

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B”BENCH: BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2852/Bang/2018
Assessment Year: 2014-15

M/s. Kottaram Agro Foods Pvt. Ltd. No.9 & 10, Muneshwara Block 3 rd Cross, Haralugatte Village Kudlu Gate, Bommanahalli Post Bengaluru 560 068 PAN NO :AAECK3937F	Vs.	ACIT (OSD) Bangalore
APPELLANT		RESPONDENT

ITA No.2853/Bang/2018
Assessment Year:2015-16

M/s. Kottaram Agro Foods Pvt. Ltd. No.9 & 10, Muneshwara Block 3 rd Cross, Haralugatte Village Kudlu Gate, Bommanahalli Post Bengaluru 560 068 PAN NO : AAECK3937F	Vs.	Deputy Commissioner of Income-tax Circle-4(1)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Jeenitha Chatarjee, A.R.
Respondent by	:	Capt. Pradeep Shoury Arya, D.R.

Date of Hearing	:	22.12.2021
Date of Pronouncement	:	28.12.2021

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals filed by the assessee are directed against the orders passed by Ld. CIT(A)-4, Bengaluru and they relate to the assessment years 2014-15 & 2015-16. Both the appeals were heard together and are being disposed of by the common order, for the sake of convenience.

2. In assessment year 2014-15, the assessee is challenging the addition made u/s 56(2)(viib) of the Income-tax Act,1961 [‘the Act’ for short] and also the disallowance of R&D expenditure. In assessment year 2015-16, the assessee is challenging the addition made u/s 56(2)(viib) of the Act.

3. The facts relating to the case are stated in brief. The assessee company is running an agro based industry. In the year relevant to the year 2014-15, the assessee had issued 50,000 shares having face value of Rs.10/- per share at a premium of Rs.390/- per share. Accordingly, the assessee collected share premium amount of Rs.1,95,00,000/-. Before the A.O., the assessee furnished a valuation report dated 2.2.2012, in which the fair market value of share was determined at Rs.100/- per share as on as on 31.3.2012. The share value had been determined under discounted free cash flow method in the valuation report. However, the AO was examining the return of income pertaining to FY 2013-14 relevant to AY 2014-15. Hence, during the course of assessment proceedings, the assessee filed another valuation report dated 15.11.2013 before the A.O. as per which the fair market value of the shares was determined at Rs.400/- per share. The A.O. noticed the second valuation report dated 15.11.2013 was signed by a

Chartered Accountant who has also issued audit report u/s 44AB of the Act. The A.O. noticed that as per Rule 11U(a) of the Income Tax Rules, the valuation report should have been obtained from an accountant who is not appointed as an auditor u/s 44AB of the Act or u/s 224 of the Companies Act. Accordingly, the A.O. took the view that the second valuation report furnished by the assessee is not valid since it was issued by a person who is not entitled to issue such report. Accordingly, the AO did not consider the second valuation report. Since the fair market value of share was determined at Rs.100/- per share in the first valuation report, the A.O. adopted the same value for the shares issued during the year under consideration and accordingly determined excess share premium at Rs.1,50,00,000/-. Accordingly, the A.O. assessed the same as income of the assessee u/s 56(2)(viib) of the Act.

4. In the year relevant to the assessment year 2015-16, the assessee had issued 36,957 shares having face value of Rs.10 per share, at a premium of Rs.1072.34 per share. Accordingly, the assessee had collected share premium of Rs.3,96,30,430/-. In support of the same, the assessee furnished valuation report prepared by the auditor who had also issued tax audit report u/s 44AB of the Act. For the very same reasons mentioned in AY 2014-15, the A.O. did not recognize the valuation report. The A.O. proceeded to determine the fair market value as on 31.3.2014 under net asset value method. The fair market value was determined by the A.O. at Rs.714.38 per share. Accordingly, the A.O. assessed the excess share premium of Rs.1,32,29,088/- as income of the assessee u/s 56(2)(viib) of the Act.

5. The Ld. CIT(A) also confirmed the same in both the years.

6. At the time of hearing, the Ld. A.R. submitted that the assessee falls under the category of “Startup company” and it has filed declaration in Form No.2 with Ministry of Commerce & Industry. By placing reliance on the Circular F.No.173/354/2019-ITA-1 dated 9.8.2019 issued by CBDT, the Ld. A.R. submitted that the Startup companies have been exempted from the provisions of Section 56(2)(viib) of the Act, even if the addition had been made in the assessment order passed before 19.2.2019. Accordingly, the Ld. A.R. submitted that the AO should not make addition u/s 56(2)(viib) of the Act in both of these years.

7. The Ld D.R submitted that the assessee is raising a new plea and accordingly submitted that issue of assessing share premium in both the years under consideration may be restored to the file of the A.O. for examining the above said claim of the assessee.

8. We heard Ld. D.R. and perused the record. We notice that the assessee is making the claim for the first time before us that it falls under the category of Startup company and hence the provisions of Section 56(2)(viib) of the Act should not be applied to it as per the Circular issued by CBDT (referred supra). Hence there is merit in the contention of Ld D.R that the above said claim of the assessee requires examination at the end of the A.O., since it goes to the root of the matter. In any case, it requires to be examined as to whether the assessee falls under the category of “start up company”, whether it has complied with the conditions prescribed for not applying the provisions of sec.56(2)(viib) of the Act. Accordingly, we set aside the order passed by the Ld. CIT(A) on this issue in both the years under consideration and restore them to the file of the A.O. in both the years for examining the above said claim of the assessee. Since we have not decided the issue of addition on merits and if by any chance, the A.O. comes to the conclusion that

the assessee does not fulfill the conditions prescribed for exempting it from the provisions of section 56(2)(viib) of the Act, then the A.O. may take appropriate decision in accordance with law,. Needless to mention, the assessee should be given adequate opportunity of being heard.

9. The assessee is contesting one more issue in assessment year 2014-15. The A.O. noticed that the assessee has claimed a sum of Rs.1,70,798/- as research & development expenditure. Since the assessee would be getting enduring benefit from the R&D activities, the A.O. took the view that the expenditure incurred by the assessee is capital in nature. Accordingly, he disallowed the above said claim. The Ld. CIT(A) also confirmed the same on the reasoning that the assessee did not furnish any specific details or breakup of the expenditure.

10. The Ld. A.R. submitted that the R & D expenditure have been incurred by the assessee for development of a new product in the same line of business of the appellant. She submitted that it is a routine endeavour of the assessee to improve its product mix and hence it cannot be considered as capital expenditure. In the alternative, she submitted that the A.O. may be directed to allow depreciation on the above said expenditure, if the claim of the assessee is not accepted.

11. We heard Ld. D.R. and perused the record. Before us also, the assessee did not furnish specific details of expenditure relating to R&D expenditure. Hence, we have no other option but to confirm the order passed by Ld. CIT(A) on this issue. However, we find merit in the alternative contention of the assessee. Since the A.O. has capitalized this expenditure, there is merit in the claim that

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depreciation should be allowed thereon. Accordingly, we direct the A.O. to allow depreciation and the amount capitalized by him.

12. In the result, both the appeals filed by the assessee are treated as allowed for statistical purposes.

Order pronounced in the open court on 28th Dec, 2021

Sd/-
(George George K.)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 28th Dec, 2021.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.