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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ ITA 618/2023, CM No. 58381/2023

PR. COMMISSIONER OF INCOME TAX -1..... Appellant

Through: Mr. Prashant Meharchandani,
SSC with Mr. Akshat Singh,
Ms. Ritika Vohra, Mr. Utkarsh
Kandpal, Advs.

Versus

ABHIRVEY PROJECTS PRIVATE LIMITED Respondent

Through: Mr. Ved Jain, Mr. Nischay
Kantoor, Ms. Soniya Dudeja,
Advs.

CORAM:

HON'BLE MR. JUSTICE YASHWANT VARMA

**HON'BLE MR. JUSTICE PURUSHAINDR KUMAR
KAURAV**

ORDER

05.04.2024

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1. We had upon hearing learned counsels appearing for respective sides passed the following order on 05 February 2024:-

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4. The ITAT has, in our considered opinion, rightly come to conclude that actual figures could not have been taken into consideration for the purposes of Section 56(2)(viii b) of the Act. We find that the aforesaid position would also flow from the judgment of this Court in **Pr.CIT vs. Cinestaan Entertainment Pvt. Ltd.** [2021:DHC:780-DB] where it was held as follows:

“12. In this factual background, the learned ITAT then proceeded to examine whether the AO after invoking the deeming provision under Section 56(2)(viii b), could have determined the FMV of the premium on the shares issued at nil after rejecting the valuation report given by the Chartered Accountant based on one of the prescribed methods under the Rules adopted by the valuer. On this aspect, after examining the statutory provisions and the factual position, the ITAT *inter-alia* observed as under:



“32. What is seen here is that, both the authorities have questioned the assessee's commercial wisdom for making the investment of funds raised in 0% compulsorily convertible debentures of group companies. They are trying to suggest that assessee should have made investment in some instrument which could have yielded return/ profit in the revenue projection made at the time of issuance of shares, without understanding that strategic investments and risks are undertaken for appreciation of capital and larger returns and not simply dividend and interest. Any businessman or entrepreneur, visualise the business based on certain future projection and undertakes all kind of risks. It is the risk factor alone which gives a higher return to a businessman and the income tax department or revenue official cannot guide a businessman in which manner risk has to be undertaken. Such an approach of the revenue has been judicially frowned by the Hon'ble Apex Court on several occasions, for instance in the case of SA Builders, 288 ITR 1 (SC) and CIT vs. Panipat Woollen and General Mills Company Ltd., 103 ITR 66 (SC). The Courts have held that Income Tax Department cannot sit in the armchair of businessman to decide what is profitable and how the business should be carried out. Commercial expediency has to be seen from the point of view of businessman. Here in this case if the investment has been made keeping assessee's own business objective of projection of films and media entertainment, then such commercial wisdom cannot be questioned. Even the prescribed Rule 11UA(2) does not give any power to the Assessing Officer to examine or substitute his own value in place of the value determined or requires any satisfaction on the part of the Assessing Officer to tinker with such valuation. Here, in this case, Assessing Officer has not substituted any of his own method or valuation albeit has simply rejected the valuation of the assessee.

33. Section 56(2) (viib) is a deeming provision and one cannot expand the meaning of scope of any word while interpreting such deeming provision. If the statute provides that the valuation has to be done as per the prescribed method and if one of the prescribed methods has been adopted by the assessee, then Assessing Officer has to accept the same and in case he is not satisfied, then we do not find any express provision under the Act or rules, where Assessing Officer can adopt his own valuation in DCF method or get it valued by some different Valuer. There has to be some enabling provision under the Rule or the Act where Assessing Officer has been given a power to



tinker with the valuation report obtained by an independent valuer as per the qualification given in the Rule 11U. Here, in this case, Assessing Officer has tinkered with DCF methodology and rejected by comparing the projections with actual figures. The Rules provide for two valuation methodologies, one is assets based NAV method which is based on actual numbers as per latest audited financials of the assessee company. Whereas in a DCF method, the value is based on estimated future projection. These projections are based on various factors and projections made by the management and the Valuer, like growth of the company, economic/market conditions, business conditions, expected demand and supply, cost of capital and host of other factors. These factors are considered based on some reasonable approach and they cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and catena of underline facts and assumptions. Nevertheless, at the time when valuation is made, it is based on reflections of the potential value of business at that particular time and also keeping in mind underline factors that may change over the period of time and thus, the value which is relevant today may not be relevant after certain period of time. Precisely, these factors have been judicially appreciated in various judgments some of which have been relied upon by the Id. Counsel, for instance:

i) Securities & Exchange Board of India & Ors [2015 ABR 291 (Bombay HC)]

"48.6 Thirdly, it is a well settled position of law with regard to the valuation that valuation is not an exact science and can never be done with arithmetic precision. The attempt on the part of SEBI to challenge the valuation which is by its very nature based on projections by applying what is essentially a hindsight view that the performance did not match the projection is unknown to the law on valuations. Valuation being an exercise required to be conducted at a particular point of time has of necessity to be carried out on the basis of whatever information is available on the date of the valuation and a projection of future revenue that valuer may fairly make on the basis of such information."

ii) Rameshwaram Strong Glass Pvt. Ltd. v. ITO [2018-TIOL1358-ITAT- Jaipur]

4.5.2. Before examining the fairness or reasonableness of valuation report submitted by the assessee we have to bear



in mind the DCF Method and is essentially based on the projections (estimates) only and hence these projections cannot be compared with the actuals to expect the same figures as were projected. The valuer has to make forecast on the basis of some material but to estimate the exact figure is beyond its control. At the time of making a valuation for the purpose of determination of the fair market value, the past history may or may not be available in a given case and therefore, the other relevant factors may be considered. The projections are affected by various factors hence in the case of company where there is no commencement of production or of the business, does not mean that its share cannot command any premium. For such cases, the concept of start-up is a good example and as submitted the income-tax Act also recognized and encouraging the start-ups.

iii) DQ(International) Ltd. vs. ACIT (ITA 151/Hyd/2015)

10. In our considered view, for valuation or an intangible asset only the future projections along can be adopted and such valuation cannot be reviewed with actuals after 3 or 4 years down the line. Accordingly, the grounds raised by the assessee are allowed".

34. The aforesaid ratios clearly endorsed our view as above. In any case, if law provides the assessee to get the valuation done from a prescribed expert as per the prescribed method, then the same cannot be rejected because neither the Assessing Officer nor the assessee have been recognized as expert under the law.

35. There is another very important angle to view such cases, is that, here the shares have not been subscribed by any sister concern or closely related person, but by an outside investors like, Anand Mahindra, Rakesh Jhunjhunwala, and Radhakishan Damania, who are one of the top investors and businessman of the country and if they have seen certain potential and accepted this valuation, then how AO or Ld. CIT(A) can question their wisdom. It is only when they have seen future potentials that they have invested around Rs.91 crore in the current year and also huge sums in the subsequent years as informed by the ld. counsel. The investors like these persons will not make any investment merely to give dole or carry out any charity to a startup company like, albeit their decision is guided by business and commercial prudence to evaluate a startup company like assessee, what they can achieve in future. It has been informed that these investors are now the major



shareholder of the assessee company and they cannot become such a huge equity stock holder if they do not foresee any future in the assessee company. In a way Revenue is trying to question even the commercial prudence of such big investors like. According to the Assessing Officer either these investors should not have made investments because the fair market value of the share is Nil or assessee should have further invested in securities earning interest or dividend. Thus, under these facts and circumstances of the case, we do not approve the approach and the finding of the ld. Assessing Officer or ld. CIT(A) so to take the fair market value of the share at 'Nil' under the provision of Section 56(2)(viib) and thereby making the addition of Rs.90.95 crores. The other points and various other arguments raised by the ld.counsel which kept open as same has been rendered purely academic in view of finding given above.

36. Other grounds are either consequential or have become academic, hence same are treated as infructuous. In the result appeal of the appellant assessee is allowed.

13. From the aforesaid extract of the impugned order, it becomes clear that the learned ITAT has followed the dicta of the Hon'ble Supreme Court in matters relating to the commercial prudence of an assessee relating to valuation of an asset. The law requires determination of fair market values as per prescribed methodology. The Appellant-Revenue had the option to conduct its own valuation and determine FMV on the basis of either the DCF or NAV Method. The Respondent-Assessee being a start-up company adopted DCF method to value its shares. This was carried out on the basis of information and material available on the date of valuation and projection of future revenue. There is no dispute that methodology adopted by the Respondent-Assessee has been done applying a recognized and accepted method. Since the performance did not match the projections, Revenue sought to challenge the valuation, on that footing. This approach lacks material foundation and is irrational since the valuation is intrinsically based on projections which can be affected by various factors. We cannot lose sight of the fact that the valuer makes forecast or approximation, based on potential value of business. However, the underline facts and assumptions can undergo change over a period of time. The Courts have repeatedly held that valuation is not an exact science, and therefore cannot be done with arithmetic precision. It is a technical and complex problem which can be appropriately left to the consideration and wisdom of experts in the field of accountancy, having regard to the imponderables which enter the process of valuation of shares. The Appellant-Revenue is unable to demonstrate that the methodology adopted by the



Respondent-Assessee is not correct. The AO has simply rejected the valuation of the Respondent-Assessee and failed to provide any alternate fair value of shares. Furthermore, as noted in the impugned order and as also pointed out by Mr. Vohra, the shares in the present scenario have not been subscribed to by any sister concern or closely related person, but by outside investors. Indeed, if they have seen certain potential and accepted this valuation, then Appellant-Revenue cannot question their wisdom. The valuation is a question of fact which would depend upon appreciation of material or evidence. The methodology adopted by the Respondent-Assessee, accepted by the learned ITAT, is a conclusion of fact drawn on the basis of material and facts available. The test laid down by the Courts for interfering with the findings of a valuer is not satisfied in the present case, as the Respondent-Assessee adopted a recognized method of valuation and Appellant-Revenue is unable to show that the assessee adopted a demonstrably wrong approach, or that the method of valuation was made on a wholly erroneous basis, or that it committed a mistake which goes to the root of the valuation process.

14. In view of the foregoing, we find that the question of law urged by the Appellant-Revenue is purely based on facts and does not call for our consideration as a question of law.

15. For the foregoing reasons, the appeal is dismissed along with pending application.”

5. Mr. Meharchandani, however, contends that even if the ITAT were convinced that the methodology as adopted by the AO was not liable to be countenanced, once the Valuation Report itself had not been accepted, the end of justice would have warranted the matter being remitted to the AO for the purposes of carrying out the valuation afresh and in accordance with law.

6. There is however, presently, a dispute with respect to the recordal of facts by the AO in its order and who has observed in paragraph 5.2 extracted above that the material which was provided to the valuer for the purposes of preparation of DCF Report had not been presented in assessment proceedings. This is seriously disputed by Mr. Jain who contends that the requisite material had in fact been placed in the course of assessment.

7. In view of the aforesaid we call upon Mr. Meharchandani to obtain instructions and apprise us as to the correctness of the observation of the AO that it had not been provided any basis / documentary evidence in support of the projected data provided to the valuer.

8. Let the relevant record consequently be produced before us or instructions obtained on or before the next date fixed.

9. Let the matter be called again on 05.04.2024.”



2. Today and before us, it is undisputed that the Assessing Officer [“**AO**”] while rejecting the valuation report which had been submitted by the respondent assessee had proceeded to frame the order on the basis of actual figures which had obtained. It was the aforesaid procedure adopted which fell for adverse comment of the Commissioner of Income Tax (Appeal) [“**CIT(A)**”] as well as Income Tax Appellate Tribunal [“**ITAT**”]. It becomes pertinent to observe that an estimation would to some extent be based on an approximate evaluation. That estimation would not be liable to be questioned on the basis of actual facts or figures. Ultimately, the correctness of an estimation would have to be tested on the basis of a legitimate and valid assessment.

3. In our considered opinion, while the ITAT was therefore justified in upholding the view taken by the CIT(A), it would have been appropriate for it to have remitted the matter to the AO for the purposes of examining the issue afresh and in light of Section 56(2)(viib) of the Income Tax Act, 1961 [“**Act**”].

4. In view of the aforesaid, we set aside the impugned order of the ITAT dated 27 December 2022 and remit the matter to the desk of the AO who shall proceed to undertake a valuation afresh bearing in mind the provisions made in Section 56(2)(viib) and ensuring that while the DCF Method is adhered to, if in case the data which has been provided by the respondent assessee is found to warrant further examination, it would be open to the AO to enlist the services of an appropriate valuer. All rights and contentions of respective parties in respect of any such exercise undertaken or assessment made on merits are kept open.



5. The appeal along with pending application shall stand disposed of the aforesaid terms.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

APRIL 5, 2024

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