

**IN THE INCOME TAX APPELLATE TRIBUNAL
AMRITSAR BENCH, AMRITSAR.**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. No.407/Asr/2019
Assessment Year: 2015-16**

JCIT, (OSD), Circle-3, Ferozepur. (Appellant)	Vs.	M/s Om Sons Marketing Pvt. Ltd. Quila Chowk, Faridkot (Punjab) [PAN: -AAACO8962E] (Respondent)
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Appellant by	Sh. Sudhir Sehgal, Adv.
Respondent by	Sh. S. R. Kaushik, CIT.DR

Date of Hearing	21.06.2023
Date of Pronouncement	07.07.2023

ORDER

Per:Anikesh Banerjee, JM:

The instant appeal of the revenue was filed against the order of the Id. Commissioner of Income Tax (Appeals), Bathinda, [in brevity 'the CIT (A)'] order passed u/s 250(6) of the Income Tax Act 1961, [in brevity 'the Act'] for A.Y. 2015-16. The impugned order was emanated from the order of the Id. Dy.

Commissioner of Income Tax-Circle-III, Ferozpur (in brevity the AO) order passed u/s 143(3) of the Act.

2. The revenue has taken the following grounds:

“i) The CIT(A) erred in deleting the addition made u/s 56(2)(viib) of the Act by accepting DCF method of valuation of shares without appreciating that DCF method was rejected by the AO after finding discrepancies in the basis of valuation.

(ii) The CIT(A) erred in not appreciating that the base point adopted for DCF method was incorrect as actual figures of EBITDA for the financial year 2014-15 were available while preparing valuation report but projected figures were adopted without any basis.

(iii) The CIT(A) erred in holding that the AO was not justified in changing the method of valuation without appreciating the findings of Hon'ble ITAT, Delhi in the case of Agro Portfolio (P) Ltd vs. ITO, 94 taxmann.com 112 wherein, it was held that where there was no possibility of verifying the correctness or otherwise of the data supplied by the assessee to the merchant banker, in the absence of which the correctness of the result of DCF method could not be verified, there was no option to the AO but to reject the DCF

method and go by NAV method to determine the FMV of the shares.

(iv) The CIT(A) erred in allowing deduction on account of interest on delayed payment of TDS/TCS without taking into consideration the order of Hon'ble Supreme Court in the case of Bharat Commercial & Industries Ltd, 98 Taxman 151 wherein, it was held that interest on delayed payment of income tax was not an allowable expenditure u/s 37(1) of the Act.”

3. Brief fact of the case is that during the year under consideration, assessee had filed its return of income on 29.09.2015 declaring 'NIL' income. The case of the Assessee was selected under CASS for complete scrutiny. The assessment order was passed on dated 29.12.2016. The Id.AO had made the following additions:

Returned Loss Rs. 2,50,84,399/-

Addition on account of difference in valuation rate of the share issued by invoking the provisions of sec 56(2)(viib) of the Act, 1961 ('the Act') Rs. 3,38,60,465/-

Addition on account of interest on TDS Rs. 2,38,149/-

Disallowance of depreciation claimed on trucks in excess of 15% Rs. 5,28,924/-

Assessed Income Rs. 95,43,140/-

The Id. AO doubted the issue of shares (7,71,309 in number) @ Rs. 147.80/- per share including the premium @ Rs. 137.80/-.The assessee duly explained that the shares have been issued as per the calculations of share value which has been calculated duly as per the method prescribed under 11UA of the Income Tax Rules, 1962 (in brevity the Rule).As per the assessee, the report for the valuation of shares as per Discounted Cash Flow (in brevity DCF) method duly signed by the Chartered Accountant was rejected by the Id. AO without giving any valid base.

3.1. The Id. AO opted the different method of calculation of share in the Fair Market Value (in brevity the FMV)and calculated value per share @ Rs. 103.90 per share i.e., Rs. 10/- face value and premium of Rs. 93.90/-. The addition was thus made by the AO @ (147.80 – 103.90 i.e., Rs. 43.90 per share). Total addition of Rs. 3,38,60,465/- which works out on 771309 shares @ Rs. 93.90/- which was added back with the total income of the assessee by invoking the provisions of sec 56(2)(viib) of the Act.

3.2. Another addition of Rs. 2,38,149/- on account of interest on TDS was made by the Ld. AO in accordance with the reporting as per Tax Audit Report which was not added back in Computation of Income at the time of filing of Return of Income.

3.3. Further, the disallowance amount of Rs. 5,28,924/- was made on account of depreciation claimed on trucks in excess of 15% as the assessee has claimed depreciation at the rate of 40% but the ld. AO restricted the claim to 15%.

3.4. The appeal was filed before the ld. CIT(A), Bathinda by challenging the assessment order. The part relief was allowed and only the disallowance was sustained on account of excess claim of depreciation.

3.5. Being aggrieved on appeal order the revenue has filed appeal before us by challenging the relief granted on amount of Rs. 3,38,60,465/- and Rs. 2,38,149/- by the ld. CIT(A).

4. The ld. AR filed written submissions which are kept in the record. The ld. AR fully stands in favour of the appeal order. The ld. AR invited our attention in para no. 5.2.7 which is extracted as below:

“5.2.7 There are certain other facts of the case that after the incorporation of the appellant company for the purposes of manufacturing of liquor, the bottling commenced in December 2013 whereas distillery started in November 2014, The placement of shares was made on 30/03/2015 and the valuation of the accountant was done on 23/02/2015. In the circumstances, the projections for discounted cash flow method

were based on data available for 2 financial years only. There is no major discrepancy in projection as well as adopting of the financial data. I am also in agreement with the contention of the appellant that in case effect of the goodwill as well as appreciation of land value is also adequately taken into consideration, the fair market value per share would touch almost Rs. 190/- much higher than the transacted value of Rs, 147.8/-.

In view of the discussion above, the Assessing Officer was neither justified in changing the method of valuation was not authorized to replace the figures of actual is in the projected figures to arrive at the aforesaid addition and thus the same is deleted. The ground of appeal is allowed.”

4.1. The ld. AR argued that at the outset, it is submitted that the matter has been decided in the favour of the assessee by the ld. CIT(A) after duly considering all the submissions and documents filed by the assessee during appellate proceedings. It has been clearly stated in paragraph 5.2.7 at Page No. 14 of the appeal order mentioned above. The ld. AO was neither justified in changing the method of valuation not was authorized to replace the figures of actual is in the projected figures to arrive at the aforesaid addition and thus the same is deleted.

4.2. The Id. AR argued that the assessee had issued the shares @ Rs. 147.80/- per share which includes Rs. 137.80 as share premium. The assessee during the course of assessment proceedings has duly submitted the report as made by the Chartered Accountant as per DCF method, annexed in **APB page No.58 to 61**. The DCF method is an approved method as per rule 11UA of Rule. It is submitted that the Explanation to S. 56(2)(viib) of the Act provides that the FMV of unquoted equity shares for the purpose of S. 56(2)(viib) of the Act shall be the value as determined in accordance with such method as may be prescribed. The prescribed methods of valuations are given under Rule 11 UA of the Rule.

4.3. The relevant extract of Section 56(2)(viib) of the Act is as under:

“56(2)(viib) where a company, not being a company in which the public are substantially interested, receives^{74a}, in any previous year, from any person [being a resident], any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received—

- (i) by a venture capital undertaking from a venture capital company or a venture capital fund [or a specified fund]; or*
- (ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf:*

[Provided further that where the provisions of this clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the fair market value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place and, it shall also be deemed that the company has under reported the said income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of section 270A for the said previous year.]

Explanation. —For the purposes of this clause,—

- (a) the fair market value of the shares shall be the value—*
- (i) as may be determined in accordance with such method as may be prescribed; or*
- (ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,*
whichever is higher;”

The relevant extract of Rule 11UA(2) of the Rule is as under

“Determination of fair market value.

11UA (2) Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (1), the fair market value of unquoted equity shares for the purposes of

sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), at the option of the assessee, namely:—

(a)

or

(b) The fair market value of the unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method”

5. The Id. AR respectfully relied on catena of case law in this regard wherein similar view has been taken:

a) **Principal Commissioner of Income Tax vs. Cinestaan Entertainment (P) Ltd. (Delhi HC) (2021) 199 DTR 345**

“ The Assessee has adopted DCF method to value its shares and Revenue is unable to demonstrate the methodology adopted by the assessee is not correct; AO has simply rejected the valuation of the assessee on the ground that the performance did not match projections and failed to provide any alternate fair value of shares; Tribunal was therefore justified in deleting the addition made under section 56(2)(viib).”

b) **Rameshwaram Strong Glass P Ltd. Vs ITO in ITA No. 172 ITD 571 (Jaipur Bench) dated 12.07.2018**

“If assessee exercises option to value its shares by choosing particular valuation method specifically provided by law, then changing such method or adopting different method would be beyond powers of revenue authorities.”

c) **Vodafone M-Pesa Ltd. vs PCIT as reported in 92 taxmann.com 73 (Bom HC)** it has been held as under:

*“9. We note that, the Commissioner of Income-Tax in the impugned order dated 23rd February, 2018 does not deal with the primary grievance of the petitioner. This, even after he concedes with the method of valuation namely, NAV Method or the DCF Method to determine the fair market value of shares has to be done/adopted at the Assessee's option. Nevertheless, he does not deal with the change in the method of valuation by the Assessing Officer which has resulted in the demand. There is certainly no immunity from scrutiny of the valuation report submitted by the Assessee. Therefore, the Assessing Officer is undoubtedly entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. **However, the basis has to be the DCF Method, and it is not open to him to change the method of valuation which has been opted for by***

the Assessee. If Mr. Mohanty is correct in his submission that a part of demand arising out of the assessment order dated 21st December 2017 would on adoption of DCF Method will be sustained in part, the same is without working out the figures. This was an exercise which ought to have been done by the Assessing Officer and that has not been done by him. Infact, he has completely disregarded the DCF Method for arriving at the fair market value. Therefore, the demand in the facts need to be stayed.”

(Emphasis supplied)

6. The AR further argued that in the case of the assessee also, the report has duly been submitted vide DCF method and the ld. AO has applied the Net Asset Value method and computed a different value of share. The ld. AO has not given any logical reason for ignoring the method adopted by the assessee and the valuation of the assessee has been arbitrarily ignored by the ld. AO.

6.1. Without prejudice to the above, it is further submitted that even if Net Asset Value method has to be applied, then the assessee has even filed calculation as per Net Asset Value before the ld. CIT(A) which has been reproduced at Page No. 6 of Appellate Order. It is very much clear from the working reproduced that the valuation as per NAV comes out to be much higher than the value adopted by the assessee as per DCF method.

6.2. The Id. AR further argued and placed the for the sake of brevity of the matter, the valuation of shares as per NAV method basis the actual figures as appearing in the Financial Statements of every year which are placed at **APB page No. 21 to 55**. The tabulated format of data is reproduced as hereunder:

Particulars	AY 2016-17	AY 2017-18	AY 2018-19
Share Capital	2,26,96,400.00	2,26,96,400.00	2,26,96,400.00
Reserves and Surplus	29,91,96,866.00	35,84,01,874.00	39,30,16,330.00
Net Assets	32,18,93,266.00	38,10,98,274.00	41,57,12,730.00
No. of Shares	2269640 shares	2269640 shares	2269640 shares
Value per Share	141.83	167.91	183.16

On the perusal of the above table, it is clear that the value as per NAV method comes out to be much higher than the value adopted by the assessee as per DCF method and as such the value adopted by the assessee as per DCF method of Rs. 147.80 per share is correct and deserves to be accepted.

7. On the other hand, the Id. DR vehemently argued and fully relied on the order of the Id. AO. The Id. DR invited our attention in assessment order. The relevant paragraph is extracted as below:

“As per the valuation report submitted by the assessee, it is seen that the valuation -as been done by taking the starting point as EBITDA (Earnings before Interest, taxes, Depreciation and Amortization). However, on perusal of the actual financial statements, it is seen that there is a substantial variation between the projection submitted by the assessee and the actuals.

The reply of the assessee has been considered but the same is not tenable. As per valuation report submitted by the assessee, the figure of EBITDA (Earnings before interest, Taxes, Depreciation and Amortization) for the F.Y.2014-15 to F.Y.2016-17 does not tally with the actual balance sheet figure. The calculation of EBITDA (Earnings before Interest, Taxes, Depreciation and Amortization) is as under:-

<i>F.Y.</i>	<i>EBIDTA</i>	<i>Actual EBITDA</i>
<i>2014-15(A.Y 2015-16)</i>	<i>16.31</i>	<i>12.57</i>
<i>2015-16(A.Y 2016-17)</i>	<i>18.20</i>	<i>22.24</i>
<i>2016-17(A.Y 2017-18)</i>	<i>17.94</i>	<i>23.82</i>

From the above analysis, it is very much clear that the calculation presented by the assessee is totally different from the actuals. In fact, the base point is at gross variation. Thus, the value submitted by the assessee cannot be relied upon. Hence, the valuation done by the assessee as per Discounted Cash Flow method prescribed in Rule 11UA(b) is not correct and calculation has to be done by method prescribed in Rule 11UA(a) of the Income Tax Rules, 1962. The Fair Market Value of a share comes to be Rs.103.90/- as per Rule 11UA(a).

However, the assessee has allotted a share at a value of Rs. 147.80/-. Thus, excess consideration received by the company over and above the fair market value per share comes out to Rs.43.90/-. The total number shares allotted are 7,71,309. Thus, the assessee has received excess consideration of Rs.3,38,60,465/- (Rs.147.80-Rs.103.90 = Rs.43.90 X 771309 = Rs.3,38,60,465/-) over and above the fair market value of the shares. This amount of Rs.3,38,60,465/- is taxable as per the provisions of section 56(2)(viib) of the Income Tax Act, 1961.

Accordingly, the amount of Rs.3,38,60,465/- is added back to the returned income of the assessee. I am satisfied that the assessee has furnished inaccurate particulars of income. Penalty proceedings u/s 271(l)(c) for furnishing inaccurate particulars of the Income Tax Act, 1961 are being initiated separately.

[Add:-Rs.3,38,60,465/-]”

7.1. The ld. DR further relied on the order of the ITAT Delhi Bench in the case of **Agro Portfolio Private Ltd. vs. ITO in ITA No. 2189/Del/2018 date of order 16.05.2018/ 94 taxmann.com 112 (Del-Trib)**. The relevant para 15 to 17 are duly reproduced as below:

“15. In these circumstances, we are unable to accept the contentions of the assessee that in view of the provisions under

section 56(2)(viib) of the Act read with Rule 11UA(2) of the Rules the Ld. AO had no jurisdiction to adopt a different method than the one adopted by the assessee, and if for any reason the AO has any doubt recording such valuation report and does not agree with the same is bound to make a reference to the Income tax Department Valuation Officer to determine the fair market value of such capital asset. This is so because unless and until the assessee produces the evidence to substantiate the basis of projections in cash flow and provides reasonable connectivity between those projections in cash flow with the reality evidences by the material, it is not possible even for the Departmental Valuation Officer to conduct any exercise of verification of the ITA No. 2i89/Del/20i8 acceptability of the value determine by the merchant banker. This is more particularly in view of the long disclaimer appended by the merchant banker at page no. 16 & 17 of the paper book which clearly establishes that no independent enquiry is caused by merchant banker to verify the truth or otherwise the figures furnished by the assessee at least on test basis. The merchant bankers solely relied upon an assumed without independent verification, the truthfulness accuracy and completeness of the information and the financial data provided by the company. A perusal of this long disclaimer clearly shows that the merchant banker did not do anything reflecting their expertise, except mere applying the formula to the data provided by the assessee. We, therefore, are unable to

brush aside the contention of the Revenue that the possibility of tailoring the data by applying the reverse engineering to the pre-determined conclusions.

16. For all these reasons, we are of the considered opinion that there has not been any possibility of verifying the correctness or otherwise of the data supplied by the assessee to the merchant banker, in the absence of which the correctness of the result of DCF method cannot be verified. This left no option to the AO but to reject the DCF method and to go by NAV method to determine the FMV of the shares. Without such evidence, it serves no purpose even if the matter is referred to the Department's Valuation Officer. We, therefore, do not find any illegality or irregularity in the approach of conclusions are by the authorities ITA No. 2i89/Del/20i8 below. While confirming the same, we dismissed the appeal as devoid of merits.

17. In the result, the appeal of the assessee is dismissed.”

8. We heard the rival submission and relied on the documents available in the record. The assessee has obtained the method for DCF for as calculating the FMV of share. In assessment order without finding any lacuna, the Id. AO has changed the method from DCF to NAV. The Id. AO has only grievance that the data taken on basis of the EBDIT was not proper due to mismatch of data. The Id. AO had

opted the NAV. The law has specifically conferred an option upon the assessee that for the purpose of S. 56(2)(viib) of the Act an assessee can adopt any of the methods mentioned u/r 11UA(2) of the Rules. From Rule 11UA, it is clear that either the NAV (Clause 'a') or DCF Method (Clause 'b') can be applied for the purpose of section 56(2)(viib) Expl. a(i) of the Act, at the option of the assessee.

In the present case, it is not denied that the assessee adopted clause (b) of Rule 11UA(2) of the Rules and accordingly obtained a Valuation Report from a Chartered Accountant. Since the law has prescribed the specific method for valuation i.e DCF so the assessee was free (and rather entitled) to choose this method. The method of valuation could be challenged by the AO only if it was not a recognized method of valuation as per Rule 11UA (2) of the Rule. The very purpose of certification of DCF valuation by a merchant banker or chartered accountant is to ensure that the valuation is fair and reasonable. Such valuation is to be done by an expert of the subject only, which an assessing officer is not expected to be. The said rule provides that such valuation shall be the fair market value for the purpose of this section based on DCF Method. The Rule nowhere permits the AO to make any adjustment therein.

8.1. The revenue fully relied on the order of **Agro Portfolio Private Ltd**, supra. The ITAT-Delhi bench has rejected the assessee's appeal on the ground of

correctness of data as provided by the assessee to merchant banker is unverifiable. The Id. AO has rejected the DCF method due to unverified data supplied assessee. But the impugned order is not coming under same factual matrix of the case **Agro Portfolio Private Ltd**, supra. The Id AO was not able to establish about any dispute about the correctness of data as supplied by the assessee to merchant banker. The Id. AO had not taken any technical support related to valuation of the share of assessee in impugned assessment year. The assessee respectfully relied on the order of **Cinestaan Entertainment (P) Ltd**, supra. We consider the order of **Cinestaan Entertainment (P) Ltd**, supra & **Rameshwaram Strong Glass P Ltd**, supra. The Id. AO has agitated about the difference in data of EBITDA in actual and in valuation. The issue was well explained by the Id CIT(A) in appeal order. The data in valuation is basis of projection which was calculated by the Merchant Banker/ Chartered Accountant. The change of method of valuation is not in accordance with the relevant provisions of the Act and the Rules stated above. Accordingly, we uphold the findings of the Id. CIT(A) and *set aside* the addition made by the Id. Assessing Officer. Accordingly, grounds taken by the revenue in this respect are dismissed.

8.2. The Id. AR had not contested the ground no-(iv) and duly accepted the contention of revenue. Accordingly, the appeal of the revenue Grounds (i) to (iii) are dismissed & the ground no (iv) is allowed.

9. In the result, the appeal of the revenue bearing **ITA No. 407/Asr/2019** is partly allowed.

Order pronounced in the open court on 07.07.2023

Sd/-

(Dr. M. L. Meena)
Accountant Member

AKV

Sd/-

(ANIKESH BANERJEE)
Judicial Member

Copy of the order forwarded to:

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