

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.2400/Del/2023
Assessment Year: 2016-17

A.H. Multisoft Pvt. Ltd., Vs ITO,
C/o Sanjiv Sapra & Associates LLP., Ward-1(1),
C-763, New Friends Colony, New Delhi.
New Delhi – 110 025.

PAN: AAGCA0146C

(Appellant)

(Respondent)

Assessee by : Shri Sanjiv Sapra, CA
Revenue by : Shri Zafarul Haque Tanweer, CIT-DR
Date of Hearing : 07.06.2024
Date of Pronouncement : 05.07.2024

ORDER

PER ANUBHAV SHARMA, JM:

This appeal is preferred by the Assessee against the order dated 27.07.2023 of the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre, Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') in appeal No.CIT(A), Delhi-1/10326/2018-19 arising out of the appeal before it against the order dated 18.12.2018 passed u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the ITO, Ward-1(1), Delhi (hereinafter referred to as the Ld. AO).

2. Heard and perused the record.

3. Appellant is in the business of providing software support/maintenance services and prior to FY 2015-16, it held strategic equity stake of 20% in South Asia FM Ltd. (“SAFL”) while the remaining equity stake in SAFL was held as follows:

- 60% by Sun TV Ltd. (listed Co.)
- 20% by South Asia Multimedia Technologies Ltd. of Mauritius (Foreign/Non-resident Co.)

3.1 The case of assessee is that SAFL is a valuable Co. having 39 FM broadcasting licenses and FM radio business across various cities in India and SAFL in turn held 49% indirect stake in 3 Digital Radio Broadcasting Cos. owning FM radio license and business in respective metro cities of Delhi, Mumbai and Kolkata. All the 42 FM stations were operated under a common and popular brand name “**Red FM**”.

3.2 SAFL made a rights issue, for expanding its business, and same was to be subscribed by its existing shareholders (which included Appellant Co.) and for such purposes, SAFL got its shares valued by prescribed Chartered Accountant Valuer (“technical expert”) KV Sriram who vide their valuation report dated 17/08/2015 valued SAFL’s net equity value at Rs.51,905.83 Lacs as per DCF method. The Valuer’s report is placed at pages 107-131 of PB. Appellant claims that on the basis of this valuation, SAFL offered its rights issue at a price of Rs.20/- per share (which included share premium of Rs.10/- per share). In order

to subscribe to such rights issue and for maintaining its strategic investment of 20% in equity shares of SAFL, the Appellant had to raise funding from its own shareholders and for such purposes it got valuation done of Appellant Co. from the prescribed Valuer namely J.N. Sharma & Co., Chartered Accountant who vide their report dated 21/09/2015 (enclosed at **pages 49-59 of PB**) mentioned in the report that in the absence of significant revenue streams of Appellant's software and allied services business, the projections from such business cannot be scientifically made and accordingly the assets and liabilities of the Appellant have to be considered as per NAV method except its investments in shares of SAFL are to be taken separately at FMV determined by SAFL's Valuer as per DCF method instead of at book value. On this basis, the Valuer has worked out the FMV of Appellant as under:

Particulars	Amount in INR
Valuation of SAFL as per DCF	519,05,83,000
Value of AHM Holding in SAFL (20% in SAFL)	103,81,16,600
ADD: Assets as per projected (provisional/unaudited) balance sheet as at 31.03.2015 (Excluding investments considered separately).	2,72,54,980
Less: Total liabilities of AHM as per projected (provisional/unaudited) balance sheet as at 31.03.2015	103,76,55,033
Current Fair Value of AHM	2,77,16,547

Fair Value Calculation

Fair Value of AHM	INR 2,77,16,547
Total number of equity shares issued	10,000
Fair value per share	INR 2771.65

3.3 Further the case of appellant is that on the basis of the above valuation report, the Appellant issued total number of 1,08,976 equity shares (as per chart reflected at page 2 of PB and reproduced at pages 6 & 7 in CIT(A) order) to its shareholders namely AR and Max Flexi at a price of Rs.2,772 per share (which included share premium of Rs.2,762 per share) aggregating to total share subscription proceeds of Rs.30,48,53,463.

4. The assessing officer did not accept that Appellant's valuable investments in equity shares in SAFL to be taken at FMV of Rs.103,81,16,600 (20% of Rs.519,05,83,000) on DCF method basis and instead replaced it by taking book value of such investments at Rs.96,78,49,990. Other assets and liabilities of the Appellant were accepted by the AO to be taken at book value. On this basis, the AO arrived at a negative book value of equity share of the Appellant by applying Rule 11UA(1)(b) and therefore, AO accepted the face value of Rs.10/- each for fresh equity shares as issued and added the entire share premium of Rs.2762 per share as received resulting in addition of Rs.30,37,53,712 u/s 56(2)(viib) on fresh 109976 number of equity shares as issued during the year to AR and Max Flexi. The same was sustained by the CIT(A) for which the assessee is in appeal and has raised following grounds of appeal;

“1. That the cryptic and non-reasoned order dated 27/07/2023 passed by the Ld. Commissioner of Income Tax (Appeals) - National Faceless Appeal Centre (“CIT(A)”) under section 250 of the Income-tax Act, 1961 (“Act”) is bad in law and against the principles of natural justice.

2. That the Ld. CIT(A) has erred on facts and in law in upholding/confirming the addition of Rs.30,37,53,712 made under section

56(2)(vii)(b) of the Act on account of consideration received towards entire share premium amount for issuing unquoted equity shares of the Appellant during assessment year 2016-17.

3. That the Ld. CIT(A) has erred on facts and in law in not appreciating that Rule 11UA(1)(b) of Income-tax Rules as applied by the AO for determining Fair Market Value ("FMV") for the unquoted equity shares issued by the Appellant was not applicable to the facts of Appellant's case.

4. That both the Ld. CIT(A) and AO have grossly erred on facts and in law by upholding the aforesaid addition made by the AO by disregarding the valuation report of the Chartered Accountant Valuer/independent expert as filed by the Appellant on completely whimsical, superficial grounds and without pointing out any serious discrepancies or defects in such valuation report.

5. That the Ld. CIT(A) has erred on facts and in law in disregarding the FMV of investment held by the Appellant in equity shares of South Asia FM Ltd. as per discounted cash flow ("DCF") method determined by the Appellant's independent Valuer in accordance with applicable Rule under the Income Tax Rules, 1962.

6. That without pointing out any adverse any material on record relating to unaccounted money being introduced through issue of shares by Appellant to its shareholders by way of infusion of alleged inflated share premium, the CIT(A) could not have confirmed the addition of Rs.30,37,53,712 made under section 56(2)(vii)(b) of the Act.

7. That without prejudice to Ground No. 2 to 6 above, the addition of Rs.30,37,53,712 as upheld by the Ld. CIT(A) u/s 56(2)(vii)(b) of the Act is very excessive. At any rate, addition on account of deemed income cannot be upheld u/s 56(2)(vii)(b), where shares are issued to existing shareholders in proportion to their existing shareholding

Various observations made by the authorities below in their respective orders are either incorrect or legally untenable. Detailed written submissions as made by the Appellant supported by documentary evidence and the case laws have either been ignored or had not been properly appreciated.

8. That the levy of interest u/s 234B at Rs.3,46,14,690 and u/s 234D at Rs.7,614 is illegal and at any rate, without prejudice, such interest is very excessive.

9. *That the Appellant reserves its right to add, amend/modify the grounds of appeal.”*

5. Hence, the issue to be adjudicated upon is whether for the purpose of determining FMV of Appellant, AO/CIT(A) were justified to replace DCF based FMV of 20% investments in equity shares of SAFL amounting to Rs.103,81,16,600 with book value of such investments amounting to Rs.96,7849,990.

6. At outset we consider it relevant to mention that Ld. AR has filed a detailed synopsis and Ld. DR has primarily relied the findings of Ld. Tax authorities below and has also drawn our attention to a news article about ED investigations of Aircel-Maxix deal, which we consider has no bearing on the merits of case as discussed further. Now, on hearing both the sides we find that it is not disputed that share premium money received by the appellant from its shareholders from its fresh issue of shares made during the year under consideration have been fully utilized by the Appellant for subscribing to the rights issue of its investee Co. namely SAFL at a price of Rs.20/- per share, which was determined by SAFL based on its DCF valuation of Rs.51,905.83 Lacs. Further, such rights issue of SAFL was fully subscribed by its existing shareholders establishing that not only assessee but other share holders of SAFL, Sun TV Network Limited, which is a listed Co. and regulated by SEBI and South Asia Multimedia Technologies Limited, which is a Mauritius based

non-resident Co., had accepted the valuation of SAFL on DCF method. Moreover, such rights issue of shares as made during the year under consideration by SAFL at a premium of Rs. 10/- each on the basis of its DCF based value of Rs.51,905.83 Lacs to the above-mentioned existing shareholders (including Appellant Co.) stands accepted by the Income Tax Dept in the hands of SAFL vide intimation order u/s 143(1) dated 09/11/2017. Copy of which is placed at **pages 395-403 of PB**. Even the investment as made by the Appellant for subscribing to such rights issue of SAFL on the basis of FMV of SAFL on DCF basis has not been disputed and stands accepted by the AO in Appellant's own case. Thus there was no justification for the AO/CIT(A) to disregard/reject the accepted DCF based method of determining FMV of investments made in shares of SAFL.

7. Then AO/CIT(A) or even the Ld. DR, defending the orders of tax authorities, has not been able to point out any specific discrepancies or errors or short comings in the recognized method of determining FMV of SAFL as per DCF method and Appellant's proportionate 20% equity stake in SAFL as duly supported by valuation reports of independent prescribed valuers ("technical experts"). The various limitations/qualifying remarks as referred to by Appellant's valuer on the data as provided by the management and pointed out by the AO/CIT(A) are general remarks/caveats which are common and prevalent in the industry and are usually found in reports provided by every valuer, which cannot be considered as specific discrepancies or short comings in

their valuation reports. Therefore, merely on an adverse inference on the basis of such general remarks/caveats, it is not justified to reject a valuation report of expert. Even otherwise we find that the increase in FMV of 20% investment when compared with its book value is only Rs.7,02,67,610 (103,81,16,600 on DCF method less 96,78,48,900 on book value) which is a mere 7.26% increase from its book value. To brush aside an expert's report altogether for such variation without establishing any significant defect in the method or data used, by expert is not justified.

8. Then we observe that the revenue has not disputed the identity, creditworthiness and genuineness of the transaction of issue of shares issued during the year by the Appellant to AR and Max Flexi, who were existing share holders of assessee. Ld. AR has canvassed before us an important fact that prior to the year under consideration, Appellant was 100% subsidiary of Max Flexi in which AR was a significant shareholder. Post such fresh issue, the shareholding structure of Appellant was changed to being held 51% by AR and 49% by Max Flexi. Thus it is not a case where shares at unjustified premium have been issued to outside non-related parties so as to make addition section 56(2)(viib) of the Act. the valuation of shares as per DCF Method has backed by valuation report. Besides, the shares have allotted to the holding-company i.e., existing shareholders and not to an outsider and therefore, it does not make any difference to a shareholder in bringing money to its subsidiary company at premium or at cost when seen holistically. A reference can be made to the

decision rendered by the Co-ordinate Bench of Tribunal in the case of **BLP Vayu (Projects-I) Pvt. Ltd. vs. Pr.CIT (20213) 151 taxmann.com 47** wherein it has been observed that such deeming fiction seeking to charge unjustified premium as taxable is wholly inapplicable for transactions between holding and its subsidiary company where no income could be said to have accrued to ultimate beneficiary, i.e., holding company.

9. We also find that Rule 11UA(1)(b) as invoked by the AO in para 14 of assessment order and sustained by CIT(A) is not applicable to the facts of Appellant's case since such Rule is for valuation of archaeological collections, drawings, painting, sculptures or any work of art.

10. Ld. AR has submitted that in case of fresh issue of shares made by unquoted Co. the AO is not authorized to pick and choose method of valuation of shares since that option is given to the Assessee. Where the Assessee exercises its option to value its shares as per DCF method, the AO cannot completely disregard such method and replace it with book value method even if specific discrepancies are found by the AO in Appellant's working of DCF based FMV. Reliance for this proposition was placed on the decision of Hon'ble Delhi High Court in case of **Pr. CIT vs. Cinestaan Entertainment (P) Ltd. vs. ITO 433 ITR 82**, wherein it was held as under:

“The methodology adopted was a recognized method of valuation and the Department was 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 went to the root of the valuation process. The deletion of addition was justified”.

11. Reliance is placed on the judgment of Delhi Bench in **India Today Online (P) Ltd. vs. ITO (Delhi ITAT)** reported in **176 ITD 459** for the proposition that while valuing unquoted shares of a Co. the value of its underlying assets (i.e.investment in shares of investee unquoted Co.) is to be taken at FMV instead of at book value. We find that, in this case assessee had substantiated the fair market value of its shares based on Valuation Report which in turn was largely based on the valuation of investment in shares as held by the assessee in another Co. Mail Today for which DCF method was applied, whereas the rest of the assets and liabilities of the assessee were valued as per NAV method. The Hon’ble Tribunal accepted such substantiation of fair market value as done by the assessee on DCF basis for its investment made in underlying asset i.e. Mail Today. Relevant findings as recorded by the Tribunal vide **para 33** of such judgment is reproduced below:

“33.Accordingly, in view of the reasoning given above, we do not find any justification for reducing the value of shares to Rs. 10 and disallowing premium Rs. 20, as assessee was able to substantiate that the shares issued at Rs. 30 per share was less than the FMV and consequently the enhancement made the Ld. CIT(A) for making the addition of Rs. 48,16,66,660/- u/s 56 (2)(viib) is set aside and the addition by him is deleted”.

12. In the light of aforesaid as we go through the order of Ld. CIT(A), we find that the order of AO is sustained by following findings in para 5.3 and 5.4 as follows:-

“5.3 The Assessing Officer has pointed out certain anomalies in the Valuation Report: -

- i. The Valuation Report is highly subjective. Scientific parameters have not been used.*
- ii. It is clearly mentioned in the Valuation Report that it is based upon the information furnished by the management. No independent data has been collected and analysed by the valuer before preparing the Valuation Report.*
- iii. It has been further written that no independent investigation has been done and no data has been verified.*
- iv. It has been further written that the valuer not responsible for arithmetical accuracy/logical consistency of any financial model or business plan provided by the company and used in valuation analysis.*
- v. It has been noted by the Assessing Officer that no enquiry into company's claim to title of assets or property has been made for the purpose of the valuation.*

5.4 Hence, It is clear that the Assessing Officer has rightly come to the conclusion that the valuation report is without independent verifications and the adoption of method of the valuation of the shares as per DCF method is not correct. I agree with the contention of the Assessing Officer. No effort has been made in the written submission and the Video Conferencing to challenge the contention of the Assessing Officer. Even the case laws applied by the appellant are not relevant here as the Assessing Officer has given finding on the basis of Valuation Report and the Annual Report and other financial details of SAFL, the investee company and the company of the appellant. Hence, the order of the Assessing Officer is confirmed and appeal of the appellant is dismissed.”

13. These observations of CIT(A), show that an additional onus has been casted on the assessee by the revenue authorities to substantiate and prove the report of the expert, which is not the mandate of law as the only burden u/s 56(2)(viib) read with Rule 11UA is to merely establish that the methodology

adopted for valuation of shares was a recognized method of valuation. The onus shifts on AO, to discredit the valuation report by establishing that there is error in the methodology or inaccuracy in the data or that the valuation is based on extrinsic, non-existent or irrelevant facts. Which, in the case of assessee, has not been even been attempted, by the tax authorities below.

14. Consequently we sustain the grounds. Appeal is allowed. The impugned addition is deleted.

Order pronounced in the open court on 05.07.2024.

Sd/-

(G.S. PANNU)
VICE PRESIDENT

Dated:05th July, 2024.

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Copy forwarded to:

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

Sd/-

(ANUBHAV SHARMA)
JUDICIAL MEMBER

Asstt. Registrar, ITAT, New Delhi