

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : G : NEW DELHI

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER

ITA No.1047/Del/2019
Assessment Year: 2014-15

Sadhvi Securities P. Ltd.,
13/34, WEA, Arya Samaj Road,
Karol Bagh,
New Delhi.

Vs ACIT,
Central Circle-5,
New Delhi.

PAN: AAHCS7130D

(Appellant)

(Respondent)

Assessee by	:	Shri V.P. Gupta & Shri Anunav Kumar, Advocates
Revenue by	:	Shri S.S. Rana, CIT, DR
Date of Hearing	:	02.05.2019
Date of Pronouncement	:	16.07.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 15th January, 2019 of the CIT(A)-24, Delhi, relating to assessment year 2014-15.

2. Facts of the case, in brief, are that the assessee is a company and is engaged in the business of share trading. It filed its return of income on 27.11.2014 declaring total income of Rs.910/-. During the course of assessment proceedings, the Assessing Officer noted that the assessee has introduced share capital by issuing 1800000 equity

shares of Rs.10 each at a premium of Rs.90 per share aggregating to Rs.18 crore in the balance sheet as on 31.03.2014. Since the assessee has charged very high premium on the shares so allotted, the Assessing Officer asked the assessee to furnish complete details of the share allotment along with names and addresses of the persons to whom the shares were allotted. He also asked the assessee to furnish calculation of the valuation made as per Rule 11UA to verify taxability u/s 56(2)(viib) of the IT Act. The assessee filed necessary details along with explanation and the valuation made for arriving at the fair market value of the shares. It also filed a valuation report in respect of the immovable property held by the assessee issued by an approved property dealer in which the fair market value of the same was enhanced substantially to justify the higher valuation of the shares allotted at such high premium.

3. However, the Assessing Officer was not satisfied with the submissions made by the assessee. He noted that the assessee has allotted 1800000 shares to two companies, namely, M/s Elecon Securities Pvt. Ltd. and M/s Ordinary Financial Services Pvt. Ltd. on 31.03.2014. He noted that the assessee has not made valuation as per the method prescribed for valuation of the unquoted shares as per Rule 11UA(2) in a proper manner. The assessee has not taken the value as per Rule 11UA(2) applicable to its case. Further, the assessee has not taken the value of assets before the introduction of share capital received through fresh allotment. He noted that the assessee has included in the calculation the amount of fresh capital and, thus, has tried to inflate the value of allotted shares artificially to Rs.100/-. Since the calculation

furnished by the assessee was in violation of the prescribed method as per Rule 11UA, therefore, the Assessing Officer rejected the calculation of valuation of the fair market value of shares allotted and calculated the value of shares as under:-

$$\frac{(A-L)}{PE} \times PV$$

$$\frac{(6407755 - 5000)}{7,60,000} \times 10 \quad \text{i.e., Rs.84.24 per share}$$

4. The Assessing Officer accordingly treated the excess of Rs.15.76 per share (i.e., 100-84.24) as the excess consideration received amounting to Rs.2,83,68,000/- for allotment of shares by the company and brought the same to tax in the hands of the assessee u/s 56(2)(viib) of the IT Act.

5. In appeal, the Id.CIT(A) upheld the action of the Assessing Officer by observing as under:-

“5.2 Ground Nos. 1 to 4 relate to the addition of Rs. 2,83,68,000/- made by the AO by invoking the provisions of section 56(2)(viib) of the Act. On perusal of the audited financials of the appellant company as on 31.03.2014, it is evident that the issued, subscribed & paid up capital of the appellant was Rs. 7,60,000/- as on 31.03.2013, whereas the same got increased to Rs. 1,87,60,000/- as on 31.03.2014. This clearly shows that during the relevant previous year the appellant has issued 18,00,000 shares with face value of Rs.10/- per share to the tune of Rs. 1,80,00,000/-. The audited Balance Sheet of the appellant as on 31.03.2014 also shows that securities premium account has increased by Rs. 16,20,00,000/-. As such, during the year, appellant received share capital of Rs. 18,00,00,000/- including share premium @Rs. 90/- per share. Other current liabilities of the appellant remained unchanged at Rs. 5,000/-. The Balance Sheet as on 31.03.2014 shows that appellant has no fixed assets. However, under the head current asset, it is seen that cash in hand has increased by a sum of Rs. 910/- as compared to the beginning of the year. Further, in the Balance Sheet, under the

head current asset, appellant has also shown inventories as on 31.03.2014 at Rs. 18,61,56,900/- as against Rs. 61,56,900/- as on 31.03.2013. As such, inventories has got increased by a sum of Rs. 18,00,00,000/- which is equivalent to the share capital received by the appellant during the year. The aforesaid analysis clearly reveals that on account of the receipt of the share capital, there is no increase in any fixed asset or cash, however there is increase in the inventory of the equivalent amount. This fact is further confirmed by the appellant as it has issued 9,00,000 shares each to M/s Elecon Securities Pvt. Ltd. and M/s Ordinary Financial Services Pvt. Ltd. @Rs. 100 per share and in consideration of the aforesaid shares, the appellant has not received any sum in cash, but has received share capital of the equivalent amount from the aforesaid two companies, which are reflected as inventory in its Balance Sheet as on 31.03.2014. During the assessment proceedings, the AO in accordance with Rule 11UA asked the appellant to furnish the fair market value of the shares in order to examine the taxability under the provisions of section 56(2)(viib) of the Act. The appellant furnished valuation computing the fair market value at Rs. 99.36/- per share, and contended that since the shares had been allotted @Rs. 100 per share, as such, no addition is warranted u/s 56(2)(viib) of the Act. The AO examined the valuation furnished by the appellant and held that valuation furnished by the appellant is incorrect as appellant has not taken the value of asset before the introduction of the shares. The AO further computed the fair market value of the shares at Rs. 84.24 per share in accordance with Rule 11UA(2) by adopting the figures prior to the allotment of the shares. Thereafter difference of fair market value as computed by the AO and value at which shares were allotted was brought to tax u/s 56(2)(viib) of the Act by making an addition of Rs. 2,83,68,000/-.

5.3 The appellant has challenged the aforesaid addition by contending that it is incorrect as appellant has not received any money as consideration for the shares, but has received shares of the equivalent amount from M/s Elecon Securities Pvt. Ltd. and M/s Ordinary Financial Services Pvt. Ltd to whom it had allotted the shares. It has been submitted by the appellant that the aforesaid provision of section 56(2)(viib) has been inserted to check introduction of unaccounted funds in the company in the garb of share premium. I hold that the aforesaid submission of the appellant is not in accordance with the mandate of the statutory provision of section 56(2)(viib) as it provides that 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 as exceeds the fair market value of the shares shall be chargeable to tax under the head income from other sources. The expression used by the legislature is "any consideration" and not "any sum of money" as has been used in clause (v), (vi), (vii)(a) of section 56(2) of the Act. Therefore if an assessee received consideration in any form be it money or otherwise, in respect of the issue of the shares, which exceeds the fair market value, the same can be brought to tax under this section. In the instant case, in consideration of the allotment of the shares, the appellant has received shares of the equivalent

amount of the allottee companies. Therefore, 'consideration' for the allotment of the shares in the instant case was shares of the allottee companies. As such, now the only question is whether the consideration for the allotment of the shares is at fair market value or not. If the consideration received by the appellant is at fair market value, then no addition can be made and if it is otherwise, the excess would be chargeable to tax as income from other sources.

5.4 The second contention of the appellant is that in case of exchange of asset there can be no difference between the value of asset received and asset given, since the book value of shares received as well as issue price of shares allotted was the same and therefore no difference in the valuation thereof could be alleged. It is an admitted fact that shares of the allottee companies have been received at book value, as such, the consideration for the allotment of the shares was the shares of the allottee companies at book value. The appellant has failed to appreciate that under the statutory provision, if the consideration of the allotment of shares exceeds the fair market value of the shares issued, difference would be taxable. The determining factor for taxability u/s 56(2)(viib) is the fair market value of the shares of the appellant company, and consideration for such shares, and if there is difference the same can definitely be brought to tax. Here in this case, the AO in accordance with the rules has computed the fair market value of the shares of the appellant company at a value lesser than the consideration, and hence the contention of the appellant is not acceptable and therefore rejected.

5.5 The last contention of the appellant is that fair market value of the shares as computed by the AO @Rs. 84.24 per share is not correct and the fair market value of the shares is Rs. 99.36 per share as computed in the valuation report submitted before the AO. It has been contended by the appellant that as per clause (b) of Rule 11U of the Income Tax Rules, Balance Sheet for the purpose of determining fair market value has been defined to mean the Balance Sheet as drawn on the valuation date and since valuation date in the case of the appellant company has been 31.03.2014 and accordingly Balance Sheet as was prepared on the aforesaid date and audited by the Chartered Accountant was to be adopted for the purpose of determining fair market value of the shares. It is seen that in the valuation report, the valuer has adopted the figures of the Balance Sheet as on 31.03.2014 while computing the fair market value of the shares, which includes the figures after the issue of the shares. The aforesaid approach of the assessee is apparently incorrect and not in accordance with the extant Rules. The valuation date has been defined in Rule 11 U(j) which reads as under:

"valuation date" means the date on which the property or consideration, as the case may be, is received by the assessee.

Therefore, as per the aforesaid Rule, valuation of the shares is to be made immediately prior to the receipt of the consideration and not subsequent to the receipt of the consideration for the allotment of the shares. Here in this case, in

the valuation report, the valuer has adopted the figures after the receipt of the consideration, as prior to the receipt of the consideration the value of inventory was merely at Rs. 61,56,900/- and after the receipt of the consideration the same has got increased to Rs. 18,61,56,900/-, which is apparently incorrect.

5.6 Further, the Balance Sheet has also been defined in Rule 11U(b) which reads as under:

“(b) "balance-sheet", in relation to any company, means,—

(i) for the purposes of sub-rule (2) of rule 11UA, the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date which has been audited by the auditor of the company appointed under section 224 of the Companies Act, 1956 (1 of 1956) and where the balance-sheet on the valuation date is not drawn up, the balance-sheet (including the notes annexed thereto and forming part of the accounts) drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the annual general meeting of the shareholders of the company; ”

The aforesaid Rule makes it clear that Balance Sheet means Balance Sheet as drawn up on the valuation date which has been audited by the auditor of the company and where the Balance Sheet on the valuation date is not drawn up, the Balance Sheet drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the Annual General Meeting (AGM) of the shareholders of the company. In this case, on the date of the receipt of the consideration, the Balance Sheet of the appellant company was not drawn up, as same was drawn up only on 31.07.2014 which is evident from the audited Balance Sheet submitted by the appellant. Therefore, clause (b) and (j) of Rule 11U make it clear that for computing the fair market value of the shares, the value of the asset and liabilities as stated in the audited Balance Sheet immediately prior to the receipt the consideration should be adopted. If on the date of receipt of the consideration, the Balance Sheet was not drawn up, then the Balance Sheet drawn up as on a date immediately preceding the valuation date should be adopted i.e. Balance Sheet of the immediately preceding year should be adopted. Here in this case, on the valuation date, i.e. 31.03.2014, the Balance Sheet was not drawn up by the auditors, as audited financials were drawn up only on 31.07.2014 and hence the value of assets and liabilities as stated in the Balance Sheet of the immediately preceding year i.e. 31.03.2013 should be adopted. I find that the AO has correctly computed the fair market value of shares @ Rs. 84.24 per share by adopting the value of assets and liabilities as on 31.03.2013, which is absolutely in accordance with Rule 11UA(2) r/w clause (b) & (j) of Rule 11U, and hence the addition of Rs. 2,83,68,000/- made by the AO is confirmed. Accordingly Ground Nos. 1 to 4 of appeal are dismissed.”

6. Aggrieved with such order of the CIT(A), the assessee is in appeal before the Tribunal by raising the following grounds:-

“1. That the CIT(A) erred in upholding the addition of Rs.2,83,68,000/- made by the Assessing Officer in the facts and circumstances of the case of the appellant without appreciating that no addition was called for in the case of the appellant in terms of section 56(2)(viib) of the Act read with Rule 11UA of Income-tax Rules.

2. That the order passed by the CIT(A) is without correctly appreciating and discussing the facts and circumstances of the case of the appellant.

3. That the appellant seeks the liberty to add, amend and modify any of the grounds at any time before hearing of the appeal.”

7. The Id. counsel for the assessee strongly challenged the order of the CIT(A) in confirming the addition made by the Assessing Officer. Referring to the object and purpose of the provisions of section 56(2)(viib) inserted by the Finance Act, 2012 w.e.f. 01.04.2013 and the speech of the Finance Minister while introducing the Bill, he submitted that the same was meant to curb generation and use of unaccounted money. Use of unaccounted money will be relevant only when the amount of premium given by the new shareholders has benefitted the existing shareholders. In other words, for the applicability of the provisions of section 56(2)(viib), the existing shareholders should have provided unaccounted money to the new shareholders who have to give money to the company by way of high premium on the shares allotted to them. However, in the case of the assessee company, the existing shareholders, who were the two shareholders and directors of the company, were holding only 76000 shares of Rs.10 each. The total funds belonging to the shareholders before allotment of shares was Rs.64,01,920/-. Accordingly, the existing shareholders on that basis who were

entitled to receive the funds in the case of winding up, would be at Rs.84.23 per share. The company has issued further 1800000 shares at Rs.100/- each and, thereafter, the total number of shares had gone up to 18,76,000 and the total funds belonging to the shareholders including the premium received on allotment becomes Rs.18,64,02,502/-. On this basis, the intrinsic value of shares comes to Rs.99.36 per share. Accordingly the benefit which can accrue to the existing shareholders on 76000 shares could be only the difference between the intrinsic value of the shares of existing shareholders prior to allotment of shares and after the allotment which is Rs.15.13 and on this basis, the increase in the value of existing shareholders comes to Rs.11,52,000/-. Therefore, it cannot be alleged that there has been any intention to introduce any unaccounted money as a result of premium on account of new shares. According to him, in any case, the benefit going to the existing shareholders pursuant to issue of new shares comes to only Rs.11,52,000/-.

8. Referring to the copy of the assessment order in the case of M/s Ganesh Credit and Investment Pvt. Ltd., a sister concern of the assessee, he submitted that under identical circumstances the Assessing Officer, in the order passed u/s 143(3), has accepted similar calculation where the assessee there also has issued 1800000 equity shares to M/s Elecon Securities Pvt. Ltd. and M/s Ordinary Financial Services Pvt. Ltd. Referring to the following decisions, the ld. counsel for the assessee submitted that the addition made by the Assessing Officer and sustained by the CIT(A) is not proper:-

- i) ITO vs. Vital Communication Ltd., ITA No.2448/Del/2007, order dated 15th June, 2016;
- ii) Vaani Estates Pvt. Ltd. v. ITO, ITA no.1352/Chny/2018 decided on 27.08.2018.
- iii) Vora Financial Services P. Ltd. v . ACIT, ITA No.532/Mum/2018 decided on 29.06.2018.
- iv) DCIT v. Dr. Rajan Pai (2016) 48 ITR (Trib) 170 (Bangalore).
- v) Extracts of certain decisions of Supreme Court
- vi) K.P. Varghese v. ITO, (1981) 131 ITR 597 (SC).
- vii) CIT v. JH Gotla (1985) 156 ITR 323 (SC).
- viii) Paharpur Cooling Towers Ltd. v. CIT (2011) 61 DTR 309.
- ix) CIT V. Modipon Ltd. (2011) 334 ITR 106 (HC)
- x) CIT v. Modipon Ltd., Paharpur Cooling Towers Ltd. (2018)400 ITR 1 (SC)
- xi) Pr. CIT v. IDMC Ltd., (2017) 393 ITR 441 (Guj.)
- xii) Pr. CIT v. IDMC Ltd., (2017) 10 TMI 732 (SC).
- xiii) CIT v. Suresh Nanda (2015) 375 ITR 172 (Del).
- xiv) CIT v. HCL Technologies Ltd. (2018) 404 ITR 719 (SC).
- xv) Southern Motors v. State of Karnataka and Ors, AIR 2017 SC 476.

9. The ld. counsel for the assessee, referring to the Stay Application No.129/Del/2019, order dated 6th March, 2019 submitted that while granting stay to

the assessee, the Tribunal observed that no unaccounted money is involved nor any money transaction took place. He accordingly submitted that the addition made by the Assessing Officer and sustained by the CIT(A) be deleted and the appeal filed by the assessee be allowed.

10. The ld. DR, on the other hand, strongly relied on the order of the CIT(A). He submitted that the assessee in the instant case has introduced share capital by issuing 1800000 equity shares of Rs.10 each at a premium of Rs.90 per share aggregating to Rs.18 crores to two companies, namely, M/s Elecon Securities Pvt. Ltd. and M/s Ordinary Financial Services Pvt. Ltd. on 31.03.2014. The assessee has not made the valuation of shares as prescribed under Rule 11UA(2) and has not taken the value of assets before introduction of share capital received through fresh allotment. Since valuation was not in accordance with law, the Assessing Officer computed the fair market value at Rs.84.24 per share and, accordingly, made addition of Rs.2,83,68,000/-. He referred to the provisions of section 56(2)(viib) and the provisions of Rule 11UA(2) and submitted that the computation made by the Assessing Officer and upheld by the CIT(A) is proper. Referring to the decision of the Delhi Bench of the Tribunal in *Agro Portfolio (P) Ltd. vs. ITO [2018] 94 taxmann.com 112 (Delhi)*, he submitted that the Tribunal in the said decision has held that where the assessee allotted shares to a company and fair market value of shares was done by a Merchant banker only on basis of Direct Cash Flow (DCF) method, only depending on data supplied by assessee and no evidence was produced for

verifying correctness of data supplied by assessee, Assessing Officer was justified in rejecting DCF method and adopting Net Asset Value method. Referring to the decision in the case of *Sunrise Academy Of Medical Specialities India Pvt Ltd Vs ITO [2018] 96 taxmann.com 43 (Kerala)* reported in 409 ITR 109, he submitted that the Hon'ble Kerala High Court in the said decision has held that in case of a company in which public is not substantially interested, any premium received by said Company on sale of shares, in excess of its face value, would be treated as income from other sources, satisfactory explanation under section 68 would not save Company from excess share premium taxability under section 56(2)(viib). Referring to the decision of the Hon'ble Kerala High Court in the case *Sunrise Academy Of Medical Specialities India Pvt Ltd Vs ITO [2018] 94 taxmann.com 181 (Kerala)*, he submitted that the Hon'ble Kerala High Court in the said decision has held that share premium received by a company over and above the fair market value which was not correctly offered to tax, is chargeable to tax u/s 56(2)(viib) as income from other source, satisfactory explanation under section 68 would not save Company from excess share premium taxability under section 56(2)(viib). He also relied on the decision of the Mumbai Tribunal in the case of *Madhurima International Pvt. Ltd Vs Pr.CIT-3 Mumbai (I.T.A. No.421/Mum/2017, order dated 28th April, 2017, A.Y.2013-14.*

11. We have considered the rival arguments made by both the sides, perused the orders of the authorities below and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the

instant case has received share capital of Rs.18 crores by issuing 18 lakhs equity shares of Rs.10 each at a premium of Rs.90 per share to two companies, namely, M/s Elecon Securities Pvt. Ltd. and M/s Ordinary Financial Services Pvt. Ltd. on 31.03.2014. We find the Assessing Officer rejected the valuation done by the assessee on the ground that the valuation so made by the assessee is not as per the method prescribed for valuation of the unquoted shares as per Rule 11UA(2) in a proper manner. We find the Assessing Officer calculated the fair market value of the unquoted shares at Rs.84.24 per share and, accordingly, made addition of Rs.2,83,68,000/- to the total income of the assessee being the excess of Rs.15.76 per share for 18 lakhs shares. We find the Id.CIT(A) upheld the action of the Assessing Officer, the reasons for which have already been reproduced in the preceding paragraphs. It is the submission of the Id. counsel for the assessee that in view of the provisions of section 56(2)(viib) and in the light of the speech of the Finance Minister, the provision should be applicable only when there is investment of unaccounted money. Since in the instant case, there is no such introduction of unaccounted money and the intrinsic value of shares comes to Rs.99.36 per share, therefore, no addition is called for. It is also his submission that while disposing the Stay Application the Bench had observed that no unaccounted money is involved nor any money transaction took place.

12. We do not find any merit in the argument of the Id. counsel for the assessee. A perusal of the Rule 11U(b) as reproduced by CIT(A) at para 5.6 of his order makes

it clear that the balance sheet means the balance sheet as drawn up on the balance sheet date which has been audited by the auditor of the company and where the balance sheet on the valuation date has not been drawn up the balance sheet drawn up as on a date immediately preceding the valuation date which has been approved and adopted in the AGM of the shareholders of the company. We find in the instant case, on the date of receipt of the consideration the balance sheet of the assessee company was not drawn up as the same was drawn up only on 31st July, 2014 which is evident from the audited balance sheet filed. Clause (b) and clause (j) of Rule 11UA makes it clear that for computing fair market value of the shares the value of the assets and liabilities as stated in the audited balance sheet immediately prior to the receipt of consideration should be adopted. If, on the date of receipt of the consideration, the balance sheet was not drawn up, then, the balance sheet drawn up as on a date immediately preceding the valuation date should be adopted i.e., the balance sheet of the immediately preceding year should be adopted. We find, in the instant case, on the valuation date i.e., on 31.03.2004, the balance sheet was not drawn up by the auditor as audited financials were drawn up only on 31st July, 2014 and, therefore, we concur with the observation of the Id.CIT(A) that the valuation of assets and liabilities in the balance sheet of the immediately preceding year i.e., 31.03.2013 should have been adopted. Since the valuation done by the assessee was not in accordance with the Rule framed for valuation of unquoted shares i.e., the assessee has not taken the value of assets before introduction of share capital received through fresh allotment and since the Assessing Officer has correctly determined the valuation of the unquoted equity

shares which has been upheld by the CIT(A), therefore, we do not find any infirmity in the order of the CIT(A). Accordingly, the same is upheld and the grounds raised by the assessee are dismissed.

13. In the result, the appeal filed by the assessee is dismissed.

The decision was pronounced in the open court on 16.07.2019.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMFBER

Dated: 16th July, 2019

dk

Copy forwarded to

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

Asstt. Registrar, ITAT, New Delhi