

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

**BEFORE,
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR U.S., JUDICIAL MEMBER**

**ITA No.5525/Del/2019
(ASSESSMENT YEAR-2013-14)**

Income Tax Officer Ward-14(1) New Delhi	Vs.	Kaka Services (P) Ltd., A-19/59, Gali No.3 Guru Nanak Pura Laxmi Nagar Delhi-110 092
(Appellant)		(Respondent)

Appellant by	Sh. Pankaj Saraogi, Adv.
Respondent by	Sh. Amit Katoch, Sr. DR

Date of Hearing	07/11/2023
Date of Pronouncement	22/12/2023

ORDER

PER YOGESH KUMAR U.S., JM:

This appeal filed by the Revenue against the order of Learned Commissioner of Income Tax (Appeals)-5, New Delhi, ["Ld. CIT(A)", for short], dated 26/03/2019 for Assessment Year 2013-14.

2. Grounds taken in this appeal are as under:

"1. Whether in the circumstances of the case and law, the Ld. CIT(A) is correct in deleting the addition of Rs.4,40,14,425/- made by the Ld. AO u/s 56(2)(viib) read with Rule 11UA.

2. Whether the Ld. CIT(A) is correct in deleting the addition of Rs.11,28,575/- made by the Ld. AO u/s 68.

3. That the appellant craves leave to add, alter, amend or forego any ground(s) of the appeal raised above at the time of hearing."

3. The brief facts of the case are that, the assessee being engaged in the business of financial services and got registered with Reserve Bank of India as non banking financial company filed its return of income declaring income of Rs.6,05,600/- which was processed u/s 143(1) of the Act on 28/05/2014. The case was selected for scrutiny u/s 143(3) of the Act under CASS parameters 'introduction of capital in NBFC/investment companies, large share premium received'. The assessment order came to be passed by making addition of Rs.11,28,575/- u/s 68 of the Act, Rs. 4,450/- u/s 14A of the Act and Rs. 4,40,14,425/- u/s 56(2)(viib) of the Act. Aggrieved by the assessment order dated 09/03/2016, the assessee preferred an appeal before the Ld. CIT(A), the Ld. CIT(A) vide order dated 26/03/2019, deleted the addition of Rs.4,40,14,425/- made by the A.O. u/s 56(2)(viib) read with Rule 11UA of the Act and also deleted Rs. 11,28,575/- made u/s 68 of the Act.

4. Aggrieved by the order of the CIT(A) dated 26/03/2019, the Department of Revenue preferred the present Appeal.

5. Ground No. 1 is regarding deletion of the addition of Rs. 4,40,14,425/- made by the A.O. u/s 56(2)(viib) of the Act read with Rule 11UA. During the Financial Year 2012-13 relevant for the Assessment Year 2013-14, the assessee issued 45,143/- shares at the face value of Rs. 10 with the premium at 990.00 per share, the assessee has been confronted with the same with

regard to justification of premium received on each share at Rs. 990.00 the assessee replied as under:-

"During the year under consideration the assessee company issued 45,143 Equity Shares of Rs. 10.00 each at a Premium of Rs. 990.00 per Share. Before issuing the Shares at Premium the assessee Company got the Valuation of its Shares done, using Discounted Cash Flow Method from a Fellow Member of the Institute of Chartered Accountants of India and obtained the Share Valuation Certificate. As per Valuation Certificate the Value of the Equity Shares, using Discounted Cash Flow Method, arrived Rs. 1017.00 per Equity Share. Copy of the Share Valuation Certificate is attached herewith for your reference."

6. The assessee had also relied upon the report of the C.A. based on the Discounted Cash Flow Method. The Ld. A.O. also asked to produce audited balance sheet and P & L Account for the Assessment Year 2014-15 and 2015-16 to justify the projected income correspondingly the minimum charged on the shares issued during the year under consideration. The assessee produced the balance sheet and P & L Account. The Ld. A.O. while making the addition of Rs. 4,40,14,425/- u/s 56(2)(viib) of the Act observed as under:-

"4.5 The perusal of the balance and profit & loss account revealed that the profit after tax of the company as on 31.03 2014 is Rs 1,19,017/- and as on 31 03 2015 is Rs. 1,62,364/ As reported by the CA valuing the shares of the company that the projections were prepared by the management, it is astonishing to note as to what were the parameters available with the management of the assessee company to project the profits of the company on the much higher side to the factual achievements, the assessee company being not a NBFC of global fame having huge orders/contacts in hand for business Comparing the projected figures of profit in support of valuation of shares based on the valuation report of the CA filed and the achieved results as per audited balance sheet and profit & loss account, the premium charged @ 990 per share on shares issued during the period under reference is not justifiable and is unacceptable

Section 56(2)(viib) read with Rule 11UA reads as under.

"56(1)-

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

(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

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf,

Explanation.-For the purposes of this clause, -

(a) the fair market value of the shares shall be the value-

as may be determined in accordance with such method as may be prescribed; or (11) 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,"

4.6 Keeping in view the provisions contained in section 56(2)(viib) read with Rule 11UA and the facts of the case, the valuation of the shares on the basis of book value of the company as per audited balance sheets as on 31.03.2012 is worked out as under:

Total assets - Total liabilities

No of Shares

Rs 4,78,88,112/= = Rs 23 66 per share

Rs. 20,23,770/-

4.7 As worked out above, the value of a share of the assessee company works out to Rs. 23.66 (Rs. 10/- as face value and Rs. 13.66 as premium on each share) rounded off to Rs. 25 per share against which the assessee has issued shares alongwith premium at Rs. 1,000/- (Rs. 10/- as face value and Rs. 990/- as premium on

each share) Accordingly. Rs. 975/- received during the year per share exceeds the fair market value of the share of the assessee company shall be added to the income of the assessee under the head "Income from Other Sources" as per provisions contained in section 56(2)(viib) read with Rule 11UA, is worked out as under:

(i) 45143 shares issued at the face value of Rs. 10/- and premium@ 990 per share i.e. $1000(45143 \times 1000)$ Rs. 4,51,43,000/-

Less: Premium to be charged at the fair market value of the shares (45143 25) as worked out as above Rs. 11.28.575/-

Total income to be added u/s 56(2)(viib) i.e. exceeding the fair market value of 45143 shares Rs. 4,40,14,425/-

4.8 Therefore, the total consideration which the assessee company charged from the investors exceeding fair market value is Rs. 4,40,14,425/- which added to the total income of the assessee under the head "Income from Other Sources" u/s 56(2)(viib) of the Income Tax Act, 1961.

7. The Ld. CIT(A) deleted the above additions, which are under challenged by the Department of Revenue. The Ld. DR submitted that the Ld. CIT(A) committed error in deleting the addition of Rs.4,40,14,425/- made by the AO u/s 56(2)(viib) r.w.Rule 11UA.

8. On the other hand, the assessee submitted that the valuation has been done by the C.A. as per Discount Cash Flow Method which is acceptable as per prescribed Rule. The AO committed an error by taking Fair Market Value at Rs.25 per share, on the basis of book value, disregarding the project value, especially when it is provided in the Act that Fair Market Value can be taken by the assessee to its option at higher amount. The order of the Ld. CIT(A) deleting the said addition requires no interference at the hands of the Tribunal, therefore, sought for dismissal of the appeal filed by the assessee.

9. We have heard the parties and perused the materials. The valuation of the shares has been done as per DCF Method. As per the provisions of law the higher of the amount between the working as per Rule 11UA or on the basis of the value of shares taking into consideration the Market Value of the asset, intangible assets and projected profit can be taken by the assessee. The Ld. AO has given the working based on the value of the shares taking into account the projected business and other parameters as per the auditor's report. As per section 56(2) (viib) of the Act, the amount exceeding the Fair Market Value of shares has to be treated as income. As per the Explanation, the Fair Market Value shall be as per the value determined in accordance with the method prescribed or as substantiated by the company based on the value of the shares, goodwill etc. whichever is higher. The working provided as per Rule 110A(2) has 2 limbs either FMV of unquoted equity share as per formula $(A-L)^* (PV) / (PE)$ or as per the FMV worked out for the unquoted shares determined by merchant banker as per discount free cash flow method. It is at the option of the assessee to choose between two. In the present case, the assessee opted for the second option for working out the fair market value shares duty supported by report of a Chartered Accountant.

10. It is also observed by the Ld. CIT(A) that AO has not provided any sound reasoning or not brought on record any material to counter the argument or to negate the submissions of the appellant. He has only taken the book value for the fair market value, though it is at the option of the appellant. Since

appellant has adopted the higher value, therefore, it cannot be denied the working without any reasoning. Looking into the facts and circumstances of the case and in law, considering the factual position in this case and valuation report etc. It has been rightly held by the Ld. CIT(A) that that there is no case by the AO to take the FMV @ Rs.25/- per share, on the basis of book value, disregarding the projected value, especially when it is provided in the Act that fair market value can be taken by the assessee to its option and at a higher amount.

11. Thus, in our considered opinion, the Ld. CIT(A) committed no error in deleting the addition. Accordingly, the Ground No.1 of the Revenue is dismissed.

12. The Ground No. 2 is regarding deletion of addition of Rs. 11,28,575/-, made by the A.O. u/s 68 of the Act.

13. The Ld. Departmental Representative submitted that the Ld. CIT(A) has committed grave error in deleting the addition, though the assessee company has failed to discharge its onus and established beyond doubt that the share application money received with a premium of Rs. 45,143/-, therefore, the order of the CIT(A) in deleting the addition is erroneous.

14. The Ld. A.O. while making the addition of Rs. 11,28,575/- u/s 68 of the Act observed as under:-

“5. Onus not discharged by the assessee:

5.1 The assessee company despite adequate opportunities as detailed in the earlier paragraphs of the order allowed did not discharge the onus of proving the creditworthiness of the investors regarding receipt of share application money with premium. The act of the assessee company is sufficient to arrive at the conclusion of the undersigned that the said transactions by the assessee are not genuine transactions.

5.2. It has been judicially established that the primary onus is on the assessee to prove the identity & creditworthiness of entries and the genuineness of transactions in respect of entries in its books of accounts. The identity and creditworthiness with regards to receipt of share application money, in the context of the provisions of section 68. cannot be seen as two separate elements but as two sides of the same coin. The creditworthiness essentially means some financial standing in one's own right backed by one's inherent capacity to earn income or the capacity of some profit-making apparatus available to one. The genuineness of the transaction means that it was actuated by prudent commercial considerations on both sides and there was nothing in the circumstances before, during and after the transaction that strongly suggest that it was not just a make-believe affair.

5.3 It has been held in the following judicial pronouncements that in the absence of adequate explanations by the assessee who has failed to discharge its onus, the A.O. is entitled to make the additions:

- Kale Khan Mohammad Hanif Vs CIT (1963) 50 ITR1(SC).*
- CIT Vs Lachman Dass Oswal (1980) 126 ITR 446(P&H).*
- Nanak Chandra Laxman Dass Vs. CIT (1982) 140 ITR 151(AII).*
- R Dalmia Vs. CIT (1976) 113 ITR 522(Del).*
- CIT Vs Devi Prasad Vishwanath Prasad (1968) 72 ITR 194(SC).*

5.4 It has been held in the following judicial citations that when the assessee company fails to discharge its onus, the A.O. is within his legitimate right to make an addition:

- CIT Vs Hero Cycles Pvt. Ltd. & Others (1997) 228 ITR 463(SC).*
- CIT VS Stepwell Industries Ltd. & Others (1997) 228 ITR 171(SC).*
- Sumati Dayal Vs CIT (1995) 214 ITR 801(SC).*
- CGT Vs Dr. George Kuruvilla (1969) 74 ITR 328(SC).*

- *CIT VS Joseph John (1967) 67 ITR 74 (SC).*
- *RB Seth Champa Lal Ram Swarup Vs CIT (1965) 60 ITR 493 (SC).*
- *CIT VS R Venkataswamy Naidu (1956) 29 ITR 529 (SC).*

5.5 In this context it will be relevant to state the provisions of Section 68 of the Income Tax Act, 1961:

"where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income- tax as the income of the assessee of that previous year."

5.6 It is well settled that in order to discharge the onus, the assessee must prove the following:

- (i) *the identity of the creditor.*
- (ii) *the capacity of the creditor to advance money, and*
- (iii) *the genuineness of the transaction.*

5.7 It has been held by the Hon'ble Apex Court in the case of *A. Govindarajulu Mudaliar Vs. CIT [1958] 34 ITR 807 (SC)* that where the assessee fails to prove satisfactorily the source and nature of certain amount received during the accounting year, the Assessing Officer is entitled to draw the inference that the receipts are of an assessable nature.

5.8 It has been held in the case of *Bharati Pvt. Ltd. Vs. CIT [1978] 111 ITR 951 (Cal. And CIT Vs. United Commercial & Industrial Co. Pvt. Ltd. [1991] 187 ITR 596 (Cal.)* that mere filing of confirmatory letters does not discharge the onus that lies on the assessee.

5.9 In view of the above cited reasons and the judicial pronouncements, the assessee company has failed to discharge its onus, as explained/stated in detail supra, and it is established beyond doubt that the share application money received with premium for 45143 shares as worked out above totaling to Rs. 11,28,575/- (Rs. 10/- face value + Rs. 15/- Premium) from the stated concerns is in fact assessee's own money and is consequently added to the total income of the assessee company u/s 68 of the Income Tax Act, 1961 as cash credits where the assessee offered no explanation about the nature and source thereof for the sum found credited in its books of accounts.

5.10 Since the assessee company has furnished inaccurate particulars of its income, I am satisfied that the assessee has concealed its true & correct income and furnished inaccurate particulars of its income as laid down in section 271(1)(c) of the Income Tax Act, 1961. Accordingly, penalty proceedings under section 274 read with section 271(1)(c) of the I.T. Act, 1961 are being initiated separately on this issue.

(Addition: Rs. 11,28,575/-)

15. The Ld. CIT(A) while deleting the addition held as under:

“8.2 On going through the contention of the appellant, as re-produced earlier, it is seen that there is no enquiry conducted to further probe the said share application money. The appellant has provided due confirmations from each party before AO, along with ITR which is not doubted by the AO nor proved to be bogus. The appellant has also submitted share application form and its allotment with ROC.

8.3 It is further seen that out of total share application money received by the appellant during the year, the AO has made addition u / s 56(2)(vii b) for a sizable portion and for the balance amount the provisions of section 68 has been invoked. When the same applicants for share are considered u/s 56(2)(vii b) then AO has not questioned their identity, creditworthiness and genuineness of transactions. Then how come the same share applicants are not found worthy of such amount i.e. Rs.11,28,575/- which is already treated by AO as acceptable share application and premium thereon.

8.4 Therefore, looking to the facts and circumstances of this case and in law, considering the discussions in the forgoing paragraphs, the addition u/s 68 of the Act is not tenable as nothing has been substantiated or brought on record to probe the same as bogus and appellants own money. Further from the same persons, the share application has been treated as proper, therefore, it cannot be said that they are bogus, specially when the full confirmation etc. has been provided by appellant and not doubted by the AO. Moreover there are few share holders who are already having the shares as on 31.03.2012, therefore, their genuineness cannot be doubtful. In such circumstances, the addition is not tenable and directed to be deleted. Accordingly, this ground of appeal is allowed.”

16. The Ld. DR vehemently submitted that the Ld. CIT(A) committed error in deleting addition of Rs.11,28,575/- made by the AO u/s 68 of the Act. Per contra, the Ld. AR by relying on the findings and the conclusions of the CIT(A), sought for dismissal of Ground No.2 of the Revenue.

17. We have heard the parties and perused the materials. The Ld. AO conducted the probe regarding share application money and the assessee provided due confirmation from each of the parties along with ITR which has been neither doubted nor proved as bogus. The assessee also provided the share application Form and its allotment with ROC. It is found by the Ld. CIT(A) that the out of total share application money received by the assessee during the year under consideration, the AO made addition u/s 56 (2)(viib) of the Act for a sizable portion and for the balance amount the provisions of Section 68 has been invoked. When the AO considers the very same applicants u/s 56(2)(viib) of the Act, then the AO cannot question their identity, creditworthiness and the genuineness of the transaction, that too when the assessee has satisfied the initial burden cast upon him u/s 68 of the Act. In our considered opinion, the Ld. CIT(A) has rightly deleted the addition made by the AO u/s 68 of the Act with requires no interference at the hands of the Tribunal. Accordingly, ground No.2 of the Revenue is dismissed.

18. In the result, the appeal filed by the Revenue is dismissed.

Order pronounced in open Court on 22nd December, 2023.

Sd/-

(DR. B.R.R. KUMAR)
ACCOUNTANT MEMBER

Dated: 22/12/2023

Pk/R.N, Sr.ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

ASSISTANT REGISTRAR
ITAT, NEW DELHI