

आयकर अपीलीय अधिकरण न्यायपीठ "एक-सदस्य" मामला रायपुर में

**IN THE INCOME TAX APPELLATE TRIBUNAL
RAIPUR BENCH "SMC", RAIPUR**

**श्री रवीश सूद, न्यायिक सदस्य के समक्ष
BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER**

आयकर अपील सं. / ITA No. 200/RPR/2023

निर्धारण वर्ष / Assessment Year : 2013-14

Chandhok Cold Storage Private Limited
Ph No.100/28, Bilaspur Road,
Ravigram S.O, Raipur-492 001
PAN : AADCC8354P

.....अपीलार्थी / Appellant

बनाम / V/s.

The Income Tax Officer,
Ward-3(1), Raipur (C.G.)

.....प्रत्यर्थी / Respondent

Assessee by : Shri Hardik Jain, CA
Revenue by : Shri Satya Prakash Sharma, Sr. DR

सुनवाई की तारीख / Date of Hearing : 13.10.2023

घोषणा की तारीख / Date of Pronouncement : 18.10.2023

आदेश / ORDER**PER RAVISH SOOD, JM:**

The present appeal filed by the assessee is directed against the order passed by the Commissioner of Income-Tax (Appeals), National Faceless Appeal Center (NFAC), Delhi, dated 19.03.2023, which in turn arises from the order passed by the A.O under Sec.143(3) of the Income-tax Act, 1961 (in short 'the Act') dated 27.03.2016 for the assessment year 2013-14. The assessee has assailed the impugned order on the following grounds of appeal:

"1. The Ld. CIT (A) has erred in law as well as facts while sustaining the addition of Rs. 8,64,000/- u/s 56(2)(viib) based on the valuation of net worth as per Audited Financial Statements as on 31.03.2012. Whereas, shares were allotted on 30.03.2013.

As per the provisions of Section 56(2)(viib) of the Income Tax Act 1961,:-

(u) 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:

In this regard on perusal of Rule 11U & 11UA prescribed under the Act, it is stated that "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) the fair market value of unquoted equity shares =

$$(A-L) \times (PV),$$

$$(PE)$$

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 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 2[***] as per the Discounted Free Cash Flow method" Further Rule 11U provides that ""balance-sheet", in relation to any company, means,—

(i) for the purposes of sub-rule (2) of rule 11UA, the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts). as drawn up on the valuation date which has been audited by the auditor of the company appointed under section 224

of the Companies Act, 1956 (1 of 1956) and where the balance-sheet on the valuation date is not drawn up, the balance-sheet (including the notes annexed thereto and forming part of the accounts) drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company"

On a joint reading of both the rules prescribed u/s 56(2)(viib), it is amply clear that valuation of the shares shall be done on the valuation date and the method of valuation used shall be at the option of assessee.

Further as per the fair market value method, the book value of assets and liabilities on the valuation date shall be used for the purpose of valuing such unquoted equity shares. When such balance sheet on the valuation date is not drawn up, the balance sheet as drawn up immediately before the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company shall be used for the purpose of valuing such unquoted equity shares.

In this regard, we would like to inform you that the assessee has got its accounts audited on the valuation date by the auditor u/s 224 of the Companies Act, 1956 and FMV of the shares was derived accordingly.

Since, the balance sheet drawn up on the valuation date is available, the balance sheet drawn up immediately before the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company cannot be used for determining the fair market value of the unquoted equity shares of the company. Thus, the CIT (Appeals) erred in facts as well as law by confirming the additions of Rs. 8,64,000/- u/s 56(2)(viib).

2. The Ld. CIT (A) erred in law as well as facts while sustaining the addition of Rs. 99,957/- on account of interest income. The addition is not sustainable in law. The assessee had earned interest income on FDR of Rs. 99,957/- which by nature is a long-term deposit. However, the Ld. AO has added such income under the head Income from other sources by referring to the Hon. Supreme Court judgement of M/s Tuticorin Alkali Chemicals & Fertilizers vs. CIT [227 ITR 172]. The excerpt of the said judgement are as follows:

"Whether interest earned on short-term investment of funds borrowed for setting-up of factory during construction of factory before commencement of business has to be assessed as income from other sources and it cannot be said that interest income is not taxable on ground that it would go to reduce interest on borrowed amount which would be capitalised - Held, yes"

In this regard, we would like to mention that above-mentioned judgement is applicable for short-term investment whereas we have invested in long term instrument. Thus, the addition by the Ld. AO is without appreciating the fact of the case and against the judgement of the Hon. Supreme Court.

