

**IN THE INCOME TAX APPELLATE TRIBUNAL  
“A” BENCH : BANGALORE**

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT  
AND SHRI B. R. BASKARAN, ACCOUNTANT MEMBER**

ITA No.2170/Bang/2019
Assessment year : 2013-14

M/s. UKN Hospitality Private Limited, 10 <sup>th</sup> Floor, Gamma Block, Sigma Soft tech Park, No.7, Airport Varthur Road, Whitefield Main Road, Bengaluru – 560 066. <b>PAN : AAACU 8470 B</b>	Vs.	Income Tax Officer, Ward – 7(1)(2), Bengaluru.
APPELLANT		RESPONDENT

Appellant by	:	Shri S. V. Ravishankar Advocate
Respondent by	:	Shri Kannan Narayanan, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	24.06.2021
Date of Pronouncement	:	30.06.2021

**ORDER**

*Per N.V. Vasudevan, Vice President*

This appeal by the Assessee is against the order of the Commissioner of Income Tax (Appeals)–10, Bangalore, dated 8.3.2019 in relation to assessment year 2013-14.

2. There is a delay of about 132 days in filing this appeal by the Assessee. The reasons for the delay is owing to the fact that Mr.K.Ravindran, the group CFO and director who was handling the matter did not bring to the notice of the Group Chairman about the impugned order. Mr.K.Ravindran was made to resign as director due to various issues and he stopped attending office since April, 2019. The Chartered Account who appeared before CIT(A) in a meeting with the officials on

30.9.2019 found that no action had been taken against the impugned order and thereafter the appeal had been filed.

3. Keeping in view the circumstances stated in the affidavit for condonation of delay, we are of the view that the delay in filing appeal should be condoned and accordingly the same is condoned.

4. The only issue involved in the appeal is as to whether the revenue authorities were justified in invoking provisions of section 56(2)(viib) of the Income Tax Act, 1961 (the Act) and bringing to tax the difference between the fair market value and the issue price of shares at a premium as income of the Assessee. Section 21 clause (B) of Finance Act, 2012 introduced Sec.56(2)(viib) of the Act with effect from the 1st day of April, 2013, and the said provisions reads thus:-

“Income from other sources.

56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

(i) ..... (viiia).....

(viib) 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 that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received—

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

(ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation.—For the purposes of this clause,—

(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, or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, 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,

whichever is higher;

(b) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meanings respectively assigned to them in clause (a), clause (b) and clause (c) of Explanation to clause (23FB) of section 10;"

5. Section 56(2)(viib) of the Act was introduced by the Finance Act 2012 with effect from the 1st day of April, 2013, which requires a Company (issuer), not being a company in which the public are substantially interested, to issue shares at Fair Market Value (FMV). Any consideration received by such issuing Company in excess of the FMV, to the extent it exceeds the face value of such shall be liable to tax. For the purpose of this section, FMV shall be the value, Higher of the following:-

- “(a) as may be determined in accordance with such methods as may be prescribed( Methods prescribed under Rule 11UA are Book value Method (NAV) and Discounted Cash flow method); or
- (b) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, 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,”

6. Discounted Cash Flow method (DCF method) was recognised in Rule 11UA w.e.f. from 29.11.2012

7. The Assessee is in the business of hospitality. The Assessee company allotted 4,50,032 equity shares of face value of Rs.10/- at a premium of Rs.136/- per share on 14.8.2012 to three persons and received a share premium. During the previous year i.e., on 21.11.2012, the Assessee issued and allotted 146 shares of Rs.100 each at a premium of Rs.92,47,480/- (premium of Rs.63,338.90).

8. The plea of the Assessee was that the valuation of shares at a premium was based on a valuation report in which Discounted Cash Flow (DCF) method of valuation of shares was adopted. According to the Assessee the DCF method was a permitted method of valuation in terms of Rule 11UA(2)(b) of the Income Tax Rules, 1962 (Rules) read with Sec.56(2)(viib) of the Act.

9. The Assessing Officer did not accept the explanations of the Assessee and he was of the view that the DCF method was permissible only in respect of shares issued after 29.11.2012 when Rule 11UA was amended providing for adopting DCF method or NAV method as method of valuation of shares for the purpose of Sec.56(2)(viib) of the Act. Since the

Assessee had issued shares on 14.8.2012 prior to the aforesaid amendment, the only option of the Assessee was to adopt the NAV method. The AO accordingly arrived at value of Rs.85 under NAV method and brought to tax a sum of Rs.2,74,51,952 (Rs.146-Rs.85 = Rs.61x 4,50032 = Rs.2,74,51,952). On appeal by the Assessee the CIT(A) confirmed the order of the AO.

10. The only issue is as to whether the DCF method was applicable for shares issued on 4.8.2012. The consideration for issue of shares was received in the previous year relevant to AY 2013-14. The provisions of Sec.56(2)(viib) of the Act were introduced by the Finance Act, 2012 w.e.f. 1.4.2013 and therefore those provisions were applicable. Income-tax (Fifteenth Amendment) Rules, 2012 – Amended Rule 11UA by notification No. 52/2012 dated 29-11-2012 whereby DCF method was a permissible method of valuation of shares. Valuation of shares for the purpose of Sec.56(2)(viib) of the Act has to be as on the date of issue of shares. The basis of valuation can be on the basis of a method which is subsequently recognized by the legislature. It cannot be said that valuation is to be made only by the method that prevailed as on the date of issue and allotment of shares. The basis of valuation by the DCF method which was one of the recognized method during the previous year relevant to AY 2013-14 ought to have been examined by the AO and CIT(A) and ought not to have been rejected on a technical reason.

11. We however find that the correctness of DCF method adopted by the Assessee for valuing shares had not been examined by the revenue authorities. On the procedure to be followed when such method of valuation is not accepted by the AO the Id. counsel for the Assessee has drawn our attention of the ITAT, Bangalore Bench in the case of *VBHC Value Homes Pvt. Ltd., Vs ITO in ITA No.2541/Bang/2019 order dated 12-06-2020*, the Tribunal after relying on the decision of the Hon'ble Bombay

High Court in the case of *Vodafone M-Pesa Ltd Vs Pr.CIT 164 DTR 257* and decision of the ITAT, Bangalore Bench in the case of *Innoviti Payment Solutions Pvt. Ltd., Vs ITO(2019) 102 Taxmann.com 59* held as follows:-

“9. We have considered the rival submissions. First of all, we reproduce paras 11 to 14 from the Tribunal order cited by learned AR of the assessee having been rendered in the case of *Innoviti Payment Solutions Pvt. Ltd., Vs. ITO (supra)*. These paras are as follows:

"11. As per various tribunal orders cited by the learned AR of the assessee, it was held that as per Rule 11UA (2), the assessee can opt for DCF method and if the assessee has so opted for DCF method, the AO cannot discard the same and adopt other method i.e. NAV method of valuing shares. In the case of *M/s. Rameshwaram Strong Glass (P) Ltd. vs. The ITO (Supra)*, the tribunal has reproduced relevant portion of another tribunal order rendered in the case of *ITO vs. M/s Universal Polypack (India) Pvt. Ltd.* in ITA No. 609/JP/2017 dated 31.01.2018. In this case, the tribunal held that if the assessee has opted for DCF method, the AO cannot challenge the same but the AO is well within his rights to examine the methodology adopted by the assessee and/or underlying assumptions and if he is not satisfied, he can challenge the same and suggest necessary modifications/alterations provided ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 the same are based on sound reasoning and rationale basis. In the same tribunal order, a judgment of Hon'ble Bombay High Court is also taken note of having been rendered in the case of *Vodafone M-Pesa Ltd. vs. PCIT* as reported in 164 DTR 257. The tribunal has reproduced part of Para 9 of this judgment but we reproduce herein below full Para 9 of this judgment.

"9. We note that, the Commissioner of Income-Tax in the impugned order dated 23rd February, 2018 does not deal with the primary grievance of the petitioner. This, even after he concedes with the method of valuation namely, NAV Method or the DCF Method to determine the fair market value of shares has to

be done/adopted at the Assessee's option. Nevertheless, he does not deal with the change in the method of valuation by the Assessing Officer which has resulted in the demand. There is certainly no immunity from scrutiny of the valuation report submitted by the Assessee. Therefore, the Assessing Officer is undoubtedly entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. However, the basis has to be the DCF Method and it is not open to him to change the method of valuation which has been opted for by the Assessee. If Mr. Mohanty is correct in his submission that a part of demand arising out of the assessment order dated 21st December, 2017 would on adoption of DCF Method will be sustained in part, the same is without working out the figures. This was an exercise which ought to have been done by the Assessing Officer and that has not been done by him. In fact, he has completely disregarded the DCF Method for arriving at the fair market value. Therefore, the demand in the facts need to be stayed."

12. As per above Para of this judgment of Hon'ble Bombay High Court, it was held that the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a final determination from an independent valuer to confront the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. Hence, in our considered opinion, in the present case, when the guidance of Hon'ble Bombay high Court is available, we should follow this judgment of Hon'ble Bombay High Court in preference to various tribunal orders cited by both sides and therefore, we are not required to examine and consider these tribunal orders. Respectfully following this judgment of Hon'ble Bombay High Court, we set aside the order of CIT (A) and restore the matter to AO for a fresh decision in the light of this judgment of Hon'ble Bombay High Court. The AO should scrutinize the valuation report and he should determine a

fresh valuation either by himself or by calling a final determination from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 change the method of valuation which has been opted by the assessee. In our considered opinion and as per report of research committee of (ICAI) as reproduced above, most critical input of DCF model is the Cash Flow Projections. Hence, the assessee should be asked to establish that such projections by the assessee based on which, the valuation report is prepared by the Chartered accountant is estimated with reasonable certainty by showing that this is a reliable estimate achievable with reasonable certainty on the basis of facts available on the date of valuation and actual result of future cannot be a basis of saying that the estimates of the management are not reasonable and reliable.

13. Before parting, we want to observe that in the present case, past data are available and hence, the same can be used to make a reliable future estimate but in case of a start up where no past data is available, this view of us that the projection should be on the basis of reliable future estimate should not be insisted upon because in those cases, the projections may be on the basis of expectations and in such cases, it should be shown that such expectations are reasonable after considering various macro and micro economic factors affecting the business.

14. In nutshell, our conclusions are as under:-

(1) The AO can scrutinize the valuation report and the if the AO is not satisfied with the explanation of the assessee, he has to record the reasons and basis for not accepting the valuation report submitted by the assessee and only thereafter, he can go for own valuation or to obtain the fresh valuation report from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee.

(2) For scrutinizing the valuation report, the facts and data available on the date of valuation only has to be



considered and actual result of future cannot be a basis to decide about reliability of the projections.

(3) The primary onus to prove the correctness of the valuation Report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, scientific study and applicable Guidelines regarding DCF Method of Valuation."

10. From the paras reproduced above, it is seen that in this case, the Tribunal has followed the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra). The Tribunal has noted that as per the judgment of Hon'ble Bombay High Court, it was held that AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. The Tribunal has followed the judgment of Hon'ble Bombay High Court and disregarded various other Tribunal orders against the assessee which were available at that point of time. In the present case also, we prefer to follow the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra) in preference to the judgment of the Hon'ble Kerala High Court cited by DR of the Revenue rendered in the case of Sunrise Academy of Medical Specialities (India) (P.) Ltd. Vs. ITO (supra) because this is settled position of law by now that if two views are possible then the view favourable to the assessee should be adopted and with regard to various Tribunal orders cited by learned DR of the Revenue which are against the assessee we hold that because we are following a judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra), these tribunal orders are not relevant. In the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO (supra), this judgment of Hon'ble Bombay High Court was followed and the matter was restored back to the file of AO for a fresh decision with a direction that AO should follow DCF

method only and he cannot change the method opted by the assessee as has been held by the Hon'ble Bombay High Court. The relevant paras of this Tribunal order are already reproduced above which contain the directions given by the Tribunal to the AO in that case. In the present case also, we decide this issue on similar line and restore the matter back to the file of AO for a fresh decision with similar directions. Accordingly, ground No.3 of the assessee's appeal is allowed for statistical purposes.”

12. The gist of the conclusion is that the law contemplates invoking provisions of section 56(2)(viib) of the Act only in situations where the shares are issued at a premium and at a value higher than the fair market value. The fair market value contemplated in the provisions above is as under: -

“(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; or
- (ii) any other value to the satisfaction of the Assessing Officer.....”

13. The law provides that, the fair market value may be determined with such method as may be prescribed or the fair market value can be determined to the satisfaction of the Assessing Officer. The provision provides an Assessee two choices of adopting either NAV method or DCF method. If the Assessee determines the fair market value in a method as prescribed the Assessing Officer does not have a choice to dispute the justification. The methods of valuation are prescribed in Rule 11UA(2) of the Rules. The provisions of Rule 11UA(2)(b) of the Rules provides that, the Assessee can adopt the fair market value as per the above two methods i.e., either DCF method or fair market value of the unquoted equity shares determined by a merchant banker. The choice of method is that of the Assessee. The Tribunal has followed the judgment of Hon'ble

Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra) and has taken the view that the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the Assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the Assessee. The decision of ITAT, Delhi in the case of *Agro Portfolio Ltd. 171 ITD 74* has also been considered by the ITAT, Bangalore in the case of *VBHC Value Homes Pvt. Ltd.(supra)*.

14. In view of the above legal position, we are of view that the issue with regard to valuation has to be decided afresh by the AO on the lines indicated in the decision of ITAT, Bangalore in the case of *VBHC Value Homes Pvt. Ltd., Vs ITO (supra)* i.e., (i) the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. (ii) For scrutinizing the valuation report, the facts and data available on the date of valuation only has to be considered and actual result of future cannot be a basis to decide about reliability of the projections. The primary onus to prove the correctness of the valuation Report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, scientific study and applicable Guidelines regarding DCF Method of Valuation. The order of Id.CIT(A) is accordingly set aside and this issue is remanded to the AO for decision afresh, after due opportunity of hearing to the Assessee.

15. In the result, the appeal is allowed for statistical purposes.

Pronounced in the open court on this 30<sup>th</sup> day of June, 2021.

Sd/-  
**(B. R. BASKARAN)**  
**ACCOUNTANT MEMBER**

Sd/-  
**(N. V. VASUDEVAN)**  
**VICE PRESIDENT**

Bangalore,  
Dated, the 30<sup>th</sup> June, 2021.  
/NS/\*

Copy to:

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

By order

Assistant Registrar  
ITAT, Bangalore.