

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, MUMBAI

BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER
AND

SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

ITA No. 3068/Mum/2022

(Assessment Year 2017-18)

ACIT, Circle-4(2)(1)
Room No. 642, 6th Floor,
Aayakar Bhavan, M.K. Road,
Mumbai-400020

(Appellant)

M/s Innovage Fintech Pvt. Ltd.
4-404, Krishna Residency, Opp
Radhakrishna Vidyalaya, behind
Vs. Sunder Nager, Malad (west),
Mumbai-400064

PAN No. AACCI3766N

(Respondent)

Assessee by : Ms. Rutuja N. Pawar &
Ms. Sneha More
Revenue by : Shri. K. C. Selvamani

Date of hearing: 15/06/2023

Date of pronouncement : 08/09/2023

ORDER

PER VIKAS AWASTHY, JM:

This appeal by the Revenue is directed against the order of Commissioner of Income Tax (Appeals), National Faceless Appeal Center, Delhi [in short 'the CIT(A)'] dated 07.10.2022, for the assessment year 2017-18.

2. The Revenue in appeal has raised following grounds of appeal:

"1. *Whether on the facts and circumstance of the case and in law, the Ld. CIT(A) is correct in allowing business expenses without placing substantial proof/records which establish*

the facts that assessee had set up its business operations in FY 2015-16?"

2. *"Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) is correct in allowing business expenses only on the basis of generating income from service in F.Y. 2015-16 without appreciating the facts the assessee had not commenced the operation from the websites however the assessee during the year had claimed various business expenses?"*
3. *"Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) is correct in deleting addition u/s 56(2)(viib) of the Act, ignoring the base adopted by the assessee for calculation of projected income and valuation method adopted by the assessee for valuation report furnished by the assessee?"*
4. *"Whether on the facts and circumstance of the case and in law, the Ld.CIT(A) is correct in deleting addition made u/s 14A, ignoring the fact that the assessee has upgraded his investment during the year which may fetch exempt income in future? Ld. CIT(A) is correct in ignoring the CBDT Circular No. 5/2014 dated 11.02.2014 which provides clarification regarding disallowance of expenses under section 14A of the Income Tax Act in cases where corresponding exempt income has not been earned during the F.Y. It concludes it is not necessary that exempt income should necessarily be included in a particular year's income for the disallowance to be triggered?"*
5. *The appellant craves to add, modify or alter the above grounds of appeal, at the time/during the course of appellate proceedings"*

3. Shri. K. C Salvamani representing department submitted that in ground no. 1 and 2 of appeal, the Department has assailed findings of the CIT(A) in deleting business expenditure disallowed by the assessing officer. The Ld. DR submitted that the assessee has claimed exorbitant business expenditure ₹8.63 crore that includes, employees expenses, advertisement expenses, etc. Whereas, the assessee has shown receipts from service of ₹ 1,56,011/- and interest income ₹ 41.67 lacs. The assessee has failed to justify the quantum of expenditure vis-à-vis receipts from service. The Id.D.R submitted that the business expenditure claimed by the assessee is in fact, pre-operative expenditure and the same should have been capitalized by the assessee. The AO has allowed the assessee to capitalize the said expenditure.

4. The Id. DR submitted that in ground no. 3 of appeal, the revenue has assailed the findings of CIT(A) in deleting addition u/s 56(2)(viib) of the Income Tax Act, 1961 [hereinafter 'the Act']. Vehemently supporting assessment order, he submitted that the assessee has charged exorbitant premium on allotment of shares to the resident investors. The premium on shares is not commensurate to the financial results of the assessee. He submitted that the assessee had issued shares on conversion of debentus to non-resident at much lesser rate as compared to the premium charged from the resident investors. He pointed that in the Financial Year 2015-16, the premium charged from the non-resident investors was ₹12,667/- per share, whereas, the assessee has charged premium of ₹21,284/- per share from resident investors on the equity



shares allotted in Financial Year 2016-17. The assessee was asked to explain the basis of valuation of shares and the vast difference in share premium. The assessee could not furnish any satisfactory explanation. Hence, the AO rejected assessee's method of valuation of shares and made addition of ₹2,48,25,404/- u/s 56(2)(viib) of the Act. He further pointed that a perusal of valuation report would show that the valuer has done valuation based on of information and explanation provided by the assessee alone. The Valuer has not made independent enquiries. Therefore, no reliance can be placed on such Valuation report. The Assessing Officer has rightly rejected the valuation. In support of his submission he placed reliance on the decision of the Tribunal in the case of Agro Portfolio Pvt. Ltd. V/s ITO 94 taxmann.com 112. The DR prayed for reversing the findings of CIT(A) and upholding the assessment order.

5. In ground no. 4 of appeal the revenue has assailed the findings of the CIT(A) in deleting addition made u/s 14A of the Act. The Id. DR Submitted that during the period relevant to assessment year under appeal, the assessee made substantial investment in shares i.e. to the tune of ₹ 5.53 crore. The assessee has not made any suo moto disallowance of expenditure for making huge investment. He further submitted that provisions of section 14A of the Act have been amended by way of insertion of Explanation according to which disallowance u/s. 14A of the Act has to be made even if no exempt income is earned during the relevant period. He placed reliance on the decision in the case of ACIT vs. Williamson Financial Services Ltd., 140 taxmann.com 164



(Gauhati –Trib) to contend that Explanation inserted by the Finance Act, 2022 to Section 14A of the Act would apply retrospectively. The Id.DR vehemently, supporting the findings of AO prayed for reversing the order of CIT(A)

6. Per contra, Ms. Rutuja N. Pawar appearing on behalf of the assessee emphatically supported the order and prayed for dismissing the appeal of Revenue. The Ld. Counsel submitted that the assessee had commenced its website on 01.10.2016 and this fact has been accepted by the AO. The assessee has capitalized all expenditure prior to the date of commencement of business. The AO has failed to take note of the fact that prior to the commencement of business, the assessee has capitalized all expenditure. Merely, for the reason that the assessee has received less receipts from services cannot be a reason for disallowing business expenditure.

7. In respect of ground No. 3, the Ld. Counsel submitted that the assessee has valued shares in accordance with method specified in Rule 11UA. The said Rule prescribes determination of Fair Market Value [FMV] of shares on the basis of Discounted Cash Flow (DCF) method and the other method. The assessee in tune with Rule 11UA determined FMV following DCF method. The Valuation Report is at page 95 of the paper book. The AO without pointing any infirmity in the valuation report has changed method of valuation of shares to Net Asset Valuation [NAV]. No valid reason has been given by the AO to change the method of valuation nor the AO has referred the matter for fresh valuation to Valuer



The AO cannot change method of valuation in an arbitrary manner. In support of her submissions, she placed reliance on the following decisions.

- PCIT v/s Cinestaan Entertainment Pvt. Ltd., 433 ITR 82 Delhi.
- Vodafone M-Pesa Ltd. vs. PCIT, 92 taxmann.com 73 (Bom)

8. In respect of ground no. 4, the Id. Counsel submits that during the period relevant to assessment year under appeal, the assessee has not earned any dividend income or income exempt from tax, hence, no suo moto disallowance was made by the assessee. She further submitted that the amendment made by the Finance Act 2022 to Section 14A of the Act is prospective, hence, the same would have no application in the impugned assessment year. In support of her submissions reliance was placed on the decision by Hon'ble Delhi High Court in the case of PCIT v/s ERA Infrastructure (India) Pvt. Ltd. in ITA No. 204 of 2022 decided on 20.07.2022.

9. We have heard the submissions made by rival sides and have examined the orders of authorities below. In ground No. 1& 2 of appeal the Revenue has assailed the findings of CIT(A) in allowing assessee's claim of business expenditure aggregating to Rs.8.63 crores. The assessee is engaged in the business of Financial Planning and Wealth Management. The Assessing Officer held that the business expenditure claimed by the assessee is pre-operative in nature, hence, disallowed the claim of assessee in entirety. Per contra, the case of assessee is that assessee



company was incorporated on 24/07/2010 and had commenced its business in F.Y.2016-17 relevant to A.Y. 2017-18. The assessee's website became operational w.e.f. 01/10/2016, prior to the said date the assessee has capitalized all its expenses. The Assessing Officer has not disputed the fact that assessee's website www.5nanace.com had become operation from 01/10/2016. In the first appellate proceedings the CIT(A) has allowed the claim of assessee observing that the assessee started earning income from services in F.Y. 2015-16 itself, therefore, the assessee commenced its business activity in the F.Y. 2015-16. The observations of the CIT(A) and the statement made by Id. Authorized Representative of the assessee regarding commencement of business are incoherent. Be that as it may, we deem it appropriate to restore this issue back to the file of Assessing Officer for the limited purpose to verify and examine; if the expenditure claimed is incurred after the date of commencement of the website i.e. 01/10/2016, the business expenditure is allowable in full or to the extent expenditure is incurred after 01/10/2016. The Assessing Officer shall grant reasonable opportunity to the assessee for making submissions, in accordance with law. Thus, ground No.1 and 2 of appeal are allowed for statistical purpose in the terms aforesaid.

10. In ground No.3 the Revenue has assailed the findings of CIT(A) in deleting addition made u/s. 56(2)(viib) of the Act. The assessee has allotted 1174 shares to resident individuals at a premium of Rs.21,284/- per share. The assessee in support of the valuation of shares furnished valuation report dated 30/04/2016 before the Assessing Officer. The



assessee followed Discounted Cash Flow method (DCF) as specified under Rule 11UA of the Income Tax Rules, 1962. The Assessing Officer changed valuation method to Net Asset Value (NAV). The contention of the Revenue is that the assessee has issued CCDs to non-residents in F.Y.2013-14 and 2014-15. The said debentures were converted into shares at a premium of Rs.12,667/- per share in F.Y. 2015-16. In the F.Y. 2016-17, the assessee has allotted shares to residents at exorbitant premium of Rs.21,280/- per share. The premium charged by the assessee from resident shareholders is based on unrealistic projections. Hence, the Assessing Officer re-determined the value of shares and made addition of Rs.2,48,25,404/- u/s. 56(2)(viib) of the Act.

11. It is an undisputed fact that the assessee had determined the value of shares in accordance with one of the approved methods specified under Rule 11UA. The Assessing Officer while rejecting the said method has not pointed the defect in the method of valuation. The only reason given by the Assessing Officer is that there is a stark difference in the actual results and projections. The Assessing Officer thereafter applied NAV for valuation of shares. It is not the case of Revenue that the valuation method adopted by the assessee is not approved under Rule 11UA. We are of the considered view that the Assessing Officer, if not satisfied with the valuation of assessee can make fresh valuation either himself or can seek report from Valuer. However, the Assessing Officer has to follow the same method of valuation as adopted by the assessee in accordance with Rule 11UA. It is not open to the Assessing Officer to



change the method of valuation adopted by the assessee. The Hon'ble Bombay High Court in the case of Vodafone M-Pesa Ltd. vs. PCIT (supra) has held that the Assessing Officer cannot change the method of valuation opted by the assessee, if the said method is in accordance with Rule 11UA of the Act. Similar view has been taken by the Co-ordinate Bench in the case of DCIT vs. M/s. Ozoneland Agro Pvt. Ltd. in ITA No.4854/Mum/2016 for assessment year 2013-14 decided on 02/05/2018 and various other decisions of the Tribunal. Thus, in view of the facts of the case and the decisions referred above, we find no merit in ground No.3 of appeal, hence, the same is dismissed.

12. In ground No.4 of appeal, the Revenue has assailed deleting of disallowance made u/s. 14A of the Act by the CIT(A). The Id. Authorized Representative has pointed that during the period relevant to the assessment year under appeal the assessee has not earned any exempt income. This fact has not been disputed by the Department. It is no more res-integra that where no income exempt from tax is earned during the year, no disallowance u/s. 14A is required to be made [Re: PCIT vs. Ballarpur Industries Ltd in Income Tax Appeal No.51 of 2016 decided by Hon'ble Bombay High Court vide order dated 13/10/2016]. As regards the argument of Id. D.R that Explanation inserted by the Finance Act, 2022 is clarificatory and would apply retrospectively, we do not concur with the same. The Hon'ble Delhi High Court in the case of ERA Infrastructure (India) Pvt. Ltd.(supra) has clarified that in Memorandum of the Finance Bill 2022 it has been mentioned that amendment will take effect from 1st



April, 2022 and will apply in relation to assessment year 2022-23 and subsequent Assessment Years. We find no infirmity in the findings of CIT(A) on this issues. Ergo, ground No.4 of appeal is dismissed being devoid of merit.

13. In the result, appeal of the Revenue is partly allowed for statistical purpose in the terms aforesaid.

Order pronounced in the open court on Friday the 08th day of September 2023.

Sd/-
(OM PRAKASH KANT)
(ACCOUNTANT MEMBER)

Sd/-
(VIKAS AWASTHY)
(JUDICIAL MEMBER)

Mumbai, Dated: 08/09/2023

Aniket Singh Rajput /VM

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. PCIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

Asst. Registrar
Income Tax Appellate Tribunal, Mumbai