

आयकर अपीलीय अधिकरण “B” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH, MUMBAI

श्री महावीर सिंह, न्यायिक सदस्य एवं श्री श्री एम बालगणेश, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, JM AND SRI M BALAGANESH, AM

आयकर अपील सं./ ITA No. 3521/Mum/2018

(निर्धारण वर्ष / Assessment Year 2013-14)

Narang Access Pvt. Ltd.

Hall No.3, B-869, Sarkar Heritage, Kane Road
and B.J.Road, Bandstand, Bandra West,
Mumbai-400 050

PAN – **AACCN5922H**

..... Appellant

v/s

The Dy. Commissioner of Income Tax

Circle-13(1)(1), Aayakar Bhavan,

2nd Floor, Mumbai-400 020

.....Respondent

अपीलार्थी की ओर से / Appellant by	:	Shri Prakash Jotwani, AR
प्रत्यर्थी की ओर से / Respondent by	:	Shri N. Hemlatha, DR

सुनवाई की तारीख / Date of hearing:	22.08.2019
घोषणा की तारीख / Date of pronouncement :	22.08.2019

आदेश / ORDER

महावीर सिंह, न्यायिक सदस्य/

PER MAHAVIR SINGH, JM:

This appeal of assessee is arising out of the order of the Commissioner of Income Tax (Appeals)-21, Mumbai in appeal No. CIT(A)-21/DCIT-13(1)(1)/IT-166/2016-17 dated 28.02.2018. The Assessment was framed by the Dy. Commissioner of Income Tax, Circle-13 (1)(1), Mumbai

(in short DCIT/ITO/ AO) for AY 2013-14 vide dated 28.03.2016, under section 143(3) of the Income-tax Act, 1961 (hereinafter 'the Act').

2. The only issue in this appeal of assessee is against the order of CIT(A) confirming the action of the AO in valuing the share premium on the basis of book value of shares as reasonable value instead of valuing on the basis of Discounted Cash Flow (DCF) method and accordingly adding the share premium at ₹ 5,32,68,570/-. For this assessee has raised the following two grounds: -

“In the facts and the circumstances of the case and in law, the learned Commissioner of income Tax (A) erred in confirming fair market value per share of the Company at Rs. 8650.80 as calculated by the Assessing Officer instead of value per share of Rs. 180995/- calculated as per DCF Method duly certified by the Practicing Chartered Accountant and disallowed Rs. 53,268,570/- as income of the Company u/s.56(2)(viib).

The learned Commissioner of income Tax (A) erred in confirming said addition of Rs.53,268,570/- (after deducting fair market value of premium per share of the Company at Rs. 8,640.80 as calculated by Assessing Officer) out of total share premium received of Rs. 79,995.370/-. The Company had received Share Premium of Rs. 55,924,365/- from a resident shareholder and Rs. 24,071,005/- from the non-resident shareholder i.e. Mls. Myen Pte

Ltd., Singapore (a Danone Group Company) at same price. - .”

3. Briefly stated facts are that the assessee company is engaged in the business of beverage products like Red Bull, Evian, Perrier, Qua Blue and Orangina. During the course of assessment proceedings, the AO on perusal of details filed, noticed that the assessee company has issued equity shares at the rate of ₹ 10 per share and premium at ₹ 180,985/- per share. The AO noted that since, the shares were issued at a very high premium, the assessee was asked to justify the high premium. The assessee was also asked as to why the provisions of section 56(2)(viib) of the Act be not applied. The assessee replied that the provisions of section 56(2)(viib) of the Act is applicable in regard to shares issued to resident but not to non-resident. It was contended that there has been amended being brought into Act vide Finance Act, 2012 by inserting a new proviso in the Act i.e. 56(2)(viib) pertaining to the issue of shares to resident shareholders. The assessee was also asked to substantiate as to how the projections have been taken for the purpose of valuation of shares and the basis of projection was also asked. The assessee submitted the valuation report dated 07.08.2012, wherein, value per share has been arising at ₹ 1,80,475/- per share under the DCF method. The AO noted that the assessee has not submitted the basis of the projections. Hence, the AO instead of DCF method of valuation adopted book value of the share for computing the premium accordingly, computed the fair market value of unquoted equity shares at ₹ 8640.40 per share. Therefore, added the differential sum of ₹ 5,32,68,570/- as income from other sources under section 56(2)(viib) of the Act by observing in Para 5.18 as under: -

“5.18 From the discussions ad detailed in above paras, it can be perused that the assessee has

failed to prove the fair market value of shares as per the DCF method as relief upon by the assessee. In the absence of reliable working of the shares as per the DCF method adoption of the book value of shares as prescribed under the Act at ₹ 8,640.80 is fair and reasonable in the given case. Accordingly, a sum of ₹ 5,32,68,570/- (₹ 1,80,995 per share [FMV as per assessee' Rs.8,640.80 per share [FMV as calculated above] X 309 (Equity shares issued to a resident) is added to the total income of the assessee under section 56(2)(viib) of the Act. Penalty proceedings under section 271(1)(c) of the Income-tax act, 1961 is initiated separately for furnishing inaccurate particulars of income and thereby concealing the income."

Aggrieved, assessee preferred the appeal before CIT(A). The CIT(A) also confirmed the action of the AO. Aggrieved, assessee is in appeal before Tribunal.

4. We have heard rival contentions and gone through the facts and circumstances of the case. We noted that the assessee issued shares in the following proportion to the Indian shareholders and foreign shareholders as under:-

Sr. No.	Date of Allotment	Name of Alotee	No. of shares	Face value per share	Premium per share	Total		
						Face value	Premium	Total
1.	5.12.12	Rahul Narang	309	10	1,80,985	3900	5,59,24,365	5,59,27,455
2.	5.12.12	Myen Pte Ltd. Singapore	133	10	1,80,985	330	2,40,71,005	2,40,72,335
	Total		442			4420	7,99,95,870	7,99,99,790

5. The learned Counsel for the assessee stated that during the course of assessment proceedings Narang Danone Access Private Limited filed letter dated 24.02.2016 and another letters dated 01.03.2016. He stated that the AO has referred these three letters in assessment order and said three letters be considered part of the present statement of fact. In spite of the submission with necessary supporting, the AO did not consider the submission of the company objectively while passing order under section 143(3) of the Act. As per the proviso read with explanation to Sec. 55(2)(viib) r.w.s. 56(2)(viib) of the Act are not applicable in case where company has valued the share at fair market value as prescribed method as per Rule 11UA i.e. DCF method. The company is Joint Venture Company between Narang Group and Danone Group. Danone is a French Multinational Food & Beverages based in Paris and Narang Group had introduced Evian Water for the first time in India and later both the group enters in to Joint Venture Agreement. As per Joint Venture Agreement the Danone Group had invested 30% paid up capital in the Company and 70% of paid capital was invested by Narang Group. As per Joint Venture Agreement during the year the company has issued 309 shares to Rahul Narang of Narang Group at the premium of ₹ 1,80,985/- and accordingly, Raul Narang subscribed to 309 shares at a premium of ₹ 1,80,985/- and paid share premium of ₹ 5,59,24,365/- and Danone Group subscribed 133 at same premium of ₹ 1,80,985/- and paid share premium of ₹ 2,40,71,005/-. The AO accepted the assessee submission that Sec. 56(2)(viib) of the Act is not applicable to non-resident person as 56(2)(viib) of the Act very clearly provide so and though said Sec. 56(2)(viib) read with Rule 11UA(2)(b) provides that Sec. 56(2)(viib) is not applicable to a company if such company has valued the shares as per DCF method but AO ignored the proviso read with explanation to Sec.56(2)(viib) of the Act. The explanation to Sec. 56(2)(viib) of the Act defines the term the fair market value as stated hereinabove. Further explanation provides that higher of (i) and (ii) would

be considered the fair market value of the shares of unlisted Company. The Assessing Officer ignored the mandate of Sec. 56(2)(viib) of the Act and erroneously calculated the value of shares on the basis of book value as per Balance Sheet and determined the value of shares of ₹ 8604.80 which is not the method prescribed under Sec. 56(2)(viib) of the Act.

6. He also argued that the documents filed as additional evidences really go to the root of the matter and these are very vital for deciding the issue. According to him, the method to be applied for valuation of shares is correct method i.e. DCF and the method adopted by AO on account of Net Asset Valuation (NAV) method is wrong and this view is supported by the co-ordinate Bench decisions of ITAT in the cases of M/s Rameshwaram Strong Glass (P) Ltd. vs. ITO (2018) 172 ITD 571 (Jaipur) (Trib.), DCIT vs. Ozoneland Agro Pvt. Ltd in ITA No. 4854/Mum/2016 for AY 2013-14 & M/s. Medplus Health vs. ITO in ITA.No.871/Hyd/2015, Regal Builtech Pvt. Ltd. vs. ACIT 7505/DEL/2018. When these facts were confronted to the learned Sr. Departmental Representative, he agreed that the matter has to be restored back to the file of the AO to examine the additional evidences and this cannot be verified or carried out proper examination at this level.

7. After hearing both the sides, we are in agreement of both the sides that these additional evidences require detailed examination at the level of the AO. Hence, this matter has to go back to the file of the Assessing Officer.

8. Now, the issue arises that in case the company issued shares to both resident and non-resident shareholders at a price of ₹ 1,80,195/- per share and the shares were issued to its existent shareholders on a proportionate basis, what method should be adopted for the purpose of valuation. The assessee has adopted the share valuation method i.e.

DCF and valued the share at the rate of ₹ 1,880,470/- per share. It is also to be noted that in 2010, the shares originally were issued at a price of ₹ 1 lacs per share. The AO has valued shares on net asset valuation method and valued the share at the rate of ₹ 8,640.80 per share and added back the remaining share premium received from residential shareholders as income from other sources under section 56(2)(viib) of the Act. We also noted that the co-ordinate Bench decision of this Tribunal has categorically held that while valuing the share premium and to determine the fair market value of shares in terms of section 56(2)(viib) of the Act, the assessee has option for adoption of valuation method and the basis of valuation has to be DCF method. We noted that even Hon'ble Bombay High court in the case of Vodafone M-Pesa Ltd vs. PCIT [2018] 92 taxmann.com 73 (Bombay) held that in view of the Income Tax Rules, the method of valuation namely NAV method or DCF Method to determine the fair market value of share in terms of section 56(2)(viib) of the Act has to be done or adopted at the assessee's option. AO was undoubtedly entitled to scrutinize the valuation report and can tinker or determine a fresh valuation after confronting the assessee. However, the basis of valuation had to be DCF method and it is not open to the AO to change the method of valuation which the assessee has duly opted. Hon'ble Bombay High Court has restored the matter back to the file of the AO.

9. We noted that firstly in the present case the valuation done by the assessee for valuing its shares is on the basis of DCF method and the AO could not have substituted it by NAV method rather he should have arrived at another value, if any, by applying DCF method only. We also noted that the explanation and additional evidences produced before us shows that why projection has been made in that manner and have been substantiated by filing additional evidences/ papers on assessee's paper book volume 2 at pages 1 to 78. We noted that this issue has been

considering by the Hon'ble Bombay High Court and remanded back to the file of the AO the issue regarding considering the value of shares in term of section 56(2)(viib) of the Act on the basis of DCF method. Here, in this present case also, we direct the AO to consider these additional evidences and then can arrive at a correct value of share for charging of share premium in term of section 56(2)(VIIB) of the Act. But on the basis of DCF method only which is adopted by the assessee. Hence, the assessment order and the order of the CIT(A) is set aside and the matter restore back to the file of the AO. In term of the above, we restore this issue to the file of the AO.

10. In the Result, the appeal of assessee is allowed for statistical purposes.

Order pronounced in the open court on 22.08.2019.

Sd/-

(एम बालगणेश / M BALAGANESH)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(न्यायिक सदस्य/ JUDICIAL MEMBER)

मुंबई, दिनांक/ Mumbai, Dated: 22.08.2019

सुदीप सरकार, व.निजी सचिव / Sudip Sarkar, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai