

THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Amarjit Singh (JM)

I.T.A. No. 6940/Mum/2018 (Assessment Year 2015-16)

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| Vardhman Entertainment & Hospitality Pvt.Ltd. 113, Commerce House, 140, N.M.Road, Fort Mumbai-400 023 PAN : AACCV9193Q | Vs. | ACIT-2(3)(1) Room No.552, Aaykar Bhawan, M.K.Road Mumbai-400 020 |
| (Appellant) | | (Respondent) |

| | |
|-----------------------|--------------------|
| Assessee by | Shri Vimal Punmiya |
| Department by | Ms. Usha Gaikwad |
| Date of Hearing | 31.05.2021 |
| Date of Pronouncement | 01.07.2021 |

O R D E R

Per Shamim Yahya (AM) :-

This appeal by the Assessee is directed against the order of learned CIT(A)-06 dated 26.09.2018 and pertains to Assessment Year 2015-16.

2. The grounds of appeal read as under :

1. Addition u/s. 56(2)(vii)(b). of the I.T. Act: Rs. 60,67,4297-

1. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the Ld. Assessing Officer in invoking the provisions of section 56(2)(viib) of the Act and making an addition of Rs. 60,67,429/- in a case where a wholly owned subsidiary company issued shares to its Holding Company in consideration of transfer of assets and liabilities of a division to it by the holding company at a value determined under the Scheme of Arrangement duly approved by the learned High Court of Bombay. The wholly owned subsidiary company has issued shares for the net value of the assets and liabilities so transferred, the total values of shares issued is same as of the net value of assets and liabilities of the division so transferred. The issue price per share also meet the criteria of books value of share as prescribed under the Rule 11UA of the Income Tax Rules.

2. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the Ld. Assessing Officer of taking a different

date that the appointed date of the Scheme of Arrangement under which the shares are issued and further erred in reducing the Deferred Tax Liability from the Total Assets while calculating the book value of shares. It may be noted that the Deferred Tax Liability is not an ascertained liability but only a notational amount shown in accounts to comply with the prescribed Accounting Standards.

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) has erred in confirming the action of the Ld. Assessing Officer in making an addition u/s 56(2)(viib) of the Act where the difference between the issue price of shares and that book value computed by the learned Assessing Officer is not even 3% of the issue price.

3. Brief facts of the case are that during the year under consideration, the assessee company had issued 1055205 equity shares to M/s.Vardhaman Developers Ltd. The face value of these equity shares was Rs.10/- and the shares were issued at a premium of Rs.190/-. Total amount of share premium received by the assessee during the year was Rs.20,04,88,950/-. The assessee was requested by AO to furnish identity of the investor, valuation report of the equity shares and justification of share valuation along with proof of the transactions. The assessee vide submitted the valuation report, Form No.PAS-3 approvals of general body and board of directors and the business transfer agreement approved by Hon'ble Bombay High Court between the assessee and M/s.Vardhaman Developers Ltd. (VDL). The share valuation report showed that the assessee had adopted the Net Asset Value method for computing the valuation shares. It was stated in the valuation report that the values as appearing in the audited books of accounts of the assessee and Amusement Park Undertaking had been taken as on 31.03.2013 and provision account for half year ended 30.09.2013 had been considered for share valuation. It was also stated that the business of operating amusement park of VDL is transferred to its wholly owned subsidiary company i.e.Vardhaman Entertainment & Hospitality Pvt. Ltd, (VE&HPL) by way of business transfer agreement. As per the agreement the share of VE&HPL had to be transferred to VDL and the assessee VE&HPL would remain subsidiary of VDL. As the structure of the company did not change, the valuation was done as per

