

IN THE INCOME TAX APPELLATE TRIBUNAL DELHI

(DELHI BENCH 'C' : NEW DELHI)

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND**

SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 6968/Del/2018, A.Y. 2015-16

M/s. Kheer Bhawani Trading P. Ltd. Flat No. 412, Naurang House-21, New Delhi	Vs.	ITO, Ward-14(3) New Delhi
(APPELLANT)		(RESPONDENT)

Assessee by	Shri S. Jain, CA
Revenue by	Shri Anuj Garg, Sr. DR

Date of hearing:	07.09.2022
Date of Pronouncement:	15.09.2022

ORDER

PER ANUBHAV SHARMA, JM:

The appeal has been filed by the Assessee against order dated 23.08.2018 in appeal no. Del/CIT(A)-5/0155/2017-18 passed u/s 250 of the Income Tax Act, 1961(hereinafter referred to as 'the Act') by Commissioner of Income Tax (Appeals)-5, New Delhi (hereinafter referred to as the First Appellate Authority in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 06.12.2017 u/s 143(3) of the Income Tax Act, 1961 passed by ITO, Ward-14(3), New Delhi (hereinafter referred to as the Ld. Assessing Officer or in short 'Ld. AO').

2. The facts in brief are assessee company filed its return for the assessment year 2015-16 declaring loss of Rs. 12,44,833/- and the case was taken up for scrutiny through 'CASS. During the year in course of assessment proceedings, it was submitted that the assessee company was engaged in the business of investment in all Types of Shares, and Securities, Stocks etc. It was observed by Ld AO that the assessee has issued 63940 preference shares for Rs. 344/- per share and has received share premium to the tune of Rs. 1,05,88,464/- from M/s Alexure Securities Private Limited, out of which Rs. 165.60 per share has been called up. Assessee was asked vide notice issued u/s 142(1) dated 11.04.2016 & 07.03.2016 to furnish the detail of;

“Large share premium received during the year (verify applicability of sec. 56(2)(viib)”

3. After taking the responses of assessee the Ld. AO made the addition with following findings :-

*“8. The reply of assessee was duly considered but found not acceptable **because assessee itself is not convinced whether Rule 11 UA should be applicable to preference share or not.** If it is not applicable then why he has received the share premium on issuance of preference share as per rule 11UA read with u/s 56(2) (vii b) of the IT Act and why at the time of issuance of preference shares assessee did not consider other provision and remedial action available, if ? No doubt, there may not be applicability of Rule 11UA on issuance of preference share but the assessee itself has treated the preference share as same as equal and at par to **unquoted** equity share and has determined the fair market value, **of** the share premium u/s 56(2) (vii b) of the IT Act read with rule 11 UA.*

Of course, No matter that rule 11UA says about unquoted equity shares but there is only difference of treatment that Preference shareholders enjoy the benefits of receiving their dividend distribution

first; the equity shareholders enjoy voting rights in major company decisions, including mergers, or acquisitions. Preference shares have the right to receive dividend at a fix rate before any dividend at a fix rate before any dividend is paid on the equity shares. Further, when the company, is wound up, they have a right to return of the capital before that of equity shares. As assessee has, itself applied the same principle and has considered the preference share at par and equal to unquoted equity shares that Rule 11 UA will be applicable on issuance of preference share. As the available preference shares that i.e. 60,000 on 31.03.2014 also should have been considered in valuation of fair market value of preference share. At the time of issuance of preference share, but assessee was totally failure to include the same.

Considering all above facts, it is crystal clear that inspite of availability of preference shares on 31.03.2014 assessee was failure in considering the same in determination in the value of share premium. In this way he has received excessive share premium to the tune of Rs 72,12,432/- as discussed in above paras and same is added to the income of the assessee u/s 56(2) (vii b) of the IT Act read with rule 11UA.”

4. In appeal before Ld. CIT(A) the assessment order was sustained by the Ld. First Appellate Authority while sustaining the valuation done by the AO invoking sub clause (A) of Rule 11UA. The ld. CIT(A) relied Clause (2) of Section 56(2)(viib) of the Act and held that it clearly empowers the AO to examine the correctness of fair market value of the shares. Accordingly the ld. CIT(A) concluded that the AO has rightly adopted the net asset value method to arrive at the fair market value of the shares and sustained the addition.

5. The assessee is in appeal raising following grounds :-

“1. That the learned Commissioner of Income Tax (Appeals) has grossly erred in law and on facts in sustaining an addition of a sum of Rs. 72, 12, 432/- under section 56(2)(viib) of the Act, which addition is based on complete

misconception of the facts and on mis - appreciation of the provisions of the Act.

2. That in doing so, the learned Commissioner of Income Tax (Appeals) has failed to appreciate the basic fact that the provisions of section 56(2)(viib) are wholly inapplicable in respect of the aforesaid transaction (as the consideration was received in AY 2012-13) and further, the reliance placed on the said provision is based on a complete misreading of the same and thus, the addition so made is liable to be deleted.

3. That in doing so, the valuation report so furnished by assessee - appellant, wherein, the value per share was worked out at Rs. 354/- per share under Rule 11UA(l)(c)(c), by a professional accountant/ valuer has been arbitrarily discarded and rejected by lower authorities and that too by applying the wrong methodology as envisaged in the said Rule and thus, the valuation of share so adopted by lower authorities at Rs. 213/- per share is unjust, improper and needs to be rejected. The learned CIT(A) has also ignored the fact that these were preference shares which are redeemable and not convertible into equity shares and is thus liability of the company.

1.3 That the adverse findings recorded by the Commissioner of Income Tax (Appeals) while sustaining the impugned addition have been recorded with preconceived notions and by arbitrarily brushing aside the detailed submissions/evidences/material placed on record, which were furnished in order to support the fact that the transaction in question is as per the fair market valuation methods prescribed under

1.4 That the learned Commissioner of Income Tax (Appeals) has further erred in sustaining the aforesaid addition purely on assumptions, presumptions, surmises and conjectures and without any evidence or material to the contrary, and hence the addition made is unsustainable and liable to be deleted.

2. That the learned Commissioner of Income Tax (Appeals) has grossly erred in making the impugned addition without providing to the assessee, a fair and proper and meaningful opportunity of being heard, thereby violating the principles of natural justice and thus such, the addition so made is vitiated both on fact and in law.

6. Heard and perused the record.

7. On behalf of the assessee it was submitted that assessee had merely issued preferential shares and as for the purpose of Section 56(2)(viib) of the Act, the Rule 11UA (2) is not applicable. It was submitted that assessee has issued preferential shares and the valuation under Rule 11UA (2) is applicable only to unquoted equity shares. It was submitted that in fact Rule 11UA(1) Sub clause (c) was applicable which prescribes method for determination of value of unquoted shares and securities other than equity shares it was submitted that the AO arbitrarily rejected the bonafide method adopted by the assessee and he particularly relied to judgment of Hon'ble Delhi High Court in **Cinestan Entertainment (P.) Ltd. [2019 (6) TMI 1367 - ITA No. 8113/Del/2018 vide order dated 27.05.2019 of ITAT Delhi]** and contended that Assessing officer cannot examine or substitute his own value in place of valuation arrived by the assessee either DCF Method or NAV Method. It is also submitted that Ld. AO has not proceeded to make assessment on the basis of Principles of Law as applicable but made assessment on the basis of certain wrong provisions cited by the assessee and did not follow the principle that there is no estoppel against statute.

8. Ld. AR submitted that there is no legality in the findings of Ld. Tax Authorities below. It was submitted that assessee itself was not sure of the manner of valuation.

9. Giving thoughtful consideration to the matter on record, in regard to the pleas of the assessee that Ld. AO has wrongly applied the provisions of law on the basis of principles of estoppels, it comes up, that as such it is not one of the specific grounds raised but being a question of law, can be suitably considered to be falling under the general ground no. 1. Remaining grounds when taken along are based on same set of facts and law and cover the controversy as to if the tax authorities below have fallen in error and applied provisions of Rule 11 UA for the valuation of preferential shares issued for Rs. 344/- each and the

valuation of Rs. 354/- per share is correct and the value would not be Rs. 213/- per shares. In this context, at the outset, it can be observed from the assessment order that Ld. AO was carried away by the fact that assessee has taken two different pleas with regard to valuation of preferential shares and that the assessee was itself not convinced Rule 11UA should be applicable or not. However, the assessment orders shows that even the Ld. AO was not convinced of applicability of Rule 11UA. As it applies to unquoted equity shares but he applied the valuation method of Rule 11UA upon the preferential shares considering them to be similar.

10. In this context, the Bench is of firm opinion that Ld. AO had fallen in error as it is settled proposition of law that there cannot be any estoppel against a statute. Reliance in this regard can be placed on the judgment of Hon'ble Calcutta H.C. in the case of **Mayank Poddar (HUF) Vs. Wealth Tax Officer reported in (2003) 262 ITR P.633** where it was said :-

"There cannot be any estoppels against statute. A property which is not otherwise taxable, cannot become taxable because of misunderstanding or wrong understanding of law by the Assessee or because of his admission or on his misapprehension. If in law an item is not taxable, no amount of admission or misapprehension can make it taxable. The taxability or the authority to impose tax is independent of admission. Neither there can be any waiver of right by the Assessee. The Department cannot rely upon any such admission or misapprehension if it is not otherwise taxable."

10.1 Then Hon'ble Bombay H.C. in the case of **Nirmala L. Mehta Vs. A. Balsubramaniam Comm. of I.T. (2004) 269 ITR P.1** said :-

"Acquiescence cannot take away from a party the relief that he is entitled to where tax is levied or collected without authority of law - Therefore

merely because the Petitioner offered the prize money to tax under the I.T. Act, 1961 that cannot take away her right in contending that the said prize money was not taxable."

10.2 Thus, it is jurisdictional error where AO not being convinced himself about applicability of Rule 11UA proceeded to make the valuation according to method of 11UA on the basis that at some stage assessee itself had applied the method.

11. Next, even if preferential shares and equity shares are considered to be falling within the purview of Section 56(2)(viib) of the Act, they stand on different footing. While the equity shareholders are the real owners of the company, the preference shareholders are not in fact, the owners of the company, they get preference over the equity shareholders on certain aspects. Hence the Net asset value of the company really represents the value of Equity shares and not "Preference shares" - As held Mumbai Bench in case of **ACIT 16(1) Vs. M/s. Golden Line Studio Pvt. Ltd, [TS-8635-ITAT-2018(Mumbai)-O]**.

12. Now, the Rule 11UA(2), applied by the Ld Tax authority, is specifically applicable for the valuation of shares for the purpose of section 56(2)(viib) but covers only unquoted equity shares within its ambit and there is no reference to the preference shares. Thus, the only method for determining the FMV of the preference shares is Rule 11UA(1)(c)(c), which is reproduced herein below:

"the fair market value of unquoted shares and securities other than equity shares in a company which are not listed in any recognized stock exchange shall be estimated to be price it would fetch if sold in the open market on the valuation date and the assessee may obtain a report from a merchant banker or an accountant in respect of which such valuation."

12.1 Thus the the Ld Tax authority below had fallen in error in applying method of valuation of unquoted equity on preferential shares and the possible correct method was to apply Rule 11UA(1)(c)(c) only.

13. Lastly, it can be observed that Ld. AO had arrived at valuation of Rs. 213/- on following basis :

“(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 as rule 11UA. On the perusal of the section 56(2)(viib) of the income Tax Act, it is very clear that the fair value of the unquoted equity shares will be determined in accordance with the method prescribed in rule 11UA.

As per rule 11UA the fair market value of the unquoted shares including face value can be determined as $(A-L) \times (PV)/(PE)$

Here the value of (A-L) is Rs.3,20,58,462/- but the value of (PV/PE) or no. of shares is not the 90,500 but it should be 1,50,500 $(90,500+60,000)$ if we include the preference share i.e. 60,000 those were available on 31.03.2014 then the value of PV/PE or no. of shares becomes $90,500+60,000=1,50,500$

In view of the above, the fair market value of unquoted shares including face value is of Rs. 213 per share

$32058462/150500 = Rs.213$

14. Now if the number of preferential share i.e. 60,000/- as available on 31.03.2014 are not included while taking the value of PV/PE on the basis that the same reflect only the quasi debt and not the equity shares. Then the fair market value arrived would not be Rs. 213/- but around Rs. 354/-.

15. Thus, this bench of the considered opinion that on the counts, Ld. AO had fallen in error in making the addition and the Ld. CIT(A) has fallen in further error in confirming the same while observing that the appellant assessee was not able to lead any argument as to why valuation of shares cannot be done in the manner provided in sub-clause A and Rule 11UA.

16. Grounds raised are sustained. **The appeal is allowed.** The impugned addition of a sum of Rs. 72, 12, 432/- is set aside.

Order pronounced in the open court on 15th September, 2022.

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Date:- 15th .09.2022

Binita, SR.P.S

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI