

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A': NEW DELHI**

**BEFORE,
SHRI M. BALAGANESH, ACCOUNTANT MEMBER
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.9241/Del/2019
(ASSESSMENT YEAR 2016-17)**

M/s. Bueno Foods Private Limited 115, Vasant Enclave New Delhi-110 092 PAN-AAFCB 1699A (Appellant)	Vs.	Asst. CIT Circle-5(1) New Delhi (Respondent)
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Appellant by	None
Respondent by	Mr. Kanv Bali, Sr. DR

Date of Hearing	24/07/2023
Date of Pronouncement	30/08/2023

ORDER

PER M. BALAGANESH AM:

This appeal of the Assessee arises out of the order of the Learned Commissioner of Income Tax (Appeals)-2, New Delhi, [hereinafter referred to as 'Ld. CIT(A)'] in Appeal No.10376/18-19 dated 16/09/2019 against the order passed by the Ld. Assistant Commissioner of Income Tax, (hereinafter referred to as the 'Ld.

AO) u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') on 28/12/2018.

2. None appeared on behalf of the assessee. Since no appearance was made by the assessee right from the first date of hearing and in view of the fact that the notices were duly sent to the assessee which were returned unserved with noting 'no such person' and also in view of the fact that service report was also placed on record by the ld. DR stating the same, we proceed to dispose of this appeal on hearing the ld. DR and after perusing the materials available on record.

3. The first issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the addition made in the sum of Rs 2,73,55,743/- being share premium collected from angel investor as per Discounted Cash Flow (DCF) method valuation u/s 56(2)(viib) of the Act, in the facts and circumstances of the case.

3.1. The assessee company during the year under consideration was operating an Online food delivery business from food prepared at its base kitchen situated at 108, Vijay Vihaar, Silokhera Road, Gurgaon. The return of income for the Asst Year 2016-17 was filed by the assessee on 13.10.2016 declaring loss of Rs 3,37,12,468/-.

During the year under consideration, the shares were issued by the assessee company at a premium of Rs 3,84,57,483/- on three different dates in 2015. Assessee submitted a share valuation report wherein the fair market value of shares was determined using DCF method which is one of the prescribed method under Rule 11UA of the Income Tax Rules. The assessee was asked to justify the allotment of shares at premium. The assessee replied that the shares were allotted to M/s Suryavanshi Commotrade Pvt Ltd on 20.06.2015, 27.07.2015, 07.09.2015 and 15.03.2016. It was submitted that initially *a valuation was done on 01.12.2014 based on projected profit and loss account and cash flows. The actual turnover of the company was more than the projected turnover though the loss also exceeded the projected loss. In view of the same, the management was of the opinion that the projections for March 2016 and thereafter will be met and hence the shares in June and July 2015 were issued based on that valuation. In August 2015, the company made a plan to set up a base kitchen and enhance its capacity from a small restaurant to a chain of restaurants. A plan was made and investors were approached to fund that plan. As per the plan, a state of art base kitchen was to be set up which will cater*

to 20 restaurants. Based on this capex, a new plant was formulated and valuation was arrived at considering this new expansion. Based on these parameters, the valuation was arrived at on 07.09.2015 and accordingly the shares were allotted.

3.2. The ld. AO observed that no justification has been provided by the assessee as to why the shares were differentially allotted only to Suryavanshi Commotrade Pvt Ltd. No evidence was provided regarding the expansion plans and the business model of the assessee, on the basis of which such projections have been taken. The ld. AO observed that the income tax returns of subsequent years were also perused and that the projections made in the valuation report on the basis of which the premium was decided at Rs 90.63 per share do not match with the actual.

3.3. The assessee further submitted that 397497 shares of Rs 10 each were issued to Suryavanshi Commotrade Pvt Ltd at a premium of Rs 90.63 per share amounting to Rs 3,60,25,153/- on 07.09.2015 and further 500000 shares were allotted to the same investor at Rs 10 per share amounting to Rs 50,00,000/- on 15.03.2016 which is also within the same financial year. The ld. AO observed that the net worth of the assessee company as on

31/03/2016 was Rs 99.95 crores and income of the company was Rs 74.77 crores during Asst Year 2016-17. The assessee furnished all the three necessary ingredients of section 68 of the Act viz. identity of the investors, creditworthiness of the investors and genuineness of the transactions in respect of all the investors, which fact is also acknowledged by the ld. AO in page 3 of his order. The assessee also took a plea that it being a start up company, no addition could be made u/s 56(2)(viib) of the Act for the premium charged by it.

3.4. The ld. AO observed that the assessee had not provided any documentary proof of it being a start up company. In any case, the valuation of shares using DCF method suffered from defects in as much as the assessee did not furnish factual evidence of nature of work, business model etc and projections made thereon did not match with the actuals. Further the ld. AO observed that the assessee had failed to justify why shares were only issued to one investor at a premium instead of all the investors. With these observations, the ld. AO rejected the share valuation using DCF method. The ld. AO substituted the Net Asset Value (NAV) method for determining the fair market value of shares, which is also the

other recognised method under Rule 11UA of the Income Tax Rules. The ld. AO accordingly determined the share value using NAV method at Rs 21.81 per share to be the fair market value of share. Accordingly, the difference in value per share of Rs 68.82 (90.63-21.81) was added as excess premium charged by the assessee for issue of 397497 shares and accordingly made an addition u/s 56(2)(viib) of the Act in the sum of Rs 2,73,55,743/- (397497 * 68.82). This action of the ld. AO was upheld by the ld. CIT(A).

3.5. We are in agreement with the stand taken by the revenue that the assessee had not placed any evidence on record to prove that it is a start up company and duly registered with Department of Industrial Policy and Promotion (DIPP) as such. Hence the claim of the assessee that it is a start up, has been rightly rejected by the revenue. It is not in dispute that the assessee had allotted 397497 shares at a premium of Rs 90.63 per share to Suryavanshi Commotrade Pvt Ltd on 07.09.2015. Apart from this, the assessee had also allotted 500000 equity shares of Rs 10 each to the very same investor on 15.03.2016 without any premium. The assessee had sought to explain this situation by stating that after initial receipt of monies from the investor, the assessee invested the same

in the new plant and machineries based on revised business plan and business model (i.e setting up of a state of the art base kitchen and cater to more restaurants) . Even thereafter, the assessee incurred huge losses and accordingly requested the same investor to invest further sum of Rs 50,00,000/- comprising of 500000 shares of Rs 10 each on 15.03.2016 on which date, the assessee had to fairly allot the shares at par in view of losses. This was duly agreed by the investors. This was the reason for allotment of shares at differential rates to the same investor by the assessee within the same financial year. This explanation cannot be faulted or doubted by the revenue as it is considered reasonable. Infact we would like to state that the assessee had been very fair to its investor that in view of losses, there was no justification for it to seek the second issuance of shares at premium. However, the first allotment was made at a premium by placing reliance on the valuation report obtained from a competent person under Rule 11UA of the Income Tax Rules using DCF method. We find that Rule 11UA of the Rules duly prescribe DCF method as one of the approved methods of valuation of shares and the law provides an option to the assessee either to adopt NAV or DCF method for determining the

fair market value of shares. Hence adoption of DCF method for valuing the shares cannot be faulted with by the revenue in the instant case. If according to revenue, the DCF method valuation report suffers from various defects, then it is open to the revenue to obtain a fresh valuation report using DCF method or re do the valuation on its own using DCF method. In any event, the revenue is not empowered to substitute the DCF method with the NAV method and proceed to make an addition on account of excess premium on the basis of differential rates in two methods. Since no fresh valuation has been brought on record by the revenue using DCF method, the valuation made by the assessee has to be accepted in the instant case and accordingly, we direct the ld. AO to delete the addition made in the sum of Rs 2,73,55,743/- u/s 56(2)(viib) of the Act. Accordingly, the Ground No. 1 raised by the assessee is allowed.

4. The last issue to be decided in this appeal is as to whether the ld. CIT(A) was justified in confirming the addition made in the sum of Rs 13,56,762/- in the facts and circumstances of the instant case.

4.1. We have heard the ld. DR and perused the materials available on record. The ld. AO on perusal of the balance sheet of the assessee company noticed that assessee has sundry creditors to the tune of Rs 11,64,373/0 and accordingly sought details of the same in the format prescribed by him from the assessee. The ld. AO observed that part details vide letter dated 23.10.2018 were submitted by the assessee but did not supply any details regarding creditors. Finally assessee submitted reply dated 25.12.2018 furnishing the complete details of sundry creditors in the format sought by the ld. AO. This fact is acknowledged in page 13 of the assessment order. The details furnished by the assessee regarding the sundry creditors for Rs 13,56,762/- duly mentioning the name, address of the creditors, PAN and amount outstanding as on 31.03.2016 in the books of the assessee company. The ld. AO however ignored the same and concluded that assessee failed to discharge the genuineness of sundry creditors and proceeded to add the same as unexplained cash credit u/s 68 of the Act.

4.2. The ld. CIT(A) accepted the fact that all the details were furnished by the assessee in the fag end of the assessment proceedings and also stated that these trade creditors were added

during the year under consideration. However, he sustained the addition made by the ld. AO u/s 68 of the Act.

4.3. At the outset, we hold that the addition towards sundry creditors had been made u/s 68 of the Act. The details furnished by the assessee regarding the creditors as stated above are listed in page 13 of the assessment order. Since no examination per se had been carried out by the lower authorities, we deem it fit and appropriate, in the interest of justice and fairplay, to restore this issue to the file of ld. AO for denovo adjudication in accordance with law. The assessee is also at liberty to furnish fresh evidences, if any, in support of its contentions. Accordingly, the Ground No. 2 raised by the assessee is allowed for statistical purposes.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 30th August, 2023.

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Dated:30/08/2023
Pk/sps

Sd/-
(M. BALAGANESH)
ACCOUNTANT MEMBER

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI