

IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCHES "A", MUMBAI

Before Justice (Retd.) C V Bhadang, Hon'ble President &  
Shri B R Baskaran, Hon'ble Accountant Member

ITA No.888/Mum/2024 for Assessment Year : 2015-16

ACIT- 2(1)(1), Mumbai.	Vs.	Amalfi Realty Pvt. Ltd., Crescent Chambers, 1 <sup>st</sup> Floor, Tamarind Lane, Fort, Mumbai 400 023.
(Appellant)		PAN AALCA6398R (Respondent)

Appellant By : Shri Ajay Chandran (CIT-DR)  
Respondent By : Shri Mihir Naniwadekar

Date of Hearing : 19.08.2024	Date of Pronouncement: 19.08.2024
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**ORDER**

**Per Justice (Retd.) C V Bhadang :**

The challenge in this appeal by the Revenue is to the order dated 08.01.2024 passed by CIT(A)/NFAC, Delhi. By the impugned order the CIT(A) has allowed the appeal filed by the respondent-assessee thereby deleting the addition of Rs.16,97,85,000/- made by the AO u/s.56(2)(viib) of the Income tax Act, 1961 ('Act' for short). The appeal relates to the assessment year 2015-16.

2. The brief facts are that the respondent-assessee is engaged in the business of development and sale of residential and commercial premises. The assessee filed its Return of Income (RoI) for the assessment year

under consideration on 30.09.2015 declaring total income of Rs.37,53,150/-. The case was selected for scrutiny and the assessment was completed u/s. 143(3) of the Act on 28.12.2017 without making any further additions.

3. It appears that subsequently a notice u/s. 148 of the said Act was issued to the assessee on 30.03.2021 inasmuch as according to the Assessing Officer income assessable to tax had escaped assessment. The record discloses that in the year under consideration, the assessee had issued 9,90,000 equity shares of Rs.10 each at a premium of Rs.490 per share as detailed below:

Name	Date of investment	Equity share capital	Share premium	Total
PREI Fund	20.10.2014	64,35,000	31,53,15,000	32,17,50,000
Amalfi Ventures Pvt. Ltd.	15.11.2014	34,00,000	16,66,00,000	17,00,00,000
Gray Investments Pvt. Ltd.	18.11.2014	26,000	12,74,000	13,00,000
Ajit Dayal	02.12.2014	19,500	9,55,500	9,75,000
Quantum Advisors Pvt. Ltd.	18.11.2014	19,500	9,55,500	9,75,000
Total		99,00,000	48,51,00,000	49,50,00,000

4. In support of the premium charged the assessee had furnished a valuation certificate as per the Discounted Cash Flow Method (DCF) in arriving at the fair value of the equity shares. The valuation report indicates that the valuer had considered a period of six subsequent years and taken into consideration the cash flow which the company would generate within these years. The Assessing Officer however, found that the technical guide on share valuation published by the ICAI provided three pre-requisites [viz. cash flow projections, discount rate and terminal value) for employing the DCF method for arriving at the fair market price of the share. The Assessing Officer noted that the cash flow projection

should reasonably capture the growth prospects and earning capacity of the company, which necessarily have to be determined on the basis of its past performance, which is also a relevant fact while employing DCF method. The Assessing Officer found that these facts were not considered by the valuer. It was found that the valuer acted on the basis of the information supplied by the company and did not resort to any independent assessment. Secondly, the Assessing Officer relied upon the fact that for the F.Y. 2016-17 the assessee had shown income of Rs 1,24,38,844/- as other income and a profit of Rs.1,18,06,709/- which was discrepant to the net cash flow of Rs.88,11,00,000/- projected/assumed for F.Y. 2016-17. In the said circumstances, the AO came to the conclusion that the net inflow considered in the valuation report was unrealistic. In that view of the matter, the AO after recording the satisfaction and obtaining approval of the competent authority u/s. 151 of the Act has made the addition of the amount of premium as income from other sources u/s. 56(2)(viib) of the Act.

5. Before the CIT(A), the assessee challenged the re-opening as well as the merits of the addition made. A perusal of the impugned order passed by the learned CIT(A) shows that he has examined the challenge to the re-opening and has consequently allowed the appeal. The CIT(A) has not examined the merits of the addition made. Feeling aggrieved the Revenue is in appeal.

6. We have heard the learned DR as well as the learned counsel appearing for the respondent. Perused record.

7. It is submitted by the learned DR that it is not a case of change of opinion by the AO in as much as the re-opening and the impugned

addition was made on the new material viz., the return for the F.Y. 2016-17. It is submitted that the valuation made by the valuer was based on the information supplied by the assessee and not on the basis of any independent exercise undertaken by the valuer. The learned DR pointed out that the projected cash flow, which is the basis for employing the DCF method, was grossly on a higher side than the actual inflow received which was evident from the return for F.Y. 2016-17. He therefore submitted that the CIT(A) was in error in deleting the addition made.

8. The learned counsel for the respondent has pointed out that admittedly the re-opening is after a period of four years from the end of the relevant assessment year and, therefore, the first proviso to section 147 of the Act was attracted. He submitted that re-opening could not have been made without finding that there was a failure on the part of the assessee to disclose any material facts, necessary for his assessment for that assessment year. The learned counsel pointed the copy of the notice dated 28.08.2017 and the submissions dated 13.12.2017 during the original scrutiny proceedings, in order to submit that the aspect about the share premium received has already been examined by the AO particularly in the context of applicability of section 56(2)(viib) of the Act. He submitted that even so there was no addition made in the scrutiny assessment made on 28.12.2017. He, therefore, submitted that this is a clear case where the re-opening is based on a mere change of opinion. He submitted that the DCF method is based on the projected cash inflow and the fact that the projected figures were not met cannot be a ground for re-opening particularly when this aspect had already been examined in the scrutiny assessment. On behalf of the respondent reliance is placed on the decision of Hon'ble Supreme Court in the case of Gemini Leather

Stores vs. ITO [100 ITR 1] and that of Hon'ble Bombay High Court in Suminter Organic and Fair Trade Cotton Ginning Mill (P.) Ltd. vs. DCIT [150 taxmann.com 232] and Vibrant Securities Private Limited vs. ITO and Ors. in Writ Petition No.3307 of 2022 decided on 23.02.2023. It is submitted that Rule 11UA(2)(a) of IT Rules 1962 ('Rules' for short) gives an option to the assessee to follow Rule 11UA(2)(b) i.e. the Discounted Free Cash Flow Method as certified by a merchant banker or a Chartered Accountant. He therefore submitted that no fault can be found with the assessee much less, there was any failure to disclose any material fact.

9. We have considered the submissions made. Indisputedly, the assessee had issued 9,90,000 equity shares of Rs.10 each at a premium of Rs. 490/- per share. Under section 56(2)(viib) of the Act, applicable w.e.f A.Y. 2013-14, where a company not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares, to the extent it exceeds the fair market value of the shares is taxable in the hands of the company as income from other sources. Fair market value of the shares is to be determined in accordance with Rule 11U and 11UA of the Rules. A perusal of Rule 11UA(2b) shows that in an appropriate case, the discounted cash flow method can be employed for determining the fair price of the shares. In this case, according to the assessee the premium was determined on the basis of the fair price as computed on the basis of DCF method. The record discloses that in the scrutiny assessment this aspect was specifically examined, in the context of the applicability of section 56(2)(viib) of the Act and no addition was made.

10. The only ground on the basis of which the AO re-opened the assessment was the cash inflow as indicated in the subsequent year, viz. FY 2016-17. In our considered view, the AO was in error in re-opening the assessment inasmuch as there was no failure on the part of the assessee to disclose any material fact which was relevant consideration as the re-opening was made after a period of four years from the conclusion of the relevant assessment year. Secondly, there was no new material justifying the satisfaction that income assessable to tax had escaped assessment. Thirdly, we find that the aspect about the premium charged was already examined in the scrutiny assessment, particularly in the context of Section 56(2)(viib) of the Act.

11. In Suminter Organic and Fair Trade Cotton Ginning Mill (P.) Ltd. (supra) the facts were more or less similar. The assessee company had issued shares at premium. The case was selected for scrutiny with respect to large share premium received. In that case also, reliance was placed on behalf of the assessee on the fair value of the shares as determined in valuation report obtained from a Chartered Accountant on the basis of the DCF method. Later, the AO re-opened the assessment on the ground that the share premium was not charged based on the correct valuation and the difference was added as income from other sources. The Hon'ble High Court found that same ground was considered in the scrutiny proceedings by the AO, which was specifically responded to by the assessee and thus there was no failure on the part of the assessee to disclose fully and truly any material facts nor there was any tangible material with the AO which would justify the re-opening.

12. It is not necessary to multiply authorities on the point. However, a similar view has been taken by Hon'ble Bombay High Court in case of Vibrant Securities Private Limited (supra).

13. We have gone through the impugned order passed by the CIT(A). The CIT(A) placing reliance on the decision of Hon'ble Supreme Court in the case of CIT vs Kelvinator of India Ltd. [256 ITR 1] has found, and in our view rightly so, that the AO does not have the power to review the assessment under Section 147 of the Act. We, therefore, find that the impugned order does not suffer from any infirmity so as to require any interference. The appeal is without any merit and is accordingly dismissed.

Order pronounced in the open court on 19<sup>th</sup> August, 2024.

Sd/-

[B R Baskaran]  
ACCOUNTANT MEMBER

Mumbai, Dated : 19<sup>th</sup> August, 2024.  
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Sd/-

[Justice (Retd.) C V Bhadang]  
PRESIDENT

**Copy of the Order forwarded to :**

1. The Appellant.
2. The Respondent.
3. The PCIT, Mumbai.
4. The CIT
5. The DR, 'A' Bench, ITAT, Mumbai

BY ORDER

//True Copy//

(Assistant Registrar)  
Income Tax Appellate Tribunal, Mumbai