

आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

महनीय श्री मनोज कुमार अग्रवाल, लेखक सदस्य एवं
महनीय श्री मनु कुमार गिरि, न्यायिक सदस्य के समक्ष।
BEFORE HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM
AND HON'BLE SHRI MANU KUMAR GIRI, JM

आयकर अपील सं. ITA No.330/Chny/2024
(निर्धारणवर्ष / Assessment Year: 2016-17)

M/s. Smart Information Worldwide Inc. 49 Sixth Main Road, Raja Annamalaipuram, Chennai-600 028.	बनम/ Vs.	DCIT International Taxation -2(2) Chennai-6.
स्थायी लेखासं./जीआइआरसं./PAN/GIR No. AAOCS-8497-G		
(पीलार्थी/ Appellant)	:	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओरसे/ Appellant by	:	Shri V. Ravichandran (CA)- Ld.AR
प्रत्यर्थी की ओरसे/ Respondent by	:	Shri AR.V.Sreenivasan (Addl.CIT)-Ld. Sr. DR

सुनवाई की तारीख/ Date of Hearing	:	20-06-2024
घोषणा की तारीख / Date of Pronouncement	:	06-08-2024

आदेश / ORDER

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2016-17 arise out of an order of learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi [CIT(A)] dated 13-12-2023 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s. 143(3) r.w.s 144C(3) of the Act on 28-02-2019. The grounds of appeal read as under: -

1. The order of the learned CIT (Appeals) is contrary to law and the facts of the case and is devoid of reasoning.

2. The learned Assessing Officer ought to have appreciated that capital gains have to be computed based on the statutory provisions and that Section 48 requires that capital gains be computed by adopting the *"full value of consideration received or accruing as a result of the transfer of the capital asset"* and does not permit the actual consideration to be substituted by the fair market value.
3. The learned Assessing Officer erred in adopting the fair value of the shares when there was no evidence to suggest that the sale consideration has been understated except in certain situations such as specifically provided such as in Sections 50C, 45(5), 45(2), 45(3), 46(2), 50D and in the absence of such specific provisions, such substitution is not permissible.
4. The learned Assessing Officer ought to have appreciated that that Finance Act, 2017 has introduced Section 50CA with effect from Assessment Year 2018-19 by which the capital gains on the sale of unlisted shares would be determined by taking the fair market value of the share if it were to be higher than the sale consideration, but this provision would apply only from Assessment Year 201819 and has no application for earlier Assessment Years.
5. The learned Assessing Officer ought to have appreciated that in the case of unlisted companies, the only statutory basis for valuation is provided under Rule 11UA which has been prescribed under Section 50CA and even if the capital gains were to be computed based on the fair market value, such fair market value has to be determined in accordance with Rule 11UA.
6. The learned Assessing Officer has erred in applying section 50D in case where the sale consideration is determinable.
7. The learned Assessing Officer erred in levying interest under sections 234A and 234B when the entire income consisted of capital gains on which tax was deductible at source under section 195.

As is evident, the sole that arise for our consideration is addition made by Ld. AO under the head capital gains.

2. The Ld. AR advanced arguments taking support of various documents as placed on record along with various judicial decisions and assailed the impugned additions. The Ld. CIT-DR controverted the same and supported the additions made by Ld. AO. Having heard rival submissions and upon perusal of case records, our adjudication would be as under.

Assessment Proceedings

3.1 The assessee being non-resident corporate assessee incorporated in USA is stated to be holding company of another entity by the name M/s Sulekha.com New Media Private Ltd. (Sulekha.com in short). The

shareholders of the assessee were promoters of Sulekha.com. The assessee held approx. 80% shareholding in Sulekha.com.

3.2 It transpired that during the year, the assessee sold equity shares of Suelkha.com for aggregate sale consideration of Rs.10.21 Crores. The assessee sold 23082 shares to Manhattan Venture Partners (MVP) at Rs.2274/- per share whereas the assessee sold 31405 shares to Norwest Venture Partner (Norwest) at Rs.1581.60 per share. As per USA-DTAA, the resultant gains were to be taxed as per domestic provisions. The Ld. AO called for valuation report. The assessee submitted that sale price was fixed by private negotiation and no separate valuation was done. During the course of assessment proceedings of AY 2014-15, the assessee had submitted valuation report for shares sold during that year. The said valuation report was based on Discounted Cash Flow (DCF) Method and the value per share was arrived at Rs.2135/- per share. Accordingly, Ld. AO proceeded to adopt the said valuation to compute the capital gains in the hands of the assessee.

3.3 The assessee, in its reply, furnished valuation in terms of Rule 11UA valuing the shares at Rs.31.40 per share which was much lesser than the price realized by the assessee. However, Ld. AO proposed invocation of Sec.50D which provide that where the consideration received or accruing as a result of the transfer of a capital asset by the assessee was not ascertainable or could not be determined then for the purpose of computing capital gains, the fair market value of the said asset on the date of transfer shall be deemed to be the full value of consideration received or accruing as a result of such transfer. The assessee assailed the same on the ground that the provisions of

Sec.50D could be applied only when the sale value could not be determined and the machinery of computation of capital gains fails.

3.4 However, Ld. AO alleged that the shares were not valued by any method as prescribed under the Income Tax Act which would mean that the correct value of the shares could not be determined and the provisions of Sec.50D gets attracted in the case of the assessee. Rule 11UA provide for valuation of shares under two methods namely Net Asst Method (NAV) and DCF Method. The values arrived by DCF method was Rs.2135 per shares whereas value as per NAV method was Rs.31.41 per share. The option would be of Ld. AO. Finally, Ld. AO adopted rate of Rs.2274 per share (rate at which shares were sold to MVP) for sale transaction carried out with Norwest and computed additional capital gains of Rs.217.44 Lacs. Alternatively, by adopting valuation as per DCF method, the additional capital gains would be Rs.173.79 Lacs.

Appellate Proceedings

4.1 During appellate proceedings, the assessee contended that Sec.48 provide for computation of capital gain based on the sale consideration received and not based on fair market value of the asset transferred except in specific case set out in Sec.50C. The fair market value, even otherwise, could not be different from the sale value negotiated between two unrelated parties at Arm's Length. The assessee also contended that the provisions of Sec.50CA prescribing substitution of fair market value of unquoted shares has been inserted w.e.f. 01.04.2018 only and therefore, the same would not apply in this year. The assessee, in its written submissions, also submitted that there was no material to believe that higher sale consideration was received by the assessee. The sale

value was evidenced by the agreement and particulars of tax deduction at source. There was no factual basis for disregarding the sales value that had actually been received. There was no relationship between the assessee and Norwest. Reference was made to various judicial decisions including the decision of Hon'ble Supreme Court in the case of **CIT vs. Gillander Arbuthnot & Co. (87 ITR 407)** holding that full value of the consideration is the consideration agreed to be paid and not the market value. The assessee also cited various other subsequent decisions taking the same view. The assessee also submitted that in case of unlisted companies, the only statutory basis for valuation was provided under Rule 11UA which has been prescribed u/s 50CA which permit substitution of FMV for sale consideration only from AY 2018-19 and not before that. It was also submitted that Sec.50D would have no application where the sale consideration was known. The assessee also submitted that it obtained a valuation report which yielded value of Rs.31.41 per share which was much lower than the sale price received by the assessee.

4.2 However, Ld.CIT(A) endorsed the computation of Ld. AO by holding that fair market value was not arrived on scientific basis. Sulekha.com was performing exceptionally well with robust financials. Therefore, Ld. AO rightly invoked the provisions of Sec.50D. Accordingly, the impugned addition was confirmed against which the assessee is in further appeal before us.

Our findings and Adjudication

5. The factual matrix is not in dispute. It emerges that the assessee has sold certain shares to MVP at Rs.2274 per share whereas it has sold similar shares to Norwest at Rs.1581.60 per share. The Ld. AO has

made addition by taking value of Rs.2274 per share with respect to sale made to Norwest disregarding the actual sale consideration. We find that identical issue arose in assessee's case for AY 2014-15 vide ITA No.329/Chny/2024 which stands adjudicated by this bench as under: -

5. From the facts, it emerges that the assessee has sold certain shares during the year to Norwest at Rs.520/- per share. Since the shares were acquired as bonus shares, the cost thereof was taken as Nil and entire capital gains have been offered to tax by the assessee. The assessee as well as Norwest are independent parties. In support of sale price, the assessee furnished valuation report also which yielded price per share at Rs.27.43 per share which is much lower than the sale price of Rs.520/- as earned by the assessee out of impugned sales transactions. The Ld. AO has not referred the valuation to an independent valuer but proceeded to compute the fair market value of per share based on projections made in earlier / subsequent years and arrived at value of Rs.1162/- per share disregarding the agreement value between the assessee and Norwest. However, the aforesaid valuation, in our opinion, is clearly fallacious one since the valuation of shares would keep on fluctuating depending upon the performance of the underlying entity and the valuation could not be arrived merely on the basis of projections. There is no finding that the shares were sold at an under-valued price.

6. Pertinently, in terms of Sec.48 of the Act, the capital gains have to be computed by adopting *full value of consideration received or accruing as a result of the transfer of the capital asset*. In other words, full value of consideration could not be substituted with any other value unless specified. There is no material to believe that the assessee received higher sale consideration. The actual sale price negotiated between two unrelated parties in a commercial transaction could not be substituted by the value determined by Ld. AO. The case law of Hon'ble Supreme Court in **CIT vs. Gillander Arbuthnot & Co. (87 ITR 407)** supports the case of the assessee. Similarly in **CIT vs George Henderson & Co. Ltd. (66 ITR 622)**, it was held that full value of consideration is the full sale price actually paid. It was further observed that the legislatures made distinction between expressions *full value of consideration* and *fair market value of capital asset transferred*. Similarly in **CIT vs Sivakami Co. Pvt. Ltd. (159 ITR 61)**, it was held by Hon'ble Apex Court that since the revenue could not prove that the consideration was understated, the capital gains were to be computed on the basis of sale consideration. Following these decisions, Hon'ble Delhi High Court in the case of **CIT vs. Nilofer Singh (309 ITR 233)** held that the expression *full value of consideration* used u/s 48 would not have any reference to the market value but only to consideration stated in the sale deeds. Similar are the decision of various other judicial authorities which are paced on record in the paper book. All these decisions support the view that full value of consideration could not be substituted with fair market value. Though Ld. CIT(A) has stated that the provisions of Sec.50CA has not been invoked by Ld. AO, we find that the aforesaid provisions have been introduced by Finance Act, 2017 w.e.f. AY 2018-19 only and the same do not apply to this year. This being so, the impugned addition as made by Ld. AO, in our considered opinion, is not sustainable in law.....

6. We find that the facts as well as issues are quite identical in this year. The only difference is that Ld. AO has invoked the provisions of Sec.50D in this year. However, upon bare perusal of Sec.50D, it could be seen that this section provides that where the consideration received or accruing as a result of a transfer of a capital asset by an assessee is not ascertainable or cannot be determined, then, for the purpose of computing income chargeable to tax as capital gains, the Fair Market Value ("FMV") of the said asset on the date of transfer shall be deemed to be the full value of the consideration received or accruing upon such transfer. Upon careful perusal of the same, it could be inferred that the basic conditions to trigger the application of this Section is that -(i) the consideration must be received or accrued; (ii) there must be a transfer of capital asset; and (iii) such consideration should not be ascertainable or determinable. The said legislative intent is clear from Memorandum to the Finance Act, 2012, which states that the said section will be invoked only in cases where in the absence of any determinable consideration, the machinery provisions fail resulting in a no tax payable situation. In such case, FMV of the asset shall be taken to be the full value of consideration. The same is clearly not the case here since the sale value is clearly determinable. Therefore, the aforesaid provisions could not be made applicable to the case of the assessee. This being so, the impugned additions stand deleted.

7. The appeal stand allowed in terms of our above order.

Order pronounced on 6th August, 2024

Sd/-
(MANU KUMAR GIRI)
न्यायिक सदस्य / JUDICIAL MEMBER

Sd/-
(MANOJ KUMAR AGGARWAL)
लेखा सदस्य / ACCOUNTANT MEMBER

चेन्नई Chennai; दिनांक Dated : 06-08-2024
DS

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकरआयुक्त/CIT Chennai.
4. विभागीयप्रतिनिधि/DR
5. गार्डफाईल/GF