

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "E" DELHI**

**BEFORE SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER
AND
SHRI YOGESH KUMAR US, JUDICIAL MEMBER**

ITA No.3685/Del/2023
Assessment Year 2016-17

Leela Tourism and Heritage Pvt. Ltd. A-189, Okhla Industrial Area-1 Delhi	Vs.	ACIT Central Circle-15(1) Delhi
TAN/PAN: AABCL3681N		
(Appellant)		(Respondent)

Applicant by:	Shri Rajiv Khandelwal, Chartered Accountant Shri Jaind Kumarm, Advocate		
Respondent by:	Shri Subhra Jyoti Chakraborty, CIT-DR		
Date of hearing:	27	06	2024
Date of pronouncement:	05	09	2024

ORDER

PER PRADIP KUMAR KEDIA - A.M.:

The captioned appeal has been filed by the assessee against the order of the Commissioner of Income Tax (Appeals)-National Faceless Appeal Centre (NFAC), Delhi ('CIT(A)' in short) dated 07.09.2023 arising from the assessment order dated 26.12.2018 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning A.Y. 2016-17.

2. The grounds of appeal raised by the assessee read as under:

"1 The Assessee is a Holding Company of an overseas 100% foreign subsidiary (through SPV), wherein an immovable property in the form of Hotel Apartment Building is situated abroad. The assessee had issued its Equity Shares based on valuation of its Shares following the then Rule 11UA(1)(c)(b) of Income Tax Rules 1962 as per provisions of Section 56(2)(viib). The Assessing Office rejected

the valuation of shares of the assessee company after considering the fact that the property in subsidiary company was valued by the foreign valuer therefore assessee officer imposed valuation of share, which should not be a 'Fair Market Value'. Accordingly, added Rs.6,10,00,000- to the income of the assessee under Section 56(2)(viib) on the reasons recorded in Assessment Order, raising the following questions:

2. Whether method of valuation adopted by the assessee as per Rule 11UA(1)(c)(b) was not applicable on the assessee even after fulfilment of conditions given in section 56(2)(viib) and Rule 11UA?

3. Whether Section 56(2)(viib) restricts valuation of shares of assessee company based on valuation done by the foreign valuer of an overseas property?

4. That on the Facts and circumstances of the case and in law, the Ld.AO erred in initiating the penalty u/s. 271(1)(C) of the Income Tax Act 1961.

5. That on the facts and circumstances of the case and in law, the Ld.AO erred in charging interest u/s.234B of the Income Tax Act, 1961.”

3. Briefly stated, the assessee is a holding company holding 100% equity of foreign subsidiary (through SPV). The assessee during the financial year relevant to Assessment Year 2016-17 in question issued 10 lakh equity shares of Rs.10/- at a premium of Rs.70/- stated to be determined as per the valuation of asset and liabilities of the company as on 31st March, 2015. The return filed by the assessee was subjected to scrutiny by issue of notice under Sections 143(2) and 142(1) of the Act. In the course of the assessment proceedings, the AO *inter alia* observed that the assessee has received large premium on issue of equity shares to M/s. Legacy Food Pvt. Ltd. The AO observed that the assessee in consideration of issue of 10 lakh equity shares received a sum of Rs.1 crore as share capital subscription and Rs.7 crore as share premium thereon. On enquiry towards justification of share premium, the assessee pointed out before the AO that for the purposes of computation of FMV of its shares issued, the assessee has taken value of the

property held in the name of overseas subsidiary company at a fair value of Rs.51,92,50,000/- instead of book value of Rs.21,42,27,200/-. The NAV of investment held in 100% subsidiary company has thus been accordingly adjusted to account for intrinsic value of shares held by Assessee-company in its subsidiary. The assessee contended that such approach in substituting the books value of the property held in the overseas subsidiary by the intrinsic value of the property is fair and reasonable and is in accord with the provisions of Rule 11UA(1)(c) read with Section 56(2)(viib) of the Act. Further, the Fair Market Value (FMV) of shares is supported by the Valuation Report. The AO however recomputed the FMV at Rs.19.02 per share as against aggregate issue price of Rs.80 per share. The AO modified the Fair Market Value essentially on the premise that investment held by foreign subsidiary in the form of 'Hotel Residence AG in Switzerland' has been incorrectly taken on market value using DCF method instead of book value. The value of investment by the Assessee in the subsidiary based on replaced value of Hotel premises is uncalled for. The AO adopted book value of investment in subsidiary for deriving FMV at Rs.19.02 per share. The AO thus invoked the provisions of Section 56(2)(viib) and held that consideration received by way of share premium on issue of equity shares to M/s. Legacy Food Pvt. Ltd. is in excess of FMV and a sum to the extent of Rs.6,10,00,000/- collected by way of share premium from M/s. Legacy Foods Pvt. Ltd. falls within the ambit of deeming fiction and thus susceptible to tax. Accordingly, the aforesaid sum was added to the total income of the assessee.

4. Aggrieved, the assessee preferred appeal before the CIT(A). It was reiterated before the CIT(A) that for the purposes of allotment, the value of shares have been arrived as per the then valuation Rules

in accordance with the subsisting provisions of Rule 11UA of the Income Tax Rules, 1962. The CIT(A) however declined any relief on the action of the AO. The CIT(A) observed that the report of the Chartered Accountant has been prepared without any verification of the market value of the assets of the overseas company. The assessee has sought to directly replace and substitute the book value of its shares held in the subsidiary company (which in turn holds the asset being hotel property in Switzerland) by enhanced value of shares based on a Valuer Report towards Hotel premises in German language to claim that the value of Hotel premises has been enhanced based on drastic change in the building plan and use of Hotel premises. The assessee has claimed that hotel asset which was earlier proposed to be used as a hotel building has now been converted in apartments and accordingly with the change in the building plan and purposes, the value of the hotel building stands at Rs.51.52 crore based on potential earning by adopting DCF method of valuation of shares in 100% of wholly owned subsidiary. The CIT(A) observed that such methodology adopted by the assessee is not supported by prescribed method of valuation. Once the NAV method has been adopted, the assessee is not allowed to replace the book value of investment in wholly owned subsidiary from Rs. 21.41 crore stated to be market value of Rs.51.92 crore based on value assigned to Assets of the subsidiary. It was further observed by the CIT(A) that the overseas report do not pertain to the relevant period and hence no cognizance of the same can be taken. The CIT(A) thus declined to interfere on such broad reasons.

5. Further aggrieved, the assessee preferred appeal before the Tribunal.

6. We have carefully considered the rival submissions and perused the first appellate order and the assessment order. The documents referred to in the course of hearing by the respective sides have also been taken into account.

7. In the present case, the assessee has challenged the additions made under Section 56(2)(viib) towards consideration received by way of allegedly excess share premium on issue of equity shares by the assessee-company.

8. As noted earlier, the assessee in the instant case has issued 10 lakh equity shares of Rs.10/- at a premium of Rs.70/- for each share. The AO has reworked and determined the FMV at Rs.19 per share as against Rs.80 claimed by assessee and consequently held that the assessee has received excess premium over fair value of equity shares issued with reference to Section 56(2)(viib) r.w. Rule 11UA of the Income Tax Rules. The AO accordingly treated excess premium receipt of Rs.6,10,00,000/- as deemed income as per the provisions Section 56(2)(viib) of the Act.

9. The amount received by way of share premium is essentially a capital receipt. However, Section 56(2)(viib) seeks to treat such consideration received as deemed income by a closely held company. Section 56(2)(viib) is one of the anti-abuse provision which brings to tax such excess consideration deemed to have been received by the closely held company while issuing shares at premium if such consideration is found to exceed the FMV of such shares. The rationale behind the introduction of deeming provisions of Section 56(2)(viib) in the statute is to deter generation and use of black money.

9.1 In the instant case, the assessee has issued shares to one M/s. Legacy Food Pvt. Ltd. for a consideration of Rs.80 per share including Rs.70 per share towards premium on face value of Rs.10 per equity share. The assessee seeks to justify the premium of Rs.70 per share as fair market value on the touchstone of Section 56(2)(viib) r.w. Rule 11UA of I.T. Rules, 1962.

9.2 For this purpose, the assessee submits that it owns overseas subsidiary by holding 100% shares thereon and thus have complete control over such entity. The investment value in such subsidiary company shown in its books at book value requires to be substituted by the intrinsic value of the shares of the overseas subsidiary company.

9.3 To assert such substituted valuation above book value, the assessee contends that the subsidiary company holds valuable asset in the form of 'Hotel Residence AG, Switzerland'. The value of investment by subsidiary in M/s. Hotel Residence AG Switzerland has been determined as per the valuation of the private valuer as on June, 2014. The assessee has advanced a justification that the valuation of hotel asset proposed to be used as hotel building stood substantially converted to hotel apartment and this change in the building plan leading to high earning potential and revenue generation has lead to higher valuations determined equivalent to INR 51.92 crore of value of shares of subsidiary company as against INR 21.24 crore reflected in its books. The assessee has thus rightly modified the value of investment and enhanced the book value of the assessee-company based on increase in the value of shares of subsidiary which justifies the share premium charged on issue of shares.

9.4 The AO has declined to admit the claim of assessee towards substitution of the investment value in the subsidiary company, as according to him, Rule 11UA do not permit the substitution of the book value for the purpose of determination of NAV which is the recognized method of valuation adopted by the assessee. Secondly, the value report is based on a disclaimer on the correctness of the valuation of the property in subsidiary company for the purpose of re-working the book value is based on the representations from management. The CIT(A) has also upheld the action of the AO citing constraints laid down by Rule 11UA whereby no option has been provided to modify the figures appearing in the balance sheet for the purposes of determination of NAV.

9.5 The assessee, on the other hand, contends that apart from the recognized methods of valuation contemplated in Rule 11UA, the assessee is also entitled to determine the FMV of the shares subject to the satisfaction of the AO on the date of issue of shares. In terms of Explanation appended to Section 56(2)(viib), once it is demonstrated to the satisfaction of the AO that the FMV stands at a higher figure, the NAV method can be suitably modified. It is an option given to the assessee company to demonstrate higher fair market value. If the option is exercised, it needs to be substantiated to the satisfaction of the AO. The assessee thus submits that while the investment value shown in its books towards 100% subsidiary company has been shown at book value but the intrinsic value / real worth of the subsidiary company is much higher owing to the revaluation of the hotel building held by the subsidiary company backed by valuation report obtained in the case of subsidiary company too. The assessee thus contends that the assessee rightly deserves to substitute the book value of the investment in subsidiary

company while determining the NAV of the assessee company.

10. On perusal of extant provision of Section 56(2)(viib) r.w. Explanation thereto, it is noticed that for the purposes of the aforesaid provision, the FMV of the shares shall be the value as determined in accordance with such method as may be prescribed under Rule 11UA of the Income Tax Rules. Coupled with this and in addition thereto, the assessee is also entitled to substantiate the FMV to the satisfaction of the AO based any rational basis. The modification in the value of shares in subsidiary company appears rational in the context of the case. The law provides for an alternative option to the assessee to substantiate the FMV in the manner as may be considered expedient. Both AO and the CIT(A) thus have proceeded on misconception that while determining the FMV as per NAV, the book value cannot at all be substituted even on some rational basis. As noted, in view of Explanation to Section 56(2)(viib), the assessee is entitled to suitably modify the NAV as long as the NAV is capable of being substituted by some proof or competent evidence. On facts, the assessee has produced the valuation report as well as the market valuation of Hotel Residence AG Switzerland in German currency. The valuation of shares of subsidiary company to determine the FMV of the holding company, i.e., the assessee company for the purposes of issuance of shares at premium thus is in accord with the deeming provision. The CIT(A), as noted earlier, has proceeded on misconception of law and facts and erroneously proceeded on the assumption that while determining the FMV as per NAV method, the component of different assets held by the assessee company cannot be modified. This approach is contrary to the Explanation (a)(ii) of Section 56(2)(viib) of the Act.

11. The method adopted for reworking of the subsidiary company by applying the DCF method or any known method is permissible as long as the assessee is able to establish the correctness of the valuation in the light of the valuation report furnished.

12. The assessee, in our considered view, is free to adopt the FMV of the asset held by the subsidiary company and rework the value of investments held in the subsidiary company. Such approach do not run contrary to the object and purpose of Section 56(2)(viib).

13. We thus set aside the action of the CIT(A) and reverse the additions made by the AO.

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

Order pronounced in the open Court on 05 September, 2024.

Sd/
[YOGESH KUMAR US]
JUDICIAL MEMBER

Sd/-
[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER

DATED: September, 2024
Prabhat