

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES : A : NEW DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No.4076/Del/2017
Assessment Year: 2013-14

Arafaath Exports Pvt. Ltd.,
C/o Vinod Kumar Goel,
282, Boundry Road,
Civil Lines,
Meerut.

Vs ITO,
Ward-1(1),
Meerut.

PAN: AAICA3838R

(Appellant)

(Respondent)

Assessee by : Shri Vinod Kumar Goel, Advocate
Revenue by : Shri Kanav Bali, Sr. DR

Date of Hearing : 29.02.2024
Date of Pronouncement : .05.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the assessee against the order dated 30.05.2017 of the Commissioner of Income Tax (Appeals), Meerut (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in Appeal No.29/16-17 arising out of the appeal before it against the order dated 28.03.2016 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred

as 'the Act'), by the ITO, Ward-1(1), Meerut (hereinafter referred to as the Ld. AO).

2. The assessee company is engaged in the business of trading of live buffaloes and, during the assessment year 2013-14, filed return of income which was processed u/s 143(3) of the Act and, later on, the case of the assessee was picked up through CASS for scrutiny. The AO examined the allotment of 90000 shares of face value of Rs.10 per share at a premium of Rs.40 per share and found the premium to be not justified. As the company had started its business in current year itself and authorized share capital was only Rs.1 lakh as on 31.03.2012. The book value of equity shares of the assessee was calculated at Rs.8 per share as on 31.03.2012 and, thus, AO invoked section 56(2)(viib), inserted by the Finance Act, 2012 w.e.f. 01.04.2013. The assessee claimed that provisions of section 56(2)(viib) of the Act is not applicable and the fair market value of the shares as determined by the Chartered Accountant at Rs.67.39 per share should be accepted. The AO observed that the Chartered Accountant has made valuation on the basis of DCF method. However, the AO was of the view that Rule 11UA(2) which prescribes DCF method of valuation of share is applicable w.e.f. 29.11.2012 and, thus, not applicable to the relevant AY for transaction effected between 1.04.2012 to 29.11.2012 for which the Net Asset Value Formula should be adopted. Thus, an addition of Rs.40,50,000/- was proposed.

2.1 Further, the AO examined the persons to whom allotment was made and it was observed that primarily the shares have been allotted to one of the directors Mr. Nadeem. He was allotted shares worth Rs.49,46,700/- for which the assessee company had received the share money in cash. The AO examined the capital account of Mr. Nadeem and other relevant evidences and found the same to be not sufficient and, accordingly, an addition of Rs.49,46,700/- was made u/s 68 of the Act.

2.2 Further, an addition of Rs.56,762/- was made on account of certain expenses for want of appropriate vouchers. The AO also made an addition of Rs.4 lakhs on account of the fact that the gross profit percentage was found to be less and, thus, considering the fact that sale and purchase of buffaloes was in cash, there is a possibility of leakage of revenue.

2.3 These additions were challenged by the assessee before the Id. First Appellate Authority where the CIT(A) upheld the findings of the AO that Rule 11UA(2) inserted w.e.f. 29.11.2012 is not retrospective and, accordingly, sustained the calculation of the AO with regard to fair market value. The Id.CIT(A) also sustained the addition of Rs.49,46,700/- u/s 68 of the Act on the basis that genuineness of the transaction; and identity and credit worthiness of Shri Nadeem were not established. However, the CIT(A) concluded that additions can be either u/s 56(2)(viib) at Rs.40,47,300/- or u/s 68 at

Rs.49,46,700/-, otherwise, it will lead to double addition. Accordingly, the CIT(A) made the following conclusion:-

“4.3 In this case, the A.O. has made an addition of Rs.40,50,000/- U/s.56 (2) (viib). This addition pertains to 90,000 number of equity shares, issued at a premium of Rs.45/- per share. Out of 90,000 number of shares, Sh. Nadeem, director subscribed for 89,940 number of shares. The addition U/s.56 (2) (viib) for 89,940 number of shares calculates at Rs.40,47,300/- @ 45 per share. The balance addition of Rs.2,700/- relates to 60 number of shares issued to other persons. Now, for 89,940 number of shares, the A.O. has made addition U/s.68 also for Rs.49,46,700/- @ Rs.55/- per share.

It cannot be disputed that for same 89940 number of shares, the addition can be either made U/s.56 (2) (viib) at Rs.40,47,300/- or U/s.68 for Rs.49,46,700/-. To make addition under both the sections will tantamount to double addition for the same issue.

Under these facts only one addition should sustain. As discussed above, it has already been held that in case the issue of shares is taken as genuine, in that case, addition U/s.56 (2) (viib) should be made and addition made U/s.68 should go. It has also been separately held that addition U/s.68 for Rs.49,46,700/- has been rightly made under the facts and circumstances of this case. Therefore, to do away with double addition for the same issue, I hold that addition of Rs.49,46,700/- should be sustained which will subsume the addition of Rs.40,47,300/- also. Therefore the addition of Rs.40,47,300/- out of addition of Rs.40,50,000/- stands deleted. However, in case, in subsequent proceedings, it is held that addition U/s.68 should not survive, in that situation, the addition of Rs.40,47,300/- shall survive U/s.56 (2) (viib). In result, the final conclusion of G.N. 1 & 2 is that, subject to above findings, out of addition of Rs.40,50,000/- U/s.56 (2) (viib), addition of Rs.40,47,300/- stands deleted on the ground of double addition to this extent and balance addition of Rs.2,700/- U/s.56 (2) (viib) is sustained AND addition of Rs.49,46,700/- U/s.68 of the I.T. Act is sustained. It is to be stated that the appellant, at no stage, took-up the issue of double addition, however in the interest of natural justice, it has been suo-moto considered and decided by me.”

3. The CIT(A) reduced the disallowance of expenses of Rs.56,762/- on ad hoc basis at 20%. The addition of Rs.4 lakhs on the basis of possibility of leakage of revenue was, however, sustained on the basis that this addition was

made by the AO with the consent of the assessee. Accordingly, the assessee is in appeal raising the following grounds:-

“1. In the facts and circumstances of the case the Ld. A.O. has erred in law in making addition of Rs.49,46,700/- u/s 68 of the Income Tax Act, 1961 holding the credit in the name of Shri Nadeem as unproved, which ought to be deleted because A.O. as well as CIT(A) has not considered the evidence filed by the assessee.

2. That the addition made by the A.O. @ 20% is without any basis and CIT(A) is in error in confirming the same.

3. That the assessee has right to add, delete or modify any grounds during the appeal proceeding.”

3.1 The assessee has also raised the following additional ground:-

“4. That the A.O. is in error in law in adding of Rs. 40,50,000/- U/s 56(2)(VII) of Income Tax Act and CIT(A) is in error in confirming the addition without considering the material facts of the case and order finding of CIT(A) was confusing.”

4. On hearing both the sides, it comes up that only the assessee is in appeal and the Revenue has not challenged the deletion on both the counts. During the course of hearing, the ld. AR had stressed on the fact that investment in shares of Rs.49,46,700/- is actually the investment of Mr. Nadeem who, in his financials, has duly explained the investment and for the relevant assessment year 2013-14 the assessment of Mr. Nadeem stands concluded u/s 143(3) of the Act. The ld. AR has stated that the shares are duly reflected in the balance sheet of Mr. Nadeem, so, no disallowance of investment in shares can be made u/s 68 of the Act in the hands of assessee. On considering copy of balance sheet as filed before us, we are of the considered view that there is substance in the

contention of the Id. AR, however, subject to verification of the facts of the balance sheet of Mr. Nadeem.

4.1 At the same time we are conscious of settled proposition of law that in case of investment by existing share holder or director an addition u/s 56(2)(viib), is not justified. The objective behind the provisions of section 56(2)(viib) of the Act is to prevent unlawful gain by issuing company in the garb of capital receipts. However, in the transaction between holding and its subsidiary company or Directors and existing share holders, no income can be said to accrue to the ultimate beneficiary i.e. holding company. The chargeability of deemed income in these circumstances militates against the solemn object of section 56(2)(viib) of the Act. Reliance can be placed for same on co-ordinate bench order in the case of **BLP Vayu (Projects-I) Pvt. Ltd. vs. Pr.CIT (20213) 151 taxmann.com 47** which is recently relied by co-ordinate bench in **ACIT Vs Dhruv Milkose Pvt. Ltd. in I.T.A. No. 8431/DEL/2019 decided on 08/02/2024**, wherein the co-ordinate bench has concluded as follows;

“8.2 The Co-ordinate Bench has essentially observed that where the allotment has been made to existing shareholders, the deeming provisions of Section 56(2)(viib) would not ordinarily be applicable. This apart, in the instant case, the assessee has also supported the premium determined on issue of shares by DCF Method. Thus, the premium charged is supportable by the valuation report and the premium has been charged to existing shareholder. Thus effectively, the benefit if any arising to the company in turn benefits to the subscriber having pre-existing right in the company. While applying Section 56(2)(viib), the purpose for which deeming provision has been inserted is not achieved in the instant case. Hence, in our view, the conclusion drawn by the CIT(A) cannot be faulted either on facts or in law.”

5. Thus, we consider it an appropriate case to restore the issues of addition on account of share premium to the AO who shall examine the financials and balance sheet of Mr. Nadeem and, if the same is verified to be correct, then, no disallowance u/s 69 can be made in the hands of the present assessee company. We allow the additional ground and ground no. 1 stands allowed for statistical purposes.

6. As with regard to ground No.2, we are of the considered view that there was no justification to make an addition on *ad hoc* basis in regard to expenses when otherwise in the business activity or earnings of the assessee no flaw is pointed out on the basis of accounts kept in regular course of business. This ground is allowed.

7. The appeal be considered partly allowed with consequences to flow as per the determination of grounds above.

Order pronounced in the open court on 16.05.2024.

Sd/-

(G.S. PANNU)
VICE PRESIDENT

Dated: 16th May, 2024.

dk

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asstt. Registrar, ITAT, New Delhi

		Date
1.	Draft dictated on	08.05.2024
2.	Draft placed before the author	09.05.2024
3.	Draft placed before the other Member	
4.	Approved Draft comes to the Sr.PS/PS	
5.	Order uploaded on	
6.	File sent to the Bench Clerk	
7.	Date on which file goes to the Head Clerk.	
8.	Date on which file goes to the AR	
9.	Date of dispatch of Order.	