

THE INCOME TAX APPELLATE TRIBUNAL
"A" Bench, Mumbai
Shri M. Balaganesh (AM) & Mrs. Kavitha Rajagopal (JM)

I.T.A. No. 832/Mum/2020 (A.Y. 2015-16)

Learning Curve Edutech Solutions Pvt. Ltd. 301, 3 rd Floor, A-Wing Mafatlal Chamber Marathon Futurex I.T. Park, Lower Parel East Mumbai-400 013. PAN : AACCL1246N (Appellant)	Vs.	Principal Commissioner of Income Tax-7 Room No. 125 1 st Floor, Aayakar Bhavan, M.K. Road Mumbai-400 020. (Respondent)
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Assessee by	Shri Nitesh Joshi
Department by	Shri Salil Mishra
Date of Hearing	30.03.2022
Date of Pronouncement	31.05.2022

ORDER

Per M.Balaganesh (AM) :-

This appeal is directed against the order passed by learned Principal Commissioner of Income Tax (PCIT)-7, Mumbai under section 263 of the I.T. Act vide order dated 02.12.2019.

2. We have heard the rival submissions and perused the material available on record. We find that the assessee in its grounds had challenged both assumption of jurisdiction under section 263 of the Act by learned PCIT as well as directions issued by learned PCIT to the Assessing Officer on merits. The assessee is engaged in the business of running day-care centres and nursery. The return of income for assessment year 2015-16 was filed by the assessee company on 30.7.2015 declaring total income of Rs Nil after claiming carry forward of current year loss of Rs. 3,02,87,682/-. The assessment was completed under section 143(3) of the Act by the learned Assessing Officer on 11.12.2017 accepting returned loss of the assessee both under normal

provisions of the Act as well as in the computation of the book profit under section 115JB of the Act. In this assessment order, the Assessing Officer in paragraph 2 had stated that the authorized representative of the assessee company had attended hearings conducted from time to time and filed various details which were placed on record and all those details were duly verified by him during the course of assessment proceedings. This assessment order was sought to be revised by learned PCIT under section 263 of the Act on the ground that the order passed by the Assessing Officer is erroneous in as much as it is prejudicial to the interest of revenue on certain aspects which were discussed elsewhere in this order.

3. We find that during the year under consideration the assessee had issued shares to the following persons as under :

Promoters category

Mr. Emron Samuel - 1202 shares
Mr. Suhas Bedekar - 1202 shares
Miss Swati Bhatt - 1203 shares

Investors category (other than promoters)

Mr. Sunil Dalal & Mrs. Nina Dalal belonging to Dalal group - 7021 shares

The aforesaid shares having face value of Rs 10 per share were issued at premium of Rs. 8265 per share. We find that the assessee had justified issue price of Rs. 8275 per share based on valuation report dated 30.6.2014 obtained from independent firm of Chartered Accountants. From the perusal of the valuation report, we find that the valuer adopted Discounted Cash-Flow (DCF) method for valuing shares of the assessee company. It is not in dispute that DCF method is one of the approved method of valuation of shares under Rule 11U & 11UA of the I.T. Rules. During the course of assessment proceedings, we find that the Assessing Officer had indeed called for the details of valuation of shares apart from proving the identity and creditworthiness of the share subscribers together with genuineness of share premium transactions. The assessee had duly furnished all relevant details in this

regard before the learned Assessing Officer. In fact we find that the assessee in its audited financial statement had clearly specified fresh issue of shares mentioning number of shares issued and name of the share holders to whom it has been issued. We find that during the course of assessment proceedings learned Assessing Officer had raised specific query vide notice under section 142(1) of the Act dated 9.11.2017 seeking justification of share premium/share application money received against un-allotted shares with valuation report. The Assessing Officer had also further asked the assessee to establish with cogent documentary evidences proving identity and creditworthiness of the share applicants as well as genuineness of the transaction. We find that the assessee had duly responded to the said query vide its letter dated 4.12.2017 filed before the learned Assessing Officer furnishing copy of confirmatory letters alongwith computation of income and copy of ITR acknowledgment in case of the promoters of the company and copy of confirmatory letters in the case of other persons from whom share capital, share premium and share application money was raised during the year. Further the assessee had also enclosed valuation report issued by independent firm of Chartered Accountants for justification of share premium received by the assessee. In the said reply the assessee had also categorically stated that valuer had adopted DCF method for valuing shares. We find from the perusal of the valuation report issued by the independent valuer dated 30.6.2014, which is enclosed in page No. 29 to 41 of the factual paper book filed before us, wherein value had arrived at issue price of Rs. 8275/- per share to be the fair value based on elaborate reasoning and financial working thereon using DCF method. Learned Assessing Officer had taken these documents on record and accepted this stand of the assessee during the course of assessment proceedings. While this is so, we are unable to comprehend ourselves regarding the observations made by learned PCIT that the Assessing Officer had not made necessary enquiries into share premium receipt during the course of assessment proceedings. In fact learned PCIT looks into very same valuation report dated 30.6.2014 which is already on record and arrived at a

conclusion that the issue price appears to be inflated and valuation carried out by independent valuer cannot be treated as fair market value. The main observation of learned PCIT is that independent valuer had worked out the issue price on the basis of period from 1st June to 31st May and not from 1st April to 31st March. For the sake of ready reference, show-cause notice issued by learned PCIT under section 263 is reproduced hereunder :

NOTICE U/S 263 OF THE INCOME TAX ACT, 1961

Office of the
Pr. Commissioner of Income-Tax-7,
Room No. 125, 1st Floor, AayakarBhawan,
MaharshiKarve Road, Mumbai 400 020.
Phone : 022 2210191(Direct)

F.No. Pr.CIT-7/Mum/263/Learning Curve Edutech-A.Y. 15-16/2019-20 Dated:22/09/2019

To,
The Managing Director,
M/s. Learning Curve Edutech Solutions Pvt. Ltd.
712, 713 & 714, 7th Floor,
Trade World 'C' Wing,
Kamala Mills Compound, Lower Parel,
Mumbai - 400 013
Madam / Sir,

Sub : Show cause notice u/s 263 of the I. T. Act, 1961 in your case
for A.Y. 2015-16 (PAN : AACCL1246N) - req

Assessment in your case for AY 2015-6 was completed u/s 143(3) on 11/12/2017 thereby assessing income at Rs (-)3,02,87,682/-.

2. In this regard, on a perusal of the records, it is seen that while passing the assessment order u/s. 143(3) on 11/12/2017, the Assessing Officer has failed to carry out enquiries as warranted by the facts and circumstances of the case and that the assessment has been completed without examining all the aspects which were required to be looked into for arriving at the correct taxable income of the assessee. It is found that even though there were clear indications that the returned income was not correct yet the AO did not conduct the necessary enquiries and the necessary details were not brought on record. The omissions which render the assessment order as erroneous and prejudicial to the interest of revenue are as below.

2.1 In your case, your company had issued equity shares of Rs. 10/- each at premium of Rs.8265/-, as per details below:

Date	No of EquityShare	Total Amount including premium
20/02/2015	2187	Rs.1,80,97,425/-
04/08/2014	2417	Rs. 2,00,00,675/-
07/07/2014	3607	Rs. 2,98,47,925/-

Section 56(2)(viib) of the Income Tax Act actually brings to tax the consideration received by a company from any resident person, which is in excess of Fair Market Value (FMV) of shares. Such excess is treated as income of the company liable to be taxed under the head "Income from Other Sources"

For the purpose of computation of Fair Market Value, the value of assets would include the value of intangible assets being goodwill know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature and the valuation is specifically defined under rule 11UA of the Income Tax Rules. As defined under Rule 11UA the

FMV of unquoted equity shares shall be the value on the valuation date, of such unquoted equity shares as determined in the following manner (a) or (b), at the option of the company namely

- (a) The FMV of unquoted equity shares shall be calculated simply by ascertaining "Book value of assets (less) Book value of Liabilities"
- (b) The FMV of the unquoted equity shares as determined by a CA as per Discounted free Cash Flow Method.

On scrutiny of the FMV working, it was observed from the explicit forecast period from 2015 to 2020 was shown as detailed below :-

Description	2015 (lakhs)		2016 (lakhs)	
	Projected	Actual	Projected	Actual
Sales & Other Income	311	316	1370	660
Earning before tax & Interest	161	-321	62	-949

From the above it is clear that the working of the share premium appears to be inflated.

Moreover, it was noticed from the P&L account an amount of Rs. 25,94,04/- was debited on account of loss from other firms. In view of above provision, the said amount should have been disallowed while computing taxable income. Omission to disallow has resulted in under assessment of income of Rs. 25,94,041/- and potential tax effect of Rs. 8,01,558/-.

3. Thus prima-facie there is a failure on the part of the AO to make relevant and meaningful inquiries as warranted by the facts of the present case and allowing the claims of the assessee. AO's failure to take cognizance of the legal implication of the transaction would render the assessment order being erroneous and prejudicial to the interest of revenue in terms of section 263 of the Act.

4. In view of the above, I propose to suitably revise the assessment order passed by the AO u/s 263 of the I.T. Act, 1961. Accordingly you are hereby requested to appear before me at above address on 26/09/2019 at 11:30 A.M. to present your case and to explain why the said order u/s 143(3) dated 11/12/2017 should not be revised u/s 263 of the I.T. Act, 1961. If you do not wish to avail of this opportunity of being heard in person or through authorized representative you may file your response in writing on or before the said date which will be considered before any such order is made under the section referred above. If nothing is heard from you by the said date, the necessary order will be passed ex-parte on the basis of material available on record without giving further opportunity to you, which may please be noted.



(Handwritten signature)

(RAKESH MISHRA)
Pr. Commissioner of Income Tax-7
Mumbai

4. In response to this show-cause notice, the assessee had furnished detailed written submission on 11.10.2017 before learned PCIT which are enclosed in pages 3 to 5 of the factual paper book. Further another show-cause notice was issued by learned PCIT on 18.10.2019 which is reproduced hereunder :-



GOVERNMENT OF INDIA
MINISTRY OF FINANCE
INCOME TAX DEPARTMENT
OFFICE OF THE PRINCIPAL COMMISSIONER OF INCOME TAX
Pr.CIT-7, MUMBAI

To, LEARNING CURVE EDUTECH SOLUTIONS PRIVATE LIMITED 712/713/714, 7th FLOOR, 712/713/714, 7th FLOOR, Trade World 'C' Wing Kamala Mills Compound Lower Panel 400013, Maharashtra India	
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PAN: AACCL1246N	Assessment Year: 2015-16	Dated: 18/10/2019	Letter No : ITBA/COM/F/17/2019-20/1019095766(1)
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Sir/ Madam/ M/s,

Subject: Proceedings u/s 263 of the I. T. Act, 1961 in your case for A.Y. 2015-16 (PAN : AACCL1246N) – reg

Ref: Your office reply dated 11/10/2019 to the Show Cause Notice u/s. 263 of the IT Act.

A perusal of the valuation report shows that same has been worked out on the basis of the period from 1st June to 31st May & not from 1st April to 31st March. The details of new centers to be opened is not mentioned therein, on the basis of which capital expenditure and revenue has been forecasted. Your valuation @ Rs. 8,275/- also is in far excess of the market price of the listed company Tree House Education Accessories Ltd. (Tree House) with market capitalization of Rs. 1,182/- crores. Your report itself mentions that the LCE Profit after tax including cash flow would be negative for the first two years. The basis of sales and other income projected at Rs. 311, 1370, 2944, 5392, 7520, & 9586 Lakhs in year ending May 2015, May 2016, May 2017, May 2018, May 2019 & May 2020 respectively, does not have any supporting empirical data for the projections made, nor is there any mention of the accounting standards used to value the shares. Under the circumstances, the valuation arrived at cannot be treated as fair market value, more so when compared to the listed price of the entity being taken as a comparison by you.

You are, therefore, hereby requested to show cause why for the reason of failure to carry out necessary inquiries in this regards, the provisions of the section

Note: If digitally signed, the date of digital signature may be taken as date of document.
ROOM NO:611,6th Floor, AAYAKAR BHAVAN, MAHARISHI KARVE ROAD, MUMBAI, Maharashtra, 400020
Email: MUMBAI.PCIT7@INCOMETAX.GOV.IN, Office Phone:02222005619

¹ The Notice/Letter/Order No. mentioned above may be treated as DIN for the purpose of procedure for issuance of Income Tax Notice prescribed by Circular No.19/2019 dt. 14 August 2019.

AACCL1246N- LEARNING CURVE EDUTECH SOLUTIONS PRIVATE LIMITED
A.Y. 2015-16
ITBA/COM/F/17/2019-20/1019095766(1)

56(2)(viib) r.w.s 263 may not be invoked and the order being erroneous so far as it is prejudicial to the interest of the revenue may not be set aside to be done de novo on this issue

You are requested to submit reply in this office **by 23/10/2019.**

RAKESH MISHRA
Pr.CIT-7, MUMBAI

(In case the document is digitally signed please refer Digital Signature at the bottom of the page)

5. The assessee filed a reply to the second show-cause notice vide its letter dated 23.10.2019 meeting each and every point raised by learned PCIT in the show-cause notice. In the said letter, the assessee also drew attention of learned PCIT that learned Assessing Officer indeed had already carried out necessary enquiries in this regard during the course of assessment proceedings. In the said reply letter dated 23.10.2019, the assessee had on without prejudice basis, also submitted that reference of Tree House (a listed company) made in the valuation report with an observation that the same is considered only to triangulate valuation under DCF method and not for comparison. The assessee further stated that the valuation of Tree House having market capitalization of Rs. 1182 crore as quoted in the letter of learned PCIT had substantially come down to less than Rs. 25 crore at present. This was apparently submitted to drive home the point that the nature of uncertainty that is prevailing in different times and hence projections using DCF method cannot be compared with actuals.

6. The sum and substance of learned PCIT disbelieving the valuation report for justification of share premium are summarized as under :

- i) Statistics for financial year 2015-16 reveal that projected sales and other income as well as earnings before interest and tax were higher than the actual.
- ii) Valuation report has been worked out on the basis of period from 1st June to 31st May and not from 1st April to 31st March.
- iii) Details of new centres to be opened are not mentioned on the basis of which capital expenditure and revenue has been forecasted.
- iv) Valuation is in excess of market capitalization of a listed company being Tree House Education Accessories Ltd.
- v) Valuation report itself mentions that the assessee's profit after tax including cash flow would be negative for the first two years.
- vi) Basis of sales and other income does not have any supporting empirical data for the projections made.
- vii) There is no mention of accounting standard used to value the shares.

7. In view of the above, learned PCIT alleged that the valuation arrived by independent valuer cannot be treated as fair market value of shares and accordingly invoked his revision jurisdiction under section 263 of the Act by setting aside the assessment order with the direction to learned Assessing Officer to allow an opportunity of hearing to assessee and reexamine the said issue in accordance with law.

8. Moot question that is to be decided is as to whether requisite enquiries were indeed carried out by learned Assessing Officer on the issue of share premium in the course of assessment proceedings or not. We find that as stated supra that the Assessing Officer had issued questionnaire dated 9.11.2017 along with notice under section 142(1) f the Act wherein a specific query was raised calling for justification of receipt of share premium to the assessee. This query was duly responded to by the assessee by furnishing details of share holders, number of shares allotted, issue price face value, issue price premium value, value received thereon, name of shareholders, valuation report for justification of issue price, confirmatory letters from share

applicants together with their ITR acknowledgment. These documents were indeed examined by the Assessing Officer which is evident from paragraph 2 of the assessment order wherein it has been categorically stated that various documents were furnished by the assessee from time to time and the same were duly verified by the learned Assessing Officer. The assessee had duly justified receipt of share premium with relevant documentary evidences before the Assessing Officer. Merely because there is no discussion regarding documents filed by the assessee on the receipt of share premium, order of the Assessing Officer, in our considered opinion, would not become erroneous. The law is very well settled that the Learned Assessing Officer would normally discuss only those issues on which he is in disagreement with the assessee. There cannot be any presumption on that account that no enquiry or requisite enquiry was not carried out by the Assessing Officer. Reliance in this regard is placed on the decision of Hon'ble Jurisdictional High Court in the case of CIT Vs. Nirav Modi (reported in 390 ITR 292), Idea Cellular Ltd. (reported in 301 ITR 407) and CIT Vs. Fine Jewellery India Ltd. (reported in 55 Taxman.com 514). Further we find that Hon'ble Gujarat High Court in the case of Nirma Chemical Works (309 ITR 67) had observed that *"if an assessment order were to incorporate the reasons for upholding the claim made by an assessee, the result would be an epitome and not an assessment order."* Merely because learned PCIT does not agree with the possible view taken by learned Assessing Officer, assessment cannot be the subject matter of revision. Reliance in this regard is placed on Hon'ble Jurisdictional High Court in the case of CIT Vs. Gabriel India Ltd. (reported in 203 ITR 108) and decision of Hon'ble Supreme Court in the case of CIT Vs. Max India Ltd. (295 ITR 282).

9. We find that learned Departmental Representative during the course of hearing had placed reliance on various decisions as under :-

- CIT Vs. Eastern Medikit Ltd. (337 ITR 56)(Del)
- Raj Mandir Estates (P) Ltd. Vs. PCIT (77 taxmann.com 285)(SC)

- Deniel Merchants (P) Ltd. Vs. ITO dated 29.11.2017
- CIT Vs. Ballarpur Industries Ltd. (85 taxamnn.com 10)(Bom)
- Sripan Land Development (P) Ltd. Vs. CIT (46 SOT 447)(Mum)
- Arvee International Ltd. Vs. Addl.CIT (101 ITD 495)(Mum)
- CIT Vs. Deepak Garg (299 ITR 435)(MP)
- CIT Vs. Jawahar Bhattacharjee (342 ITR 74)(Gau)
- Toyota Motor Corporation Vs. CIT (306 ITR 52)(SC)

10. We find that in all the aforesaid cases relied by the learned DR, there was no application of mind by the Assessing Officer and requisite enquiries were not carried out by the learned Assessing Officer and hence revision jurisdiction of learned PCIT under section 263 of the Act was upheld by Hon'ble courts. Whereas in the instant case, from the facts narrated above, it could be seen that there has been due application of mind by learned Assessing Officer and accordingly we hold that the case laws relied upon by learned Departmental Representative as factually distinguishable and would not come to the rescue of the Revenue. The law is very well settled that revision jurisdiction under section 263 of the Act could be done only in the case of 'lack of enquiry' by the learned Assessing Officer. The above facts clearly prove that there has not been any 'lack of enquiry' by the learned Assessing Officer. Hence, we hold that learned PCIT categorically erred in invoking revision jurisdiction under section 263 of the Act in the instant case on the issue of examination of share premium in the context of section 56(2)(vii)(b) of the Act.

11. Even on merits, we find that all the allegations levelled by learned PCIT for disbelieving valuation report had been duly met by the learned authorized representative before us. We find that the valuation report had duly captured incurrance of loss before interest and tax by the assessee in the first two years while drawing projections. We are in the agreement with the arguments

advanced by learned AR that academic year of Centre and nursery schools which assessee is engaged in, would start only from the months of June and hence valuer was duly justified in preparing projections by considering period of 1st June to 31st May instead of 1st April to 31st March. Learned AR also placed record of business plan containing details of centres opened or to be opened in future, year on year. These details were very much available before the valuer as part of the documents submitted by the assessee. In fact the existence of business plan and furnishing of the same by the management of the assessee company had been duly acknowledged by the valuer in the valuation report itself. Hence the arguments advanced by learned Departmental Representative before us that the business plan which is part of the paper book filed by the assessee was not available before the valuer while preparing valuation report, is dismissed. Admittedly this business plan would be the very basis of making projections under Discounted Cash Flow method by the management and valuer while preparing valuation report. In fact we find that the valuer also had compared valuation made with a comparable listed company i.e. Tree House Education Accessories Ltd. in his valuation report and takes cognizance of its market capitalization while preparing valuation report. Hence, observation by learned PCIT that even listed company like Tree House does not command an issue price as the assessee, cannot be accepted, as the same is without any basis. When valuer had already taken cognizance of the comparable listed company and still justified the issue price of Rs. 8275 per share for the assessee company, the same cannot be merely ignored by learned PCIT on the ground that the said price for the startup company is in far excess of a listed company's price. From the perusal of the valuation report, we find that the entire basis of projections had been explained in detail in the valuation report itself. We find that the valuer had carried out analysis of historical financial statements and budgets to determine forecasts of revenues and expenses. He has also carried out research and analysis of available empirical data to assess in determining fair value. In his valuation report he has also referred to the valuation processes

available being income approach or the asset approach or market approach and reasons why he considers income approach to be relevant in the present case. He has stated that income approach is based on DCF method which is the method prescribed under Rule 11UA(2)(b) of the I.T. Rules. We find that the valuer with a view to corroborate the said value had referred to the price earnings of listed company i.e. Tree House Education Accessories Ltd. and the market capitalization of its shares to conclude that the price earning multiple in this industry would be approximately 20.5 times. The said company market capitalization was Rs. 1,182 crore. The assessee's profit for next four years were estimated at Rs. 1.96 crore and applying the price earnings multiple of 20.5, the value of its equity would come to Rs. 40.18 crore. Since this value was estimated based on earnings for four financial years, the said value was discounted to determine the present value at Rs. 21 crore. Hence, comparable listed company has also been duly taken cognizance by the valuer in the valuation report. We find that the market capitalization is computed on the basis of total number of shares multiplied with current price per share. In any event, simplicitor comparison of market capitalization for valuation of shares of two companies is inappropriate. The manner of estimation of sales and other income was duly reflected in the business plan and workings notes of the valuer which also captured data of new centres to be opened year after year. Learned PCIT had also referred that there is no mention of the Accounting Standard used by the Chartered Accountant to value the shares. In fact at the relevant point of time, no accounting standard had been prescribed by the Institute of Chartered Accountants of India (ICAI) for valuing the shares. There was only a Technical Guide on share valuation published by the ICAI which was available for technical guidance of the Chartered Accountants. Hence, we hold that all the allegations levelled by learned PCIT for disbelieving the valuation report had been duly met hereinabove. Accordingly, even on merits, there cannot be any addition on account of share premium either under section 68 or under section 56(2)(vii)(b) of the Act as the issue of shares in the instant case has been done in accordance with Rule 11UA(2)(b) of the I.T.

Rules using DCF method. Hence, legal ground raised by the assessee challenging the assumption of jurisdiction under section 263 of the Act together with ground raised by the assessee on merits are hereby allowed.

12. In the result, appeal by the assessee is allowed.

Order pronounced in the open court on 31.05.2022.

Sd/-
(KAVITHA RAJAGOPAL)
JUDICIAL MEMBER

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated : 31/05/2022

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS