IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCHES : SMC : NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

ITA No. 2222/Del/2019
Assessment Year : 2014-15

M/S CLEARVIEW HEALTHCARE PVT. LTD., C/O KAPIL GOEL, ADV. F-26/124, SECTOR-7, ROHINI, DELHI – 110 085 (PAN: AAECC0475A) (Appellant)	Vs.	ITO, WARD 6(2), NEW DELHI (Respondent)

Assessee by : Sh. Kapil Goel, Adv.
Department by : Sh. Pradeep Singh Gautam, Sr.DR..

ORDER

This appeal filed by the assessee is directed against the order passed by the Ld. CIT(A)-33, New Delhi on 15.10.2018 in relation to the assessment year 2014-15.

2. The facts in brief are that assessee filed its e-return on 17.11.2014 declaring loss of Rs. 16,285/-. The return of the assesee was processed u/s. 143(1) of the Income Tax Act, 1961 (in short "Act") on 25.5.2015 and thereafter the case of the assessee was selected for scrutiny through CASS. Statutory notice u/s. 143(2) of the Act was issued on 28.8.2015 and duly served upon the assessee. In response to the same, the AR of the assessee attended the proceedings and filed the detailed as called for. The assessee company was incorporated on 29.1.2010. The assessee company is stated to be engaged in the business of setting up advance machines for diagnosis

and treatment of cancer in association with hospitals all over India. The details filed by the AR of the assessee were examined on test check basis with reference to the books of accounts produced. Thereafter, the AO observed that the difference between the share premium received in excess of valuation as determined under Rule 11UA of the Act amounting to Rs. 16 x 57,477 (Shares issued to resident shareholders namely Sh. Kamal Batra, Sh. Pankaj Sudan and Sh. Pravin Jain) = Rs. 9,19,632/- was treated as income of the assessee as per the provisions of section 56(2)(viib) of the Act and added the same to the income of the assessee as income from other sources u/s. 56(2)(viib) of the Act by completing the assessment at Rs. 9,03,350/- vide order dated 23.12.2016 passed u/s. 143(3) of the Act. Against the assessment order dated 23.12.2016, assessee appealed before the Ld. CIT(A) who vide his impugned order dated 15.10.2018 has dismissed the appeal of the assessee by holding that AO was justified in limiting the price of shares of the company Rs. 144/- only and held that that the addition of Rs. 9,19,632/- was justified. Against the impugned order, assessee is in appeal before the Tribunal.

3. During the hearing, Ld. Counsel for the assessee stated that lower authorities have not appreciated that assessee does not come within mischief of stated provision as manifest from cursory look to explanatory memorandum to Finance Act, 2012 by which stated provision was brought into the law and stated share premium is a clean money and so is not covered within provisions of section 56(2)(viib) of the Act (legislative intent is to apply said provision where money received is not clean and is unaccounted money received in garb of share premium where as no where it is case of revenue that stated money is not clean money). It was further submitted that Ld. CIT(A) erred in confirming/sustaining the addition made of Rs 9,19,632/- u/s 56(2)(viib) of the Act in para 8.1 to 8.4 of his order by not appreciating that genuineness of share premium gets established from

impeccable fact that as far justification of share premium of here is concerned, that on 01/12/2014 (during AY 2015-2016) share of Clearview Healthcare Pvt Ltd were sold to Medipass SRL Italy @ 380.53 per share (which in turn valued shares of Clearmedi Healthcare Private Limited @ 615 per share assessee herein) and for which necessary copy of resolution dated 20/12/2013 duly attested by Notary public of Italy were purveyed to AO durng assessment itself and it was categorically stated in our reply that said transaction has actually taken place at agreed rate of Rs 380.53 per share of Clearview Healthcare Pvt. Ltd (Rs 615 per share of Clearmedi Healthcare Private Limited) for which in continuation to same we are relying on , share purchase agreement dated 20/03/2014 and copy of income tax return of seller of shares of Clearview Health care Pvt Ltd (Shahsi Baliyan)) etc which is on records for adjudication as necessary plea was duly raised to AO. It was further submitted that Ld CIT(A) erred in confirming/sustaining the addition made of Rs 9,19,632 u/s 56(2)(viib) of the Act in para 8.1 to 8.4 of his order by not appreciating that Once share sale/purchase done subsequently is considered at which shares of company are actually transacted then it would not be difficult to accept that share premium received in subject period is fully and completely justified and cannot be interdicted as done by AO. It was further submitted that Ld CIT(A) erred in not appreciating that when addition of Rs 919,632 /- u/s 56(2)(viib) of the Act was palpably incorrect because after rejecting assessee's valuation no valid substitute for correct valuation has been brought on records as rejecting assessee's valuation does not mean that total share premium is automatically taxable u/s 56(2)(viib) and AO is obliged to bring on records suitable valuation as per extant DCF method before proceeding to tax share premium. It was further submitted that Ld CIT(A) erred in not deciding the appeal of assessee on its merits when addition of Rs 919,632 /- u/s 56(2)(viib) of the Act was palpably incorrect because of following apparent

errors and discrepancies i.e. Non residents were issued the shares at same time at same premium; AO has lightly doubted and rejected the expert opinion; Subsequently same share have been sold to Italian Co. at more than double rate on which capital gain was offered. He further stated that the issue in dispute is squarely covered by the decision of the ITAT, Chenai A Bench decided in ITA Nos.663, 664 & 665/Chny/2019 in case of M/s Lalithaa Jewellery Mart Pvt. Ltd decided on 14.06.2019 and placed the copy thereof and requested to delete the addition by following the same ratio.

4. On the contrary, Ld. DR relied upon the orders of the authorities below.

5. I have heard both the parties and perused the relevant records especially the orders of the revenue authorities and the case law cited by Ld. Counsel for the assessee. I find that assessee has continuously impressed on one significant basic factual aspect to establish the correctness of share premium obtained u/s 56(2)(viib) of the Act by stating that on 01/12/2014 (during AY 2015-2016) share of Clearview Healthcare Pvt Ltd (assessee herein) were sold to Medipass SRL Italy @ 380.53 per share (which in turn valued shares of Clearmedi Healthcare Private Limited @ 615 per share) and for which necessary copy of Resolution dated 20/12/2013 duly attested by Notary public of Italy were submitted to AO during assessment itself and it was categorically stated in reply that the said transaction has actually taken placed at agreed rate of Rs 380.53 per share of Clearview Healthcare Pvt Ltd (Rs 615 per share of Clearmedi Healthcare Private Limited) (refer assessee's paper book pages 143- 144 letter dated 23.12.2016 addressed to AO in assessment proceedings, same reply in letter to AO Dated 19.12.2016 paper book pages 153) clearly justifies instant share premium of Rs 150 per share and AO wrongly added Rs 16 per share as alleged excessive premium (which amounted to Rs 919,632 in aggregate) within the meaning of provisions of section 56(2)(viib) of the Act (explanation to section 56(2)(viib) clause (ii)

thereof where judicious satisfaction of AO is talked about). This plea of assessee has considerable cogency. The second plea is that when ultimately shares are bought by foreign buyer on basis of detailed due diligence which is reflected from share purchase resolution and share purchase agreement already placed on records and money paid for share purchase by foreign buyer is beyond shadow of doubt it cannot be said that subsequent money which is paid by foreign buyer to share holders sellers in India who have subscribed share at premium in subject period is not a clean money which defense of assessee also has considerable cogency. Further, plea of assessee that once assessee has given approved valuer (CA) report justifying share premium raised which is based on valid and prescribed method being DCF and said report is in accordance with ICAI norms and no where AO has countered said report by substitute valuation from alternate expert on basis of chosen DCF method and assessee's valuation is justified by subsequent sale/purchase and there is no unaccounted money involved even remotely, I find that the same is not tenable and the addition made by AO u/s 56(2)(viib) read with rule 11UA is held to be unlawful. Further plea of assessee that assessee does not come within mischief of stated provision as manifest from cursory look to explanatory memorandum to Finance Act, 2012 by which stated provision was brought into the law and stated share premium is a clean money and so is not covered within provisions of section 56(2)(viib) of the Act (legislative intent is to apply said provision where money received is not clean and is unaccounted money received in garb of share premium where as no where it is case of revenue that stated money is not clean money. For the sake of convenience, I am reproducing the legislative intent behind section 56(2)(viib) inserted by Finance Act 2012 as under:-

