

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH: BANGALORE**

**BEFORE SMT. BEENA PILLAI, JUDICIAL MEMBER
AND
SRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.15/Bang/2024
Assessment Year: 2016-17

Finwizard Technology Pvt. Ltd. Queens Paradise, 1 st Floor Curve Road Shivaji Nagar Bangalore 560 001 PAN NO : AACCF5863B	Vs.	ACIT Circle-1(2)(1) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Smt. Sheetal, A.R.
Respondent by	:	Shri V. Parithivel, D.R.

Date of Hearing	:	28.03.2024
Date of Pronouncement	:	28.03.2024

O R D E R

PER BEENA PILLAI, JUDICIAL MEMBER:

Present appeal has been filed by assessee against order dated 27.12.2023 passed by NFAC, Delhi u/s 250 of the Income Tax Act, 1961 (in short “The Act”) for the assessment year 2016-17 on following grounds of appeal:

- 1. The ld. CIT(A) has erred in confirming the addition of Rs.1,73,65,755/- made by the AO u/s 56(2)(viib)*
- 2. The Assessing Officer and the ld. CIT(A) have failed to appreciate that Rule 11UA(2)(b) gives the choice to the Assessee to adopt either the DCF or the NAV method, which is more suitable and gives higher FMV of the shares.*
- 3. The AO and the ld. CIT(A) have erred in rejecting the DCF method adopted by the appellant based on the reasoning that the valuation is based on estimates furnished by the assessee at the time of valuation and which differ from the actual results of future.*
- 4. The appellant craves leave to add, alter, substitute or delete any or all of the grounds of appeal urged above.*

Total tax effect : Rs.57,41,641/-

2. Brief facts of the case are as follows:

2.1 The assessee is a company incorporated under the provisions of Companies Act. It is engaged in the business of providing automated investment service. The assessee has filed its return of income for the year under consideration on 17.10.2016 declaring a loss of Rs.43,17,974/-

2.2 The case was selected for limited scrutiny and notice u/s 143(2) of the Act was issued to the assessee. Subsequently, a notice u/s 142(1) of the Act was also issued in response to which assessee has filed the details called for.

2.3 The ld. AO noticed that the assessee during the year issued shares at premium and received total share premium of Rs.3,21,69,640/-. The details regarding the same were called upon by the ld. AO. The ld. AO perused all the details furnished by the assessee and observed that the assessee received investments from Non-Residents as well as Residents, for which confirmation details were not furnished. The Resident investors also did not reply to the notice u/s 133(6) of the Act. The ld. AO observed that assessee had two different valuations that did not have details to support the same. The ld. AO therefore, observed that the discrepancies, if any in the DCF method adopted by the assessee to compute the valuation of shares, were not verifiable. In view of the same, the ld. AO made addition u/s 56(2)(viib) of the Act amounting to Rs.1,73,65,755/-, received as share premium from the residents, and the balance amount of Rs.1,48,03,285/- from non-residents was added u/s 68 of the Act for not able to establish the identity, creditworthiness and genuineness of the transaction.

2.4 Aggrieved by the order of the ld. AO, assessee has preferred an appeal before the ld. CIT(A).

2.5 Before the ld. CIT(A), assessee furnished documents relating to non-residents whereby the ld. CIT(A) was satisfied regarding the genuineness, identity and creditworthiness of such non-residents

who made investments. The ld. CIT(A), deleted the disallowance u/s 68 of the Act amounting to Rs.1,48,03,285/-.

2.6 In respect of disallowance made u/s 56(2)(viib) of the Act, regarding share premium received from residents, the ld. CIT(A) upheld the disallowance by observing that the share valuation certificate was not reliable and the ld. AO was correct in invoking the provisions of section 56(2)(viib) of the Act.

2.7 The ld. CIT(A) has also deleted the protective addition made by the ld. AO being the difference between the share valued by the auditors at Rs.741/- per share and the amount valued by the assessee at Rs.765/- per share under the head "income from other sources".

2.8 Aggrieved by the order of ld. CIT(A), assessee is in appeal before this Tribunal.

2.9 The grounds raised by assessee are in respect of the disallowance upheld by the ld. CIT(A) u/s 56(2)(viib) of the Act.

3. The ld. A.R. submitted that during the year assessee has received share premium of Rs.1,73,65,755/-. The same was allotted by issuing preference shares on the basis of share valuation report as per Rule 11UA(2)(b) of the Income Tax Rules. She submitted that the Company's shares were valued as per Discounted Cash Flow (DCF) method as approved under the Rule and was also qualified by a Professional. The ld. A.R. submitted that assessee allotted preference shares to the residents at Rs.765/- per share, which is more than the share value arrived at by the statutory valuer of the company vide valuation report dated 22.10.2015 (Rs.741/- per share).

3.1 She submitted that the ld. AO disallowed the same by holding that the valuation certificate was prepared without any scientific analysis and thus rejected the same. The ld. AO rejected the valuation for following reasons:-

- (a) The share was valued at Rs.741/ per share as per the valuation report dated 22.10.2015.
- (b) There was another valuation report dated 21.10.2015, as per which the share was valued at Rs.752/ per share.
- (c) It was replied by the appellant that the report given by M/s. Harish Vasanth and Associates cannot be considered as they were the statutory auditors of the company. Hence, they have requested to consider the report given by M/s. S. Sivakumar and Associates that was correct.
- (d) It is to be mentioned here that these reports were obtained on 21.10.2015 and 22.10.2015. How in one day gap there can be a huge gap was not explained by the appellant.
- (e) The investors before investing into the company needs some basis to enable them to invest in the shares with premium. If the appellant valued Rs.10/- worth of share into two different values that is Rs.741/- (own statutory auditors) and Rs.752/- (other professional) the investor may stick onto the lowest value only. For them it does not matter whether it was valued by own statutory auditor or other professional.
- (f) In such a situation receiving the share with a premium of Rs.765/- per share needs for in depth examination.
- (g) It is for this reason the AO had examined the share valuation certificate dated 22.10.2015 and observed serious discrepancies between the projected revenue and the actual revenue given in the valuation certificate. In this connection the disclaimer given by Shri S. Siva Kumar and Associates in Para-6 needs to be examined carefully which is as under:

6. Exclusions and Limitations

- 6.1 In forming our view on the value of the company, we have relied solely on the information provided to us by the Company and discussions we have had with the management. We have not carried out any tests to establish the accuracy of such statements and information.
- 6.2 We have used the financial projections provided by the company for the valuation. The projected financial information, we are informed, are management's best estimates. We do not certify the projected financials. We provide no assurance that this information or the assumptions on which this information has been prepared by the management are accurate.
- 6.3 The statements and opinions included in this report are given in good faith and in the belief that such statements and opinions are not false or misleading. We have no reason to believe that the information given to us was false or that any information has been withheld from us and have therefore relied upon the same without undertaking any independent verification of the same.

3.2 In support, the Id. A.R. also submitted that all the shareholders to whom the shares have been issued continues to be the share holders of the company even today. She thus, submitted that deeming provisions of section 56(2)(viib) of the Act will not be applicable under such circumstances.

3.3 The Id. A.R. submitted that CBDT vide Notification dated 14.1.2020 issued to the present assessee that reads as under:



Deenadayal S <contactddca@gmail.com>

Fwd: Intimation under clause (ii) of the proviso to Section 56(2)(viib) of the Income-tax Act, 1961

1 message

Subramanya S V <subu@fisdom.com>
To: Deenadayal S <contactddca@gmail.com>

Tue, Jan 14, 2020 at 2:43 PM

Begin forwarded message:

From: PRAJNA PARAMITA <rsuform2-cbdt@gov.in>
Subject: Intimation under clause (ii) of the proviso to Section 56(2)(viib) of the Income-tax Act, 1961
Date: 14 January 2020 at 2:37:12 PM IST
To: subramanya.s@gmail.com
Cc: "PRAJNA PARAMITA" <dir.ita1@gov.in>

F.No. 173/147/2019-ITA-I
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
(ITA-I)

Reference No. 100120002657

Dated 14th January, 2020

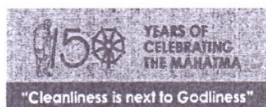
Intimation under clause (ii) of the proviso to Section 56(2)(viib) of the Income-tax Act, 1961

With regard to your declaration dated **10-Jan-20**, furnished in Form 2 in pursuance of para 5 of the notification no. G.S.R.127(E) dated 19th February 2019 of Department for Promotion of Industry and Internal Trade ('DPIIT'), Ministry of Commerce and Industry read with notification no. S.O.1131 (E) dated 5th March 2019 of Central Board Of Direct Taxes, it is stated that the provisions of clause (viib) of sub-section 2 of Section 56 of the Income-tax Act, 1961 ('Act') shall not apply to (name of the applicant company) **FINWIZARD TECHNOLOGY PRIVATE LIMITED** PAN **AACCF5863B** DPIIT Recognition number **DIPP7499** on the amounts received as consideration for issue of shares subject to the fulfilment of conditions as specified in the notification no. G.S.R.127(E) dated 19th February 2019 of DPIIT and subsequent amendments, if any.

The above is, *interalia*, subject to para 6 of the notification no. G.S.R. 127(E) dated 19th February 2019 of DPIIT, which states as under:

"6. Notification referred in para 4 shall apply irrespective of the dates on which shares are issued by the Start up from the date of its incorporation, except for the shares issued in respect of which an addition under section 56(2)(viib) of the Act has been made in an assessment order made under the Act before the date of issue of the notification."

(Prajna Paramita)
Director(ITA-I), CBDT
E-Mail Id:- rsuform2-cbdt@gov.in



3.4 Based on the above, the Id. A.R. submitted that the provisions u/s 56(2)(viib) of the Act are not applicable to the assessee, being a startup.

4. On the contrary, the ld. D.R. submitted that the provisions of section 56(2)(viib) of the Act has been invoked by the ld. AO to add the premium that has been computed to the value of shares. He submitted that assessee has not furnished any details in order to verify the valuation method and to calculate the actual premium charged on the fair market value of the share. The ld. D.R. submitted that the CBDT Circular has an exception that the said notification is not applicable to the addition made u/s 56(2)(viib) of the Act in an assessment order passed prior to the date of issue of notification. He submitted that in the present case the notification is issued after the passing of the assessment order. He submitted that the basis for the premium is also not ascertained and therefore, the addition made by the ld. AO deserves to be upheld.

5. We have heard the rival submissions and perused the materials available on record. We are of the view that share allotment in lieu of purchase consideration payable for an asset acquired is not outside the ambit of the provisions of sec.56(2)(viib) of the Act.

5.1 The ld. A.R. relied on the notification issued by CBDT in case of the assessee excludes the addition made u/s 56(2)(vii)(b) of the Act prior to the date of notification. The notification reproduced herein above is very categorically clear. We therefore uphold the argument of the ld. D.R. that the notification dated 14.1.2020 will not come into play for the year under consideration where the assessment order is passed on 16.12.2018.

5.2 With regard to the correctness of DCF method adopted by the Assessee for valuing shares and the procedure to be followed when such method of valuation is not accepted by the AO the ld. counsel for the Assessee has drawn our attention of the ITAT, Bangalore Bench in the case of VBHC Value Homes Pvt. Ltd., Vs ITO in ITA No.2541/Bang/2019 order dated 12-06-2020, the Tribunal after relying on the decision of the Hon'ble Bombay High Court in the case of Vodafone M-Pesa Ltd Vs Pr. CIT 164 DTR 257 and decision of the

ITAT, Bangalore Bench in the case of Innovit Payment Solutions Pvt. Ltd., Vs ITO(2019) 102 Taxmann.com 59 held as follows:

“9. We have considered the rival submissions. First of all, we reproduce paras 11 to 14 from the Tribunal order cited by learned AR of the assessee having been rendered in the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO (supra). These paras are as follows:

"11. As per various tribunal orders cited by the learned AR of the assessee, it was held that as per Rule 11UA (2), the assessee can opt for DCF method and if the assessee has so opted for DCF method, the AO cannot discard the same and adopt other method i.e. NAV method of valuing shares. In the case of M/s. Rameshwaram Strong Glass (P) Ltd. vs. The ITO (Supra), the tribunal has reproduced relevant portion of another tribunal order rendered in the case of [ITO vs. M/s Universal Polypack \(India\) Pvt. Ltd.](#) in ITA No. 609/JP/2017 dated 31.01.2018. In this case, the tribunal held that if the assessee has opted for DCF method, the AO cannot challenge the same but the AO is well within his rights to examine the methodology adopted by the assessee and/or underlying assumptions and if he is not satisfied, he can challenge the same and suggest necessary modifications/alterations provided ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 the same are based on sound reasoning and rationale basis. In the same tribunal order, a judgment of Hon'ble Bombay High Court is also taken note of having been rendered in the case of Vodafone M-Pesa Ltd. vs. PCIT as reported in 164 DTR 257. The tribunal has reproduced part of Para 9 of this judgment but we reproduce herein below full Para 9 of this judgment.

"9. We note that, the Commissioner of Income-Tax in the impugned order dated 23rd February, 2018 does not deal with the primary grievance of the petitioner. This, even after he concedes with the method of valuation namely, NAV Method or the DCF Method to determine the fair market value of shares has to be done/adopted at the Assessee's option. Nevertheless, he does not deal with the change in the method of valuation by the Assessing Officer which has resulted in the demand. There is certainly no immunity from scrutiny of the valuation report submitted by the Assessee. Therefore, the Assessing Officer is undoubtedly entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. However, the basis has to be the DCF Method and it is not open to him to change the method of valuation which has been opted for by the Assessee. If Mr. Mohanty is correct in his submission that a part of demand arising out of the assessment order dated 21st December, 2017 would on adoption of DCF Method will be sustained in part, the same is without working out

the figures. This was an exercise which ought to have been done by the Assessing Officer and that has not been done by him. In fact, he has completely disregarded the DCF Method for arriving at the fair market value. Therefore, the demand in the facts need to be stayed."

12. *As per above Para of this judgment of Hon'ble Bombay High Court, it was held that the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a final determination from an independent valuer to confront the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. Hence, in our considered opinion, in the present case, when the guidance of Hon'ble Bombay high Court is available, we should follow this judgment of Hon'ble Bombay High Court in preference to various tribunal orders cited by both sides and therefore, we are not required to examine and consider these tribunal orders. Respectfully following this judgment of Hon'ble Bombay High Court, we set aside the order of CIT (A) and restore the matter to AO for a fresh decision in the light of this judgment of Hon'ble Bombay High Court. The AO should scrutinize the valuation report and he should determine a fresh valuation either by himself or by calling a final determination from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 change the method of valuation which has been opted by the assessee. In our considered opinion and as per report of research committee of (ICAI) as reproduced above, most critical input of DCF model is the Cash Flow Projections. Hence, the assessee should be asked to establish that such projections by the assessee based on which, the valuation report is prepared by the Chartered accountant is estimated with reasonable certainty by showing that this is a reliable estimate achievable with reasonable certainty on the basis of facts available on the date of valuation and actual result of future cannot be a basis of saying that the estimates of the management are not reasonable and reliable.*
13. *Before parting, we want to observe that in the present case, past data are available and hence, the same can be used to make a reliable future estimate but in case of a start up where no past data is available, this view of us that the projection should be on the basis of reliable future estimate should not be insisted upon because in those cases, the projections may be on the basis of expectations and in such cases, it should be shown that such expectations are reasonable after considering various macro and micro economic factors affecting the business.*
14. *In nutshell, our conclusions are as under:-*

(1) *The AO can scrutinize the valuation report and if the AO is not satisfied with the explanation of the assessee, he has to record the reasons and basis for not accepting the valuation report submitted by the assessee and only thereafter, he can go for own valuation or to obtain the fresh valuation report from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee.*

(2) *For scrutinizing the valuation report, the facts and data available on the date of valuation only has to be considered and actual result of future cannot be a basis to decide about reliability of the projections.*

(3) *The primary onus to prove the correctness of the valuation Report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, scientific study and applicable Guidelines regarding DCF Method of Valuation."*

10. From the paras reproduced above, it is seen that in this case, the Tribunal has followed the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra). The Tribunal has noted that as per the judgment of Hon'ble Bombay High Court, it was held that AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. The Tribunal has followed the judgment of Hon'ble Bombay High Court and disregarded various other Tribunal orders against the assessee which were available at that point of time. In the present case also, we prefer to follow the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra) in preference to the judgment of the Hon'ble Kerala High Court cited by DR of the Revenue rendered in the case of Sunrise Academy of Medical Specialities (India) (P.) Ltd. Vs. ITO (supra) because this is settled position of law by now that if two views are possible then the view favourable to the assessee should be adopted and with regard to various Tribunal orders cited by learned DR of the Revenue which are against the assessee we hold that because we are following a judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra), these tribunal orders are not relevant. In the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO (supra), this judgment of Hon'ble Bombay High Court was followed and the

matter was restored back to the file of AO for a fresh decision with a direction that AO should follow DCF method only and he cannot change the method opted by the assessee as has been held by the Hon'ble Bombay High Court. The relevant paras of this Tribunal order are already reproduced above which contain the directions given by the Tribunal to the AO in that case. In the present case also, we decide this issue on similar line and restore the matter back to the file of AO for a fresh decision with similar directions. Accordingly, ground No.3 of the assessee's appeal is allowed for statistical purposes.

5.3. The gist of the conclusion is that the law contemplates invoking provisions of section 56(2)(viib) of the Act only in situations where the shares are issued at a premium and at a value higher than the fair market value. The fair market value contemplated in the provisions above is as under: -

(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) Any other value to the satisfaction of the Assessing Officer.....*

5.4 The law provides that, the fair market value may be determined with such method as may be prescribed or the fair market value can be determined to the satisfaction of the Assessing Officer. The provision provides an Assessee two choices of adopting either NAV method or DCF method. If the Assessee determines the fair market value in a method as prescribed the Assessing Officer does not have a choice to dispute the justification. The methods of valuation are prescribed in Rule 11UA(2) of the Rules. The provisions of Rule 11UA(2) reads as under:-

*“(2) 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:—**”*

the fair market value of unquoted equity shares = (A-L) × (PV), where,
(PE)

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;*
- (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;*

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

P = the paid up value of such equity shares; or
V

(b) the fair market value of the unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method.

5.5 The provisions of Rule 11UA(2)(b) of the Rules provides that, the Assessee can adopt the fair market value as per the above two methods and the choice of method is that of the Assessee. The

Tribunal has followed the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra) and has taken the view that the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the Assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the Assessee. The decision of ITAT, Delhi in the case of Agro Portfolio Ltd. 171 ITD 74 has also been considered by the ITAT, Bangalore in the case of VBHC Value Homes Pvt.Ltd.(supra).

5.6 We are of the view that, the ld. AO erred in considering the actuals of revenue and profits declared in the future years as a basis to dispute the projections. At the time of valuing the shares as on 21/22.10.2015, the actual results of the later years would not be available. What is required for arriving at the fair market value by following the DCF method are the expected and projected revenues. Accordingly, the valuation is on the basis of estimates of future income contemplated at the point of time when the valuation was made.

5.7. In view of the above legal position, we are of view that the issue with regard to valuation has to be decided afresh by the ld. AO on the lines indicated in the decision of Coordinate Bench of this Tribunal in the case of **VBHC Value Homes Pvt.Ltd., Vs ITO (supra)** i.e., (i) the ld. AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. (ii) For scrutinizing the valuation report, the facts and data available on the

date of valuation only has to be considered and actual result of future cannot be a basis to decide about reliability of the projections.

5.6.1 The primary onus to prove the correctness of the valuation Report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, Scientific study and applicable Guidelines regarding DCF Method of Valuation. The order of Id.CIT(A) is accordingly set aside for deciding the issue afresh after due opportunity of hearing to the Assessee.

6. In the result, the appeal is allowed for statistical purpose.

Order pronounced in the open court on 28th Mar, 2024

Sd/-
(Laxmi Prasad Sahu)
Accountant Member

Sd/-
(Beena Pillai)
Judicial Member

Bangalore,
Dated 28th Mar, 2024.
VG/SPS
Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The DR, ITAT, Bangalore.
5. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.