

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

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

ITA No.7262/Del/2017
Assessment Year: 2014-15

M/s India Convention and Culture Centre Pvt. Ltd.,
House No.4, Road No.71,
Punjabi Bagh West,
Delhi – 110 026.

Vs ITO,
Ward-12(2),
New Delhi.

PAN: AAECG2115M

(Appellant)

(Respondent)

Assessee by : Shri Ved Jain, Advocate &
Shri Rishabh Jain, CA
Revenue by : Mrs. Naina Soin Kapil, Sr. DR
Date of Hearing : 04.07.2019
Date of Pronouncement : 27.09.2019

ORDER

PER R.K. PANDA, AM:

This appeal filed by the assessee is directed against the order dated 1st November, 2017 of the CIT(A)-4, New Delhi relating to assessment year 2014-15.

2. Facts of the case, in brief, are that the assessee is a company and filed its return of income on 29th September, 2014, declaring the loss of Rs.3,56,772/-. During the course of assessment proceedings, the Assessing Officer noted that the

assessee company has allotted 70 lac equity shares of Rs.10 each at a premium of Rs.5 per share to the following companies:-

Name of shareholder	No. of shares issued
M/s Rapture Software Pvt. Ltd.	2,50,000 equity shares of Rs.10 each issued at premium of Rs.5/- per share. Rs.5/- per share paid as share application money and Rs.5/- per share paid as premium
M/s Motive Equity Pvt. Ltd.	50,00,000 equity shares of Rs.10 each issued at premium of Rs.5/- per share. Rs.5/- per share paid as share application money and Rs.5/- per share paid as premium
M/s Complete Equity Pvt. Ltd.	15,00,000 equity shares of Rs.10 each issued at premium of Rs.5/- per share application money and Rs.5/- per share paid as premium.
M/s Glaxo Buildcon Pvt. Ltd.	2,50,000 equity shares of Rs.10 each issued at premium of Rs.5/- per share. Rs.5/- per share paid as share application money and Rs.5/- per share paid as premium

3. He noticed that the assessee company has received premium on issue of shares to the tune of Rs.3.5 crores. He, therefore, asked the assessee to justify the premium received over and above the fair market value of the shares, with documentary evidence in terms of section 56(2)(viib) of the IT Act. On the basis of various details filed in the balance sheet, the Assessing Officer determined the paid up value of equity shares of Rs.10/- each at Rs.6.65 crores which is as under:-

“Total assets – Total Liability/Total paid up value of the share

$$47,57,29,526 - 40,85,69,537 / 1,01,00,000 = 6.65$$

Total paid up value of equity shares of Rs.10/- comes to Rs.6.65.”

4. He, therefore, asked the assessee to explain as to why the excess amount of premium over and above the value of the value per share should not be disallowed and added back to its income. In absence of any reply from the side of the assessee to justify such premium and considering the fact that it is a time barring case where the proceedings are going to be barred by time limitation, the Assessing Officer determined the excess value of such premium received over and above the fair market value of shares at Rs.3,50,00,000/- under the provisions of section 56(2)(viib) of the IT Act and added the same to the total income of the assessee.

5. Before the CIT(A), the assessee filed certain additional evidences and submitted that in view of Rule 11UA of the Income Tax rules, 1962, the value should be Rs.66.50 per share instead of Rs.6.50 per share computed by the Assessing Officer. Based on the arguments advanced by the assessee, the Id.CIT(A) held that the correct fair market value per share comes to Rs.10.05 as against Rs.6.50 computed by the Assessing Officer and, accordingly, restricted the disallowance to Rs.3,46,50,000/- by observing as under:-

“6.6 I have considered the submissions of the appellant and the order of the AO. The Appellant has taken that in view of Rule 11UA of the Income Tax Rules, 1962, the AO erred in computing the fair market value of the equity shares of the appellant company. The appellant submitted that the value should be Rs. 66.50 per share instead of Rs. 6.50 per share computed by the AO.

6.7 I have considered Rule 11UA of the Rules, the calculation made by the AO and the submissions of the appellant. In view of the same, I find that the AO has erred in computing the fair market value of the equity shares of company. However, at the same time the submission of the appellant that the value of each equity share is Rs. 66.50 is also not correct. The Ld. AO and the appellant, both erred in not considering the value of share application money

outstanding, in the calculation of liability for the purpose of computation of fair market value, as per Rule 11UA of the Rules. The correct computation is explained below:

6.8 According to Rule 11UA of the Rules, the Fair Market value of the equity shares of the company would be as under:

Assets	=	Rs. 47,57,29,528/-
Liabilities	=	Rs. 46,55,69,538/- (i.e. Total Liabilities - Paid up capital - Reserve and Surplus)

Here, the AO erred in calculating the value of Liabilities, the AO erred in not including the amount of share application money in Liabilities. As per Rule 11UA, paid up capital and reserve and surplus have to be deducted from the total liabilities. Share application money is not paid up capital, it is a liability till the time the shares are not allotted.

$$PE = \text{Rs. } 1,01,00,000$$

$$PV = \text{Rs. } 10/- \text{ per share}$$

$$\text{Fair Market Value} = (A-L)/PE * PV = \text{Rs. } 10.05$$

$$\text{FMV} = 47,57,29,526 - (40,83,58,301 + 11,236 + 5,70,00,000) \times 10 / 1,01,00,000 = \text{Rs } 10.05$$

Thus, the correct FMV per share, in this case comes to Rs 10.05/-.

6.9 I have also considered the submission of the appellant with regard to the fact that the company has received permission of change in 'land use' of their land holding, thus having a commercial right for setting up an Institution for Art, Culture and Convention. However, the appellant has not at all explained how the same would increase the fair value of the shares of the company and/or the quantum of such right on the value of the equity shares. Further, according to the certificate of the changes of land use permission, received from Directorate of Town & Country Planning, Haryana, the company has already paid some amount for such conversion in land use, which must be debited in the assets of the company, thereby increasing the value of their assets.

Thus, in the absence of any explanation by the assessee regarding the quantum of effect of such commercial right over the value of equity shares of the company, the same cannot be considered, and accepted.

Further, I have also considered the case laws relied upon by the appellant. The case laws relied upon by the appellant do not relate to the facts of the case.

6.10 In view of the fair market value of the equity shares as computed above and the consideration/ price at which the shares are issued, the company

has received an excess consideration of Rs. 4.95 per equity shares, over and above the fair market value of the equity share i.e. (Rs. 15 - Rs. 10.05).

Thus, the total amount that should have been added to the income of the appellant under Section 56(2)(viib) of the Act is Rs. 4.95 x 70,00,000 equity shares = Rs. 3,46,50,000/-. Accordingly, the addition u/s 56(2)(viib) is reduced to Rs.3,46,50,000/- from Rs.3,50,00,000/-. The appellant gets a relief of Rs.3,50,000/- only. Addition of Rs.3,46,50,000/- is confirmed.”

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

“Against CIT (A) order under section 250 of the Income Tax Act, 1961

Ground No. 1

The Learned CIT (A) erred in passing the ex parte order without giving reasonable opportunity of being heard to the appellant.

Ground No. 2

That the Learned CIT (A) erred in taking share application money as liability in calculating fair market value as per section 11UA of Income tax act.

Ground No. 3

The Hon'ble CIT Appeals passed the order without remanding the matter to Assessing Officer for calculating the FMV of shares under section 56(2)(viib) read with 11UA while considering the share application as liability of the Company which was considered as shareholders fund by the assessing officer.

Ground No. 4

The Hon'ble CIT Appeals passed the order without considering the FMV of Land owned by the Company as on the date of issuing the shares for calculating the value of shares as per section 56(2)(viib).

Ground No. 5

That the assessee craves its plea to add any other ground that may arise during the time of appeal proceeding.

PRAYER

Under the circumstances submitted above it is respectfully prayed that the appeal may kindly be allowed. Petition under Rule 46 (A) of the Income Tax Rules, 1968-Admittance of additional evidences since, few of the documents could not be filed because of various reasons like lack of clarity of documents of the assessee as well as authorized representative.”

7. The Id. counsel for the assessee, referring to page 14 of the paper book, drew the attention of the Bench to the asset side of the balance sheet and submitted that the tangible assets shown in the balance sheet are to the tune of Rs.56,44,80,642/-. Referring to page 19 of the paper book, he submitted that the land at Gurgaon has been shown at Rs.56,45,80,642/- as at 31st March, 2014. Referring to page 25 of the paper book, he submitted that the Director of Town & Country Planning, Haryana, vide letter dated 12th October, 2011 had granted change of land use on the basis of application of the assessee dated 2nd May, 2011 and 11th August, 2011 wherein they have permitted the assessee for setting up an institution for art, culture and convention centre over an area measuring 18,011.85 sq. mtr. Referring to page 27 of the paper book, he submitted that the Director of Town and Country Planning, Haryana, vide letter date 14th June, 2012 had granted change of land use permission for setting up an institution for art, culture and convention centre over an additional area of 24937.45 sq. mtr., situated in the revenue estate of village Maidawas. He submitted that the assessee had paid an amount of Rs.31,42,119/- towards conversion charge and Rs.48,19,448/- on account of 10% of the total external development charges. Referring to page 107 of the paper book, he submitted that the circle rate of the land w.e.f. 01.04.2011 has gone up to

Rs.22,000/- per sq. yard. He submitted that if the same is considered, the total cost of land comes to Rs.113 crores and, therefore, the value per share comes to Rs.658.33, the details of which are as under:-

Particulars	Amount
Total Assets (Considering FMV of land which was converted from agricultural to Institution (Refer Note 1))	1,130,072,749
Other Assets	917,608
Total Assets	1,130,990,357
Total Liabilities	465,569,537
Net Assets	665,420,820
Equity Shares	1,010,000
Value of Shares	658.83

8. He submitted that as against the fair market value of shares at Rs.658.83 per share, the assessee has issued the shares at a premium of Rs.5 only. Therefore, no addition u/s 56(2)(viib) is called for. Referring to the decision of the Delhi Bench of the Tribunal in the case of India Today Online Pvt. Ltd., vide ITA No.6453 and 6454/Del/2018, order dated 15th March, 2019, he submitted that the Tribunal in the said decision has held that valuation of the shares has to take into consideration various factors and not simply on the basis of financials. It has been held that substantiation of the fair market value of the shares has to be first decided on the basis of the valuation done by the assessee and it cannot be decided from the lens of section 11UA which can be applied in case sub-clause (i) has been exercised. It has been held that FMV can be determined in either of the two manners whichever is higher so as to demonstrate that the value of shares does not exceed the fair market value and then the Assessing Officer cannot insist upon to follow only one

particular method. He also relied on the decision of the Jaipur Bench of the Tribunal in the case of Sahu Minerals and Properties Ltd. in ITA No.895/JP/2017, order dated 07.01.2019.

9. The ld. DR, on the other hand, heavily relied on the orders of the Assessing Officer and CIT(A).

10. 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 allotted 70 lac equity shares of Rs.10 each at a premium of Rs.5 per share and has received premium of Rs.3.5 crores. We find the Assessing Officer, invoking the provisions of section 56(2)(viib), made addition of Rs.3,50,00,000/- on the ground that the fair market value of shares comes to Rs.6.65 per share as per the book value. We find the ld.CIT(A) computed the fair market value of the shares at Rs.10.05 per share and gave part relief of Rs.3,50,000/- and sustained the addition of Rs.3,46,50,000/- the reasons for which has been reproduced in the preceding paragraphs. It is the submission of the ld. counsel that the lower authorities have wrongly computed the fair market value of the shares on the basis of the book value ignoring the FMV of the land held by the company. It is the submission of the ld. counsel for the assessee that the value of its shares in terms of clause (ii) of Explanation (a) of section 56(2)(viib) on the basis of the value of its land at market value which is Rs.113

crores comes to Rs.658.83 per share. Therefore, it is the submission of the ld. counsel for the assessee that instead of taking the book value of the property at Rs.47.81 crore as per the balance sheet, the lower authorities should have taken the fair market value of land which was converted from agricultural to institutional at Rs.113,00,72,749/- and other assets of Rs.9,17,608/-. Thus, according to him, the fair market value of the shares comes to Rs.658.83 per share.

11. We find some force in the above argument of the ld. counsel for the assessee. The Explanation to provisions of section 56(2)(viib) reads as under:-

*“Explanation.—*For the purposes of this clause,—

(a) the fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,

whichever is higher;”

12. From the various details furnished by the assessee, we find the assessee had obtained permission of the competent authority for change of land use from ‘agricultural’ to ‘institutional’ for art, culture and convention centre for a total area of 42949 sq. mtrs or 51366.94 sq. yards. A perusal of the circle rate for such institutional area shows that the circle rate has been prescribed at Rs.22,000/- per sq. yard. Thus, as per the circle rate prescribed by the competent authority, the

value of total assets i.e., the fair market value of the land which was converted from 'agricultural' into 'institutional' comes to Rs.113,00,72,749/-. If the other assets of Rs.9,17,608/- is added to such asset and the total liability of 46,55,69,537/- is deducted, then, the net asset comes to Rs.665,420,820/-. If the same is divided by the number of equity shares of 10,10,000/-, then, the value per share comes to Rs.658.83 which is more than the premium of Rs.5/- charged by the assessee on a share of Rs.10/-. We, therefore, find merit in the argument of the ld. counsel for the assessee that the valuation of the shares should be made on the basis of various factors and not merely on the basis of financials and the substantiation of the fair market value on the basis of the valuation done by the assessee simply cannot be rejected where the assessee has demonstrated with evidence that the fair market value of the asset is much more than the value shown in the balance sheet. The order of the CIT(A) is accordingly set aside and the grounds raised by the assessee are allowed.

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

The decision was pronounced in the open court on 27.09.2019.

Sd/-

(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 27th September, 2019

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Copy forwarded to :

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

Asstt. Registrar, ITAT, New Delhi