Further, we have relied upon the Delhi High Court judgement of Inc144 Oil Panipat Poer consortium Ltd. Vs. Income Tax Officer, 2009 states that "Whether since income was in a period prior to commencement of business, it was in nature of capital receipt and, hence, was required to be set off against pre-operative expenses- Held-yes"

In the light of above facts and judgements, the addition of Rs. 99,957/- which was interest income on FDR should not be shown as income, since the same relates to the period prior to commencement of business and is in fact in nature of capital receipt. Thus, the Ld. CIT (Appeals) has erred in sustaining the addition of Rs.99,957/- as interest income.

3. The Ld. CIT (A) erred in law as well as facts while making an addition of Rs.16,027/- out of depreciation. The addition is not sustainable in law.

4. The appellant reserves the right to add, amend or alter any ground or grounds at the time of hearing."

2. Succinctly stated, the assessee company, which is engaged in the business of running cold storage, had e-filed its return of income for A.Y.2013-14 on 27.03.2015, declaring an income of Rs. Nil. The case of the assessee company, thereafter, was selected for scrutiny assessment u/s. 143(2) of the Act.

3. During the course of the assessment proceedings, it was, inter alia, observed by the A.O. that the assessee company had issued 96000 equity shares of a face value of Rs. 10/- per share at a premium of Rs.90/- per share. On being queried as regards the huge share premium of Rs.90/- per share on the basis of which an amount of Rs.8,64,000/- was received, it was submitted by the assessee company

that the said shares were issued only to the directors and their relatives and its book value as on 31.03.2012 was Rs. 91/- per equity share. Considering the aforesaid reply of the assessee, the A.O held a conviction that now, as per Rule 11UA of the Income Tax Rules, 1962, the "Fair market value" (FMV) of the shares of the assessee company based on the book value method as per its balance sheet on 31.03.2012 worked out at Rs.91 per share, therefore, same were issued at an excess premium of Rs.9/- per share, i.e., over and above the FMV of Rs.91 per share. Accordingly, the A.O., based on his aforesaid deliberations, made an addition u/s. 56(2)(viiib) of the Act of Rs.8,64,000/- (Rs.9/- per share x 96000 shares). Also, the A.O made a further addition of Rs.99,957/- of interest on FDR, which the assessee company had credited to the pre-construction expenses instead of crediting it as its income in the profit & loss a/c, on the ground that the same pertained to the period prior to the commencement of its business and, thus, was in the nature of capital receipt. After inter alia, making the aforesaid additions, the A.O. vide his order passed u/s. 143(3) dated 27.03.2016 determined the income of the assessee company at Rs.9,36,420/-.

4. Aggrieved the assessee carried the matter in appeal before the CIT(Appeals) but without success. The CIT(Appeals), while approving the order passed by the A.O on both the aforesaid issues, had held as under:

"IX. DISCUSSION OF ISSSUE No.1

Addition on account of interest income: Interest on FDR Rs 99957 appearing in 26AS relates to interest earned on FD's invested out of amount received as pre-construction expenses. Before the

completion of a project which is a large project which could be completed only after more than 5 years or 10 years, money is credited in the banks for carrying out the necessary work like installation of plant, machinery, manufacturing assembly line etc. since it takes time to complete the project and money cannot be used at a stretch, so it will be invested as FD in the bank which will fetch interest falling under Income from Other sources as held in a plethora of cases including that of Tuticorin Alkali Chemicals & Fertilizers Ltd vs CIT 227 ITR 172. There are a number of case laws which says that interest income falls under Income from Other sources. TDS credit is also claimed on the same by the taxpayer.

GROUND No.2 The assessee had issued 96000 equity shares during the year at Rs.100 per share. The assessee was asked to justify the huge premium of Rs.90 per share at which shares were issued against which Rs.86400007 was received as share premium. The assessee replied that the shares were issued to the directors and their relatives only and book value of shares as on 31.3.2012 is Rs.91 per share. The reply of the assessee has been considered, however, it is not acceptable as no such exception has been carved out in Section 56(2)(viib). The onus was on the assessee company to justify that the issue price is not exceeding the fair market value of shares, however, the assessee has failed to justify the premium charged. It is noticed that the fair market value of the shares of assessee company computed based on book value method as provided in Rule 11 UA based on Balance Sheet of assessee company as on 31-03-2012 works out to Rs. 91 per share whereas the shares have been issued at premium .of Rs.90 per share thus the issue price is totaling to Rs.100 per share instead of Rs.91, therefore, the excess premium of Rs.9 per share over and above the fair market value i.e Rs.91 per share aggregating to Rs.8,64,000 (Rs.9*96000) is held as income of the assessee u/s 56(2)(viib).