the NAV method / taking the date of balance-sheet of amusement park undertaking of VDL as at 31.03.2013, which came at Rs.2110.41 lakhs. The AO was not satisfied with the determining the value of the shares, the AO proceeded to compute the valuation as per IT. Rule 11UA considering the book value of the assets as on the data available in the balance-sheet of the assessee as on 31.03.2014. The AO observed that in its submission dated 24.11.2017, the assessee had stated that the fair market value as per Rule 11UA of the amusement park division as on 31.03.2013 (as on appointed date was 01.04.2013) for which the shares were issued. It was further stated that the share market value of the shares issued for park division comes to Rs.200/- being the same valuation at which the shares were issued for transfer of amusement park division by the assessee company to its holding company and the valuation of shares issued for transfer of amusement park division would always be the net asset value (book value) of the assets and liabilities as on the appointed date of the amusement park division, further, justification was given that since the appointed date of demerger was 01.04.2013, pending the approval of Hon'ble High Court, the assessee company had already incorporated the assets, liabilities and activities of the amusement park and created an equity capital suspense account in its audited accounts for the year ended 31.03.2014. However, after considering the submission of the assessee, the AO did not agree with the same. According to the AO, assessee could not put forward proper justification as to why the share valuation was done on 15.11.2013, when the actual share was issued to M/s.VDL in F.Y.2014-15. i.e. after one year. He observed that as per the normal practice, the valuation of shares should be done on the same day when the shares are issued. The assessee had computed the value of shares as on 31.03.2013 and half yearly data as on 30.09.2013. However, it could have done the valuation of shares in F.Y.2014-15 when the shares were actually issued. According to the AO, assessee had tried to justify that the valuation was done as per the valuation followed while transferring shares of M/s.VDL, which was Rs,200/- per share, since the structure of the company did not change and the assessee

company was still a subsidiary company of M/s.VDL. It had been justified that M/s.VDL had kept a capital suspense account for purchase of shares. AO opined that, the valuation of shares as per the book value of asset method had to be taken as net asset value of the assessee on the date of issuance of shares. He observed that since the same was not followed by the assessee, the valuation method adopted by the assessee was not correct. The AO further observed that the assessee, vide its submission dated 27.11.2017 had stated that the fair market value as per Rule 11UA of the amusement park division as on 31.03.2013 was considered. It has also pleaded that since the transfer of assets & liabilities and issue of shares were between a holding company and its wholly owned subsidiary, the transaction was not a bilateral transaction and there was no tax implication involved as even the transfer was also not regarded as transfer within the meaning of section 47(iv) of the Act. The assessee had without prejudice submitted the fair market value per share as on 31.03.2014 at Rs. 196.88. The AO observed that this contention of the assessee was not correct because though the shares of the subsidiary company was transferred to the parent company after the Bombay High Court order on demerger, the assessee had not prepared a balance-sheet as on the date of share transfer. In this regard, the AO has reproduced the provisions of section 47(iv) wherein it has been mentioned that -

"47. Transactions not regarded as transfer.....

(iv) Any transfer of a capital asset by a company to its subsidiary company, if—

(a) The parent company or its nominees hold the whole of the share capital of the subsidiary company

(b) The subsidiary company is an Indian company.....'¹

He observed that from the above provisions of the relevant section, it is clear that the capital asset if transferred by a parent company (100% shareholder of subsidiary company) to its subsidiary company, then the transaction is not a transfer. This section is not relevant with the assessee company as in this case the parent company, M/s.VDL was not 100% shareholder of the subsidiary company, M/s.VEHPL (assessee). Hence, the share transaction has to be treated as a transfer. In view of the above, the AO observed • that it was clear that the assessee had not followed the

proper valuation method for its equity shares. In this regard, A.O. referred to the provisions of Section 56(2)

The AO observed that in this case, the assessee company is a company in which the public are not substantially interested and has received premium for issue of shares from a resident. In view of the aforesaid discussion and provisions of Explanation to Section 56(2)(viib), the AO concluded that the method so as to determine the fair market value is calculated as per the Net book value of asset method. Hence, provisions of section 56(2)(viib) are henceforth applicable. The AO further observed that the fair market value of shares can be computed from net asset value as per books. The Net asset value as on 31.03.2014 is (Book value of assets - Book value of liabilities) = Rs.20,78,89,003/-. The no. of shares issued/to be issued till 31.03.2014 was 1070205. Hence, the fair market value per share is Rs.194.25. The assessee had taken share value per share at Rs.200/-per share (including share premium). Therefore, the AO treated the excess value of share of Rs.(200 -194.25) * 1055205 = Rs.60,67,429/- as excess of the fair market value as per provisions of Section 56(2)(viib) of the Act and added it to the total income of the assessee as income from other sources.

4. Upon assessee's appeal Ld.CIT(A) confirmed the order of the AO. He rejected the assessee's contention that transfer in pursuant to Hon'ble High Court order effective from a appointed ate, which is the basis of valuation. He also rejected the contention of 5% tolerance, but as per proviso to section 43CA(1) holding it to be prospective. His adjudication in this regards is as under:-

The appellant, in their submission, have primarily contended that because their agreement was having an appointed date as 1st April, 2013, the balance-sheet should be considered that of 31.03.2013 and the meaning of "Valuation date" as mentioned in Rule

11 DA is the date on which the property or consideration, as the case may be, is received by the assessee. The appellant further seeks to contend that they have received the property consequent to this agreement and have incorporated them in their books of account and therefore, the valuation adopted by them is correct. In respect of such contention of the assessee, it is stated that when the approval is granted by the Hon'ble High Court with effect from certain date, there cannot be any justification of considering the assets either to have been transferred to the assessee or the consideration becoming due from the appellant to VDL from any other date. It is further the fact of the case that the shares of the appellant have been issued only subsequent to the approval of the Hon'ble High Court and it is on this date when the shares have been issued, its valuation is required to be determined even if the consideration for the assets received by the appellant could be considered to have been fixed as on 01.04.2013. While the assets may have been recorded in the books of the assessee, its consideration has only been paid after the approval of the High Court and what would be important is the valuation of the shares on the date when they are issued to the assessee based on the parameters and financials available and relevant for valuation as on the date of the issue of shares. Accordingly, the contention of the appellant either regarding valuation date or consideration of their balance-sheet as on 31.03.2013 or subsequently half-yearly balance-sheet till 30.09.2013 is not found to be acceptable and is rejected. The appellant has further contended that the transaction cannot be regarded as transfer within the meaning of section 47(iv) of the Act. In respect of such contention of the appellant, it is stated that here the question is not about charging capital gains consequent to transfer of capital asset by the holding company to the assessee. Whether or not the questioned transaction is a transfer, is not relevant in the facts of this case. There is no issue relating to charging of any capital gain consequent to the transaction involved, rather there is an issue relating to determination of fair market value of shares issued by the appellant to its holding company. Further, the transfer of assets is at book value and therefore, question of chargeability of capital gain does not arise. Accordingly, and in the given facts and circumstances of the case, the provisions of section 47(iv) are not relevant. The appellant has further contended that the valuation determined by the AO and that determined by the assessee are within 5% of the tolerance limit as per the proviso inserted in the provisions of section 43CA(1) of the Act. In respect of such contention of the assessee, it is stated that the proviso to section 43CA(1) of the Income-tax Act has been inserted by the Finance Act, 2018 and as such, is not applicable to the year under consideration. It is further stated that the said provisions are applicable for determination of full value of consideration for transfer of assets other than capital assets being land or building or both and the same is not relevant for shares issued by a company to another company and where the issue is relating to determination of fair market value of such shares. The assessee has further placed reliance on a number of decisions wherein they have fairly mentioned that the decisions are pertaining to section 50C of the Act but it is the argument of the assessee that the principles laid down in these case laws can be applied to the assessee's case under consideration. In regard to such contention of the assessee, it is stated that determination of fair market value of the property for the purposes of section 50C can have certain latitude and variance having regard to the facts of the case. However, while determining the fair market value of the shares, Rule 11 DA has been prescribed and in such rules, there is nothing of the kind for any variation which could be given benefit of to the appellant. Accordingly, the relevant contentions are not found to

be applicable to the facts of the case as also the decisions relied upon by the assessee being pertaining to the provisions of section 50C, are not found to be applicable for deciding the issue on hand. In view of the facts and circumstances of the case and discussion hereinabove, the contentions and submission of the assessee are not found to be acceptable and are accordingly, rejected. The fair market valuation arrived at by the AO of shares issued as also the addition made u/s.56(2)(viib) is found to be justifiable and is accordingly, upheld. This ground of appeal is accordingly, dismissed.

5. Against the above order assessee is in appeal before us. We have heard both the parties and perused the records.

6. The Ld. Counsel of the assessee has summarized his submission as under:-

1. The appellant M/s. Vardhman Entertainment & Hospitality Pvt. Ltd. is a wholly owned subsidiary of M / s. Vardhman Developers Ltd (Holding Company).
2. M/s. Vardhman Developers Ltd. had set up an amusement park known as Vardhman Fantasy Park.
3. According to a Scheme of Arrangement under section 391 to 394 of the Companies Act, 1956/2013 with effect from 1st April, 2013, the amusement Park a division of M/s. Vardhman Developers Ltd was demerged to M/s. Vardhman Entertainment & Hospitality Pvt. Ltd. the resulting company and the consequent issue of shares by resulting company to the demerged company.
4. The Demerged Company and Resulting Company are group companies of Vardhman group.
5. The Assets and Liabilities of Amusement park division were transferred at book value from the appointed date i.e. 01.04.2013 as per the list (Paper Book Pg. No. 96) for a consideration of Rs.2110.41/- lakhs which was proposed to be paid by way of allotment of 10,55,205 equity shares of Face value Rs. 10/-each and at a premium of Rs. 190/- per share.
6. The Valuation report for fair share swap ratio was done by a qualified Chartered Accountant as on the appointed date of 1st April, 2013.(Paper Book Pg. No. 88-95)
7. The audited accounts of M/s. Vardhman Entertainment & Hospitality Pvt. Ltd. and Amusement park undertaking of M/s. Vardhman Developers Ltd. for F.Y ended 31st March, 2013 and/provisional accounts for half year ended 30th September, 2013 have been considered for valuation of shares.
8. The Net Asset Value Method had been adopted for determining the value *of* shares.
9. The Fair Market Value has been determined as per Rule 11UA of the amusement park division as on 31.03.2013 (as the appointed date is 01.04.2013) for which the shares were issued. (Paper Book Pg. No. 127)
10. As the Approval of Bombay High Court was pending the appellant had created an Equity Capital Suspense Account in its audited accounts for the year ended 31.03.2014.(Paper Book Pg. No. 130)
11. The effective date of Scheme of Arrangement as approved by the Hon'ble Bombay High Court was 10th September, 2014.

12. M/s. Vardhman Entertainment & Hospitality Pvt. Ltd. issued 10,55,205 Equity Shares of Rs. 10/- each at a premium of Rs. 190/- per share to M/s. Vardhman Developers Ltd., the resulting company during the financial year 2014-15 relevant for AY. 2015-16 based on the valuation detailed in the Scheme of Arrangement as submitted to and approved by the High Court dated 1st August,2014.(Pg. No. 53 to 87of Paper Book).

13. The shares of M/s. Vardhman Entertainment & Hospitality Pvt. Ltd. were allotted to M/s. Vardhman Developers Ltd. on 22.09.2014 through a board resolution.(Pg. No. 144 of Paper Book).

A. VALUATION DATE

Rule 11U of the Income Tax Act, 1961 states that for the purpose of valuation under rule 11UA, the date of valuation must be the date on which the asset is transferred. However, in appellants case, the balance sheet was not available as of the date of the transfer of assets and thus the latest balance sheet was considered and valuation was done.

The valuer choose to do the valuation as of the latest balance sheet available and take a management representation that no material change had happened in the value of assets and liabilities between the balance sheet date and the valuation date.

In this connection, the AO has mentioned in the assessment order at page 2 para 4 as to why the share valuation was done on 15.11.2013 taking the data of balance sheet as on 31.03.2013. And while passing the order, the AO has .mentioned that the Appellant should have done the valuation in FY 2014-15 wherein the Appellant has issued shares to VDL In this regard, the Appellant would like to bring to Your Honours attention the meaning of 'valuation date' as given under Rule 11U which is reproduced as under:

"Valuation date" means the date on which the property or consideration, as the case may be, is received by the assessee

Accordingly, since the Appellant has received the assets and liabilities with effect From 1.04.2013, valuation as on said date is to be considered which is in compliance with Rule 11U. The contention of the AO that valuation was to be done in FY 2014-15 is not as per the provisions of the Act. During the FY 2014-15, only approval which was pending from High Court had been received.

B. AUDITED FINANCIALS

Rule 11U of the ITA states that for the purpose of valuation under rule 11UA, the balance sheet used for the FMV computation should be audited. However, in real, the valuer had come across situation wherein the financials were still not audited.

The Valuer should seek audited financials from the management of the company and if the management of the company is not able to provide then seek explanation and take a management representation that they do not expect any material change in the value of assets and liabilities between the provisional financials and the audited financials which would be

available at a future date. Thus, the Audited Balance Sheet dated 31.03.2013 was considered for valuation of shares.

Further, the Appellant would like to state that the present instance is the case of a corporate reorganization wherein a Holding Company has transferred the assets and liabilities of one of its division to its wholly owned Subsidiary Company, which has in turn, issued shares of the value equal to the value of net asset so transferred.

The Appellant vide letter dated 27.11.2017 had also submitted that since the transfer of assets & liabilities and issue of shares are between a holding company and its wholly owned subsidiary, the transaction is not a bilateral transaction and there is no tax implication involved as even the transfer is also not regarded as transfer within the meaning of section 47(iv) of the Income Tax Act, 1961. In this regard, the Ld.AO has erroneously mentioned in the assessment order that provisions of section 47 (iv) of the Income Tax Act, 1961 are not applicable since VDL is not a 100% subsidiary of the Appellant. The Appellant is a wholly owned subsidiary of VDL wherein 100% of the shares are held by VDL (out of total 15,000 shares issued by the Appellant, 14,998 shares stands in the name of VDL and 2 shares in the name of nominees of VDL, so as to maintain the requirement of minimum 2 shareholders as per the Companies Act, 1956). In view of the same the Appellant is a wholly owned subsidiary of VDL and therefore the transfer is an exempted transfer as per section 47(iv) of the Income Tax Act, 1961.

According to Circular No.1/2011 dated 6 April, 2011 which reads as under:-

13.2 These are anti-abuse provisions which were applicable only if an individual or an HUF is the recipient. Therefore, transfer of shares of a company to a firm or a company, instead of an individual or an HUF, without consideration or at a price lower than the fair market value was not attracted by the anti-abuse provision. In order to prevent the practice of transferring unlisted shares at prices much below their fair market value, section 56 was amended to also include within its ambit transactions undertaken in shares of a company (not being a company in which public are substantially interested) either for inadequate consideration or without consideration where the recipient is a firm or a company (not being a company in which public are substantially interested). It is also provided to exclude the transactions undertaken for business reorganization, amalgamation and demerger which are not regarded as transfer under clauses (via), (vic), (vicb), (vid) and (vii) of section 47 of the Act. thus, considering the above explanations and circular it is evident that the transfer of share is exempted under section 47(iv) of the Income Tax Act and since Appellant has not received any money but issued shares in consideration of the amusement park division to its holding company, there ought to be no tax implication on the Appellant and addition under section 56(2)(viib) of Income Tax Act, 1961 is unwarranted.

Without prejudice to above,

The AO has also erred while computing the Fair Market Value by reducing the Deferred Tax Liability from the Total Assets. In this regard, since Deferred Tax Liability is not an ascertained liability but only a notional amount which is shown in the accounts in compliance with the prescribed Accounting Standards, the same is to be ignored for

valuation purposes. This is as per Rule 11UA of the Income Tax Rules, 1962. Considering the same, the valuation per share as per Ld. AO would be revised as follows:

With regard to this above calculation, the Appellant would like to state that in order to avoid undue hardship due to some minor variation in the two values, Finance Act, 2018 has inserted a proviso below Sub-section (1) of Section 43CA which provides that in case if value adopted or assessed or assessable by Stamp valuation authority is higher by an amount which is up to 5% of the actual consideration, then no addition shall be made, However, being a proviso inserted to avoid hardship to the assesseees, it should be applied with retrospective effect from A.Y 2014-15 the year of introduction of Section 43CA. In view of the same, the said proviso can be said to be applicable for the year under consideration. In the instant case, the value as considered by the Appellant and that by the AO is less than 3% which is below the tolerable limit of 5% as prescribed by the aforesaid section. Accordingly, addition made under section 56(2) (viib) is not warranted.

Without prejudice to the above,

The Appellant would like to state that the difference between the valuation as considered by the Appellant and that computed by the AO is below 3% of the issue price of the shares. In this regard, the Appellant would like to also place reliance on the following Judicial precedent wherein it has been held that the difference between the value as arrived by the Appellant and that by the Income Tax Authority is within the tolerable limits then no addition is warranted in this case.

7. The Ld. Counsel further placed reliance on following case laws:-

- i) M/s john flower (india) pvt. Ltd. V. DCIT ITA no.4691/mum/05
- ii) Rahul constructions vs. DCIT (2010) 38 dtr (pune)(trib)
- iii) Smt. Sita bal khetan vs. Income tax officer ITA no. 823jp/2013
- iv) Honest group of hotels (p) Ltd vs, CIT 177 CTR (j& k) 232
- v) ACIT v. Harpreet hotels (p) Ltd. ITA no. 1156-1160/pune/2000
- vi) M/s. Low limited vs. ITO ITA no.267/ kol/2013
- vii) ACIT v. Suvarna rekha ITA No.743/hyd/2009

8. Upon careful consideration, we find that the issue in dispute is addition made u/s 56(2)(vii)(b) of the difference in the value of shares transferred by the assessee company to its holding company, pursuant to a scheme approved by the Hon'ble Jurisdictional High Court. Although assessee has challenged the order on various grounds, firstly, we adjudicate the challenge on the basis that the date of valuation

taken by the AO is not accordance with the scheme and the appointed date duly approved by the Hon'ble High Court. In this regard, it is noted that the scheme was approved by the Hon'ble High Curt on 01/08/2014 without any variance in the appointed date. The appointed date as per the scheme approved by the Hon'ble High Court was 01/04/2013 or such other date as the Hon'ble High Court may direct or approve. The Hon'ble High Court order while approving the scheme did not direct otherwise regarding the appointed date. Hence, the appointed date of the scheme approved by the High Court is 01/04/2013. This submission regarding appointed date has been rejected by the authorities below, on the premise that the Hon'ble High Court order is dated 01/08/2014. Ld. CIT(A) has rejected this contention on the premise that shares have been issued only subsequent to the approval of the Hon'ble High Court. We note that Ld.CIT(A) in this regard has completely misled himself. The scheme approved by the Hon'ble High Court provided an appointed date to be 01/04/2013 or any other date directed by Hon'ble High Court. Since, while accepting the scheme Hon'ble High Court has not directed any change in appointed date, we are of the considered opinion, the appointed date is 01/04/2013 and hence, the value considered by the assessee, which is nearer to the date is appropriate. The valuation date taken by the AO is not in accordance with the appointed date approved by Hon'ble High Court and in this view of the matter appointed date taken and the valuation done by the AO is incorrect. Hence, we do not find any infirmity in value taken by the assessee as per the scheme approved by the Hon'ble High Court and appointed date therein. Hence, the addition made is directed to be deleted.

9. Since, we already set aside the order of the authorities below as above, other grounds of challenge by the assessee are of academic interest and hence, we do not adjudicate the same. In this view of the matter, the orders of the authorities below are set aside and issue raised by the assessee is allowed.

10. In the result, this appeal by the assessee stands allowed.

Pronounced in the open court on 01.07.2021

Sd/-
(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 01.07.2021
Sr.PS. Thirumalesh
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai