

IN THE INCOME TAX APPELLATE TRIBUNAL
“D” BENCH, MUMBAI
BEFORE SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER &
SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No. 568/Mum/2021
(A.Y:2015-16)

Drums Food International Pvt Ltd Unit No. 912, 9 th floor Hubtown Solaris, N.S Phadke Marg, Andheri (E), Mumbai – 400 069.	Vs.	PCIT – 6 Room No. 501, 5 th Floor, Aayakar Bhavan, MK Road, Mumbai – 400020.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AACCD7235M		
Appellant	..	Respondent

Appellant by :	Dr. K. Shivaram, Sr. Adv.AR
Respondent by :	Mr.Surendra Kumar, CIT-DR

Date of Hearing	25.04.2022
Date of Pronouncement	30.06.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Principle Commissioner of Income Tax (Pr.CIT)-6, Mumbai passed u/s 263 of the Act. The assessee has raised the following grounds of appeal:

- 1. The learned Pr. CIT erred in revising u/s 263 r.w Explanation 2 the assessment order passed u/s. 143(3) dt.10.11.2017 with respect to the issue of valuation of shares without appreciating that the said assessment order was*

neither erroneous nor prejudicial to the interest of the revenue and hence the order of revision is bad in law.

2. The learned Pr. CIT failed to appreciate that assessee had furnished all details pertaining to the issue of valuation of shares during the course of assessment proceedings and the learned Assessing Officer has accepted the valuation after making proper enquiry and due application of mind and thus the assessment order was neither erroneous nor prejudicial to the interest of the revenue and hence the order of revision is bad in law.

3. The learned Pr. CIT failed to appreciate that on the issue of valuation of shares the Assessing Officer had adopted a possible view which view was not unsustainable in law and thus the assessment order cannot be termed as erroneous and prejudicial to the interest of the revenue and hence the order of revision is bad in law.

5. Without prejudice to above the learned PCIT erred in observing that the appellant has not furnished any explanation as regards valuation as on the date of issue of shares whereas the Learned PCIT has failed to consider that the new valuation report giving the valuation as per Rule 11UA as on date of issue of shares which was filed in the revision proceedings was also in conformity with valuation adopted by the appellant and no infirmity is found in the valuation report of the valuer & hence the order of revision is bad in law.

6. Without prejudice to above, the learned PCIT has no jurisdiction to decide the issue on merit in revision jurisdiction by applying the Wrong principle of law and relying on the case

laws which are not applicable to the facts of the appellant & hence the revision order may be set aside.

7. Without prejudice to above the learned PCIT ought to have directed the Assessing Officer to consider the valuation report dt 31/7/2020 which was furnished before the PCIT which is conforming the value of the share issued & hence the revision order may be directed to be modified accordingly.

8. The appellant craves leave to add, amend, alter or delete any of the above grounds of appeal.

2. The brief facts of the case are that the assessee is a private limited company and is engaged in the business of manufacturing and distribution of food and dessert items. The assessee has filed the return of income for the A.Y 2015-16 on 30.09.2015 disclosing a total loss of Rs.4,92,98,559/- and the return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for scrutiny and notice u/s 143(2) and 142(1) of the Act along with questionnaire are issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and filed the details and the case was discussed. The Assessing Officer (A.O) on perusal of the financial statements and Tax Audit Report found that the assessee has claimed the interest on TDS of Rs. 8,806/- and was not disallowed in the

computation of income, therefore the A.O has made the disallowance of Rs. 8,806/-. Further the A.O found that, in the profit and loss account the assessee has claimed rates and taxes of Rs.12,110/- which pertains to the F.Y 2013-14 and F.Y 2012-13 and are in the nature of prior period expenditure was disallowed and assessed the total loss of Rs.4,92,77,643/- and passed the order u/s 143(3) of the Act dated 10.11.2017.

3. Subsequently, the PCIT on perusal of the assessment records and the A.O order is of the opinion that the A.O has not verified/examined the facts in respect of allotment of shares at a premium in the financial year 2014-15 and issued notice u/s 263 of the Act as under:

3.The assessee company had issued 67260 equity shares (face value of Rs.100/- and securities premium of Rs.900) in the F.Y.2014-15, receiving securities premium of Rs.6,21,84,000/-. As per the valuation report submitted by the assessee, the shares have been valued at Rs. 1050.98 appx. In the valuation report, two methods were considered by the valuer. As per DCF method, value per equity share is estimated at Rs.1536.28 and as per PIE method, it was estimated at Rs.565.68, and to arrive at the value, the valuer has used equal weight average to arrive at the value of Rs. 1050.98 per share.

It was also noticed that in the f.Y. 2013-14, the assessee company has issued 12,51,768 equity shares of value of the Rs. 100/- and securities premium of approx Rs.387.41), thus, receiving securities premium of Rs.9,75,37,940/-.

In the valuation report submitted, it is noticed that equity capital in F. Y. 2012-13 has been considered for determination of Weighted Average Cost of Capital (WACC). The effect of issue of shares in F. Y. 2013-14 has not been considered. The valuation should change with the issue of shares. Thus, the valuation of shares should have been done in the year when the shares have been issued. Only valuation report cannot be relied upon. The applicability of Rule 11UA can be known only after the valuation of shares is done again.

4 In view of the above, it is clear that the assessment order passed u/s 143(3) of the Act, dated 10/11/2017, is erroneous in so far as it is prejudicial to the interest of revenue. Within the meaning of Sec. 263 of the Act. Hence, it is proposed to revise the aforesaid order u/s 263 of the Act.

4. In compliance to notice, the assessee has filed the detailed submissions on the allotment of shares and applicability of the provisions and Rule 11 UA of the I T Rules as under:

According to us the above notice u/s 263 is not justified on following grounds which are without prejudice to one another:

1. The assessment order dated 10/11/2017 is neither erroneous nor prejudicial to the interest of the /revenue

as same is passed after making necessary enquiries and after application of /mind and the order of Revision is nothing but change of opinion. During the course of assessment proceedings, Ld AO had asked specific query with respect to huge share premium. Assessee addressed the said issue by filing various submissions from time to time. Hence, the Assessment order was passed after full application of mind.

2. Exercise of revisionary jurisdiction us 263 with respect to Share Application money is not in accordance with law as the said issue was specifically enquired into by the Ld A. O. The AO has asked specific query on huge share premium and verified all submission with respect to the same even from the point of view of Section 68. Hence, it is impermissible us 263 to hold that enquiry should have been done in a particular manner.

3. Unless the view of AO is unsustainable in law, Revision of order cannot be made. Exercise of revision us 263 cannot be resorted to for substitution of one view for the other. The view adopted by the Ld AO on applicability of Section 56(2) (vib) in the facts of the present case is a possible view. In the facts of the present case Notice u/s 263 does not state that the view adopted by AO is unsustainable in law. In fact in earlier year also, no addition of share premium was made in the hands of the Assessee. The provisions of Section 56(2) (viib) are anti-abuse provisions and same may be invoked only if there is evasion of taxes. Hence, revision tantamount to change of opinion which is not permissible u/s 263.

4. Without prejudice to above as there is no loss to the revenue, since the valuation is as per Rule 11UA and the value adopted by the AO is the same, hence revision is not justified.

5. The PCIT has dealt on the facts, information and the judicial decisions and provisions of law in respect of the valuation report and allotment of shares and finally observed that the order passed by the A.O is erroneous and prejudicial to the interest of the revenue and invoked the explanation (2) to Sec. 263 of the Act and relied on the judicial decisions and observed that the assessment order passed u/s 143(3) of the Act is set aside and cancelled and directed the A.O to frame a fresh assessment and the assessee should be provided adequate opportunity of hearing and passed the order u/s 263 of the Act dated 30.03.2021. Aggrieved by the revision order, the assessee has filed an appeal before the Hon'ble Tribunal.

6. At the time of hearing, the Ld. AR submitted that the Pr.CIT has erred in set aside the order of the A.O, as the order was passed after due verification and application of mind. The assessee has filed the details in the course of hearing on the claim and allotment of shares and emphasized on the correspondences on the allotment of shares and other information. The

Ld. AR explained that the assessee has substantiated the facts of allotment of shares and was filed on record. The AO was satisfied with the submissions and took the possible view. The Ld.AR substantiated the submissions with the paper book and judicial decisions and prayed for allowing the appeal.

7. Contra, the Ld. DR submitted that the assessee has not explained the facts in respect of the valuation of shares before the lower authorities though the assessee has produced the books of accounts and other information .Further on this disputed issue, there is no findings by the AO and has not applied his mind and also there is no specific disclosure in the assessment order and supported the order of the Pr.CIT.

8. We heard the rival submissions and perused the material on record. The sole crux of the disputed issue as envisaged by the ld. AR that the order passed by the Pr.CIT is devoid of merits and the A.O passed the order after making the enquiries and does not satisfy the twin conditions i.e erroneous and prejudicial to the interest of the revenue. The Ld. AR

further submitted that the Pr.CIT has only considered the facts that the AO has not conducted the enquiry but no specific findings are recorded. During the F.Y 2014-15 the shares were allotted to the share holders as per the valuation report dated 05.07.2013 obtained from the Govt registered valuer and the method prescribed under Rule 11 UA as per DCF method. The shares were valued as per weighted average method, consequently the assessee has issued the shares of face value of Rs100 at a premium of Rs.900, Rs.1000 and Rs.1050 to the existing share holders and there are no new share holders. The assessee has allotted right issue shares to the existing share holders at a premium and allotment was made on 04.09.2014, 11.11.2014 and 06.02.2015.

9. The assessee has complied with the notice issued under 142(1) of the act dated 20.07.2017 where the questionnaire was issued in particular at S.no. 29, the A.O wanted the details of large share premium received by the assessee and applicability of sec. 56(2) (viib) of the act. The assessee has filed the explanations and letters on 08.08.2017, 31.08.2017, 06.09.2017 and 20.09.2017 and were demonstrated

by the Ld.AR at page 65 to 75 of the paper book. Further, the assessee has submitted the details called by the A.O on the shares issued at a premium as under:

a) List of shareholders as on first and last date of F.Y.2014-15.

b) List of Share Application money received.

c) Form PAS 3 for allotment of shares along with Board Resolution and list of Allottee.

d) Minutes of the Board meeting for allotment of shares.

e) Valuation Report issued by M/s. Anmol Sekhri Consultants Pvt. Ltd. Dated 5th July, 2013.[Pg. No. 119-161] Copy of PAN, IT Return Acknowledgement and Bank Statement highlighting the payment made for share application amount of the following parties:-

(i) RSM Enterprises Pvt. Ltd.

(ii) Dimple Thakker

(iii) Rosalind Rock

(iv) Ashutosh Agrawal

(v) Sainath Ramanathan

(vi) Samir Palod

(vii) Manu Chandra

(viii) Ankur Goel

(ix) Blue Lagoon Vanijya Pvt. Ltd

(x) Shiv Chandra

(xi) Tejshree Madhu

(xii) Deepak Mittal

(xiii) Shripad Nadkarni

g) Explanation on valuation report by the Government approved valuer dated 05.07.2013 for issue of shares at premium

10. The AO after considering these facts is of the opinion that the explanations were fair and there is no reason to make further enquiries and passed the assessment order. The Ld. AR submitted that the PCIT has issued the notice that the equity capital in F.Y 2012-13 has been considered for determination of weighted average cost and the effect of issue of shares in F.Y 2013-14 is not changed. Whereas the valuation has been done in the year in which the shares are

issued and applicability of Rule 11UA of the I T Rules. The Ld. AR referred to the submissions and reply to the revision notice at page 181 and 196 of the paper book and the valuation report of M/s Galactico corporate services Pvt Ltd dated 31-07-2020 as per Rule 11UA placed at page 169 to 180 and demonstrated that the shares issued does not attract provisions of 56(2)(viib) of the Act. The Ld. AR contended that the A.O has passed the order after making enquiries on allotment. The Ld. AR submitted that the Pr. CIT has only directed the AO to make enquires whereas the A.O in the notice u/s 142(1) of the Act has called for information and discussed on the issue and the Pr. CIT has not considered these facts which are on record and the case was discussed by the A.O in the assessment proceedings therefore there cannot be any non application of mind by the A.O. Further the A.O has considered one of the possible views based on the information and it is not necessary that the AO should put all the discussions and observations in the assessment order as per explanation (2) to Sec. 263 of the Act the Authority

has invoke the provisions only that there no verification / enquiry conducted by the A.O.

11. We are of the opinion that the A.O has made verification of the facts on the aspects of allotment of shares but on the valuation, it is not clear whether valuation report was considered on record. We considering the facts and circumstances are of the view that it is a matter of verification and the Ld. AR also could not substantiate whether the valuation report dated 31-07-2020 filed before the Pr.CIT is similar and filed on the A.O. s record. We find the notice U/sec263 of the Act is dated 21-03-2020 and the valuation report was filed subsequently in the revision proceedings and further the Assessement order was passed U/sec143(3) of the Act on 10-11-2017. We are in agreement with the findings of the Pr.CIT that AO has not completed the assessment by adopting proper valuation of shares. Considering, the fact that the assessee itself filed the valuation report only during revisionary proceedings. We notice that Pr.CIT directed the AO to redo the assessment afresh. From the records, we observe that AO has not considered only the valuation of shares but he has

framed the assessment by duly collecting the information from the assessee, the Ld. AR has made detailed submissions on this aspects. Therefore, we are inclined to modify the directions of the Pr.CIT and direct the AO to redo the assessment by adopting the valuation report submitted by the assessee in revisionary proceedings. Hence the AO has to only look after this aspect and need not disturb the whole assessment order. Therefore the grounds of appeal are partly allowed in favour of the assessee.

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

Order pronounced in the open court on 30.06.2022.

Sd/- (S RIFAUR RAHMAN) ACCOUNTANT MEMBER	Sd/- (PAVAN KUMAR GADALE) JUDICIAL MEMBER
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Mumbai, Dated 30.06.2022

KRK, PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. संबंधित आयकर आयुक्त / The CIT(A)

4. आयकर आयुक्त(अपील) / Concerned CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, Mumbai / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार / BY ORDER,

सत्यापित प्रति //True Copy//

1.

(Asst. Registrar)
ITAT, Mumbai