

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER) AND
SHRI SANDEEP SINGH KARHAIL (JUDICIAL MEMBER)**

**ITA No. 12/MUM/2022
Assessment Year: 2018-19**

ACIT (TDS)-2(2),
Room No. 322, MTNL Office,
Cumballa Hill,
Mumbai-400026.

Appellant

Vs.

Sula Vineyards Pvt. Ltd.,
901, Hubtown Solaries, N.S.
Phadke Marg,
Mumbai-400029.

PAN No. AABCN 7126 Q

Respondent

Revenue by : Mr. Hoshang B. Irani, DR
Assessee by : Mr. Niraj Singh, AR

Date of Hearing : 28/07/2022
Date of pronouncement : 16/09/2022

ORDER

PER OM PRAKASH KANT, AM

This appeal by the Revenue is directed against order dated 28/10/2021 passed by the Ld. Commissioner of Income-tax (Appeals)-53, Mumbai [in short the Ld. CIT(A)] in relation to in order dated 22/03/2019 passed under section 201(1)/201(1A) of the Income-tax Act, 1961 (in short 'the Act') by the Assessing Officer



for assessment year 2018-19. The Ld. CIT(A) has passed a consolidated order for assessment year 2012-13; 2013-14; 2014-15; 2015-16; 2016-17; 2017-18 and 2018-19. The present appeal preferred is against the order for assessment year 2018-19. The grounds raised by the Revenue are reproduced as under:

- i. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating the fact that the Fair Market Value of the shares of the assessee company had been established by means of the trade between unrelated parties leading to establishment of a definitive value.*
- ii. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in completely placing reliance on the value of per share of the assessee company determined by the Merchant Banker and not taking cognizance of a determinative value established by trade between unrelated parties during the year under consideration itself.*
- iii. *Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not appreciating that even though the trade between unrelated parties took place after the exercise of option under ESOP scheme by the employee, the said trade had taken place during the same financial year whereby the value of perquisite based on the fair market value so established could have been added to the salary income of*



the employee and appropriate TDS done by the assessee company.

- iv. *Whether on the facts and in the circumstances of the case and in law, the Ld.CIT(A) erred in rejecting the Fair Market Value (FMV) of Rs.850/- per share adopted by the Assessing Officer while upholding the value of Rs.194.15 per share computed by the Merchant Banker without appreciating that section 17(2)(vi) r.w. Rule 3(8) provides for adopting FMV of the shares which could not have been less than the actual trade @ Rs.850/- per share executed between the unrelated parties during the year itself.*

2. Briefly stated facts of the case are that the assessee is engaged in manufacturing and sales of wines in India. A survey action under section 133A of the Act was carried out in the case of the assessee on 10/10/2018, wherein according to the Assessing Officer, the assessee violated provisions related to deduction of tax at source including section 192 of the Act. The issue raised in present appeal by the Revenue relates to short-deduction of tax on perquisites to Mr. Rajeev Samant, the then director of the assessee company. According to the Assessing Officer, the assessee company had allotted 40,000 warrants to Sh. Rajjeev Samant during the Board of



Directors meetings held on 09/02/2010 at the option of conversion into shares at the rate of ₹155 per share. Out of the 40,000 warrants, 20,000 warrants were converted to shares in the month of June 2017 and balance 20,000 warrants were converted into shares in the month of February 2018. Mr Rajeev Sawant paid ₹ 62 lakh to the company for the 40,000 shares.

2.1 As per the section 17(2)(vi) of the Act the value of any specified security allotted or transferred, directly or indirectly by the employer, free of cost or at concessional rate, is to be treated as perquisites in the hands of the employee and the company is required to deduct tax at source on the same in terms of section 192 of the Act. The value of the specified security has been defined in section 17(2)(vi) of the Act as the fair market value of the specified security on the date of which the option is exercised by the employee as reduced by the amount actually paid by the employee in respect of security or shares. The Rule 3(8) of the Income-tax



Rules, 1962 prescribe for determination of market value of any equity shares on the date of exercising option by the employee. The Rule 3(8)(iii) prescribe determination of fair market value in case of the shares in the company, which is not listed on recognized stock exchange. According to the rule, in such cases fair market value of shares in the company shall be as determined by a merchant banker on the specified date i.e. the date of exercising the option or any date earlier than the date of exercising this option not being a date which is more than 180 days earlier than the date of exercising the option.

2.2 As required by the above sections and the Rules, the company got fair market value of shares determined through a merchant banker, who worked out the fair market value of the shares at ₹194.15 per share. The assessee company accordingly worked out the perquisites in the hands of Mr. Rajeev Samant as under:

	Particulars	Amount (₹)
a.	Fair Market Value of the Shares	194.15
b.	Exercise Price of the Shares	155.00
c.	Perquisite per share [(a)-(b)]	39.15



d.	Total Shares Issued	40,000
e.	Total Perquisite [(c)*(d)]	15,66,000

2.3 The assessee company accordingly deducted tax at source (TDS) on the perquisite amount of ₹15,66,000/- in terms of section 192 of the Act and deposited the tax into Government account.

2.4 But according to the Assessing Officer, during relevant assessment year M/s Reliance capital had sold shares of the assessee company at the rate of ₹ 850 per share and therefore fair market value of the specified security (equity share of assessee company) should have been computed taking the market value at the rate of ₹850 per share. The Ld. Assessing Officer accordingly computed the quantum of perquisite and liability in terms of section 201(1) and interest under section 201(1A) of the Act as under:

“5.3 After looking into facts of the case and all the submission made by the assessee and analyzing the facts of the case the contention of the assessee is not acceptable for the reasons recorded as under:

- 1. The fact is the assessee-company has sold its share to Rajeev Samat @ ₹155 per share against the 40000 share warrants*



issued on 09.02.2010. In computation of tax liability u/s 192 for AY 2017-18, the assessee company added different of market value and sale value of the shares i.e. 39.15 per share as perquisite and TDS deducted u/s 192 of the Act.

- 2. It is observed from the sale purchase transactions between Reliance capital who was holding certain shares of assessee company have sold its holding @ 80 per share. In the light of these facts, the statement u/s 131 of Mr. Rajeev Samant, the Director, recorded during the course of survey action and sought its explanation on this issue.*
- 3. In response to above said query, the assessee has filed its working of valuation of shares and nothing else. It is fact that the shares of the company (Sula Vineyards Pvt. Ltd.) were sold by Reliance Capital to third party @ 850 per share in FY 2017-18. Neither director refused/denied the price of share in its submission nor filed any evidence of sale purchase transactions of the said shares.*
- 4. To avoid the tax liability the assessee emphasizing on the valuation of shares rather adopting its market value of shares. The best market price of share of a company is always be the price which it fetched in the market. The Reliance capital sold its holding @ 850 per share in the month of March 2018 and it is the best market value of the share of the company which is at par with that of value of shares in the stock market.*
- 5. What is Fair Market Value?*

Fair market value is an estimate of market value of a property, based on what knowledgeable, willing and unpressured buyer



would probably pay in knowledgeable, willing and unpressured seller in the market.

In the light of the above definition the assessee would have to take the market value which Reliance capital fetched while selling its equity holding of assessee company.

6. The option of exercising is clearly mentioned in Rule 3(8) of the Income Tax Rules in cases where there is no sale purchase transactions in the shares of any private company. However, it is evident from the transactions itself the reliance capital has sold its holding @ ₹850 per share and it is duly recorded in the registry. Hence, the applying of fair market value as per the prevailing market rates is the appropriate method.
7. In view of the above said observation, it is seen the assessee has credited the appropriate credit of perquisites in the salary of the director Rajeev Samant, hence the default thereof u/s 192 is worked out as under :

	Particulars	Amount (₹)
a.	Fair Market Value of the Shares	850
b.	Exercise Price of the Shares	155.00
c.	Perquisite per share [(a)-(b)]	695
d.	Total Shares Issued	40,000
e.	Total Perquisite [(c)*(d)]	2,78,00,000
	Less : Perquisite added	15,66,000
		2,62,34,000

Sr. No.	Name of the Party	Nature of Transaction	Date of Payment or Credit whichever is earlier	Amount paid of credited ₹	Amount of TDS ₹	Short/non-deduction to be charged u/s 201(1)	Interest u/s 201(1A) (months)
1.	Rajeev Samant	Perquisites in Salary	Various dates	₹2,62,34,000	Nil	₹78,70,200	₹8,65,722



3. On further appeal, the Ld. CIT(A) deleted the liability raised under section 201(1) and interest under section 201(1A) of the Act of observing as under:

“60. Ground No. 4 is related to TDS liability of ₹78,70,200/- u/s 192 in respect of perquisites on conversion of warrants into shares under ESOP.

60.1 During the course of TDS proceedings, the AO observed that Mr. Rajeev Samant, an employee of the company was allotted warrants under ESOP scheme on 09.02.2010. He exercised the option and was issued 40000 shares into equity shares during 2017-18 @ ₹155 per shares. During the same year shareholders of the Appellate company, i.e. Reliance Capital had sold their shares @ 850 per share to a third party. The AO was of the view that the FMV should be considered of ₹850 per share and as against FMV of the shares determined at ₹194.1 per share by a merchant banker under Rule 3(8). Hence, the AO considered the difference of ₹39.15 per share as perquisite at ₹15,66,000/-. Accordingly, the AO calculated the short deduction of tax u/s 192 of the Act at ₹78,70,200/-.”

4. In the above finding, inadvertently, the Ld. CIT(A) has referred quantum in dispute at ₹78,70,200/- whereas correct amount in dispute in the year under consideration is of ₹2,62,34,000/-.



5. Aggrieved, the Revenue is in appeal by way of raising grounds as reproduced above. In the grounds raised, the Revenue is aggrieved by way of deletion by the Ld CIT(A) of the disallowance made by the Assessing Officer of ₹2,62,34,000/-

6. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The assessee issued 40,000 warrants to Sh Rajeev Samant (the Managing Director) on 09/02/2010 at the option of converting into shares at the ₹155 per share. The employee Sh. Rajeev Samant exercised his option in the assessment year under consideration and converted those warrants into equity shares. The assessee as per section 17(2)(vi) of the Act treated the value of the said equity shares in terms of Explanation below the section, according to which fair market value of the said equity shares was reduced by the amount actually paid. Further, the Rule 3(8) of the Rules, provided that in case of shares of the company, which is not listed on the recognized



stock exchange, the fair market value shall be such value of the shares in the company has determined by a merchant banker. The assessee adopted the fair market value of ₹194.15 per share determined by a merchant banker and accordingly worked out amount of perquisite to Sh. Rajeev Samant at ₹15,66,000/-. But the contention of the Revenue is that during the year under consideration shares of the assessee company were sold in an independent transaction at ₹850 per share and therefore the fair market value should have been taken at ₹850 per share and the perquisite should accordingly be computed at ₹2,78,00,000/- and tax should have been deducted on said amount accordingly. The assessee has deducted tax on the perquisite amount of ₹15,66,000/- and therefore in view of the Assessing Officer, tax has not been deducted on the balance perquisite amount of ₹2,62,34,000/-, and therefore, same is disallowable in terms of section 40(a)(ia) of the Act.



6.1 The Ld. CIT(A) in the instant assessment year has followed his finding in assessment year 2012-13, The finding of the Ld. CIT(A) in assessment year 2012-13 is reproduced as under:

“6.3 The findings of the AO in the assessment order and the written submission of the appellant has been considered.

The only dispute is regarding what should be the FMV of shares to determine the value of perquisites in respect of exercising of option under ESOP granted to the employee of the company.

Mr. Ajoy Shaw, an employee of the company opted for 5,000 shares under ESOP scheme on 12.08.2008. He exercised the option and converted 1500 shares into equity shares during 2011-12 @ Rs. 155 per share. The appellant has taken FMV of the shares at Rs. 104.54 per share which was determined by a merchant banker under Rule 3(8). According to the AO, the FMV should be Rs. 260 per share, at which other two shareholders of the Appellant company had sold the shares to a third party. The AO was of the view that

Perquisite defined under section 17 of the IT Act includes the value of any specified security or sweat equity shares allotted or transferred, directly or indirectly, by the employer, or former employer, free of cost or at concessional rate to the assessee. The Value of the perquisite in respect of allotment under ESOP is to be calculated as per Sub rule (8) of Rule 3 of the IT Rule. In the case of the appellant company the shares of the company are unlisted,



therefore, the FMV is to be determined as per Sub rule (8) (iii) of Rule 3 of the IT Rule. Sub rule (8) (ii) of Rule 3 of the IT Rule provides that in a case where, on the date of exercising of the option, the share in the company is not listed on a recognized stock exchange, the fair market value shall be such value of the share in the company as determined by a merchant banker on the specified date.

In the case of the appellant, as on the date of exercising of option, the shares of the company were not listed on a recognized stock exchange, therefore, the fair market value should be the value of the share of the company as determined by a merchant banker on the specified date. The Merchant banker has determined the FMV of the shares at Rs. 104.54/- as on the date of exercising the option. The shares were issued to the employee @ Rs. 155 per share. The issue price is more than the FMV determined under Rule 3(8) of the IT Rules, there is no benefit or perquisites given by the appellant company to the employee on issuing the shares under ESOP. The AO has also not challenged the FM of the shares determined by the merchant banker. Therefore, the appellant was not liable to deduct TDS on such grant of shares under ESOP. The TDS liability of Rs. 47 250/- imposed by the AO is deleted.

Accordingly, the ground no.3 of the appeal is allowed."

6.2 Thus, the issue-in-dispute in the instant case is whether the fair market value of equity shares of the assessee as on the date of exercising of the option by the employee for converting the warrant



into shares, as determined by the merchant banker should be adopted or fair market of equity shares should be adopted on the basis of a real-time transactions of sale of equity shares of the company.

6.3 We find that for the purpose of computing fair market value of the equity shares allotted to the employee Sh. Rajeev Samant, the assessee has followed the procedure laid down in Rule 3(8) of the Rules. Under the rules, in case of shares of unlisted company the fair market value shall be the value determined by a merchant banker. The merchant banker has also been defined in the Rules. The said rule has been reproduced by the Ld. Assessing Officer in the impugned order. Same is extracted again for ready reference:

"The extract of the said Rule is provided below for ease of reference.

(8)(i) For the purposes of sub-clause (vi) of clause (2) of section 17, the fair market value of any specified security or sweat equity share, being on equity share in a company, on the date on which



the option is exercised by the employee, shall be determined in accordance with the provisions of clause (ii) or clause (iii).

(ii) In a case where, on the date of the exercising of the option, the share in the company is listed on a recognized stock exchange, (iii) In a case where, on the date of exercising of the option, the share in the company is not listed on a recognised stock exchange, the fair market value shall be such value of the share in the company as determined by a merchant banker on the specified date. (iv) For the purpose of this sub-rule,

- a. "closing price" of a share on a recognised stock exchange on a date shall be the price of the last settlement on such date on such stock exchange*

Provided that where the stock exchange quotes both "buy and "sell" prices, the closing price shall be the "sell" price of the last settlement;

- b. "merchant banker means category I merchant banker registered with Securities and Exchange Board of India established under section 3 of the Securities and Exchange Board of India Act, 1992 (15 of 1992);*

- c. "opening price" of a share on a recognised stock exchange on a date shall be the price of the first settlement on such date on such stock exchange:*



Provided that where the stock exchange quotes both "buy" and "sell" prices, the opening price shall be the "sell" price of the first settlement;

- d. "recognized stock exchange" shall have the same meaning assigned to it in clause (f) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956):*
- e. "specified date" means,*
 - i. the date of exercising of the option; or*
 - ii. any date earlier than the date of the exercising of the option not being a date which is more than 180 days earlier than the date of the exercising."*

6.4 On plain reading of the above Rules, it is evident that fair market value of the specified shares was to be taken as determined by the merchant banker. The assessee following above Rules, has adopted the fair market value of ₹194.15 as determined by the merchant banker. But the contention of the revenue in the grounds raised is that value as per the actual trade at the rate of ₹850 per share executed between the unrelated parties should have been adopted. No decision has been cited by the Ld. Department Representative, which could support the case of the Revenue and therefore we do not find any basis for adopting the fair market value



as suggested by the Ld. Departmental Representative based on an independent transaction of sale of shares of the assessee company between unrelated party. Once under the Rules it has been clearly specified that fair market value determined by the merchant banker has to be taken as the value of the shares and the assessee followed those rules and computed quantum of perquisite and consequent liability of TDS. The Ld. CIT(A) has accordingly deleted the disallowance. In the grounds raised before us, the Revenue has nowhere challenged correctness of fair market value determined by the merchant banker. Further, during the course of hearing, the Ld. counsel of the assessee filed a copy of the assessment order in the case of Sh. Rajeev Samant i.e. the employee director who received the said equity shares of the assessee company and submitted that no addition has been made on the issue of underreporting of value of perquisite in his hands, and thus department has accepted the quantum of perquisite in his hands. The Ld. DR could not controvert



this factual aspect pointed out by the Ld. counsel of the assessee, though in our opinion, any omission on the part of the Assessing Officer in the case of the recipient cannot give right to the assessee to take benefit of the said omission.

6.5 In view of above discussion, we do not find any error in the order of the Ld. CIT(A) on the issue-in-dispute and accordingly, we uphold the same. The grounds raised by the Revenue are accordingly dismissed.

7. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court in 16/09/2022.

Sd/-

Sd/-

(SANDEEP SINGH KARHAIL)
JUDICIAL MEMBER

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

Mumbai;

Dated: 16/09/2022

Dragon Legal/Rahul Sharma, Sr. P.S.



Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary)
ITAT, Mumbai