

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'E' : NEW DELHI)

**BEFORE SH. G.S.PANNU, HON'BLE PRESIDENT
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.4028/Del/2018
(Assessment Year : 2014-15)

Dy. Commissioner of Income Tax, Circle-2(1), Gurgaon.	Vs.	M/s. Mais India Medical Devices Private Limited, Plot No. 1221, Sec.-46, Gurgaon PAN : AAHCM7723L
(APPELLANT)		(RESPONDENT)

C.O. No. 39/Del/2021
Arising out of ITA No.4028/Del/2018
(Assessment Year : 2014-15)

Dy. Commissioner of Income Tax, Circle-2(1), Gurgaon.	Vs.	M/s. Mais India Medical Devices Private Limited, Plot No. 1221, Sec.-46, Gurgaon PAN : AAHCM7723L
(APPELLANT)		(RESPONDENT)

Assessee by	Sh. Prakash Sinha, CA
Revenue by	Sh. Sumit Kumar Verma, Sr. DR

Date of hearing:	19.05.2022
Date of Pronouncement:	31 .05.2022

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been preferred by the Revenue against the First Appellate order dated 23.03.2018 in appeal no. 328/16-17 for assessment year 2014-15 passed u/s 250(6) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act) by Commissioner of Income Tax (Appeals)-1, Gurgaon (hereinafter referred as the Ld. First Appellate Authority or in short Ld. F.A.A), in appeal before it against order dated 05.12.2016 u/s 143(3) of the Act passed by the Assessing, Dy. Commissioner of Income Tax, Circle-2, Gurgaon,(Officer or hereinafter referred to as ' Ld. AO). Assessee has preferred Cross-Objections.

2. The facts in brief are the assessee company was incorporated on 01.03.2012 on the basis of joint venture agreement between a resident company namely M/s. Sysmech Industries LLP and the other non-resident company M/s. Demas Company for Trading and Contracting. Both the joint venture partners agreed to contribute project cost in the ratio of 60 and 40 while keeping share holding ratio 50 : 50. On the basis of valuation of equity shares at Rs. 59.99 per share following the DCF method assessee issued shares Rs 60 per share to non-resident share holder after necessary compliances under FEMA etc. While shares to resident company were issued at Rs. 40 per share. The assessee filed return of income declaring loss of Rs. 2,97,79,141/- and the case was picked up for limited scrutiny to furnish the various details including the share valuation as computed under Rule – 11UA of the Income Tax Rules, 1962. The ld. AO rejected the

valuation of share and made addition in the hands of assessee for allotment of shares to the Indian entity Sysmech Industries LLP u/s 56(2)(viib) of the Act, while giving the following finding :

“ Therefore, as discussed above, the legislature at its wisdom does not cover receipt in the form of excess of price over the FMV of the share issued to Non resident as income of the issuer company. Hence, the share allotted to Delmas, Saudi Arabia is not come under the purview of section 56(2)(viib) and also not covered by section 92 of the Income Tax Act. However, such case is not applicable in the case when the shares are issued to the Residents in India.

(B) In the given factum of the case the assessee company has issued the shares to the following residents in India :-

S.No.	Share Holder's Name	Date of allotment	No. of Shares Allotted	Face value	Share Premium	Amount Paid
1.	Sysmech Industries LLP Regd. Off: Plot no. 1221 sector-46 gurgaon-122003	<u>30/05/2013</u> <u>18/10/2013</u> <u>16/11/2013</u> <u>30/12/2013</u>	813246 213222 220260 240934	10 10 10 10	0 30 30 30	81,32,460 85,28,880 88,10,400 96,37,360

Keeping the above discussion into consideration and applicability of section 56(2)(viib) of the Act, the assessee company has received the benefit which is calculated as under :-

S.No.	Share Holder's Name	No. of Shares Allotted	Face value	Share Premium	Amount Paid	Share premium
1.	Sysmech Industries LLP Regd.	813246 213222 220260 240934	10 10 10 10	0 30 30 30	81,32,460 85,28,880 88,10,400 96,37,360	0 63,96,660 66,07,800

	<i>Off: Plot no. 1221 sector-46 gurgaon- 122003</i>					72,28,020
						2,02,32,480

As the Assessee failed to discharge its onus which has been casted under the provision of section 56(2)(viib) of the Act, I am of the considered opinion that the assessee company has received the consideration on issue of shares more than its FMV. As, in the interest of justice, the face value of the share of the company is Rs. 10 and had a loss in the previous assessment year therefore it may have the FMV as above calculated at Rs. 3.60 per share. However, the company might still have issued its share at minimum face value of Rs. 10 pr share. Accordingly, this regard, the security premium received by the assessee company will liable to be treated as income under section 56(2)(viib) of the Act.

4. In appeal the order of AO was set aside, therefore, Revenue has come in appeal raising following grounds :-

“(i). Ld. CIT(A) has erred in providing relief to the assessee on this ground holding that percentage increase in profits over next two years justify the share premium received.

(ii). Ld. CIT(A) has erred by not taking into consideration and challenging the assumptions in the DCF Model.

(iii) That the appellant craves for the permission to add, delete or amend grounds of appeal before or at the time of hearing of appeal.”

4.1 Assessee in Cross objections has raised following grounds of:-

“1. That Ld. AO and subsequently Ld. CIT(A) have erred in law and on facts and circumstances of the case in not appreciating the fact that the valuation of the shares of the assessee is based on the prescribed method (DCF Method) under Rule 11UA (2)(b) by a prescribed expert, i.e., Chartered Accountant, and the same can neither be varied nor disregarded by the Ld. AO for determination of fair market value for the purposes of section 56(2)(viib).”

5. Heard and perused the record. The grounds of appeal and the cross objections arise from same set of facts and law so are taken up together for determination.

5.1 On behalf of the Revenue it was submitted that Ld. CIT(A) has failed to appreciate the reasons which formed the basis of assessment order as at the time of valuation of the share the assessee company was under loss and the fair market value was rightly calculated by Ld. AO, at Rs. 3.60 per share. It was submitted that the provisions of Section 56(2)(viib) of the Act could not be applied to the non-resident entity but that does not dilute the liability of the assessee. It was submitted subsequent profits were irrelevant consideration.

5.2 On the other hand, on behalf of the Assessee it was submitted that there is no error in the findings of Ld. CIT(A) as revenue has contradicted itself as for non-resident entity the valuation given by the Chartered Accountant has been considered and valuation for the Assessee has been rejected. The Ld. Counsel also relied the assessment order dated 26.05.2021 placed on record along with written submissions in support of cross objections with regard to assessment of M/s. Sysmech Industries LLP where the resident Indian Company has also been assessed to tax u/s 56(2)(viia) of

the Act for allegedly having purchased shares of present assessee company M/s. Mais India Medical Devices Private Limited for lower rates than markets value for Rs. 59.99.

6. Now appreciating the matter on record and the submissions made it can be observed from the assessment order that Ld. AO has rejected the share valuation as computed under Rule 11UA of the Income Tax Rules, 1962 for the reason that the share issued to the resident company was much below the price at which shares were allotted to the non-resident company. The Ld. AO also observed that there was loss in the previous assessment years therefore, the value determined by DCF Method was not correct.

7. It appears that Ld. AO has fallen in error in not considering objectively the facts and circumstances of the case as reflected in the joint ventures agreement between the resident and non-resident entity. This agreement holds the key for reasons why there was difference in valuation of the shares for each one of them. Clause 4.2.1 of the joint ventures agreement provided that initial share capital of the assessee company shall be by contribution of 5 lac shares from each and Clause 4.2.2 which is reproduced below for convenience, indicated how the project costs was to be funded in the ratio of non-resident, entity paying 40% of the project cost and the resident entity paying 60% of the project cost.

“4.2.2 Funding of Project Cost

*The Project cost, as detailed in Schedule 3 of this Agreement, shall be funded by both **SysMech and Demas** through subscription of Equity Shares of the JV Company. It is agreed that SysMech shall pay for 10% of the Project cost through subscription of Equity Shares and Demas shall pay for 60% of the Project through subscription of Equity Shares including payment of any share premium amount which shall be mutually decided by the Parties. It is further agreed that after*

subscription of Equity Shares under this clause, equity shareholding of Demas and SysMech in the JV Company shall remain 50:50.”

8. Thus, in furtherance of these clauses of joint ventures agreement there was difference in the share price as issued to the resident company and that to the non-resident company. The discounted factor has occurred due to difference in the shares of capital contribution to the project cost. However, in the case in hand Ld. AO without considering the relevant clauses of joint ventures agreement presumed that as there was difference in the valuation of share for resident and non-resident entity, so, the valuation given by prescribed expert is liable to be rejected.

9. Then Hon'ble Supreme Court of India in **Duncans Industries Ltd. vs. State of UP, 2000 ECR 19 (SC)** which is relied in ITAT Delhi Bench's order in **Cinestaan Entertainment Pvt. Ltd. vs. ITO, New Delhi (2019) 106 taxman.com 300**, as relied by the Counsel for assessee, has held that question of valuation is basically a question of fact. Thus, where the law by virtue of Section 56(2)(viib) read with Rule 11UA (2)(b) makes the prescribed expert's report admissible in evidence, then without discrediting it on facts, the valuation of shares cannot be rejected.

9.1 Here is a case where the Ld. Assessing Officer has not disputed or questioned the financial, technical and professional credentials of the venturists for entering into the joint ventures agreement. Assessing Officer without disputing the details of projects, revenue's expected, costs projected has discredited the prescribed expert's report which is admissible in evidence for valuation of shares and to determine fair market value.

9.2 Then Ld. CIT(A) has rightly gone into the merits of the facts while making an observation that as projected in the report of prescribed expert there has been marked improvement in the profit margins of the company in subsequent years and thus upholding the valuation done by the Assessee's CA on DCF Method.

10. Lastly, there is also force in the contention of counsel for assessee that Ld. Assessing Officer has accepted and rejected the valuation in respect of three entities differently. In regard to the assessee it was rejected, in case of non-resident entity it was accepted but distinguished and in case of resident entity also it was accepted, while holding that it was benefited by allotment of shares by under valuing. Such act of approbation and reprobation itself makes the exercise of statutory powers, liable to be set aside.

11. In the light of aforesaid discussion, there is no substance in the grounds of appeal of the revenue, **the same is dismissed**. However, **the cross objections are allowed**.

Order pronounced in the open court on 31st May, 2022.

Sd/-
(G.S.PANNU)
PRESIDENT

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Date:- 31.05.2022

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI