

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH, MUMBAI
BEFORE SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER &
PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA No. 6833/Mum/2019

(A.Y: 2015-16)

Paath Financial Services Pvt Ltd., Flat No.4, Sai Krupa Chawl, Rawalpada, Ganesh Nagar, Dahisar(E), Mumbai – 400068.	Vs.	ITO – 15(1)(4) Aayakar Bhavan, M.K Raod, Churchgate, Mumbai – 400020.
PAN/GIR No. : AAHCP2103K		
Appellant	..	Respondent

Appellant by :	Mr.Poojan Mehta.AR
Respondent by :	Mr.Soumendu Kumar Dash.DR

Date of Hearing	15.07.2022
Date of Pronouncement	09.09.2022

आदेश / O R D E R

PER PAVAN KUMAR GADALE JM:

The assessee has filed the appeal against the order of the Commissioner of Income Tax (Appeals) – 24, Mumbai passed u/s 143(3) and 250. The assessee has raised the following grounds of appeal:

- 1. Increasing the Income by Rs. 99,00,000/- by treating the amount of share capital received as unexplained cash credit u/s 68 of the Act, whereas as per the facts and circumstances the addition should not be made.*
- 2. Making an addition of Rs. 9,00,90,000/- by treating the amount of share premium received as unexplained cash credit u/s 68 of the Act whereas as per the facts and circumstances addition should not be made.*

2. The brief facts of the case are that the assessee company is engaged in the business of share trading and derivative transactions. The assessee has filed the return of income electronically for the A.Y 2015-16 on 29.09.2015 disclosing a total income of Rs.1,54,770/- and the return of income was processed u/s 143(1) of the Act. Subsequently, the case was selected for limited scrutiny under CASS and notice u/s 143(2) and 142(1) of the Act were issued. In compliance to the notice, the Ld. AR of the assessee appeared from time to time and submitted the details as called for and the case was discussed. The A.O on perusal of the financial statements in particular Audited balance sheet found that the assessee has issued 9,90,000 shares at the face value of Rs. 10/- each at a premium of Rs.91/- each and the assessee was required to explain the basis for valuation of shares to determine/

substantiate the premium charged. In compliance, the assessee has filed explanations by letter dated 22.11.2017 mentioning the facts and the complete details and the basis for which the shares have been issued on bulk basis considering the long term prospects of the company. Whereas the shareholders have invested in the shares of the company considering its business model as well as the future profitability of the company.

3. The assessee company has obtained the share valuation certificate as per Rule 11UA of the Act. The assessee has filed the working of discounted free cash flow statement for the F.Y 2014-15 to 2018-19. Whereas the A.O on perusal of the valuation report observed that the assessee has not furnished the basis / working of the projected figures of the free cash flow of the company for the above financial years. The AO further called for the information and the basis of issue of shares and working of discounted free cash flow (DCF). The assessee has submitted the details vide letter dated 11.12.2017 mentioning that the certificate as per DCF method has been issued considering the future business and profitability of the company and

the company has done the good business in the succeeding years but the profitability remains low and the copy of the profit and loss account for the F.Y 2016-17 was also filed. Whereas the AO on perusal of the facts and the information submitted was not satisfied with the explanations and is of the opinion that the assessee company does not have strong financial or commercial strength nor any track record to support the premium charged against the shares and no fixed assets have been part of the company assets which support the charging of the premium of the company. Therefore the AO found that the cash flow statement did not support the financials of the assessee company and the premium charged by the assessee on the shares is without any explanations.

4. Further, the A.O has called for the details by questionnaire dated 03.11.2017 to prove creditworthiness and genuineness of the subscribers of shares. The AO dealt on the valuation of share premium and has made a details observation that the share premium cannot be justified and the assessee has not proved the creditworthiness and relied on the judicial decisions and concluded that the share capital

and share premium is not genuine and made addition as unexplained cash credit in the books of accounts u/s 68 of the Act and assessed the total income of Rs. 10,01,44,770/- and passed the order u/s 143(3) of the Act dated 20.12.2017.

5. Aggrieved by the order, the assessee has filed an appeal before the CIT(A), whereas the CIT(A) considered the grounds of appeal, submissions of the assessee, findings of the AO and the CIT(A) dealt on the explanations furnished by the assessee and the relevant documents in the paper book and the provisions of Sec. 68 and 56(2)(viib) of the Act. The CIT(A) perused the details referred at Para 2.5.4 of the Order and observed that while section 68 taxes income from undisclosed sources, the relevant section in the instant case is Sec. 56(2)(viib) of the Act. Whereas the CIT(A) is of the opinion that the provisions of Sec. 56(2)(viib) of the Act brings to tax any money received by the assessee from a resident on the issue of the shares to the extent it exceed the fair market value(FMV) of the shares issued. The CIT(A) relied on the decision the Coordinate Bench of this Tribunal in the case of Innoviti Payment Solutions Pvt Ltd,

Bangalore, wherein it was decided that the AO has power to challenge the computation of DCF methodology of the Assessee. Further on the decision of the Honble Tribunal in the case of TUV Rheinland NIFE Academy Pvt Ltd., held that the assessee was unable to substantiate the projections based on which the value was determined using the DCF method and the very basis for the DCF valuation does not hold good. Hence, considering the facts that the A.O. has rightly rejected the valuation adopted by the assessee in the absence of appropriate working the CIT(A) is of the opinion that AO has rightly applied the provisions of Sec. 56(2)(viib) of the Act and accordingly uphold the addition made by the AO and dismissed the assessee appeal. Aggrieved by the CIT(A) order, the assessee has filed an appeal before the Hon'ble Tribunal.

6. At the time of hearing, the Ld. AR submitted that the CIT(A) has not upheld the addition u/s 68 of the Act but u/s 56(2)(viib) of the Act that shows that there is no doubt on the investors as well as genuineness of the transaction and the shares were issued at a premium considering the fair market value(FMV) and the Ld. AR substantiated the submissions with the

judicial decisions and factual paper book covering the various submissions in respect of the transactions and prayed for allowing the appeal. Contra, the Ld.DR supported the order of the CIT(A) and submitted that the CIT(A) has rightly considered the addition u/s 56(2)(viib) of the Act.

7. We heard the rival submissions and perused the material on record. The Ld. AR submissions are that the CIT(A) has erred in substantiating the addition u/s 56(2)(viib) of the Act which is not a matter of facts/addition before the AO and whereas the AO has made the addition u/s 68 of the Act. The contentions of the Ld. AR that the addition made by the CIT(A) will not be hold good under two different parameters. The LD. AR referred to the submissions and the factual paper book filed in the course of hearing and in particular the details filed before the valuer as well as the annual accounts of the assessee. Whereas during the year, the assessee company has issued shares at a premium to four different parties. The Ld.AR submitted that the income tax returns, Audited financial statements of the parties for three assessment years along with the confirmation and board resolution etc

were filed to justify the share premium. The assessee has submitted the valuation report u/s 56(2)(viib) of the Act placed at page 143 to 146 of the paper book in the assessee proceedings. The Ld.AR submitted that the valuation report is exhaustively prepared and dealt on the facts considering the business operations of the company at Para 1 and 2 and mandate of valuation of shares on DCF method as the shares were not listed on any recognized stock exchange. The valuer has considered the background of the company and the methodology of the valuation discussed by the valuer with respect to DCF method and also the method that has been worked out and the projections of the future cash flow provided by the management and respective assumptions. The Ld.AR emphatically explained the cost and discounted rate of return and the working of the average cost of capital.

8. Further the Ld.AR referred to the Para 5 in relation to the information provided by the management has been considered and in Para 6 the valuer has considered the contributing factors for valuation of stock value categories mentioning the projections provided by the company are reviewed for the purpose

of valuation and the expenditure and investments along with the weighted average cost of capital and terminal values. The Ld. AR referred to the value of the share under the DCF method and substantiated the submissions relying on the following judicial decisions as under:

(i) Green Infra Ltd. Vs. ITO, [2013] 38 taxmann.com 253 (Mumbai-Trib), held as under:

Section 56, read with section 68, of the Income-tax Act, 1961 Income from other sources Chargeable as [Share premium] Assessment year 2009-10 Assessee-company was incorporated on 3-4-2008 During previous year ending on 31-3-2009, it had collected share premium on allotment of shares of face value of Rs. 10 each at a premium of Rs. 490 per share It had credited said amount in balance-sheet under head share premium account It claimed that share premium was a capital receipt not exigible to tax Assessing Officer had taxed share premium under section 56(1) as assessee's income from other sources Whether since expenditure and receipts directly relating to share capital of a company are of capital in nature, share premium collected by assessee could not be taxed under section 56(1) as income from other sources - Held, yes Whether since entire transaction relating to allotment of shares had been done through banking channel and assessee had invested share premium in its three subsidiary companies, provisions of section 68 as suggested by revenue had also not applicable to instant case - Held, yes [Paras 10.3, 11.28 & 12] [In favour of assessee]

II. Section 37(1), read with section 32, of the Income-tax Act, 1961 Business - expenditure - Allowability of [Commencement of business] - Assessment year 2009-10 Assessing Officer had disallowed expenses claimed by assessee and also depreciation on ground that assessee had not commenced its business during assessment year under consideration and, therefore, expenses were of capital in nature - Registrar of companies had issued certificate of commencement of business on 29-4-2008 - Details of all expenses incurred during previous year had been furnished by assessee before Assessing Officer Such expenses were incurred for setting up of subsidiary companies - One of subsidiary companies had started generating electricity within three months from end of financial year, i.e., by June, 2009 - Whether in peculiar facts of case it could be said that assessee had commenced its business during assessment year under consideration and was eligible for all legitimate expenses including depreciation. Held, yes [Para 17.1] [In favour of assessee]

III. Section 28(1), read with section 56, of the Income-tax Act, 1961 - Business income - Chargeable as [Interest] - Assessment year 2009-10 In return of income filed for - assessment year 2009-10, assessee had shown interest income earned on FDR as business income - Assessing Officer treated said income as income from other sources on plea that assessee had not commenced its business, nor its business was that of money lending and, as such, it had kept unused funds in FDR and earned interest income - Period of holding FDR on which assessee earned interest was very short - Whether in light of holding period, interest earned was to be taxed under head business income - Held, yes [Para 22] [In favour of assessee]

(ii) ITO Vs. Chiripal Poly Films Ltd., [2019] 104 taxmann.com 172 (Mumbai – Trib.)

1. Section 68 of the Income-tax Act, 1961 - Cash credit (Share application money) - Assessment year 2011-12 - Assessee-company issued 1.98 lakhs shares of Rs. 10 each to company OMIL, Mauritius at a premium of Rs. 990 per shares - Assessing Officer noted that authorized share capital of assessee was only Rs. 3 crores; out of which assessee had already issued share capital worth Rs. 1.78 crores and assessee could have allotted shares to OMIL to extent of Rs. 1.21 crores only - Accordingly, Assessing Officer made additions to income of assessee under section 68 - However, for issuing of shares, assessee complied with all requirements of RBI guidelines by filing FIRE with RBI - IT had also filed Unique Identification Number received from RBI - Further, it had also filed FCGPR with RBI in this connection and, thus, assessee was having sufficient authorized share capital to issue shares to investor Whether under Income-tax Act, there is no requirement for increasing share capital for allotment of shares and since Assessing Officer had not carried out any inquiry except recording fact that there no authorized share capital and, hence, concluded that entire transactions genuine, no additions could be made under section 68 - Held, yes [Paras 11 and 12) in favour of assessee]

II. Section 68, read with section 56, of the Income-tax Act, 1961 - Cash (Sub-section (viib)) - Assessment year 2011-12 Whether amendment in section 56(2)(viib) inserted vide Finance Act, 2013 with effect from 1-4-2013 is prospective in nature and could not be applied in assessment year 2011-12 for making addition under section 68 - Held, yes - Assessee-company received share application money from several investors - Assessing Officer noted that assessee

had charged share premium at Rs. 990 per share from investors whereas under rule 11UA fair market value of share of assessee was worked out to Rs. 37.87 per share as on 31-3-2010 and Rs. 166.54 per share as on 31-3-2011 - Accordingly, relying on amended provision of section 56(2)(viib), he treated excess share premium received by assessee as unexplained income and made addition under section 68 - It was found that assessee had adequately disclosed transaction in its books of account, filed statutory Forms regarding allotment of shares, provided name, address and PAN of shareholders, etc. Whether since assessee had sufficiently discharged onus cast upon it for purpose of section 68, no addition could be made on this account - Held, yes [Para 22] [In favour of assessee]

III. Section 56 of the Income-tax Act, 1961 read with rule 11UA of the Income-tax Rules, 1962 - Income from other sources - Chargeable as (Sub-section (2)(viiia)) - Assessment year 2011-12 - Whether where entire reserves and surplus appearing in balance sheet of company were only on account of grant/subsidy received from Government of India and not on basis of any business profit earned by company, said amount could not be taken into account while determining fair market value of shares as per provisions of section 56(2)(viiia), read with rule 11UA- Held, yes [Para 26] [In favour of assessee]

IV. Section 56, read with section 4, of the Income-tax Act, 1961 Income from other sources Chargeable as (Interest) - Assessment year 2011-12 Assessee-company earned interest on deposit placed with a bank with object of availing credit facilities for importing equipments for setting up of its new plant - Whether interest income earned on such deposit was inextricably linked or connected to setting up of plant and, therefore, interest

was to be treated as capital receipt - Held, yes [Paras 28 and 29] [In favour of assessee]

V. Section 115JB, read with section 14A, of the Income-tax Act, 1961 and rule 8D of the Income-tax Rules, 1962 - Minimum alternate tax (Section 14A application) - Assessment year 2008-09 - Whether while computing book profit under section 115JB Commissioner (Appeals) was justified in deleting addition of expenses relatable to exempt income, being interest and other charges paid to bank, capitalized in 'capital work in progress' account by invoking provisions of section 14A, read with rule 8D - Held, yes [Paras 30 to 32] [In favour of assessee]

(iii) *Cinestaan Entertainment P. Ltd., Vs. ITO, [2019] 106 taxmann.com 300 (Delhi – Trib)*

Section 56 of the Income-tax Act, 1961 read with rule 11UA of the Income-tax Rules, 1962 Income from other sources Chargeable as (Share premium) - Assessment year 2015-16 Whether assessee has an option to do valuation of shares and determine fair market value either on DCF Method or NAV method and Assessing Officer cannot examine or substitute his own value in place of value determined Held, yes Whether Income Tax Department cannot sit in armchair of businessman to decide what is profitable and how business should be carried out; Commercial expediency has to be seen from point of view of businessman Held, yes Assessee-company was engaged in business of production and distribution of feature film In initial phase of setting up its business, it had approached accredited investors to join in as equity partners and raised funds by issuing shares to said investors Shares were issued at premium based on valuation from prescribed expert i.e. Chartered Accountant using DCF method which was a prescribed

method under section 56(2)(viib) read with rule 11UA(2)(b) and assessee invested said fund in compulsorily convertible debenture of associate companies - Assessing Officer disregarded valuation report of CA mainly on ground that valuation of equity shares was based on projection of revenue which did not match with actual revenues of subsequent years - Assessing Officer held that share premium received by assessee was without any basis and he took fair market value of share premium at Nil and made addition under section 56(2)(viib) He was also of view that in order to achieve said projections, assessee should have invested share premium amount to earn some income/return - Assessing Officer had not disputed details of projects, revenues, cost incurred and manner in which it was substantiated by actual revenue In fact, projected revenue would really commensurate with actual state of affairs based on subsequent year financials - Whether on facts, approach and finding of Assessing Officer and addition made by Assessing Officer could not be approved - Held, yes [Paras 30-36] [In favour of assessee]

(iv)Vodafone M-Pesa Ltd., Vs. DCIT, [2020] 114 taxmann.com 323 (Mumbai - Trib).

Section 56 of the Income-tax Act, 1961 read with rule 11UA of the Income-tax Rules, 1962- Income from other sources - Chargeable as (Share premium) - Assessment year 2015-16 Whether valuation of shares is itself is a projection of future events or activities and no doubt it has to be done with some accuracy, however, no person at time of projecting events or result can project with 100 per cent of accuracy - Held, yes - Assessee company had issued shares of face value of Rs. 10/- each at a premium of Rs. 14.70 per share and, accordingly, received share premium

Shares were issued after duly valuing shares based on Discount Cash Flow (DCF) method and valuation was done by a merchant banker Assessing Officer was of view that valuer had not independently valued prospects of assessee company and merely relied on information supplied by assessee and; accordingly, he proceeded to value fair market value of shares based on Net assets value added method - CIT(A) accepted DCF method adopted by assessee - However, he proceeded to compare projections adopted by valuer with actual results or actual performance of assessee company in subsequent years and arbitrarily he held that business was growing at 40 per cent and, hence, enterprise value of assessee should also be taken up by merchant banker Thus, he determined share value at Rs. 11.17 per share and excess of amount received by assessee was treated as addition under section 56(2)(viib) Whether Assessing Officer and Commissioner (Appeals) were trying to evaluate accuracy of valuation at time of assessment, and this was not proper and also factual results of company were based on so many factors subsequent to adoption of projection and valuation and, thus, finding of Assessing Officer and Commissioner (Appeals) could not be upheld Held, yes [Paras 18 to 20] [In favour of assessee]

(v) ITO Vs. Singhal General Traders (P.) Ltd, [2020] 115 taxmann.com 119 (Mumbai - Trib).

1. Section 68 of the Income-tax Act, 1961 Cash credit (Share premium) - Assessment year 2012-13 - Assessee-company issued shares of face value of Rs. 10 at a very high premium of Rs. 190 per share - Assessing Officer had no doubt about genuineness of source of funds of share applicant and he accepted identity and creditworthiness of share applicants - Still he had drawn adverse inference

merely on ground that assessee company's performance did not justify high value of share premium - Whether additions so made under section 68 for undisclosed income were unjustified - Held, yes [Para 15] [In favour of assessee]

II. Section 56 of the Income-tax Act, 1961 - Income from other sources - Chargeable as (Share premium) - Assessment year 2012-13 - Whether provisions of section 56(2)(viib) inserted by Finance Act, 2012 with effect from 1-4-2013 would apply prospectively from assessment year 2013-14 - Held, yes - Whether on fact described under heading 'Cash Credit', Assessing Officer was not empowered to examine justification of share premium in subject assessment year Held, yes [Paras 12 and 14] [In favour of assessee]

9. The Ld. AR submitted that the decisions relied by the AO and CIT(A) does not apply to the facts of the case and detailed chart was filed. The Ld. AR referred to the findings of the AO and the CIT(A) where the AO has made addition u/s 68 of the Act as the genuineness and creditworthiness of the transactions were not proved and whereas the CIT(A) has considered the facts of the share valuation u/s 56(2)(viib) and came to a conclusion that the addition of the fair market value is correct. Whereas the Ld. DR relied on the order of the AO and submitted that the shares were issued to various parties and the financial statements

does not justify the charging of premium in the absence of information and it is the duty of the assessee to justify that the shares are issued to these parties at fair market value. The Ld. AR submitted that the additions made by the AO is on the basis of presumptions though the information was filed. The CIT(A) has upheld the action of the AO in making addition.

10. Whereas the AO in the assessment order dealt on the provisions of Sec. 56(2)(viib) of the Act as regards valuation of shares, however made the addition not u/s 56(2)(viib) but u/s 68 of the Act as the genuineness and creditworthiness of the shareholders are not proved. The AO is satisfied with the applicability of provisions of Sec. 56(2)(viib) of the Act but made addition u/s 68 of the Act and whereas the CIT(A) has confirmed the addition considering the fact of valuation. We found that there are two different analysis has come into effect where the AO having dealt on the provisions of Sec. 56(2)(viib) of the Act has called for the information in respect of Discounted valuation of shares and dealt on the facts in Assessment Order and made an addition. Further the

AO also has gone into the basic requirements of cash credits u/s 68 of the Act and is of the opinion that the genuineness and creditworthiness of the shareholders has been not proved. Whereas on appeal, the CIT(A) has dealt on the provisions, judicial decisions and various factual aspects. At this juncture, we consider it appropriate to refer to the findings of the CIT(A) who has considered the valuation basis page 4 Para 2.5.6 to 2.5.9 of the order read as under

2.5.6 In the case of Innoviti Payment Solutions Private Limited, Hon'ble Bangalore Tribunal addressed the issue on the application of DCF methodology and the powers of the AO to inquire into it. In the said case, the assessee could not conclusively establish that the projections used for DCF valuation were prepared scientifically. The Tribunal referred to the Technical Guide on share valuation by a research committee of the ICAI, wherein it was stated that the DCF value is good as the assumptions used in developing the projections, and these projections should consider various factors affecting the business. The Tribunal held that if the assessee has opted for the DCF method, the AO cannot discard it and adopt another method; however, the AO is well within his rights to examine the methodology adopted by the assessee and the underlying assumptions and if he is not satisfied, he can challenge the same and suggest necessary modifications.

2.5.7 Recently, the Bangalore Tribunal gave a contrary view in the case of TUV Rheinland NIFE Academy Pvt Ltd. In this case, the Tribunal held that since the assessee was unable to substantiate the projections (based on which the value was determined using the DCF Method) to the AO, the very basis for the DCF valuation did not hold good.

2.5.8 Following the above, I am of the considered view that the AO has rightly rejected the valuation adopted by the appellant in the absence of appropriate working not being shared by the appellant.

2.5.9 In light of the above facts and legal proposition, I am of the view that the AO has rightly applied the provisions of section 56(2)(viib) of the Act and accordingly, uphold the addition made by the AO. These grounds of appeal are dismissed.

11. We found on the same issue both the revenue authorities have has different opinion one being addition u/s 68 and other U/sec 56(2)(viib) of the Act. We find that the AO has called for various details and assessee has substantiated with the material information and judicial decisions which cannot be disputed and the A.O. was satisfied with the applicability of section 56(2)(viib) of the Act. The CIT(A) has not upheld the addition u/s 68 of the Act but u/s 56(2)(viib) of the Act that shows that there is no doubt

on the investors as well as genuineness of the transaction and the shares were issued at a premium considering the fair market value(FMV).We find that the valuation aspect of the shares is made on the Discounted cash flow method (DCF) and these facts are mentioned by the A.O. at Para 4.1 of the order and it clearly indicates that the assessee has submitted the working of cash flow statement for F.Y 2014-15 to 2018-19 and the AO has not made adverse comments that the cash flow statements are false and not in accordance with the accounting principles. The cash flow statements are estimates of business and also it is not the case of the revenue that future results of the assessee is wayward compared to the projections. At this stage, there is no point in referring back to the old track record and to examine the future projections of the company. Further there cannot be a direct relation of assets base of the assessee company with financial future cash flows from business operations as the assessee is engaged in the business of trading in shares and derivatives transactions. The projected future financials are prepared by the management persons, who understands the business operations and

the duty of the valuer is to perform due diligence of such estimates and apply the relevant criteria based on the business of the assessee. Therefore we are of the considered view that the rejection of valuation of shares as per the DCF method is also without any evidence on record. Accordingly, we set aside the order of the CIT(A) and direct the assessing officer to delete the addition and allow the grounds of appeal.

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

Order pronounced in the open court on 09.09.2022.

Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Mumbai, Dated 09.09.2022

KRK, PS

Copy of the Order forwarded to :

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

6. Guard file.