> "As per memorandum explaining provisions to Finance Bill 2012:

"….Share premium in excess of the fair market value to be treated as income Section 56(2) provides for the specific category of incomes that shall be chargeable to income-tax under the head "Income from other sources". It is proposed to insert a new clause in section 56(2). The new clause 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. In such a case if the consideration received for issue of shares 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 incometax under the head "Income from other sources. However, this provision shall not apply where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund. Further, it is also proposed to provide the company an opportunity to substantiate its claim regarding the fair market value. Accordingly, it is proposed that the fair market value of the shares shall be the higher of the value— (i) as may be determined in accordance with the 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 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. This amendment will take effect from 1st April, 2013 and will, accordingly, apply in relation to the

assessment year 2013- 14 and subsequent assessment years…"

5.1 I further find that the issue in dispute is squarely covered by the decision of the ITAT 'A' Chennai Bench decided in ITA Nos.663, 664 & 665/Chny/2019 in case of M/s Lalithaa Jewellery Mart Pvt. Ltd decided on 14.06.2019 wherein, it was held that:

"15. Now coming to valuation of shares, as rightly submitted by the Ld. counsel for the assessee, there are two limbs in Section56(2)(viib) of the Act. As per explanation to Section 56(2)(viib) of the Act, the first limb is valuation to be made as per the prescribed method. In fact, the method for valuation of shares is prescribed under Rule 11UA of the Income-tax Rules, 1962. The second limb is the valuation of the company based on value on the date of issue including its assets. Assets include intangible assets such as goodwill, knowhow, patents, copyrights, trademarks, licences, franchises, etc. The Assessing Officer has not taken into consideration the second limb in explanation to Section 56(2)(viib) of the Act. The second limb provides that when valuation was made by the company, if the Assessing Officer is not satisfied about the valuation, he has to call for material from the assessee how the valuation was made by the assessee-company. Satisfaction of the Assessing Officer as referred in explanation to Section 56(2)(viib) of the Act would be judicial satisfaction of the Assessing Officer. Judicial satisfaction means the Assessing Officer has to take into consideration the well established method of valuation of shares including the assets as explained in Explanation 2 to Section 56(2)(viib) of the Act. It cannot be arbitrary. The Assessing Officer has to take note of the judicial and established principles in arriving at his satisfaction. In this case, the Assessing Officer has not found any specific fault in rejecting or not satisfying with the valuation made by the assessee. When the Assessing Officer has not foundany defect or error in the valuation of shares by the assessee company, it may not be necessary to apply the method of valuation prescribed under Rule 11UA of the I.T. Rules. Therefore, this Tribunal is unable to uphold the valuation made by the Assessing Officer under Rule 11UA of the Income-tax Rules, 1962."

5.2 Keeping in view of the facts and circumstances of the case and by applying the principles from the aforesaid decision and legislative intent behind insertion of section 56(2)(viib), I hold that addition made by AO on account of alleged excess share premium is unjustified when those very shares are sold in next financial year at much higher amount after proper due diligence, that to a non resident buyer and further there is no case of unaccounted money being brought in garb of stated share premium, hence, addition made u/s 56(2)(vii) of the Act is hereby deleted.

6. In the result, the Appeal filed by the Assessee stands allowed.

Order pronounced on 03-01-2020.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Dated: 03-01-2020

SRB

Copy forwarded to:

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

AR, ITAT, NEW DELHI.