

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

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL
MEMBER AND
SHRI B.R. BASKARAN, ACCOUNTANT MEMBER**

ITA Nos.473 & 474/Bang/2020
Assessment Year: 2015-16 & 2016-17

M/s. Valencia Nutrition Limited (Earlier known as Valencia Nutrition Pvt. Ltd.) D.No.134, 6 th Main 1 st Block Banashankari 3 rd Stage Bangalore-560 085 PAN NO : AAECV3892Q	Vs.	Deputy Commissioner of Income-tax Circle-7(1)(2) Bangalore
APPELLANT		RESPONDENT

Appellant by	:	Shri B.R. Sudheendra, A.R.
Respondent by	:	Shri Manjeet Singh, D.R.

Date of Hearing	:	06.10.2020
Date of Pronouncement	:	09.10.2020

ORDER

PER B.R. BASKARAN, ACCOUNTANT MEMBER:

Both the appeals filed by the assessee are directed against separate orders passed by Ld. CIT(A)-7, Bengaluru and they relate to the assessment years 2015-16 & 2016-17 In both the appeals, the assessee is challenging the decision of Ld. CIT(A) in confirming the addition of excess share premium made u/s 56(2)(viib) of the Act.

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2. The appeal filed by the assessee for assessment year 2015-16 is barred by limitation by 609 days. The assessee has filed a petition requesting the bench to condone the delay.

3. Ld. A.R. submitted that the assessee company was in its initial years of formation, when the assessment for assessment year 2015-16 was finalised. The assessee had incurred loss in that year and it was also having brought forward business losses. Hence, the addition made by the A.O. in respect of excess share premium did not give rise to any tax liability. Since the assessee company was not properly advised of future tax implications, it did not file an appeal before Tribunal challenging the order passed by Ld. CIT(A).

4. The A.O. made an identical addition of excess share premium in assessment year 2016-17 also and it was confirmed by Ld. CIT(A). When the assessee approached a new counsel for filing appeal against order of Ld. CIT(A) passed for assessment year 2016-17, the assessee was advised that it should have filed an appeal for assessment year 2015-16 also. Since the issues urged in both the years are identical in nature, and since the assessee came to know of the tax implications in not filing appeal for assessment year 2015-16, it immediately took steps for filing appeal for assessment year 2015-16 also as advised by the new counsel. Accordingly, the Ld. A.R. submitted that the assessee failed to prefer appeal in time due to ignorance of legal complications. Accordingly, Ld. A.R. prayed that the delay in filing appeal may kindly be condoned.

5. We have heard Ld. D.R. on this preliminary issue and perused the record. Having regard to the submissions made by assessee in its petition, we are of the view that there was reasonable cause for the assessee in not filing appeal within the limitation

period before the Tribunal. Accordingly, we condone the delay and admit the appeal for hearing.

6. The facts relating to the case are discussed in brief. The assessee company is engaged in the business of manufacturing of energy drinks with brand name "Bounce & Vita-Me". During financial year relevant to the assessment year 2015-16, the assessee company has issued 24538 shares having face value of Rs.10/- each at a share premium of Rs.622/- per share. Accordingly, the assessee has collected share capital along with the share premium to the tune of Rs.1.55 crores. The A.O. noticed that the assessee has followed "Discounted Cash Flow" method (DCF Method) for determining the share price. As per the valuation report prepared under DCF method, the value of one share of assessee company was determined at Rs.634/- per share. Accordingly, the assessee had issued shares @ Rs.632/- per share, which included share premium of Rs.622/- per share. The A.O. took the view that the share valuation under DCF method has been carried out on the basis of projections and estimations given by the management and accordingly, he held that the value of share @ Rs.632/- per share was an inflated value. The A.O. took the view that the value of share should be based on "Net Asset Method" mentioned in rule 11UA of the Income Tax Rules. Accordingly, the A.O. worked out the value of shares at Rs.75/- per share under Net Asset Method. Since the par value of share is Rs.10/-, the A.O. took the view that the assessee should have collected share premium at a price of maximum of Rs.65/- per share. However, the assessee has collected share premium of Rs.622/- per share. Accordingly, the A.O. took the view that the share premium collected in excess of Rs.65/- i.e. Rs.557/- per share is excess share premium and the same is assessable u/s 56(2)(viib) of the

Act. Accordingly, he assessed the excess share premium of Rs.1,36,67,666/- as income of the assessee under the head “income from other sources” u/s 56(2)(viib) of the Act.

7. In the previous year relevant to the assessment year 2016-17, the assessee has issued 11480 shares @ Rs.632/- per share and collected share premium of Rs.1,11,92,008/-. In this year also, the assessee had followed DCF method to determine the value of shares. The A.O. in this year also, took the view that the net asset value method is the appropriate method to determine the fair market value of share. Accordingly, the A.O. determined the net asset value of shares at Rs.37/- per share. Accordingly, he determined the excess share premium at Rs.1,08,80,104/- and assessed the same as income of the assessee under the head “income from other sources” u/s 56(2)(viib) of the Act.

8. In both the years, the Ld. CIT(A) confirmed the addition made by the A.O. Hence, the assessee has filed these appeals before us.

9. The Ld. A.R. submitted that the A.O. did not examine the workings given in the valuation report prepared u/s DCF method. He submitted that the DCF method is one of the recognized methods under Rule 11UA of I T Rules. Accordingly, he submitted that the A.O. was not justified in rejecting the DCF method without examining the valuation report furnished by the assessee. He submitted that an identical issue was considered by the coordinate bench in the case of M/s. Innoviti Payment Sales Pvt. Ltd. Vs. ITO (ITA No.1278/Bang/2018 dated 9.1.2019) and the coordinate bench has restored the issue to the file of the A.O. with certain directions. Accordingly, the Ld. A.R. prayed that this issue urged in both the years may also be restored to the file of the A.O. with a similar

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directions for examining the valuation report furnished by the assessee under DCF method.

10. The Ld. D.R., on the contrary, supported orders passed by Ld. CIT(A). However, he did not object to the proposal that the assessee to restore the matter to the file of the A.O. following the decision rendered by coordinate bench of the Tribunal.

11. We have heard the rival contentions and perused the record. We notice that the co-ordinate bench has examined the issue of valuation of shares under DCF method in the case of Innoviti Payment Solutions P Ltd (supra) and has followed the decision rendered by Hon'ble Bombay High Court in the case of Vodafone M Pesa Ltd vs. PCIT (164 DTR 257). Accordingly, it was held that the AO should scrutinize the valuation report prepared under DCF method and if necessary, he can carry out fresh valuation either by himself or by calling a final determination from an independent valuer to confront the assessee. The AO cannot change the method of valuation and he has follow DCF method only. The decision rendered in the case of Innoviti Payment Solutions P Ltd (supra) was followed by another co-ordinate bench in the case of Futura Business Solutions P Ltd (ITA No.3404 (Bang) 2018). For the sake of convenience, we extract below the observations made by the co-ordinate bench in the case of Future Business Solutions P Ltd (supra):-

“17. With regard to the correctness of DCF method adopted by the Assessee for valuing shares and the procedure to be followed when such method of valuation is not accepted by the AO, the ld. counsel for the Assessee has drawn our attention of the ITAT, Bangalore Bench in the case of VBHC Value Homes in ITA

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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 Innovit 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 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

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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 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

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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

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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.

18. 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.....

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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) reads as under:-

“(2) Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (1), the fair market value of unquoted equity shares for the purposes of sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), at the option of the assessee, namely:—

(a) the fair market value of unquoted equity shares = where, $(A-L) \times (PV), (PE)$

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance sheet, but not including the following amounts, namely:—

- (i) the paid-up capital in respect of equity shares;
- (ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;

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(iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

(iv) any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

(v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;

(vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

P E = total amount of paid up equity share capital as shown in the balance-sheet;

P V = the paid up value of such equity shares; or

(b) the fair market value of the unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method.

19. 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 and 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

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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).

20. The gist of the findings of the Assessing Officer and the Id. CIT(A) on the alleged discrepancies in the valuation report is as under:

1. Growth rate is taken at 12% year after year
2. WACC has been forecasted at 30%
3. The sales have been projected at Rs.2,36,54,400/- for the F.Y.2012-13, Rs.7,88,74,080/- for the F.Y.2013-14 and Rs.14,00,00,000/- for the F.Y.2014-15, whereas the actuals as per the returns filed are Rs.17,67,146/-, Rs.4,50,06,477/- and Rs.4,26,45,399/- only. In view of this, the growth rate of 12% is stated to be not acceptable.
4. The net profit has been projected at Rs.30,94,769/- for the F.Y.2012-13, Rs.1,29,86,330/- for the F.Y.2013-14 and Rs.2,16,06,523/- for the F.Y.2014-15, whereas the actuals as per the returns filed are (-) Rs.5,40,078/-, (-) Rs.1,25,58,421/- and (-) Rs.2,70,00,184/- only.

21. We are of the view that, the Assessing Officer has erred in considering the actuals of revenue and profits declared in the future years as a basis to dispute the projections. At the time of valuing the shares as on 16.04.2012, the actual results of the later years would not be available. What is required for arriving at the fair market value by following the DCF method are the expected and projected revenues. Accordingly the valuation is on the basis of estimates of future income contemplated at the point of time when the valuation was made. It has been clarified by the Assessee that the product which was being developed by the Assessee has substantial value and the Assessee was able to raise funds to the tune of Rs.50.13 crores from international market

22. 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 for deciding the issue afresh after due opportunity of hearing to the Assessee.

23. In the result, the appeal is allowed for statistical purpose.”

12. The facts are identical in the instant cases, i.e., the AO has proceeded to determine the value of shares in both the years by adopting different method without scrutinizing the valuation report furnished by the assessee under DCF method. Accordingly, following the decisions rendered by the co-ordinate benches, we set

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aside the orders passed by Ld CIT(A) in both the years and restore the impugned issue in both the years to the file of the AO with the direction to examine this afresh as per the directions given by the co-ordinate bench in the case of Innoviti Payment Solutions P Ltd (supra).

13. In the result, both the appeals of the assessee are treated as allowed for statistical purposes.

Order pronounced in the open court on 9th Oct, 2020

Sd/-
(George George K.)
Judicial Member

Sd/-
(B.R. Baskaran)
Accountant Member

Bangalore,
Dated 9th Oct, 2020.
VG/SPS

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.