

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'E' : NEW DELHI)**

**SHRI SHAMIM YAHYA, ACCOUNTANT MEMBER
and
MS. ASTHA CHANDRA, JUDICIAL MEMBER**

**ITA No.3552/Del./2019
(ASSESSMENT YEAR : 2015-16)**

ACIT, Circle 15 (2),
New Delhi.

vs.

Lifestyle Probuild Pvt. Ltd.,
D-59, Chander Nagar,
Behind DAV Public School,
Ghaziabad – 201 011 (UP)

(PAN : AABCL8580A)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri Gaurav Jain, Advocate
REVENUE BY : Ms. Jyoti Verma, Sr. DR

Date of Hearing : 13.08.2023
Date of Order : 09.10.2023

ORDER

PER SHAMIM YAHYA, ACCOUNTANT MEMBER :

This appeal by the Revenue is directed against the order of the Id.
CIT (Appeals)-5, New Delhi dated 22.01.2019 pertaining to the
assessment year 2015-16.

2. Grounds of appeal taken by the Revenue read as under :-

“1. The Ld. CIT (A) has erred in limiting the investment to
only the investment which yield dividend income.

2. The Ld. CIT (A) has erred in allowing the interest
expenses by observing that the assessee has its own fund.”

3. Brief facts of the case are that during the year, the assessee company has allotted 18,660 equity shares having face value of Rs.10/- at a premium of Rs.1,490/- each. The AO has calculated the value of share at Rs.196/- per share on the basis of book value method while the assessee has valued the share at Rs.1500/- per share on the basis of DCF method supported with valuation report. The AO has made an addition of Rs.2,43,32,640/- u/s 56(2)(viib) of the Income-tax Act, 1961 (for short 'the Act'). AO has made the addition on the basis of following grounds:

- a. Projections are unrealistic
- b. valuer has not done any due diligence and refused to own the financial projections
- c. there are certain differences in valuation report
- d. Directors failed to appear to give personal deposition

After considering the facts of the case, the AO rejected the valuation made by the valuer under DCF method and valued the share at Rs.196 per share being book value of shares and thus made the addition of differential amount as mentioned above.

4. Upon assessee's appeal, Id. CIT (A) observed that the assessee company was constructing a hotel at McLeodganj, Dharamshala which is famous for the seat of His Holiness Dalai Lama; that in support of valuation of shares, the AR for the assessee has filed two valuation reports dated 15.03.2012 and 09.03.2015 before AO; that valuation report dated 15.03.2012 prepared by the Chartered Accountant as per rule 11UA

wherein value of shares has been calculated at Rs.1509/-; that since the future projects for expansion were stated to be revised, fresh valuation report dated 09.03.2015 from the same valuer was filed considering the revised future projections; that once the basis of projection is changed and valuation is revised, the old valuation report loses its relevance; that therefore, valuation report dated 15.03.2012 becomes academic and matter of reference for history after fresh valuation done by the company on 09.03.2015; that hence, revised valuation report dated 09.03.2015 is to be considered for valuation of shares.

4.1 Thereafter, ld. CIT (A) elaborately considered the facts and passed the following order :-

“6.10 As regards valuation of shares, the Ld. AR submitted that the financial projections were made considering the future projects, market conditions, domestic political conditions, international political conditions, shifting of tourism from J&K to HP, religious and tourist importance of place of the project, travel advisory by various countries to various parts of India, non availability of similar or better facility in the vicinity of the project, brand value of ITC, financial affordability of the tourist, easy accessibility etc.

6.11 a) Though the AO has rejected the valuation report filed by the appellant yet he has not mentioned as to what was found incorrect in the valuation report. On perusal of the valuation report it is found that the company has prepared a set of estimated financial projections for the period of FY 2015-16 to FY 2023-24, based on audited accounts of FY 2013-14 and other company specific future plans. While preparing the financial projections, due consideration has also been given to the historical information about the company and about the past financial performance & position.

b) The valuer has done the valuation based on following factors:

- i) Specific nature of business
- ii) Background of the company
- iii) Audited financials of FY 2013-14
- iv) Projections provided by the management
- v) Shareholding pattern as on valuation date
- vi) Research and market related data available in public domain through internet, SEBI, BSE and Damodaran websites etc.

c) Further, it is seen that following points regarding the working, management and project of the appellant company are also having the great impact on valuation of its shares:

6.12 Current business operations of the company, which is running its flagship hotel "Fortune Park Moksha" at McLeodGanj, Dharamshala, as on the valuation date.

6.13 Valuable and important management tie up with ITC's - Fortune Brand name franchisee which gives the hotel Moksha a distinctive edge and access to large network of ITC. This relationship is also valuable as an intangible as it is not easy to secure this kind of relationship with ITC by every another hotel.

6.14 Financial projections based on 59 room's of premium facility befitting the standard of ITC - Fortune which command premium, accordingly price tariff for each room and escalation in tariff considering the season, non-season, business and tourism activities in the state and near to hotel location etc.

6.15 Further the appellant company also had additional land bank near to existing hotel for which the company planned to develop as a part; of its expansion and make the existing facility from 59 to 120 rooms. This additional facility is expected to get operational by the end of FY 2021- 2022. The company decided to expand considering the response of its current business operations and tourism pro-motion activities of the state.

6.16 It is also noted that there are ITO Five Star Hotel in McLeodganj or even in Dharamshala itself.

6.17 It is further noted that the appellant company started its hotel operations and also secured brand cum management tie up with ITC - Fortune Group under the experienced management. Hotel is generating positive cash flows since inception.

6.18 The location of the hotel in Dharamshala is also unique as the place is having extra ordinary importance being seat of His Holiness Dalai Lama apart from tourist destination.

6.19 The AO has made the addition on the ground that the projections used in valuation report are unrealistic. However, from perusal of the audited accounts of the appellant, as provided, for latest three years, it is found that actual figures are much more favorable than the projected figures. Comparison between actual and projected figures of latest 3 years filed by the Ld. AR is as under:

FY	Projected Revenue (Page 6 of Asstt. Order) (Page 55 PB)	Actual Revenue	Additional Revenue
2015-16	1,60,00,000	1,72,54,180	12,54,180
2016-17	10,40,08,526	11,05,75,396	65,66,870
2017-18	11,36,66,099	12,32,45,382	95,79,283

6.20 Further, the AO mentioned that the assessee has taken unrealistic estimates of revenue growth viz 35.770/0, 113.40%. However, it is found from the details provided that the company has earned much more than the estimated figures. Revenue and EBIT of the company has grown by 18632% and 11808% respectively in 5 years which is much more than the estimated figures. In the time span of 5 years revenue of the company has grown from Rs.657,949/- to Rs.12,32,45,382/- and EBITDA of the company has grown from Rs.371,576/- to Rs.4,42,48,881/-. A chart showing revenue and EBITDA filed by the Ld. AR for preceding 5 years has already been reproduced.

6.21 The above points regarding the working, management, project and figures from the audited accounts of the appellant

company clearly establishes that the actual financial position of the company is much better than as projected in valuation reports. Therefore, it is found that the projected figures used for valuation of shares of the appellant company under DCF method are appropriate on the given parameters and basis of rejection of valuation by the Ld. AO is not found tenable.

6.22 As far as due diligence by the valuer regarding projected figures, it is clearly mentioned by the valuer in point no. 3 on page 14 of the valuation report dated 09/03/2015 that "we carried out the review of such data for consistency and reasonableness. Nothing has come to our attention to indicate that the information provided had material mis-statements or would not afford reasonable grounds upon which to base the report." This clearly indicates that the valuer has done necessary due diligence regarding projections given by the management. once it is establishes that the appellant is able to meet its projections than the question, whether due diligence was done or not, does not arise.

6.23 The Ld. AR further submitted that in the memorandum explaining the provisions of Finance Bill, 2012, the amendment to section 56(2) by insertion of a sub-clause (viib), was classified under the heading "Measures to Prevent Generation and Circulation of Unaccounted Money". Therefore, this section is an anti-abuse provision aimed at arresting circulation of unaccounted money in the economy, as prior to this companies were issuing shares at a substantial premium to convert the unaccounted money through shell companies without providing any valuation justifying the premium.

6.24 On going through the financials of the investor, namely, M/s ForzaMedi India Private Limited as provided, it is seen that it is having net revenue and net profit of Rs.1,62,64,17,526/- and Rs.33,68,26,585/- respectively for the year ended 31.03.2015. It had accumulated profits of Rs.84,64,30,563/- as on 31.03.2015. It seems that the decision of the investor to make investment in the appellant company was a strategic business move keeping in mind the market opportunities. Therefore, the purpose of investment is demonstrated to be genuine and conversion of the unaccounted money through shell companies is not borne out of record because the investor

is a cash rich company with net profit of Rs.33.68 Cr and gross revenue at Rs.162.64 Cr. Therefore, investment of Rs.2,79,90,000/- made by M/s ForzaMedi (India) Private Limited in the equity shares of the assessee company at a premium do not prove to be routing of unaccounted money as reflected through records.

6.25 The Ld. AR further submitted that it is only in Explanation (a)(ii) of sec 56(2)(viib) that satisfaction of Ld. AO is required but there is no such condition in explanation (a) (i) which means that if shares are valued as per rule 11U/11UA, the AO is not permitted to reject the valuation, as decided in various case laws. The valuation report filed by the appellant is also under expl. (a)(i) of sec 56(2)(viib). It is also submitted that the assessee is entitled to follow any method of valuation. The Ld. AO cannot force the assessee to choose a different method of valuation. The AO cannot reject the DCF method followed by the appellant and apply book value method. As per rule 11UA(2), it is the discretion of the assessee whether to follow book value method u/r 11UA(2)(a) or to follow DCF method u/r 11UA(2)(b). There is no provision either in the IT Act or in the IT Rules which authorizes the AO to reject the valuation of the assessee and reframe the same under different method. The Ld. AR relied on the following case law in support of his contention:

M/s Rameshwaram Strong Glass Pvt Ltd Vs ITO; 2018-TIOL-1358-ITAT-JAIPUR

6.26 In response to the observation of the AO that investor company was issued summon u/s 131 for verification of the investment and the premium and none attended, the Ld. AR submitted that the investor company duly submitted the reply to the Ld. AO on 11/12/2017 along with all the relevant evidences and confirmed the premium as well as the investment.

6.27 However, once it is established that the value at which shares are issued is correct and the purpose of investment and transaction for issuance of share is genuine. The above contentions and submissions do not call for any comments though they are supported by the case law relied upon by the appellant.

6.28 In view of the facts and circumstances of this case and in law as discussed in foregoing paragraphs, it is clear that valuation of share at Rs.1,500/- is in accordance with law where shares are issued at fair market value considering different basis on sound footings. Therefore, rejection of the same by AO with book value of shares is not tenable and addition made by the AO u/s 56(2)(viib) amounting to Rs. 2,43,32,640/- is hereby deleted.”

5. Against the above order, Revenue is in appeal before us. We have heard both the parties and perused the records.

6. Ld. DR for the Revenue relied upon the order of Delhi Bench of the ITAT in the case of Agro Portfolio (P.) Ltd. vs. ITO 94 taxmann.com 112 (Delhi-Trib.) for the proposition that valuation made on unrealistic forecast is not sustainable.

7. Per contra, ld. Counsel of the assessee submitted that ld. CIT (A) has properly appreciated the facts. He supported the findings of the ld. CIT (A). He further relied upon several case laws in this regard.

8. We note that in this case, ld. CIT (A) has given a finding that actual performance of the assessee is even better than the forecast. Hence, any adverse inference on account of forecast is not appropriate and sustainable. Further, we note that ld. CIT (A) has passed a very reasonable and elaborate order. Furthermore, we find it appropriate to refer to the provisions of section 56(2)(vii)(b) of the Act and Rule 11UA as under :-

“Section 56(2) provides for addition in certain cases. Sub-section (viib) thereof reads as under :

(viib) where a company, not being a company in which the public are substantially interested, receives, 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.

Following second proviso shall be inserted after the existing proviso to clause (viib) of sub-section (2) of section 56 by the Act No. 23 of 2019, w.e.f. 1.4.2020:

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 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;

Following clauses (aa) and (ab) shall be inserted after clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 by the Act No. 23 of 2019, w.e.f. 1.4.2020 :

- (aa) "specified fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or a Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992);
- (ab) "trust" means a trust established under the Indian Trusts Act, 1882 (2 of 1882) or under any other law for the time being in force;
- (b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation to clause (23FB) of section 10."

Rule 11UA of the Act provides for valuation. Relevant sub-rule applicable for this assessment year with regard to valuation of shares and securities read as under :

11UA(1)(c) valuation of shares and securities,—

- (a) the fair market value of quoted shares and securities shall be determined in the following manner, namely,—

- (i) if the quoted shares and securities are received by way of transaction carried out through any recognized stock exchange, the fair market value of such shares and securities shall be the transaction value as recorded in such stock exchange;
- (ii) if such quoted shares and securities are received by way of transaction carried out other than through any recognized stock exchange, the fair market value of such shares and securities shall be,—
 - (a) the lowest price of such shares and securities quoted on any recognized stock exchange on the valuation date, and
 - (b) the lowest price of such shares and securities on any recognized stock exchange on a date immediately preceding the valuation date when such shares and securities were traded on such stock exchange, in cases where on the valuation date there is no trading in such shares and securities on any recognized stock exchange;
- (b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:—

the fair market value of unquoted equity shares =

$$\frac{(A-L)}{(PE)} \times (PV),$$

where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of

deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance-sheet, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;
- (iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (iv) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (v) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balancesheet;

PV = the paid up value of such equity shares.

- (c) the fair market value of unquoted shares and securities other than equity shares in a company which are not listed in any recognized stock exchange shall be

estimated to be price it would fetch if sold in the open market on the valuation date and the assessee may obtain a report from a merchant banker or an accountant in respect of which such valuation.

[(2) Notwithstanding anything contained in sub-clause (b) of clause (c) of subrule (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) the fair market value of unquoted equity shares =

$$\frac{(A-L)}{(PE)} \times (PV)$$

Where ,

A= book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L= book value of liabilities shown in the balance-sheet, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;
- (iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

- (iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;
- (iv) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;
- (vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PE = total amount of paid up equity share capital as shown in the balance-sheet;

PV = the paid up value of such equity shares; or

- (b) the fair market value of the unquoted equity shares determined by a merchant banker [***] as per the Discounted Free Cash Flow method.]”

9. We note that the coordinate Bench of the Tribunal in the case of M/s. Kilitch Healthcare India Ltd. vs. DCIT ITA No.7061/Mum/2019 order dated 22.03.2022 has appreciated the provisions of law as under :-

“17. Now coming to the mandate of the Act, it is noted that section 56(2)(vii)(b) provides for addition in case of premium obtained from shares exceeds the fair market value of the shares. Fair market value is defined to be the value as may be determined in accordance with such a method as may be prescribed or as may be substantiated by the company to the satisfaction of the Assessing Officer based on certain aspect specified in the rule. Rule 11UA of the Act provides the necessary rule. Rule 11UA(1)(C)(c) which is the relevant here, provides that the fair market value of unquoted shares and securities other than equity shares in a company which are not listed in any

recognized stock exchange shall be estimated to be price it would fetch if sold in the open market on the valuation date and the assessee may obtain a report from a merchant banker or an accountant in respect of which such valuation. Admittedly, this rule is applicable in the present case and as provided in the said rule the assessee had option to obtain fair market value on the basis of valuation done by the accountant. Now the assessee has obtained valuation of accountant. Section 56(2)(vii)(b) provides fair market value of shares to be the one as may be determined in accordance with the method as may be prescribed or as may be substantiated to the satisfaction of Assessing Officer. Hence, if the method adopted by the assessee is not in accordance with the Rules contained in Explanation (a)(i) to section 56(2)(vii)(b), above any other method to the satisfaction of the Assessing Officer can be adopted. The obvious corollary is that if the method adopted by the assessee is in accordance with the method contained in the Act read with Rules, the Assessing Officer cannot disregard the same without cogent reasoning. Admittedly in this case the assessee has adopted a method which is in accordance with that prescribed in the Act read with the Rules. As noted above prescribed method for unquoted shares is not any specific method but it provides that assessee may obtain valuation report from merchant banker or accountant. In this case the assessee has obtained valuation report of the accountant. To this extent, valuation adopted by the assessee cannot be said to be not in accordance with law.”

10. We note that the above is squarely applicable to the facts of the present case. Hence, respectfully following the same, we uphold the order of the Id. CIT (A).

11. In the result, this appeal by the Revenue stands dismissed.

Order pronounced in the open court on this 9th day of October, 2023.

**Sd/-
(ASTHA CHANDRA)
JUDICIAL MEMBER**

**sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER**

**Dated the 9th day of October, 2023
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT (A)-5, New Delhi.
- 5.CIT(ITAT), New Delhi.

AR, ITAT
NEW DELHI.
