b>Freedom Wealth Solutions Pvt. Ltd.</b> Express Zone, A-wing, 8 <sup>th</sup> floor Western Express Highway, Goregaon(E), Maharashtra-400 063	<b>बनाम/</b> Vs.	<b>ITO Ward-9(3)(3)</b> 5 <sup>th</sup> floor, Aaykar Bhavan M. K. Road Mumbai-400 020
स्थायीलेखासं./जीआइआरसं./ PAN/GIR No. <b>AABCF-3377-P</b>		
(अपीलार्थी/ <b>Appellant</b> )	:	(प्रत्यर्थी / <b>Respondent</b> )

अपीलार्थीकीओरसे/ <b>Appellant by</b>	:	Shri Vijay Mehta -Ld. AR
प्रत्यर्थीकीओरसे/ <b>Respondent by</b>	:	Ms. Usha Gaikwad-Ld. DR

सुनवाईकीतारीख/ <b>Date of Hearing</b>	:	07/09/2021
घोषणाकीतारीख / <b>Date of Pronouncement</b>	:	22/09/2021

**आदेश / O R D E R**

**Manoj Kumar Aggarwal (Accountant Member)**

1. Aforesaid appeals by assessee for Assessment Years (AY) 2013-14 & 2015-16 contest separate orders of learned first appellate authority. However, facts as well as issues are substantially the same in both the years and therefore, the appeals were heard together and are now being

disposed-off by way of this common order for the sake of convenience & brevity. First we take up appeal for AY 2013-14.

2.1 The appeal for AY 2013-14 arises out of the order of Ld. Commissioner of Income-Tax (Appeals)-16, Mumbai [CIT(A)], dated 30/09/2019 in the matter of assessment framed by Ld. Assessing Officer (AO) u/s 143(3) on 31/03/2016. The ground read as under: -

1. The CIT (A) has erred in law and on facts in confirming the addition of Rs.1,36,03,086/- made by the Assessing Officer u/s. 56(2)(viib) of the Act in respect of share premium. The CIT(A) ought to have deleted the aforesaid addition of Rs.1,36,03,086/- as made by the Assessing Officer.
2. The CIT (A) has erred in law and on facts in passing the appellate order, which is invalid and bad in law. Further, the order passed by the Assessing Officer is also invalid and bad in law.

As evident, the assessee is aggrieved by confirmation of certain additions u/s 56(2)(viib) for Rs.136.03 Lacs.

2.2 The provisions of Sec. 56(2)(viib), as inserted by Finance Act, 2012 w.e.f. 01/04/2013, inter-alia provide that where a company (not being a company in which the public are substantially interested) receives any consideration for issue of shares that exceeds the face value of such shares, then any consideration which is excess of fair market value (FMV) of shares shall be chargeable to tax as Income from other sources. For the purpose of this section, FMV shall be the value, higher of the following:

- (a) as may be determined in accordance with such methods as may be prescribed (methods prescribed under Rule 11UA are Book value Method (NAV) and Discounted Cash flow method); or
- (b) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents,

copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature.

### **Assessment Proceedings**

3.1 In the above background, the material facts are that the assessee being resident corporate assessee issued on 30/03/2013 15572 Equity Shares of face value of Rs.10/- each at a premium of Rs.1024/- per share. The assessee is stated to be engaged in rendering investment and risk management advisory services. The shares have been issued to sole investor namely Shri Jayant Davar. The investments are duly supported by PAN, financial statement of the investor, copies of share certificates, Form No.2 filed by the assessee with Registrar of Companies (ROC). These documents are not in dispute. The dispute is with respect to issue price of share. The valuation of the shares was based on valuation report dated 28/03/2013 issued by the Chartered Accountants. Based on Discounted Cash Flow (DCF) method, the valuer recommended fair value of the shares to be Rs.1034/-. The working of the same has been provided in the report and the same has also been extracted in para-4 of the assessment order. Upon perusal of the same, it could be seen that the net present value of projected net cash flow for perpetuity has been discounted by adopting discounting factor of 15.16% and the value per share has been arrived at Rs.1034/- per share.

3.2 However, Ld. AO expressed dissatisfaction over the valuation on the plea that the assessee was having negative reserves & surplus. The actual financial results of financial years 2014-15 & 2015-16 were not in accordance with the projections made by the assessee. The discounting factor of 15.16% was very high.

3.3 Finally, in the opinion of Ld. AO, the valuation was to be done as per the alternative formula provided in the rules to arrive at FMV of Unquoted Shares which was as follows: -

(A-L) X (PV)

(PE)

Where A would represent book value of the assets in the balance-sheet, L would represent book value of liabilities shown in the balance-sheet, PE would be total amount of paid up equity share capital as shown in the balance-sheet and PV would be paid-up value of such equity shares.

The valuation thus arrived on the basis of above formula, yielded FMV as Rs.151/- per share. Therefore, the excess premium of Rs.873/-per share (Rs.1024 - Rs.151) was to be added u/s 56(2)(viib). The same resulted into impugned addition of Rs.136.03 Lacs in the hands of the assessee.

### **Appellate Proceedings**

4. The Ld. CIT(A) justified rejection of valuer's valuation by noticing that the method of valuation was full of defects and based on data of self-serving documents. The Valuer clearly mentioned that no independent analysis was made for valuation of shares rather the same was based on reports and documents provided by the assessee. Nothing was given in support of profits projections. The actual figure of next three years was negative in contrast to the projections made in the report. The basis for estimation made in the valuation under DCF method was not furnished by the assessee. Therefore, the said method was correctly rejected by Ld.AO and the additions were justified. Aggrieved, the assessee is in further appeal before us.

### **Our findings and Adjudication**

5. Upon careful consideration of factual matrix, it could be gathered that the assessee has issued certain shares at premium of Rs.1024/- per share. The premium has been received in accordance with the valuation report of the valuer. Upon perusal of valuation report, it could be seen that the valuer has adopted DCF method to value the share which is one of the prescribed method under Rule 11UA to value unquoted equity shares. Under DCF method, further cash flows generated out of the business would be discounted to arrive at net present value of these cash flows. The methodology would certainly require estimation of revenues, expenditure and cash projections and would involve estimations and assumptions. Therefore, the actual result may not be in line with the valuation made on the basis of assumptions / estimation. Hence, there is clear fallacy in the observation of lower authorities that the valuation was to be rejected merely because the financial results of next three years were not in accordance with the projections made by the valuer. Rule 11UA(2) provide an option to the assessee to value the shares on the basis of intrinsic value per share or by adopting Discounted Cash Flow Method (DCF). The valuation made by the assessee has been arrived at on the basis of DCF method of valuation and therefore, disturbing the same, without any cogent reasons, could not be held to be justified.

6. We further find that the prime object of insertion of Sec. 56(2)(viib) was to tax excessive share premium received unjustifiably by private companies on issue of shares without carrying underlying value. The

intent of the provision was to deter the generation and use of unaccounted money. However, there are no such allegations against the assessee since the assessee has demonstrated the fulfilment of primary ingredients of Section 68.

7. Our aforesaid findings are duly supported by the binding judicial pronouncement of Hon'ble Bombay High Court in the case of **Vodafone M-Pesa Ltd. V/s PCIT (2018) 92 taxmann.com 73 (Bombay)**, wherein it was held that there was no immunity from scrutiny of the valuation report and AO was entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. However, the basis has to be the DCF Method and it is not open to him to change the method of valuation which has been opted for by the Assessee. Similarly is the ratio of decision of Hon'ble Madras High Court in **CIT V/s VVA Hotels (P) Ltd. (2020) 122 taxmann.com 106**.

The Hyderabad Tribunal in **DQ (International) Ltd. V/s ACIT (2016) 72 taxmann.com 142** held that projections could not be replaced with actuals down the line. The valuation will go either way. When it goes to north, the revenue may adopt the same and when it goes to south, the assessee may adopt and therefore, there won't be any consistency. What is important is the value available at the time of making business decision. It should be left to the wisdom of the businessman. The method adopted should be consistent and should be documented to review in the future. The review does not mean replacing the projection with actuals. It is the rational of adopting the values for making decision at the point of time of making decision. When the values are replaced

subsequently, it is not valuation but evaluation i.e. moving the post of result determined out of projections.

Similar is the decision of Delhi Tribunal in **Cinestaan Entertainment (P) Ltd. vrs. ITO (2019) 106 taxmann.com 300** wherein the coordinate bench concurred with assessee's submissions that the deeming provisions of Sec. 56(2)(vii) could not be invoked on normal business transaction of issuance of shares unless it has been demonstrated by the revenue authorities that the entire motive for such issuance of shares on higher premium was for the tax abuse with the objective of tax evasion by laundering its own unaccounted money. The deeming fiction was to be strictly interpreted and there was no mandate to the Assessing Officer to arbitrarily reject the valuation done by the assessee on his own surmises and whims. It is a trite law, well settled by the Supreme Court, in the case of Commissioner of Customs (Imports) v. Dilip Kumar & Sons [2016] 69 taxmann.com 206/55 GST 764 that in the matter of charging section of a taxing statute, strict rule of interpretation is mandatory and if there are two views possible in the matter of interpretation, then the construction most beneficial to the assessee should be adopted. Viewed from such principle, here is a case where the shares had been subscribed by unrelated independent parties, who were one of the leading industrialists and businessman of the country, and after considering the valuation report and future prospect of the company, had chosen to make investment as an equity partners in a 'start-up company' like assessee, then it cannot be said that there is any kind of tax abuse tactics or laundering of any unaccounted money. It cannot be the unaccounted or black money of investors as it is their tax paid money

invested, duly disclosed and confirmed by them; and nothing has been brought on record that it is unaccounted money of assessee company routed through circuitous channel or any other dubious manner through these accredited investors. If such a strict view is adopted on such investment as have been done by the Assessing Officer and by Commissioner (Appeals), then no investor in the country will invest in a 'start-up company', because investment can only be lured with the future prospects and projection of these companies.

8. Drawing strength from the above cited judicial precedents, the facts and circumstances of the case do not convince us to confirm the impugned additions made u/s 56(2)(viib). By deleting the same, we allow the ground no.1 which render ground no.2 as infructuous. The appeal, thus, stand party allowed

#### **Assessment Year 2015-16**

9. Facts are substantially the same in this year. In this year, the assessee fetched a premium of Rs.75/- per share on fresh issue of shares. The shares were issued to HUF entity of a director of the assessee and three other investors as detailed in para-7 of the order. The valuation was arrived at as per Rule 11UA by adopting DCF method of valuation. However, Ld. AO opined that excess premium was hit by the provisions of Sec. 56(2)(viib) since the Book value of the share was Rs.0.12 per share as against issue price of Rs.85/- per share. The valuation adopted exorbitant future cash flows. The assessee was a loss making entity and no investor would pay premium for loss making entity. Therefore, the excess premium of Rs.75/- per share was added to the income of the assessee.

10. In the alternative, Ld. AO proposed addition u/s 68 though the assessee submitted copy of ITR, confirmation, bank statements etc. However, it did not submit copy of Balance Sheet and Profit & Loss Account to prove the creditworthiness. Further, the major investor i.e. M/s Parth Infracon Private Ltd. was incurring losses and the investments in assessee's entity were funded out of funds provided by another group entity. Therefore, protective additions were to be made u/s 68.

Upon further appeal, Ld. CIT(A), applying the same reasoning, confirmed the additions made by Ld. AO u/s 56(2)(viib). Aggrieved, the assessee is in further appeal before us.

11. We find that facts are pari-materia the same in this year. The valuation report has adopted DCF method of valuation of shares which has been rejected by Ld. AO by alleging that exorbitant estimation of future cash flows were made in the report. However, as observed by us in AY 2013-14, the valuation was as per one of the prescribed method and adoption of any method was optional for the assessee. Therefore, our findings as well as adjudication as for AY 2013-14 shall *mutatis mutandis* apply to this year also so far as the addition u/s 56(2)(viib) is concerned.

12. The Ld. AO, in the alternative, has invoked the provisions of Sec.68. However, upon perusal of assessment order, we find that the same are devoid of any concrete material on record. The assessment order itself records a finding that the assessee had furnished copies of ITR, confirmation, bank statement etc. in support of the transactions. It also takes note of the fact that the major investor funded the investment out of funds provided by group entities. Therefore, the assessee, in our

opinion, has successfully proved the identity of the investor entities, their creditworthiness and also the genuineness of the transactions. No further investigations are shown to have been carried out by Ld. AO to dislodge assessee's documentary evidences and the allegations are bereft of any concrete material on record. It is trite law that no addition u/s 68 could be made merely on the basis of presumption, conjecture or surmises. There are no allegations that the assessee's own unaccounted money was routed back in the garb of share application money. In the absence of such a finding, the alternative, as proposed by Ld. AO would have no legs to stand and accordingly, unsustainable in law.

13. Finally, by deleting impugned additions as made u/s 56(2)(viib), we allow ground nos.1 & 2 of the appeal. The others grounds have not been urged before us and hence, dismissed. The appeal stand partly allowed.

### **Conclusion**

14. Both appeals stand partly allowed.

*Order pronounced on 22<sup>nd</sup> September, 2021.*

**Sd/-**

**(Pavan Kumar Gadale)**

न्यायिक सदस्य / **Judicial Member**

**Sd/-**

**(Manoj Kumar Aggarwal)**

लेखा सदस्य / **Accountant Member**

मुंबई Mumbai; दिनांक Dated : 22/09/2021  
Sr.PS, Dhananjay

### **आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT– concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

ITA Nos.6999-7000/Mum/2019  
M/s Freedom Wealth Solutions Private Ltd.  
Assessment Years: 2013-14 & 2015-16  
**आदेशानुसार/ BY ORDER,**

**उप/सहायक पंजीकार (Dy./Asstt.Registrar)**  
**आयकरअपीलीयअधिकरण, मुंबई / ITAT, Mumbai.**