

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

**BEFORE SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER**

**ITA No.2221/Del/2019
[Assessment Year: 2013-14]**

Clearmedi Healthcare Pvt. Ltd C/o- Kapil Goel Adv. F-26/124, Sector-7, Rohini, Delhi-110085	Vs	ACIT, Circle-6(1), New Delhi
PAN-AAECC1660P		
Assessee		Revenue

Assessee by	Sh. Kapil Goel, Adv.
Revenue by	Sh. Vivek Kumar Upadhyay, Sr. DR

Date of Hearing	18.09.2023
Date of Pronouncement	22.09.2023

ORDER

PER SHAMIM YAHYA, AM,

This appeal by the assessee is directed against the order of the Ld. CIT(A)-33, New Delhi, dated 15.10.2018 pertaining to Assessment Year 2013-14.

2. Although the assessee has raised various grounds but main ground is that the Ld. CIT(A) erred in confirming the addition made of Rs.1,84,70,000/- u/s 56(2)(viib) of the Act.

3. Brief facts of the case are that the assessee issued 1,50,755 shares of the face value of Rs.10/- each. The assessee received the share premium of Rs.3,61,86,000/- on the issue of above shares. The premium per share worked out to Rs.240/-. The Assessing Officer noted that the assessee issued shares on two dates i.e. 18.04.2012 & 21.12.2012 during

the year under consideration. Rule 11UA as it was applicable on 18.04.2012, provided for only one method of valuation i.e. book value method. The assessee submitted the valuation report dated 18.04.2012 issued by M/s Anand Dua & Associates, Chartered Accountants, thereby the value of per share was determined at Rs.250.19 per share. The CA computed the value per share on the basis of discounted cash flow method. The discounted cash flow method of valuation of shares was allowed to be used by Income Tax (15th Amendment) Rules, 2012 w.e.f. 29.11.2012. Therefore, the Assessing Officer held that assessee was not entitled to use discounted cash flow method at the time of first issue of shares i.e. 18.04.2012 for the purposes of section 56 of the IT Act, 1961. The Assessing Officer observed that the valuation report recommended the valuation of shares at Rs.250.19 per share when it issued 57,910 shares. But the assessee used this valuation report for entire number of shares i.e. 1,50,775. The projections in the valuation were not found to be realistic as the capital of the Assessee was only Rs.5,79,100/-. There was negative net worth of Rs.33,69,683/- as on 31.03.2012. The company came into existence only on 08.10.2010 and was incurring losses. In the light of above facts, the Assessing Officer issued a show cause notice to the assessee to explain the valuation of the shares. The assessee submitted before the Assessing Officer that both the investors had agreed on a particular share holding ratio, therefore, parameters for the valuation could not be different, one in the case of resident and other in the case of non-resident. The assessee referred to the non-discrimination clause existing in Double Taxation Avoidance Agreement

signed between India & UK and India & Italy. The assessee further submitted that section 56(2)(viib) of the Act became applicable on the amounts which were received after 01.04.2012. The allotment of shares on 18.04.2012 was related to the amounts received in FY 2011-12. Hence, the assessee argued that provisions of section 56(2)(viib) of the IT Act are not applicable on the issue of shares on 18.04.2012. The assessee also submitted that the validity of the valuation report was for whole of the Financial Year 2012-13 as stated in the valuation report. The Assessing Officer cannot step into the valuation based on future projections. The other argument of the assessee was that section 56(2)(viib) of the IT Act is not applicable to non-resident. It was submitted that the allotment was made to non-resident i.e. Medipass Group and the resident Clearview Healthcare Pvt. Ltd. simultaneously. The assessee company could not discriminate between the two. The Assessing Officer issued notice u/s 133(6) of the IT Act to the valuer Anand Dua, CA, Prop. M/s Anand Dua & Associates. In a query asked by the Assessing Officer, he informed the Assessing Officer that the projections for period 2013 to 2018 were provided by the management of Clearmedi Healthcare. His scope of work was limited to compute price of equity shares as per the information submitted by the management. It was clearly stated that no comments are offered upon the accuracy, reliability and achievability of said business projections.

4. The Assessing Officer considered the reply of the assessee company and the report received from the valuation authority. The Assessing Officer agreed that share premium received from non-resident was outside

the purview of section 56(2)(viib) of the IT Act. However, the shares issued to Clearview Healthcare Pvt. Ltd., Delhi was hit by the provisions u/s 56(2)(viib) of the IT Act. The non discrimination clause as mentioned by the assessee was not applicable in the case of provisions us 56(2)(viib) of the IT Act. The Assessing Officer was also of the view that non discriminatory clause in the agreements between the countries relate to actions by the state governments and not to the private parties. While dealing with the submission of the assessee company that application money was received in FY 2011-12, the Assessing Officer noted that the money claimed by the assessee was lying as share application money as on 31.03.2012. The shares were issued on 18.04.2012. The incident of taxing the excess amount cannot arise before the act of allotment of shares. Therefore, the applicability of section 56(2)(viib) of the IT Act has to be examined with reference to the allotment of the shares and not the receipt of the money in some other form. The Assessing Officer analyzed the interest cost in the projected year and observed that after taking into account the same the value of the shares could reduce to Rs.39.63 per share in place of Rs.250/- per share valued by the auditor. The Assessing Officer also examined the projected cash inflow and computed the value per share in negative. Based on his computation the Assessing Officer found that the whole of the premium @ Rs.250/- per share was based on incorrect report. He has, therefore, added premium paid by Clearview Healthcare Pvt. Ltd. amounting to Rs.1,84,70,000/- to the total income.

5. Upon assessee's appeal, the Ld. CIT(A) confirmed the additions by holding as under:-

“7.3. I have considered the facts of the case carefully. I agree with the Assessing Officer that provisions of section 56(2)(viib) of the IT Act are applicable in respect of the shares issued after 01.04.2012. It is immaterial that the money in this respect was received prior to this period. The other important factor is that Rule 11UA of IT Rules which existed on 18.04.2012 did not provide the use of alternative methods. The discrimination clause is not contained in section 56(2)(viib) of the IT Act. It is the Assessee who has to address such issues amongst the parties. I also find that the valuation report submitted by the valuer was not realistic at all. He admitted in his response to the Assessing Officer that the projections were taken as indicated by the management. In view of the above facts and in the circumstances, I confirm the addition made by the Assessing Officer and dismiss the ground of appeal taken by the Appellant.”

6. Against the above order, the assessee is in appeal before us. We have heard both the parties and perused the record.

7. The Ld. Counsel for the assessee contended that in group concern of the assessee, this Tribunal has deleted the addition on a finding that those very shares are sold in next financial year at much higher amount.

The submissions of the ld. Counsel for the assessee are as under:-

“As noted by this hon'ble ITAT in case of associate company M/s Clearview Healthcare Pvt Ltd vs ITO Ward 6(2) Delhi IT 2222/DEL/2019 AY 2014-2015 where same/identical addition W/s 56(2)(viib) excessive Share premium was made same is deleted by hon'ble ITAT on principal aspect that : on 01/12/2014 (FY 2014-2015 AY 2015-2016) share of clearview healthcare pt ltd (who is investor in present company and is subject matter of addition u/s 56(2) (viib)) were sold to foreign investor Medipass SRL Italy @ 380.53 per share where while valuing shares of said company, valuation was made of shares of instant assessee company (being underlying investment in hands of clearview healthcare pt ltd) @, 615 /share which is more than double of instant valuation of share @ 250 per share; is accepted as valid ground to delete the addition made u/s 56(2) (viib) we refer to para 3 &5 of said order); notably seller of shares shashi baliyan (director of instant company) is assessed in India qua capital gains arising from said share sale @ 380.53 per shares.”

8. Per contra, Ld. DR has relied upon the orders of the authorities below.

9. The Tribunal in ITA No.2222/Del/2019, for Assessment Year 2014-15 vide order dated 03.01.2020 has concluded as under:-

“5.2 Keeping in view of the facts and circumstances of the case and by applying the principles from the aforesaid decision and legislative intent behind insertion of section 56(2)(viib), I hold that addition made by Assessing Officer on account of alleged excess share premium is unjustified when those very shares are sold in next financial year at much higher amount after proper due diligence, that to a non resident buyer and further there is no case of unaccounted money being brought in garb of stated share premium, hence, addition made u/s 56(2)(vii) of the Act is hereby deleted.”

10. Upon careful consideration, we find that the order of the Ld. CIT(A) was an ex-parte order. Moreover, the case law now referred was not put up before the authorities below. Hence, in the interest of justice, we remit this issue to the file of the Assessing Officer. The Assessing Officer shall examine the issue afresh in the light of our observation hereinabove duly verifying the factual veracity of the assessee's submission.

11. In the result, this appeal of the assessee stands allowed for statistical purposes.

Order pronounced in the open court on 22nd September, 2023.

Sd/-
[ANUBHAV SHARMA]
JUDICIAL MEMBER

Sd/-
[SHAMIM YAHYA]
ACCOUNTANT MEMBER

Delhi; Dated: 22.09.2023.

Shekhar

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT

4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi