

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES 'B' JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 11/JP/2021
निर्धारण वर्ष/Assessment Year :2016-17

Vinayaka Microns (India) Private Ltd., 385-386 Vinayaka Sendra Road, Sainath Nagar, Gram Thikrana Rajasthan	बनाम Vs.	Pr. Commissioner of Income Tax, Udaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No. AADCV6612R		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से/ Assessee by : Sh. Sanjeev Jain (CA)
राजस्व की ओर से/ Revenue by : Sh. B. K. Gupta (Pr. CIT)

सुनवाई की तारीख/ Date of Hearing : 21/10/2021
उद्घोषणा की तारीख/Date of Pronouncement: 01/11/2021

आदेश / ORDER

PER: VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the assessee against the order of Id. PCIT, Udaipur dated 01.02.2021 wherein the assessee has raised the following grounds of appeal.

- "1. The Ld. Pr. CIT erred in law as well as on facts of the case by treating the order of the AO as erroneous and prejudicial to the interest of the Revenue.*
- 2. The Ld. Pr. CIT erred in law as well as on facts of the case by setting aside/cancelling the original assessment order of the AO by passing order u/s 263."*

2. During the course of hearing, the Id A/R submitted that the assessee has filed its return of income for the assessment year 2016-17 declaring total income of Rs. 49.98 Lakhs. It was submitted that during the year under consideration, the assessee company had issued 59,500 equity shares of face value of Rs. 100/- at a premium of Rs. 100/-. The Fair Market Value of the shares was Rs. 250/- as per Discounted Free Cash Flow method, which was opted by the assessee as provided in Rule 11UA(2)(b) of the Income Tax Rules, 1962. The Valuation Report was obtained by the assessee from a Chartered Accountant in practice as prescribed in the Rules existing at that time. However the assessee company issued shares @ Rs. 200/- only i.e. less than the Fair Market Value thus determined. The case of the assessee was selected for scrutiny for verification of issue of share premium. The assessee filed valuation report and relevant documents alongwith detailed submission regarding selection of option of Discounted Free Cash Flow method for valuation of shares at the time of scrutiny assessment which is available on the record of the A.O. After detailed verification, returned income of the assessee was accepted without making any addition / disallowances.

3. It was submitted that thereafter, a notice u/s 263 notice was received by the assessee from the Id PCIT, Udaipur stating that the report required for this purpose should be from the FCA i.e. the fellow member of the ICAI whereas the report in question was obtained from an associate member of the ICAI. As this point was ignored by the A.O. at the time of assessment, it was proposed to modify / enhance / cancel the assessment.

4. In response, the assessee submitted another report obtained from a certified Merchant Banker as prescribed in Rule 11UA(2)(b) of the Income Tax Rules, 1962 to the Id. PCIT during the course of revisionary

proceedings and as per the valuation report, fair market value of shares of the company as at 31.03.2016 was Rs. 215/- The Id PCIT however set-aside/ cancelled the assessment and restored the matter back to the file of AO with the director to pass fresh assessment order. It was submitted that against the said order and findings of Id PCIT, the assessee is in appeal before the Tribunal.

5. It was submitted by the Id A/R that the assessee has been given the option under Rule 11UA(2) to opt for valuation of shares as per the method of its choice and accordingly it chose Discounted free cash flow Method and submitted valuation report obtained from a Chartered Accountant in Practice based on certain figures. There was a technical mistake in obtaining the report. The report was obtained from an Associate Member of the ICAI as against the Fellow Member as prescribed under Rule 11U. However, the report submitted by the assessee at the time of assessment was never rejected or questioned by the AO. The assessee duly submitted the valuation report however due to technical mistake on the part of the assessee, it has received the notice u/s 263. Here it should be noted that the technical mistake was not only done by the assessee only but also by the valuer and further by the concerned AO also but in any case, the valuation of the shares was not wrong at any stage.

6. It was submitted that though it may be argued that there was an error on the part of the A.O. in accepting report from an Associate Member instead of a Fellow member of the Institute of Chartered Accountants of India, however the error did not cause any prejudice to the revenue. No excessive share premium was charged by the company which could have been brought to tax u/s 56(2)(viib) of the Act. This is also

validated from the report issued by a Merchant Bank which was obtained and submitted at the time of hearing during the revisionary proceedings u/s 263 of the Act.

7. It was submitted that the Ld. Pr. CIT, in the order u/s 263 has stated that there is wide variations as regard the value of shares, furnished by the assessee company during the course of assessment proceedings and vide submission dated 10.12.2020, especially in view of the fact that the Merchant Banker in the Note mentioned on page no. 12 (annexure-2) has specifically mentioned that "we have used the same data which has been provided by the company to Chirag Parakh for preparation of valuation report". In this connection it is submitted that in fact there is negligible variation in the value of shares done by Chartered Accountant *vis-a-vis* Merchant Banker, which is explained in the below table:

Sr. No.	Particulars	Chartered Accountants Report	Merchant Banker Report
1	Per share price/value	294.32	292.69
2	Less : Discount for Illiquidity Ratio	44.15 (@15%)	73.17 (@ 25%)
3	Fair Value per Equity Share	250.17	219.50

8. It was submitted that it is clear from the above table that the difference in valuation of shares done by both the persons was due to illiquidity discount provide @ 15 % by ACA as against 25% by Merchant Bank. This is a subjective matter based on their assumption regarding illiquidity which affected Fair Market Value of Shares otherwise per share price / value arrived at by both persons is nearly similar.

9. It was submitted that the assessee company issued shares at a price which is much lower than the price worked out by both the persons as is explained in the below mentioned table :

Particulars	Amount
Valuation of shares as per the valuation report submitted by the assessee at the time of assessment to the Assessing authority.	250.00
Valuation of shares as per the Valuation report prepared by the Merchant Banker.	219.00
Share valuation taken by the Assessee at the time of issue of shares issued on valuation.	200.00

10. It was submitted that there was no loss of revenue to the Department and the order passed by the Assessing officer was not prejudicial to the interest of the revenue by accepting the valuation of shares done by the Company @ 200/- while issuing shares.

11. It was submitted that in the case of Malabar Industrial Co. Ltd. Vs. Commissioner of Income Tax [2000] 109 TAXMAN 66 (SC), it was held by the Hon'ble Supreme Court that in order to invoke section 263, Assessing Officer's order must be erroneous and also prejudicial to Revenue and if one of them is absent, i.e., if order of Income-tax Officer is erroneous but is not prejudicial to revenue or if it is not erroneous but is prejudicial to revenue, recourse cannot be had to section 263(1) of the Act.

12. It was accordingly submitted that the AO's order was not prejudicial to the interest of Revenue. The AO passed order after proper verification of share premium received by the assessee company and just because the valuation report was obtained from an Associate Member instead of Fellow Member of ICAI, it could not be said that AO did not verify share premium

received by the Company. In view of the above submission, it was submitted that order u/s 263 passed by the Ld. Pr. CIT is not sustainable and it is prayed that it should be quashed and due relief be provided to the assessee company.

13. Per contra, the Id. PCIT/DR relied on the order of Id. Pr. CIT and our reference was drawn to his relevant findings which read as under:-

"6. I have carefully examined the written submission of the AR of the assessee. The contentions of the AR of the assessee have been considered but the same are not fully acceptable. The assessee company has adopted discounted free cash flow method for valuation of shares issued by it during the year under consideration and as per Rule 11UA(2)(b), the fair market value of shares should be determined by a Merchant Banker or an Accountant. Further, accountant for the purpose of Sub-rule (2) of the Rule 11UA, means a fellow of the ICAI within the meaning Chartered Accountancy Act, 1949 who is not appointed by the Company as an Auditor u/s 44AB of the I.T. Act. However, in the instant case, the assessee has furnished valuation report from an ACA, which is not sustainable and the same is liable to be rejected as he was not a certified fellow of the ICAI as on 31.03.2016.

6.1 Further, it is pertinent to mention here that, as per the valuation report submitted by the assessee company duly signed by an Associated Chartered Accountant (ACA Chirag Parakh M.No. 142965), during the assessment proceedings, the fair value of equity share has been taken at Rs. 250.17 as per share, whereas as per the valuation report submitted by the assessee company duly signed by a Merchant Banker, Capital Square Advisors Pvt.

Ltd, during the proceedings u/s 263 vide submission dated 10.12.2020, the fair value of equity share has been taken at Rs. 219.50 as per share. Thus, it is seen that there is wide variations as regard the value of shares, furnished by the assessee company during the course of assessment proceedings and vide submission dated 10.12.2020, especially in view of the fact that the Merchant Banker in the Note mentioned on page No. 12 (annexure-2), has specifically mentioned that "we have used the same data which has been provided by the company to Chirag Parakh for preparation of valuation report)".

7. In view of the above, the creditability of the Fair Market Value of the shares furnished by the assessee company becomes doubtful and the same cannot be accepted as such. Further, the assessee company has failed to comply with the statutory requirement as regards valuation of shares, as per the Income Tax Act and Rules.

8. Thus, it is useful to refer to the Explanation-2 below section 263(1) inserted w.e.f. 01.06.2015 by Finance Act, 2015, which provides that:

"Explanation 2. - For the purpose of this section, it is hereby declared that an order passed by the Assessing officer shall be deemed to be erroneous in so far as it is prejudicial to the interest of the Revenue, if, in the opinion of the Principal Commissioner of Commissioner, -

(a) the order is passed without making inquiries or verification which should have been made, -

(b) the order is passed allowing any relief without inquiring into the claim;

(c) *the order has not been made in accordance with any order, direction or instruction issued by the Board under section 119; or*

(d) *the order has not been passed in accordance with any decision which is prejudicial to the assessee, rendered by the jurisdiction High Court or Supreme Court in the case of the assessee or any other person."*

9. *The assessment order u/s 143(3) of the I.T. Act for the A.Y 2016-17 dated 29.11.2018 was passed by the Assessing Officer in this case, without making proper enquiries or doing any verification of the issue of Large share premium received by the assessee company during the year and the applicability of 56(2)(viib) as discussed in preceding paras. Hence, assessment order u/s 143(3) of the I.T. Act for the A.Y 2016-17 dated 29.11.2018 has thus been rendered erroneous and prejudicial to interest of Revenue on the issue of non-verification of Large share premium received by the assessee company during the year and the applicability of 56(2)(viib). The same is therefore set-aside/cancelled and restored back to the file of AO on this issue with the direction to pass fresh assessment order after conducting proper verification and enquiries on this issue and make necessary addition in accordance with the provisions of I.T. Act 1961. However, an opportunity of being heard should be given to the assessee before passing the order."*

14. We have heard the rival contentions and perused the material available on record. The issue under consideration relates to fair market value of the shares and receipts of consideration on issue of shares over and above the fair market value invoking applicability of section 56(2)(viib) of the Act. During the course of assessment

proceedings, the assessee submitted report from an accountant who has determined the fair market value of shares at Rs 250.17 per share where as the assessee has issued shares of face value of Rs 100 at a premium of Rs 100, thus at a value lower than the fair market value. During the course of revisionary proceedings, the Id PCIT pointed out that the valuation report has been obtained from an associate member of ICAI as against fellow member of ICAI as prescribed under Rule 11UA(2). The assessee thereafter obtained and submitted a report from a merchant banker who is equally qualified to issue such valuation report under Rule 11UA(2) and who has determined the fair market value of the shares at Rs 219.50 per shares which is still higher the value at which the shares were issued by the assessee company. Thus, even where the report of the merchant banker is considered, the provisions of section 56(2)(viib) continues to remain inapplicable. Further, there is no adverse finding recorded by the Id PCIT and no dispute which has been raised regarding the discounted cash flow method of valuation and the methodology adopted in both the valuation reports. Though there is a variation in valuation so determined in two reports on account of certain underlying assumption regarding illiquidity ratio, as highlighted by the Id A/R, there can always be a different of opinion among the technical experts, but the necessary corollary thereof doesn't necessarily mean that the valuation so determined doesn't stand on sound foundation in terms of data and methodology and the fair market value and issue of shares is not supported by the valuation report. Therefore, we agree with the contention advanced by the Id A/R that even where there is a technical breach in terms of obtaining and submitting the valuation report from an associate member of ICAI as against fellow member of ICAI; and even taking into consideration report of the merchant banker, the position will remain the same and

the provisions of section 56(2)(viib) continues to remain inapplicable and thus, the order passed by the Assessing officer cannot be held as prejudicial to the interest of Revenue which is an essential condition for invocation of jurisdiction u/s 263 of the Act.

15. In light of aforesaid decisions and in the entirety of facts and circumstances of the case, we set-aside the order passed by the Id PCIT u/s 263 and the order passed by the AO is hereby sustained.

In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 01/11/2021.

Sd/-
(संदीप गोसाई)
(Sandeep Gosain)
न्यायिक सदस्य / Judicial Member

Sd/-
(विक्रम सिंह यादव)
(Vikram Singh Yadav)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 01/11/2021

*Ganesh Kr.

आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- Vinayaka Microns (India) Pvt. Ltd., Rajasthan
2. प्रत्यर्थी / The Respondent- Pr. CIT, Udaipur
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. 11/JP/2021}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar