

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SHRI PAVAN KUMAR GADALE, JUDICIAL MEMBER**

ITA No.83/Bang/2019
Assessment year : 2015-16

M/s. Antariksh Softtech Pvt. Ltd., #11/1, KHR House, Palace Road, Bengaluru – 560 017. PAN : AAHCA 1836 G	Vs.	The Income Tax Officer, Ward – 1(1)(2), Bengaluru.
APPELLANT		RESPONDENT
Assessee by	:	Smt. Prathibha, Advocate
Revenue by	:	Shri. Tshering Ongela, Addl.CIT (DR)(ITAT), Bengaluru
Date of hearing	:	25.06.2020
Date of Pronouncement	:	09.07.2020

ORDER

Per A. K. GARODIA, AM:

This appeal is filed by the assessee and the same is directed against the order of learned CIT(A)-1, Bengaluru, dated 30.11.2018, for Assessment Year 2015-16.

2. The grounds raised by the assessee are as under:

1. *The Learned CIT (A) erred in passing the order in the manner that he did.*
2. *The learned CIT(A) erred in making addition u/s 56(2) (viib) of the Act to the tune of Rs. 199,20,618/- without appreciating the explanation of the Appellant.*

3. *The learned CIT (A) failed in giving sufficient opportunities to the Appellant to submit the details called for.*
4. *The learned CIT (A) ought to have appreciated that said section 56(2) (viib) of the Act are not made applicable to the shares issued to NRI mainly to encourage Foreign Investments.*
5. *The learned CIT(A) ought to have appreciated the alternative ground that valuation of shares is done fully in compliance to Rule 11 U a (2) (b) and Rule 11 U (a) (i) and there is no excess money is calculated.*
6. *The learned CIT (A) erred in levying the interest u/s 234B of the Act.*
7. *Without Prejudice, the additions are excessive, arbitrary and unreasonable and ought to be deleted in full.*
8. *For these and other grounds that maybe urged at time of hearing of the appeal the assessee prays that the appeal may be allowed.*

3. In course of hearing, it was submitted by learned AR of the assessee that addition was made by the AO by invoking the provisions of section 56(2) (viib) of the Income Tax Act, 1961. She submitted that in the facts of the present case, provisions of this section is not applicable in respect of the shares issued by the assessee company to Smt. Vijayalakshmi because she is a non-resident in the present year and the provisions of this section are applicable only in respect of the shares issued by the company to a resident. In this regard, she submitted a copy of the passport of this lady to whom shares were issued i.e., Smt. Vijayalakshmi being passport No.F5207571 issued on 19.12.2005 valid up to 18.12.2015 and it was pointed out that the address of that person in this passport is of London and therefore, it cannot be said that Smt. Vijayalakshmi is a resident of India in the present year. At this juncture, the Bench pointed out that having an address of London in the passport is not relevant regarding the residential status of a person and therefore, she has to

bring on record the details of number of days stay in India in the present year of Smt. Vijaya. In reply, it was submitted by learned AR of the assessee that she will file relevant details and evidences in this regard within 10 days and accordingly, she filed written submissions on 03.07.2020 along with a copy of relevant pages of passport of the individual and submitted a certificate also from the assessee company in which it is stated that in the Financial Year 2014-15 relevant to Assessment Year 2015-16, Smt. Vijayalakshmi was in India only for 42 days and details of stay of Smt. Vijayalakshmi in India in this year are that she entered into India on 15.06.2014 and departed from India on 06.07.2014 having a stay in India of 21 days and again, she entered into India on 05.12.2014 and again departed from India on 26.12.2014 and again having a stay in India of 21 days and in this manner, she was in India only for 42 days in Financial Year 2014-15 relevant to Assessment Year 2015-16 which is the present year. Learned DR of the Revenue supported the orders of authorities below and it was also the submission of learned DR of the Revenue that even if this evidence is admitted regarding residential status of Smt. Vijayalakshmi, the matter may be restored back to the file of AO for a fresh decision after examining these evidences because the same were not produced before the AO or before CIT(A).

4. We have considered the rival submissions. First of all, we reproduce the provisions of clause (viib) of sub section 2 of section 56, which is as under:

⁶[(viib) 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

Provided that this clause shall not apply where the consideration for issue of shares is received—

- (i) by a venture capital undertaking from a venture capital company or a venture capital fund ^{66a} [or a specified fund]; or
- (ii) by a company from a class or classes of persons as may be notified⁷ by the Central Government in this behalf.”

5. We also reproduce the relevant portion of section 6 of Income Tax Act, 1961 as under:

“Residence in India.

6. For the purposes of this Act,—

(1) An individual is said to be resident in India in any previous year, if he—

(a) is in India in that year for a period or periods amounting in all to one hundred and eighty-two days or more ; or

*(b) ¹⁹[***]*

(c) having within the four years preceding that year been in India for a period or periods amounting in all to three hundred and sixty-five days or more, is in India for a period or periods amounting in all to sixty days or more in that year.”

6. From the provisions of clause (viib) of sub section 2 of section 56 as reproduced above, it is seen that if a company not being a company in which the public are not 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 and such amount is in excess of fair market value of shares then such excess amount received by the company can be taxed as income from other sources. Hence, it is seen that in order to invoke the provisions of section 56(2)(viib), it is essential that the excess amount is

received by the company from a resident and therefore, this should be first examined as to whether the person from whom any money is received by the company on issue of its shares is resident in India or not in the relevant year. As per para 11 of the Assessment Order, it is noted by the AO that valuation report was questioned vide notice dated 15.12.2017 by invoking section 56(2)(viib) of the Income Tax Act, 1961 and this was the only objection of the AO that the valuation report is incorrect. On page No.7 of the Assessment Order, the AO has reproduced the relevant provisions of section 56(2)(viib) also in which this is noted that this clause of section 56(2)(viib) will apply 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 and if such consideration is in excess of fair market value of the shares then such excess money is chargeable to tax under the head "Income from other Sources" but there is no discussion in Assessment Order on this aspect as to whether the money received by the assessee company from Smt. Vijayalakshmi is an amount received from a resident. As per the provisions of section 6 of Income Tax Act, 1961, reproduced above, an individual will be resident in India in any previous year if he is in India in that year for a period or periods amounting in all 182 days or more or having within the 4 years preceding that year being in India for a period or periods amounting in all to 365 days or more and is in India for a period or periods amounting in all to 60 days or more in that year. Hence, it is very clear that if the person in question was not in India in the relevant previous year for 60 days or more then such a person cannot be said to be a resident in India in that year. As per the copy of passport No. F5207571 submitted before us by learned AR of the assessee along with written submissions, it is seen that the name in the passport is "Vijaya" but as per the Assessment Order, the amount was received from Smt. Vijayalakshmi. This

is also seen that passport copy was not submitted before the AO or CIT(A) and it is submitted before the Tribunal for the first time as an additional evidence. Hence, we feel it proper to restore this matter back to the file of AO for a fresh decision because there is no finding of AO or CIT(A) on this aspect as to whether the said person from whom the amount in question was received by the assessee company was a resident in India or not in the present year. The AO is directed to examine this issue as per law and give a categorical finding as to whether the said person Smt. Vijayalakshmi from whom the amount in question was received by the assessee company was resident in India or not in the present year and thereafter, decide this aspect first as to whether the provisions of section 56(2)(viib) are applicable or not in respect of this amount in question received from Smt. Vijayalakshmi. If it is found that the provisions of section 56(2)(viib) are not applicable because the said person is not a resident in India in the present year then nothing more remains to be decided because in that situation, the provisions of section 56(2)(viib) cannot be made applicable in respect of this amount in question but if it is found that the said person i.e., Smt. Vijayalakshmi is a resident in India in the present year, then the whole issue should be examined and decided by the AO afresh in the light various judicial pronouncements available by now such as (i) the tribunal order rendered in the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO as reported in 175 ITD 10 (Bang.), (ii) the tribunal order rendered in the case of M/s. VBHC Value Homes Pvt. Ltd., Vs. ACIT in ITA No. 2541/Bang/2019 dated 12.06.2020, (iii) the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd. vs. PCIT as reported in 164 DTR 257. In these judicial pronouncements, it was held that AO cannot change the method of valuation of shares chosen by the assessee which is DCF Method in the present case and in these three cases. If the AO finds that the said person Smt. Vijayalakshmi is a resident in India in

the present year, the effect of provisions of section 56(2) (viib) should be decided by him afresh in the light of these judicial pronouncements as noted above.

7. In the result, assessee's appeal stands allowed for statistical purposes in the terms indicated above.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(PAVAN KUMAR GADALE)

Judicial Member

Bangalore,

Dated: 09th July, 2020.

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| 1. Appellants | 2. Respondent | 3. CIT |
| 4. CIT(A) | 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.