

**IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPURBENCH, JODHPUR.**

**BEFORE DR. M. L. MEENA, ACCOUNTANT MEMBER
AND SH. ANIKESH BANERJEE, JUDICIAL MEMBER**

**I.T.A. Nos. 329 to 330/Jodh/2023
Assessment Year: 2014-15 to 2015-16**

Idana Pet Industries P. Ltd. 22A, Bhatt Ji Ki Bari, Udaipur. [PAN: AADCI1197A] (Appellant)	Vs.	ITO, Ward-2(1),/ ACIT, Circle-1, Udaipur. (Respondent)
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Appellant by	Sh. Amit Kothari, CA
Respondent by	Ms. Nidhi Nair, Sr. DR

Date of Hearing	14.12.2023
Date of Pronouncement	19.12.2023

ORDER

Per: Anikesh Banerjee, Hon'ble J.M.:

Both the appeals of the same assessee were filed against the order of the Id. Commissioner of Income Tax (Appeals), NFAC, Delhi, [in brevity the 'CIT (A)'] order passed u/s 250 of the Income Tax Act 1961, [in brevity the Act] for A.Ys. 2014-15 to 2015-16. The impugned order was emanated from the order of the Id. Income Tax Officer, Ward-2(1), Udaipur, (in brevity the AO) order passed u/s 143(3) of the Act.

2. At the outset, both the appeals are partly common issue related to addition u/s 56(2)(viib) of the Act. Related to Assessment Year 2015-16 has a separate issue for adjudication. Therefore, both the appeals are taken together, heard together and disposed of together. For the sake of convenience, **ITA No. 329/Jodh/2023** is taken as the lead case.

ITA No. 329/Jodh/2023

3. The assessee has taken the following grounds which are reproduced as below:

“1. The order passed by the ld.CIT(A) confirming the order passed by the ld. AO is bad in law and bad on facts.

2. a.The Id. CIT(A) has erred in confirming addition of Rs.1,71,22,500/- ma- made56(2)(viib) on account of share premium received of allotment of shares. The addition so made is bad in law and bad on facts.

b. The authorities below had erred in not accepting the valuation of the Shares made by Technical Expert as required under Rule 11DA of the Income Tax Rules.

c. The variation made in the valuation of shares was without any material basis or evidence and was bad in law.

d. The contribution was from promoters which was duly explained and treating the same as income was bad in law.”

4. Brief fact of the case is that the assessee-company incorporated under the Companies Act, 1956. In impugned assessment year, the assessee allotted share@ 100 per share (Rs. 10/- + Rs.90/-) to the director and the son of director. The assessee was assessed u/s 143(3) and addition was confirmed for contravening section 56(2)(viib) r.w. Rule 11 UA of Income Tax Rule 1962 (here in after Rule). The difference of amount of share premium with the NAV, calculated by the Id. AO was added back with the total income of the assessee. During hearing, the assessee submitted the valuation of shares under “Discounted Free Cash FlowMethod” (DCF Method), and the valuation of equity share was amount to Rs. 158.93 per share which is far above the NAV of the allotted share. For Assessment Year 2015-16, the addition was confirmed for 15 lacs for undisclosed sundry creditors and Rs.4,72,088/- for payment of expenses made to relative u/s 40A(2)(b) of the Act. Aggrieved assessee filed an appeal before the Id. CIT(A). The Id. CIT(A) passed a speaking order and upheld the assessment order. Being aggrieved assessee filed an appeal before us.

5. The ld. AR submitted the written submissions which are kept in the record. The ld. AR first invited our attention in appeal order page 6, the relevant paragraph is reproduced as below:

“5. Decision:

Ground No.1 is disallowance of share premium worth Rs.171,22,500/- The appellant has issued on premium of Rs.90 per share. During the year, aggregate consideration received for such share was of Rs.19,02,500/- and share premium of Rs.1,71,22,500/-. The Assessing Officer as per section 56(2)(viib) held that aggregate consideration received for such share as exceeds the fair market value is to be treated income of the appellant under the head income from other sources. The Assessing Officer came to the conclusion that the appellant has received share premium of Rs. 1,71,22,5007-, which is more than the fair market value of the shares. Hence, the Assessing Officer added the amount of Rs. 1.71,22,500/- u/s. 56(2)(viib) of the Income Tax Act.

Before me in the appellate proceedings, written submission has been filed. It is stated that the valuation of shares has been based on discounted free cash flow method. The appellant has produced a certificate of CA and letter issued by RIIC,

mentioning last bid price and Valuation Report by the Certified Chartered Valuer.

I have gone through the submission of the appellant and the relevant portion of the assessment order. The Assessing Officer has made out the case that the appellant has issued shares on high premium value despite incurring book loss. The appellant company is a closely held company and the shares are mostly issued to the Directors and the son of the Director. Hence, the Assessing Officer came to the conclusion that the issue of share premium is very disproportionate looking to the financial position of the appellant company. The Assessing Officer has analyzed how Discounted Cash Flow method (DCF) as relied upon by the appellant cannot be applied here. Hence, I agree with the contention of the appellant. The addition of Rs. 1,71,22,500/- is confirmed and the appeal of the appellant is dismissed on this ground.

6. In the result, the appeal of the appellant is dismissed.”

5.1 The ld. AR placed that the assessee followed the “DCF Method” under Rule 11UA and the share was valued amount to Rs. 158.93 per share whereas assessee allotted the share @ Rs.100 per share. The ld. AR placed that relied on the order of

ITAT Mumbai Bench in the case of **Crown Chemicals Pvt. Ltd.** [TS-1017-ITAT-2022 (Mum)] **date of judgment 23.12.2022**, held:

"Even the prescribed Rule 11UA(2) does not give any power to the Assessing Officer to examine or substitute his own value in place of the value determined or requires any satisfaction on the part of the Assessing Officer to tinker with such valuation."

5.2 The Id. AR invited our attention in the valuation report of share, which is enclosed in **APB page 22**. The certificate is duly reproduced as below:

I.T.A. Nos. 329 to 330/Jodh/2023
Assessment Year: 2014-15 to 2015-16

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CERTIFICATE

This is to certify that as per project report as submitted to financing institution State Bank Of Bikaner and Jaipur, MIA Brach Udaipur, the discounted free cash flow statement for valuing the shares of M/S IDANA PET INDUSTRIES PVT. LTD., UDAIPUR calculated taking discount factor @12%

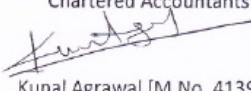
As per calculation the value of equity shares of Rs.10.00 each is comes to Rs.158.93 only

Year	Expected Cash Flow	Discount Factor @ 12%	Value in Lac	
			Discount Rate taken as	12%
			Discounted Cash Flow	
1	196.26	0.89	175.23	
2	186.7	0.80	148.84	
3	177.37	0.71	126.25	
4	174.94	0.64	111.18	
5	176.6	0.57	100.21	
6	179.1	0.51	90.74	
7	163.62	0.45	74.01	
8		0.40	0.00	
9		0.36	0.00	
10		0.32	0.00	
Total Present Value of Expected Cash Flow			826.45	
			82645283.01	
Total Number of Equity Shares outstanding			520000.00	
Value of per Equity Share			158.93	

Note - Terminal Value of Assests of Company has not been taken in calculation it is taken the value of shares may be increased.

PLACE : UDAIPUR
DATE : 26/09/2016

for Agrawal Bhandari & Co.,
Chartered Accountants


Kunal Agrawal [M.No. 413977]
Partner

6. The Id. AR relied on the order of **ITAT Delhi Bench 'B'** in the case of **Deputy Commissioner of Income-tax, Hometrail Buildtech (P.) Ltd, [2023] 155 taxmann.com 578 (Delhi - Trib.)**. The relevant paragraphs are annexed as below:

“14. Moreover, valuation of an unquoted equity share, in terms of rule 11UA of the Rules can, at the option of the assessee, be determined as per either NAV Method or as per DCF Method, which means that the option is given to the assessee and once the assessee has exercised an option, the Assessing Officer is bound to follow the same unless by bringing cogent material on record, the Assessing Officer establishes perversity in the method adopted by the assessee.

15. The Hon'ble High Court of Delhi in the case of Pr. CIT v. Cinestaan Entertainment (P.) Ltd. [2021] 433 ITR 82 has held a under:

"13. From the aforesaid extract of the impugned order, it becomes clear that the learned ITAT has followed the dicta of the Hon'ble Supreme Court in matters relating to the commercial prudence of an assessee relating to valuation of an asset. The law requires determination of fair market values as per prescribed methodology. The Appellant-Revenue had the option to conduct its own valuation and determine FMV on the basis of either the DCF or NAV Method. The Respondent-Assessee being a start-up company adopted DCF method to value its shares. This was carried out on the basis of information and material available on the date of valuation and projection of future revenue. There is no dispute that methodology adopted by the Respondent-Assessee has been done applying a recognized and accepted method. Since the performance did not match the projections, Revenue sought to challenge the valuation, on that footing. This approach lacks material foundation and is

irrational since the valuation is intrinsically based on projections which can be affected by various factors. We cannot lose sight of the fact that the valuer makes forecast or approximation, based on potential value of business. However, the underline facts and assumptions can undergo change over a period of time. The Courts have repeatedly held that valuation is not an exact science, and therefore cannot be done with arithmetic precision. It is a technical and complex problem which can be appropriately left to the consideration and wisdom of experts in the field of accountancy, having regard to the imponderables which enter the process of valuation of shares. The Appellant-Revenue is unable to demonstrate that the methodology adopted by the Respondent-Assessee is not correct. The AO has simply rejected the valuation of the Respondent-Assessee and failed to provide any alternate fair value of shares. Furthermore, as noted in the impugned order and as also pointed out by Mr. Vohra, the shares in the present scenario have not been subscribed to by any sister concern or closely related person, but by outside investors. Indeed, if they have seen certain potential and accepted this valuation, then Appellant-Revenue cannot question their wisdom. The valuation is a question of fact which would depend upon appreciation of material or evidence. The methodology adopted by the Respondent-Assessee, accepted by the learned ITAT, is a conclusion of fact drawn on the basis of material and facts available. The test laid down by the Courts for interfering with the findings of a valuer is not satisfied in the present case, as the Respondent-Assessee adopted a recognized method of valuation and Appellant-Revenue is unable to show that the assessee adopted a demonstrably wrong approach, or that the method of valuation was made on a wholly erroneous basis, or that it committed a mistake which goes to the root of the valuation process.

14. In view of the foregoing, we find that the question of law urged by the Appellant-Revenue is purely based on facts and does not call for our consideration as a question of law.

15. *For the foregoing reasons, the appeal is dismissed along with pending application."*

16. *Considering the facts of the case in totality, in light of the decision of the Hon'ble Delhi High Court [supra], we do not find any error or infirmity in the findings of the ld. CIT(A).*

17. *In the result the appeal of the Revenue in ITA No. 6905/DEL/2019 is dismissed."*

6.1, The ld. AR relied on **Nabh Multitrade Pvt Ltd vs. ITO, 3(2), Jaipur , ITA No. 269/JP/2018 date of pronouncement-09/10/2020**, relevant paragraph as follows:-

"Once the assessee has produced all the valuation reports based on Discounted Free Cash Flow method as well as the fair market value of the assets as on the date of issue of the shares, then this observation of the ld. CIT (A) that the assessee has failed to exercise an option of adopting the method is contrary to the record. Further, despite the fact that all the valuations are available on record, the ld. CIT (A) has again failed to give the credit to the extent of the valuation being the fair market value of the shares based on Net Assets Value method at least. Failure on the part of the ld. CIT (A) to allow the credit to the extent of the fair market value even based on the Net Assets Value method, it appears that the ld. CIT (A) was not functioning as an independent appellate authority but reflecting as an authority to collect the maximum

revenue. Accordingly, in the facts and circumstances of the case when the assessee has substantiated the value of the shares issued at a price of Rs. 200/- by a fair market value of Rs. 230/- which is more than the issue price, then no addition is called for under section 56(2)(viib) of the Act. This Tribunal in the case of M/s. Ramehwaram Strong Glass (P) Ltd. vs. ITO (supra) has considered this issue of adopting the prescribed method at the choice of the assessee in para 4.5 as under :-.....”

7. The ld. DR vehemently argued and fully relied on the order of the revenue authorities. Further, The ld. DR relied on the order of ITAT Delhi Bench in the case of **AgroPortfolio (P.) Ltd., vs. Income Tax Officer, Ward 1 (4), New Delhi, [2018] 94 taxmann.com 112 (Delhi - Trib.)**

The relevant paragraph is reproduced as below: -

“16. For all these reasons, we are of the considered opinion that there has not been any possibility of verifying the correctness or otherwise of the data supplied by the assessee to the merchant banker, in the absence of which the correctness of the result of DCF method cannot be verified. This left no option to the AO but to reject the DCF method and to go by NAV method to determine the FMV of the shares. Without such evidence, it serves no purpose even if the matter is referred to the Department's Valuation Officer. We, therefore, do not find any illegality or irregularity

in the approach of conclusions are by the authorities below. While confirming the same, we dismissed the appeal as devoid of merits.”

8. We heard the rival submission and considered the documents available in the record. The assessee has taken the DCF method for valuation of share which is followed by the Rule 11UA the Rule. However, there is no dispute between the parties that Rule 11UA(1) is not applicable on the facts and circumstances of the present case which is a provision of general nature whereas Rule 11UA(2) is a specific provision providing for the valuation of the unquoted equity shares. After going through the relevant Section and the Rules, in our opinion, the matter of valuation of unquoted equity shares, has been completely left to the discretion of the assessee. It is his option whether to choose NAV Method (Book Value) under clause (a) or to choose DCF Method under clause (b) and the Id. AO cannot adopt a method of his own choice.

The Id. DR has relied on **Agro Portfolio (P.) Ltd**(supra). But the order is not coming under factual matrix, Here the data supplied was incorrect and correctness of DCF method was in question. In assessee's case there is no question about the correctness of data.

8.1 We relied on the order of the ITAT Mumbai Bench in the case of **Crown Chemicals**, (supra), ITAT, Delhi Bench in the case of **Hometrail Buildtech (P.) Ltd** and ITAT Jaipur Bench in the case of **Nabh Multitrade Pvt. Ltd.**, (supra). We find that the assessee valued the share amount to Rs.158/- per share and allotted share is Rs.100 which is much less than the NAV which is not contravening of section 56(2) of the Act. Further, all the investment in equity shares are accumulated from the directors and son of director. So, the addition in related to contravening of section 56(2) is not justified. Accordingly, we set aside the appeal order.

Accordingly, the ground no. 2 of the assessee is allowed.

9. Ground No. 1 and 3 are general in nature.

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10. In this appeal, the assessee has raised the following grounds which are as under:

“1. The order passed by the Id CIT(A) confirming the order passed by the Id. AO is bad in law and bad on facts.

2, a.The Id, CIT(A) has erred in confirming addition of Rs. 71,24,5487- made u/s 56(2)(viib) on account of share

premium received of allotment of shares. The addition so made is bad in law and bad on facts.

b. The authorities below had erred in not accepting the valuation of the Shares made by Technical Expert as required under Rule 11UA of the Income Tax Rules, c. The variation made in the valuation of shares was without any material basis or evidence and was bad in law,

d. The contribution was from promoters which was duly explained and treating the same as income was bad in law.

3. The Id. CIT(A) has erred in sustain the addition of R.S. 15,00,000/- u/s 68 of the Act. The addition so sustained is bad in law and bad on facts.

4. The Id. CIT(A) has erred in sustaining disallowance of Rs. 4,72,08s/- on account of depreciation.

5. The appellant crave liberty to add, amend, alter, modify or delete any of the ground of appeal on or before its hearing before your honour.”

11. In this case, we heard the rival submission and considered the documents available in the record. The addition was made Rs.15 lacs u/s 68 for non-furnishing of the identity and PAN of the creditors. Further the amount of Rs. 4,72,088/- was

added for contravening of section 40A (2)(b), the appellant has claimed the depreciation Rs.4,72,088/-. The entire depreciation was on non-existence asset related to building of R.S. Petroleum one of the relative of the director. The ld. AR vehemently argued on the contrary, per contra, the ld. DR invited our attention in the relevant part of the appeal order which is reproduced as below:

“5.2 Ground No.2 is the addition of Rs. 15,00,000/- as unexplained credit entry in the list of sundry creditors in the name of Iskam Infra Pvt Ltd, The AR of the appellant could not produce address of the creditors and PAN. The statement of Director Mr. B.S. Chouhan was recorded. He has stated that he did not remember the party.

During the course of appellate proceedings before me, no effort has been made to prove the identity, creditworthiness and genuineness of the transaction. Hence, this addition of the Assessing Officer is confirmed and appeal of the appellant is dismissed on this ground.

5.3 Ground No.3 is the addition of Rs.4,72,088/- on account of expenses made to relatives u/s 40A(2)(b) of the Income tax Act. The appellant has claimed depreciation of Rs.4,72,088/- on account of non existing asset relating to building of R.S. Petroleum, one of the relatives of the

Director. The Assessing Officer made it a point that actually no construction was done but the depreciation was claimed on non existing asset.

During the course of appellate proceedings before me, no details have been filed to challenge the finding of the Assessing Officer. Even in the ground of appeal, there is a reference of cheating / forgery done to the appellant and hence it has been claimed that it is an allowable expenditure. No evidence has been filed to prove the cheating or forgery to the appellant. Hence, this ground is therefore dismissed.”

12. In our considered view, both the issues are not settled before the revenue authorities. The assessee was unable to substantiate its claim before the revenue authorities. Accordingly, we remit back the matter to the file of the Id. CIT(A) for adjudication afresh related both the issues. Ordered accordingly.

13. Ground nos. 3 and 4 are partly allowed for statistical purposes.

14. Ground nos. 1 and 5 are general in nature and ground no. 2 as already adjudicated above. No, need further adjudication.

15. As our observations in the Ground nos. 2, 1 and 3 in **ITA No 329/Jodh/2023** are *mutatis mutandis* applicable to **ITA No. 330/Jodh/2023** and will be followed accordingly.

16. In the result, the appeal of the assessee bearing **ITA No. 329/Jodh/2023** is **allowed** and **ITA No. 330/Jodh/2023** is partly allowed for statistical purposes.

Order pronounced in the open court on 19.12.2023

Sd/-

(Dr. M. L. Meena)
Accountant Member

Sd/-

(ANIKESH BANERJEE)
Judicial Member

AKV

Copy of the order forwarded to:

- (1) The Appellant
- (2) The Respondent
- (3) The CIT
- (4) The CIT (Appeals)
- (5) The DR, I.T.A.T.

True Copy
By Order