The value of share is Rs 10 which is the face vale and Rs 90 which is the premium. Where as assessee was showing Rs 91 as the value of share. The shares are given directors and its relatives at Rs 100 which includes Rs 10 as the face value and Rs 90 as the premium. Since the shares were issued less than the book value the difference of Rs 9 per share multiplied by 96000 shares issued would be the income which needs to be taxed. The same has been brought to tax by the assessing officer. Kindly refer to provisions of sec 56(2)(viia) and sec 56(2)(vii)©.

56 (2) In particular, and without prejudice to the generality of the provisions of subsection (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

(i)..

[(vii) where an individual or a Hindu undivided family receives, in any previous year, from any person or persons on or after the 1st day of October, 2009,—

(a) (b) (c) any property, other than immovable property,—

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration:

Fair market value of a property other than an immovable property means the value determined in accordance with the method as may be prescribed. Rule 11 U and 11 UA. The FMV as per Rule 11 U and Rule 11 UA is Rs 91 per share where as assessee has issued it at Rs 100 per share. This means there is a difference of Rs 9 per share issued. The assessing officers stand of taxing the difference is upheld.

Addition upheld : 864000/-”

5. The assessee, being aggrieved with the order of the CIT(Appeals), has carried the matter in appeal.

6. I have heard the Ld. Authorized Representatives of both the parties, perused the orders of the lower authorities as well as the material available on record. Apropos the addition of Rs.8.64 lacs made by the A.O, I find that the issue leading to the said addition hinges on the determination of the FMV of the shares. as per the mandate of Section 56(2)(viib) of the Act. As observed by me hereinabove, the assessee company had issued 96000 shares of a face value of Rs.10/- per share at a premium of Rs.90/- per share. As the FMV of the shares of the assessee company was taken by the A.O based on its balance sheet as of 31.03.2012 on the basis of the book value method as provided under Rule 11UA at Rs.91/- per equity share, he

had, thus, made an addition of the excess premium of Rs.9/- per equity share that was received by the assessee company and made a consequential addition of Rs.8,64,000/- (supra) in its hands.

7. Before proceeding any further, it would be apt to cull out the provisions of Section 56(2)(viib) of the Act, which reads as follows:

“(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 ⁹[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:

¹⁰**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;

- ¹¹[(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;"

As per "Explanation (a)" to Section 56(2)(viib) of the Act, the same, inter alia, contemplates that the FMV of the shares shall be the value as may be determined in accordance with such method as may be prescribed under Rule 11UA of the Income Tax Rules, 1962 as had been made available on the statute vide the IT (fifteenth amendment) rules, 2012 w.e.f. 29.11.2012. Rule 11UA of the Income-Tax Rules, 1962 contemplates the methods for making a valuation of the shares/securities, and the same as was applicable in the case of the assessee for the year under consideration reads as under:

"11UA [(1)] For the purposes of Section 56 of the Act, the fair market value of a property, other than immovable property, shall be determined in the following manner, namely –

- (a) XXXXXXXX
- (b) XXXXXXXX
- (c) XXXXXXXX

[(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:—

(A-L)

the fair market value of unquoted equity shares = (PE) X (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 unamortized 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;

(v) 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;]

(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 such valuation.]”

8. On a perusal of the aforesaid methods for valuation of the unquoted equity shares, it transpires that the same contemplates two sets of methods, at the option of the assessee, to determine the FMV of unquoted equity shares, viz. (i) as per the book value; and (ii) as per discounted free cash flow method. As per both of the aforesaid methods, the valuation of FMV of unquoted equity shares shall be the

value, **on the valuation date**, of such unquoted equity shares. The meaning of the term “valuation date” can be traced in sub-rule (j) of Rule 11UA, which reads as follows:

“(j) “valuation date” means the date on which the property or consideration, as the case may be, is received by the assessee.

On the basis of the mandate of law, it becomes clear beyond any scope of doubt that the assessee, by adopting either of the aforesaid methods to determine FMV of the unquoted equity shares, is required to determine the value of the same as on valuation date, i.e., the date on which the property or consideration is received by the assessee company.

9. On a conjoint reading of Section 56(2)(viib) r.w. Rule 11UA, I find that the FMV of the unquoted equity shares would be their value as of the date on which the assessee company receives property or consideration for the same. As against the aforesaid requirement of law, it transpires that on one hand, the A.O had determined the FMV of the unquoted equity shares of the assessee company as per the Net Worth Method on 31.03.2012 at Rs. 91/- per equity share, while the assessee company had determined the same as per the said method as on 29.03.2013 at Rs. 144/- per equity share. In my considered view, both the A.O and the assessee company had wrongly adopted the date of valuation. I, say so, for the reason that as per the meaning of “valuation date” as contemplated under Rule 11UA(j), the FMV of the unquoted equity shares shall be the value on the valuation date, i.e., the date on which the assessee company receives property or consideration. Considering the

fact that neither the A.O. nor the assessee had taken the correct date for determining the FMV of the unquoted equity 96000 shares as per the method provided in Rule UA r.w Rule 11U, i.e., the value as on the “valuation date,” therefore, neither of the same merits acceptance.

10. As the specific date/dates on which the assessee company had received consideration are not available on record, in all fairness, I restore the matter to the file of the A.O. with a direction to determine the same as per Rule 11UA r.w. Rule 11U applicable to the case of the assessee for the year under consideration. As a word of caution, it may be observed that as Rule 11UA/11U had been subjected to an amendment vide IT(Fifteenth Amendment) Rules, 2012 w.e.f. 29.11.2012, therefore, the A.O while computing the FMV of the aforesaid unquoted equity shares, shall take cognizance of the said fact while working out the valuation on the date on which consideration in lieu of such shares was received by the assessee company.

11. At this stage, we may herein clarify that as per the mandate of law, the option to determine the FMV of unquoted equity shares remains with the assessee as per either of the two methods viz. (i) as per the Net Worth Method; and (ii) as per the Discounted Free Cash Flow (DCF) method remains with the assessee company. Accordingly, in terms of my aforesaid observations, I restore the matter to the file of the A.O. for fresh adjudication. Needless to say, the A.O., in the course of set-aside proceedings, shall afford a reasonable opportunity of being heard to the assessee company. Thus, the **Ground of Appeal No.1** raised by the assessee is allowed for statistical purposes in terms of the aforesaid observations.

12. I shall now take up the grievance of the assessee that the A.O. had grossly erred in making an addition of the interest on FDRs of Rs.99,957/- to its returned income.

13. Before me, it is the claim of the Ld. AR that as the interest on FDRs was earned prior to the completion of its project, which was completed after more than 5 to 10 years, the money which was parked in its bank account for carrying out necessary work, viz. installation of plant & machinery, manufacturing assembly line, etc. being in the nature of capital receipt could not have been assessed as its income from other sources. The Ld. A.R had placed reliance on the judgment of the Hon'ble Supreme Court in the case of M/s. Tuticorin Alkali Chemicals & Fertilizers Vs. CIT (227 ITR 172). Also, the Ld. AR had drawn support from the judgment of the Hon'ble High Court of Delhi in the case of Indian Oil Panipat Power Consortium Ltd. Vs. ITO (2009) 315 ITR 255.

14. I have thoughtfully considered the aforesaid issue and concur with the claim of the Ld. AR that as the interest income earned by the assessee company on the funds which were temporarily parked/deposited with the banks as fixed deposits prior to commencement of its business was in the nature of a capital receipt and, hence, was required to be set off against the pre-operative expenses. My aforesaid view is fortified by the judgment of the Hon'ble High Court of Delhi in the case of Indian Oil Panipat Power Consortium Ltd. Vs. ITO (supra). Accordingly, in terms of my aforesaid observations, I herein vacate the addition of Rs.99,957/- made by the A.O by recharacterizing the interest receipt as the income of the assessee company from

other sources. Thus, the **Ground of appeal No.2** raised by the assessee company is allowed in terms of the aforesaid observations.

15. As regards **Ground of appeal No.3**, the Ld. AR did not advance any argument; therefore, the same is dismissed as not pressed.

16. **Ground of appeal No.4**, being general in nature, is dismissed as not pressed.

17. In the result, the appeal of the assessee is partly allowed for statistical purposes in terms of the aforesaid observations.

Order pronounced in open court on 18th day of October, 2023.

Sd/-

(रवीश सूद /RAVISH SOOD)

न्यायिक सदस्य/JUDICIAL MEMBER

रायपुर/ RAIPUR ; दिनांक / Dated : 18th October, 2023.

**#SB

आदेश की प्रतिलिपि अग्रहित / Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G)
4. The Pr. CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, रायपुर बेंच,
रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary

आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur.