

| आयकर अपीलीय अधिकरण न्यायपीठ, मुंबई |
IN THE INCOME TAX APPELLATE TRIBUNAL
"F" BENCH, MUMBAI

BEFORE SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER
&
SHRI GIRISH AGRAWAL, HON'BLE ACCOUNTANT MEMBER

I.T.A. No. 3098/Mum/2023
Assessment Year: 2014-15

DCIT - CC, 5(3), Mumbai	Vs	JWL Cold Store Private Limited, Panvel Air India Building 19 th Floor, Room No. 1906 Nariman Point Mumbai - 400021 [PAN: AACJ8416G]
अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)

Assessee by :	Shri Satish Mody, A/R
Revenue by :	Ms. Rajeshwari Menon, Sr. D/R

सुनवाई की तारीख/Date of Hearing : 05/06/2024
घोषणा की तारीख /Date of Pronouncement: 31/07/2024

आदेश/ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the Revenue is against the order of Ld. CIT(A), - 53, Mumbai, vide order no. ITBA/APL/S/250/2023-24/1053692147(1), dated 13.06.2023 passed against the assessment order by the Deputy Commissioner of Income Tax - Panvel Circle, Panvel, u/s. 143(3) of the Income-tax Act (hereinafter referred to as the "Act"), dated 26.12.2016 for Assessment Year 2013-14.

2. The only issue raised by revenue in its appeal is in respect of deleting addition of Rs.5,29,57,140/- made by the ld. AO u/s 56(2)(viib) of the Act towards excess share premium received by assessee wherein

valuation method of Discounted Cash Flow (DCF) adopted by assessee was changed to a different method by ld. AO i.e. Net Asset Value (NAV).

3. Brief facts of the case are that, assessee filed its return of income on 29.09.2014 reporting total income at Nil, under normal provisions of the Act and Rs.25,06,997/- as book loss u/s 115JB. Assessee is engaged in the business of providing temperature-controlled warehousing and distribution services. During the year, assessee had issued 79,33,571 equity shares at face value of Rs.10/- with premium of Rs.20/- per share. Total amount of share premium received is Rs. 5,29,57,140/-. Details and explanations were called for in respect of the said transactions. Assessee had furnished the details of shares issued during the year which were in two tranches, one on 15.11.2013 on which no share premium was charged and other on 31.03.2014 where share premium of Rs.20/- was charged. The said detail is tabulated as under:-

Sr. No.	Particulars	New Issue of Shares	Date of Issue	Face Value per share	Security Premium Charged per share	Security Premium Amt.
1	Lalit Jobanputra	44,85,714	11.11.2013	10	0	
2	A.S. Madhavan	17,65,238	31.03.2014	10	20	3,53,04,760
3	A.V. Ravi Kumar	8,82,619	31.03.2014	10	20	1,76,52,380
4.	Rita Jobanputra	8,00,000	15.11.2013	10	0	
	Total	79,33,571				5,29,57,140

4. Details of the allottees of the shares to whom the same were issued at premium was also furnished which is tabulated as under:-

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DETAILS OF ALLOTTEE

TABLE: A

1	Name of Company	JWL COLD STORE PVT. LTD.
2	Date of allotment	31/03/2014
3	Type of Shares allotted	EQUITY SHARES
4	Nominal Amount per share (Rs.)	Rs. 10 (Rupees Ten Only)
5	Premium / (Discount) amount per share (Rs.)	Rs. 20 (Rupees Twenty Only)
6	Total Number of allottees	2
7	Brief particulars in respect of terms and condition, voting rights, etc.	RANKING PARRI PASSU WITH EXISTING EQUITY SHARES

SR. NO.	Name Address & occupation of Allottee	Nationality of the Allottee	Number of shares allotted	Total amt. paid (including premium) (in Rs.)	Total amt. to be paid on calls (including premium) O/s (in Rs.)
1	Mr. A. S. Madhvan 503/504-B Wing, Buidling No. 4, Powai Vihar HSG.Complex, Powai, Mumbai-400 076. Occ:- Service	Indian	1,765,238	52,957,140	Nil
2	Mr. A.V.Ravikumar 556,14th Street, 4th Sector , K.K. Nagar, Cheenai: 600 078. Occ:- Service	Indian	882,619	26,478,570	Nil
TOTAL			2,647,857	79,435,710	

5. It is worth noting the fact that shares were issued to all the existing shareholders of assessee. In order to justify issue of shares at premium, assessee furnished a valuation report. As per the valuation report dt. 15.03.2014, issued by Akhilesh R. Bhargava & Co., C.A.s, value per equity share of Rs.10/- under DCF enterprise valuation method was arrived at Rs.32.18/-. Ld. AO rejected the valuation furnished by the assessee stating that projections show profits as against loss in the earlier years. According to him, projected profit is not realistic and capital expenditure is shown for only one year i.e., for 2014. He further observed that projections are not commensurate with the actual reported figures. Assessee substantiated its valuation by submitting financial details for the years from AY 2014-15 to AY 2023-24 to demonstrate that even if actual profits are taken into consideration and valuation is arrived at, it

would still come to Rs.34.71/- per share. This figure of Rs.34.71/- per share was arrived at by assessee on its actual data of profits for the year under consideration which the ld. AO considered it to be another valuation report furnished by assessee. Details of profit for arriving at this figure is reproduced as under:-

Sr No.	Particulars	A.Y.									
		2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24
1	Revenue from Operations	30,07,220	10,27,39,900	14,84,76,748	21,40,44,052	26,95,15,331	34,86,96,453	52,53,77,422	67,92,68,659	96,14,40,326	1,19,81,62,421
2	Direct and Indirect Expenses	55,14,217	9,20,23,616	14,55,88,235	18,87,41,229	22,70,95,789	26,89,80,772	37,35,09,070	45,75,42,589	64,41,78,758	89,61,97,288
3	Profit Before Tax	-25,06,997	1,07,16,284	28,88,513	2,53,02,823	4,24,19,541	7,97,15,681	15,18,68,352	22,17,26,070	31,72,61,568	30,19,65,133
4	Tax (including Deferred Tax)	-	5,30,63,473	10,99,22,198	-12,88,61,361	-82,93,534	-84,00,140	1,76,02,047	5,64,24,761	6,40,08,951	5,18,93,460
5	Profit before Tax	-25,06,997	6,37,79,757	-10,70,33,685	15,41,64,184	5,07,13,075	8,81,15,821	13,42,66,305	16,53,01,309	25,32,52,617	25,00,71,673

6. Ld. AO thus arrived at a conclusion that assessee is deviating from its own stand and submitting valuation reports multiple times with different results. He thus, rejected DCF method adopted by assessee and concluded to take NAV as the correct method to determine the fair market value of shares issued by assessee. In this respect, he also stated that valuation report dt. 15.03.2014 is not based on any examination of historical financial statements or prospective results to make an unbiased valuation. According to him, entire valuation was made exclusively on the information given by assessee rather than by any independent assessment made by the valuers. He thus, by adopting Net Asset Value method arrived at fair market value of each share at Rs.1.62/- and thus, computed excess share premium at Rs.5,29,57,140/- to be added as income from other sources u/s 56(2)(viib) of the Act.

6.1. Aggrieved, assessee went in appeal before ld. CIT(A). Before ld. CIT(A), it was strongly contested that ld. AO substituted facts and figures or estimates without demonstrating that valuation report is based

on incorrect or wrong facts. It was further contended that under Rule 11UA(2) of Income-tax Rules, 1962 (in short 'Rules'), valuation report can be made either under Clause (a) or under Clause (b) at the option of assessee. The method of valuation is always at the option of assessee and once option is taken by assessee, same cannot be withdrawn or taken away by ld. AO by adopting a different method of valuation. Assessee had selected DCF method and shares issued were valued from Registered valuer who adopted projections of sales and expenditure and various assumptions and scenarios which were furnished by the management of assessee. However, ld. AO compared actual performance of assessee with projections adopted for valuation of shares. Assessee submitted that shares were issued in two tranches, one without premium and another at a premium of Rs.20/- per share, since its project was in two different phases and, therefore, different valuation methods were adopted for two tranches. The status of project as on 15.09.2013 and as on 15.03.2014, was furnished as under:-

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15.09.2013	15.09.2014
• <i>Incomplete/uncertain</i>	• <i>Complete</i>
• <i>Approvals/power awaited</i>	• <i>Approvals/power received</i>
• <i>Yet to set up infrastructure (WIP)</i>	• <i>Infrastructure set up and complete</i>
• <i>Yet to commence business</i>	• <i>Business commenced</i>
• <i>No serious business enquiries</i>	• <i>Lucrative/long term enquiries</i>
• <i>Sources of funding not clear</i>	• <i>Funding in place</i>
• <i>No certainty of time of completion of construction and commencement of business</i>	• <i>All completed</i>
• <i>Enterprise not ready (only a basket of assets/liabilities)</i>	• <i>Enterprise ready</i>

6.2. According to assessee, value per share as on 31/03/2013 under the NAV method was at Rs.7.73/- per share. The shares were issued without premium at face value of Rs.10/- each. Assessee also submitted that in second tranche, shares were issued at premium of Rs.20/- for which valuation method was adopted under DCF method which gave a value at Rs.32.18/- per share. Since Id. AO had compared actual data of assessee for the period 2014 to 2018, assessee justified the charging of premium by taking the actual data to arrive at a value of Rs.34.71/- per share.

7. Reliance was placed on several judicial precedents including that of Hon'ble Jurisdictional High Court of Bombay in case of *Vodafone M-Pesa Ltd. v PCIT* (2018) 164 DTR 257/ 256 Taxman 240 (Bom)(HC) and Hon'ble Delhi High Court in case of *Agra Portfolio (P.) Ltd. v. Principal*

Commissioner of Income-tax reported in [2024] 161 taxmann.com 303 (Delhi) and several other decisions of Co-ordinate Bench of ITAT.

8. Ld. CIT(A) after considering all the submissions and facts of the case and analyzing the applicable provisions of Section 56(2)(viib) r.w.r 11UA(2), gave a detailed finding with his observation on conclusion drawn by Id. AO which are extracted below:-

“5.3.5. From the above, it evident that the Valuation can be made either under Clause (a) or Clause (b) of Rule 11UA(2) at the option of the assessee. In the instant case, the appellant has opted for Valuation as per NAV method prior to issuance of equity share on 15.11.2013 and for valuation as per DCF basis prior to issuance of share on 31.03.2014. Thus, the appellant has indeed followed the requirements of Rule 11UA.

5.3.6. As regards the AO's reason for rejection of the DCF Valuation Report dated 15.03.2014, I am of the view that the AO cannot substitute the facts and figures or the estimates without demonstrating that the Valuation report is based on incorrect or wrong facts. The valuation of a business is an art and will continue to remain subjective. But, that is no good reason to substitute a valuation unless the same is shown to be patently incorrect.

5.3.7. As regards the AO's contention that the number of equity shares has been adopted wrongly at 1,45,68,830 shares, I agree with the appellant that the correction of this error would only result in higher intrinsic value per share.

5.3.8. The appellant has pointed out that this company was incorporated in 2013 and that the business was still in nascent stage. It was formed in order to conduct the activity of large and modern cold store. The appellant has also pointed out the difference in the status of project as on 15.09.2013 and 15.03.2014 to justify the different approaches to valuation.

5.3.9. As regards the disclaimer clause of the valuation report, same cannot be faulted with unless the valuation is shown to be on a fundamental erroneous basis.

5.3.10. As regards the AO's contention that the appellant has filed third Valuation Report vide letter dated 08.12.2016 determining the value of equity share at Rs.34.71, the same has been examined. It is seen that the appellant vide letter dated 08.12.2016 in response to the queries raised by the AO provided this computation to justify its claim and not in the form of a new Valuation Report. This is evident from the submission which is as under:-

“It may not be out of place to mention here, without prejudice, that even if the actual figures for F.Y. 2014, 2015 and 2016 are considered for the purpose of such DCF valuation, though not permitted, the value per share is Rs.34.71 which is more than the pricing of Rs.30 per share allotted by us”

5.3.11. In the case of *Ashwin Vanaspati Industries vs CIT*, 255 ITR 26 (Guj HC), the Hon'ble Gujarat HC has held as follows: "The valuation report is by a registered valuer. Neither in the assessment order nor in the Tribunal's order is there any whisper that the valuation report by the registered valuer is incorrect in any manner whatsoever. Once there is a report by the registered valuer, it is incumbent upon an authority to dislodge the same by bringing adequate material on record in the form of departmental valuation report, because in absence of the same, a technical expert's opinion (Registered Valuer's report) cannot be dislodged by any authority by merely ignoring the same. In the present case, that is what has happened. Neither the Assessing Officer nor the Tribunal have even attempted to state that the valuation report and the values put on the assets are incorrect in any manner whatsoever.

They have simply ignored the valuation report". Thus, the valuation report cannot be discarded by generic discussion and without pointing specific defects.

5.3.12. Similarly, in the case of *Urmin Marketing P Ltd vs DCIT*, [2020] 122 taxmann.com 40 (Ahmedabad - Trib.), the Hon'ble ITAT held as follows:

"33. The next allegation of the AO is that there was contradiction and inconsistency in the valuation report filed by the assessee. Admittedly the valuation report was prepared by the RBSA capital advisors LLP which is the approved valuer. The valuation of the business being a technical matter, in our view, the assistance of the expert is required. The AO himself cannot determine such value. If he was not satisfied with the valuation report, then the only recourse available to the AO is to refer the matter to the technical person. In holding so, we draw support and guidance from the judgment of this tribunal in the case of *Synbiotics Ltd* [2017] 88 taxmann.com 402 (Ahd. - Trib.)". Thus, very great importance is attached to the Valuation Report submitted by the appellant.

5.3.13. It was held in *Cinestaan Entertainment (P) Ltd vs ITO*, [2019] 177 ITD 809 (Delhi - Trib.) by Hon'ble ITAT: "32. Section 56(2) (viib) is a deeming provision and one cannot expand the meaning of scope of any word while interpreting such deeming provision. If the statute provides that the valuation has to be done as per the prescribed method and if one of the prescribed methods has been adopted by the assessee, then Assessing Officer has to accept the same and in case he is not satisfied, then we do not find any express provision under the Act or rules, where Assessing Officer can adopt his own valuation in DCF method or get it valued by some different Valuer. There has to be some enabling provision under the Rule or the Act where Assessing Officer has been given a power to tinker with the valuation report obtained by an independent valuer as per the qualification given in the Rule 11U. Here, in this case, Assessing Officer has tinkered with DCF methodology and rejected by comparing the projections with actual figures. The Rules provide for two valuation methodologies, one is assets based NAV method which is based on actual numbers as per latest audited financials of the assessee company. Whereas in a DCF method, the value is based on estimated future projection. These projections are based on various factors and projections made by the management and the Valuer, like growth of the company, economic/market conditions, business conditions, expected demand and supply, cost of capital and

host of other factors. These factors are considered based on some reasonable approach and they cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and catena of underline facts and assumptions. Nevertheless, at the time when valuation is made, it is based on reflections of the potential value of business at that particular time and also keeping in mind underline factors that may change over the period of time and thus, the value which is relevant today may not be relevant after certain period of time." This was upheld in PCIT vs Cinestaan Entertainment (P) Ltd, 433 ITR 82, by the Hon'ble Delhi HC that valuation is not an exact science, and therefore cannot be done with arithmetic precision.

5.3.14. In view of the detailed discussion above, I am of the view that the issuance of shares in two tranches has been made in accordance with Rule 11UA and the addition made by the AO u/s 56(2)(viib) deserves to be deleted. Hence, this ground is allowed."

9. Aggrieved, Revenue is in appeal before the Tribunal.
10. Heard both the parties. Perused the material available on record.
11. Above stated facts are undisputed and uncontroverted. Assessee had issued shares in two tranches, one without premium and second with premium of Rs.20/- per share. Assessee had adopted DCF method under the option available to it under Rule 11UA(2) for which all necessary details of projections and estimates were placed before the authorities below. However, ld. AO compared the projections and estimates with the actual performance of assessee to negate the applicability of DCF method and resorted to adopting NAV method to make the addition which is in challenge before us. Valuation report will always include limitation and responsibilities of the valuation professional which does not make the report incorrect though ld. AO has taken a contrary view on the same.
12. The ld. CIT(A) had quoted Section 56(2)(viib) and Rule 11UA in the impugned order. From perusal of the same it is noted that the assessee is unable to determine the Fair Market Value of the unquoted equity shares

either on NAV method or on basis of a report drawn by a Merchant Banker/Chartered Accountant, determining fair market value as per DCF method for which assessee has to exercise its option. The language of Rule 11UA(2) indubitably places a choice upon the assessee to either follow the route as prescribed in clause (a) or in the alternative to place for the consideration of the AO a Valuation Report drawn by a merchant banker/Chartered Accountant as per the DCF method. The choice stands vested solely in the hands of assessee.

13. On perusing the decision in case of *Vodafone M-Pesa Ltd. v PCIT (supra)*, the Hon'ble Court had held that while it would be open for the ld. AO for the reasons so recorded, to doubt or reject the valuation that may be submitted for its consideration, however, the statute does not appear to empower it to independently evaluate the face value of the unquoted equity share by adopting a valuation method other than one chosen by assessee.

14. Thus, we note that it is not permissible for the AO to reject the method adopted by assessee and apply a different method of valuation though, the AO can definitely reject the valuation report but not the method so opted by an assessee. In the present case, ld. AO has rejected the method opted by assessee and applied different method for making addition.

15. We further take recourse to the decision in the case of *Agra Portfolio (P.) Ltd. (supra)*, wherein the decision of the Hon'ble Bombay High Court in the case of *Vodafone M-Pesa Ltd. v PCIT (supra)* as well as several other Co-ordinate Benches of ITAT which include that of Mumbai Bench in the case of *Sodexo Facilities Management Services (ITA No. 2945/Mum/2022)*, *Credtalpa Alternative [2022] 94 ITR (Trib) 596*, by Hyderabad Bench in the case of *M/s. MLR Auto Limited [ITA No. 115/Hyd/2021]* and Bangalore

Bench in the case of *Taaq Music Pvt. Ltd.* [2020] SCC Online ITAT 9482, which held that, where assessee-company, for valuation of shares, placed reliance on valuation report drawn by a merchant banker wherein DCF method was adopted, AO could not have rejected said method and adopted NAV method for valuation of shares.

16. Considering the facts on record, elaborate observations and findings arrived at by Id. CIT(A) by taking into account provisions of Section 56(2)(viib) & Rule 11UA, and in light of the judicial precedents discussed above including that of Hon'ble jurisdictional High Court of Bombay, we do not find any reasons to interfere with the findings given by Id. CIT(A) for deleting the addition made by Id. AO towards share premium. Accordingly, effective grounds raised by revenue are dismissed.

17. In the result, appeal of the revenue is dismissed.

Order pronounced in the Court on 31 July, 2024 at Mumbai.

Sd/-
(PAVAN KUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(GIRISH AGRAWAL)
ACCOUNTANT MEMBER

Mumbai, Dated 31/07/2024

SC Sp/2

आदेश की प्रतिलिपि अद्येषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent
3. संबंधित आयकर आयुक्त / Concerned Pr. CIT
4. आयकर आयुक्त (अपील)/ The CIT(A)-
5. विभागीय प्रतिनिधि , आयकर अपीलीय अधिकरण, मुंबई /DR,ITAT, Mumbai,
6. गार्ड फाई/ Guard file.

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Assistant Registrar
आयकर अपीलीय अधिकरण
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