

IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE

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

ITA No.2534/Bang/2019
Assessment year: 2016-17

The Deputy Commissioner of Income Tax, Circle 1(1)(1), Bangalore.	Vs.	M/s. Antariksh Softech P. Ltd., No.11/1, KHR House Palace Road, Bangalore – 560 052. PAN: AAHCA 1836G
APPELLANT		RESPONDENT

Appellant by	:	Shri Pradeep Kumar, CIT(DR)(ITAT), Bengaluru.
Revenue by	:	Smt. Sheetal Borkar, Advocate

Date of hearing	:	01.10.2020
Date of Pronouncement	:	09.10.2020

ORDER

Per N.V. Vasudevan, Vice President

This appeal by the revenue is against the order dated 29.8.2019 of CIT(Appeals)-1, Bengaluru relating to AY 2016-17. The grounds of appeal raised by the revenue reads as follows:-

“1. The order of learned CIT(Appeals) in so far as it is prejudicial to the interest of revenue, is opposed to law and the facts and circumstances of the case.

2. The Id. CIT(A) erred in deleting the addition of Rs.6,40,18,500/- u/s. 56(2)(vii), the excess amount of share premium received on allotment of equity shares.

3. Whether on the facts and in circumstances of the case and in law, the Id. CIT(A) is right in accepting the additional evidence submitted during the course of appellate proceedings without

giving an opportunity to the AO to examine the fresh evidences as required under Rule 46A.

4. For these and such other grounds that may be urged at the time of hearing, it is humbly prayed that the order of the Id. CIT(A) be reversed and that of the Assessing Officer be restored.

5. The appellant craves leave to add, to alter, to amend or delete any of the grounds that may be urged at the time of hearing of appeal.”

2. There is a delay of 7 days in filing this appeal which has been explained as owing to delay in receiving approval from the Principal CIT. The delay in filing the appeal is condoned as the same has occurred due to reasonable and sufficient cause.

3. The assessee is a domestic company engaged in the business of internet services and infrastructure management services. During the relevant previous year, the assessee issued 19500 shares and received share premium of Rs. 6,98,05,000 from Manipal Education & Medical Group (I) P. Ltd. 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;"

4. 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,

5. As per the Explanation to Sec.56(2)(viib) of the Act, fair market value (FMV) is prescribed under the Rules. Besides the above, the AO also noticed that the CA in valuing the shares had adopted Discounted Cash Flow (DCF) method. 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. The Assessing Officer did not accept the explanations of the Assessee and he was of the view that the projection made in the working as per the DCF method was provided by the Assessee company and not based on any independent analysis. The projection was irrational and did not have any relevance to the factual financial results of the assessee. The AO held that the basis of working of the value of shares under the DCF method was details and workings provided by the Assessee as per the whims and fancy of the management to arrive at higher value to issue shares at a huge premium. For these reasons, the AO rejected the valuation report prepared as per DCT method and proceeded to value shares as per the book value method and arrived at a value of Rs.297 per share and treated the

difference between the FMV and premium received as income chargeable to tax u/s. 56(2)(viib) of the Act.

6. On appeal by the assessee, the CIT(Appeals) deleted the addition made by the AO against which the revenue has preferred the present appeal before the Tribunal.

7. At the time of hearing, it was agreed by both the parties that there was a violation of Rule 46A of the Income Tax Rules, 1962 (Rules), in as much as the CIT(A) did not confront the material that was placed before him to substantiate the valuation under the DCF method adopted by the Assessee in its report of valuation. The Id. counsel for the assessee, however, submitted that what was filed before the CIT(Appeals) was only financial statements to substantiate the valuation as made by the assessee. In our view, when the basis of conclusion of CIT(Appeals) is the financial statements filed by the assessee before him, it was incumbent upon the CIT(A) to have confronted the material filed before him to the AO in accordance with the mandate of Rule 46A of the I.T. Rules, 1962.

8. The Id. counsel for the assessee also filed before us a copy of the decision of the Tribunal in the case of *M/s. VBHC Value Homes Private Limited, Bangalore v. ITO* in ITA No.2541/Bang/2019, order dated 12.6.2020 wherein the Tribunal followed the decision of the Hon'ble Bombay High Court in the case of *Vodafone M-Pesa Ltd. v. Pr.CIT, 256 Taxmann 240*. The Id. counsel for the assessee submitted that as per the ratio laid down in the aforesaid decision, the DCF method adopted by the assessee was correct. In our view, since there is a violation of Rule 46A of the Rules, the issue should be remanded back to the CIT(Appeals) for fresh consideration after affording opportunity to the AO. We are of the view that the argument raised by the learned counsel for Assessee can be raised before the CIT(Appeals) by the assessee. We therefore set aside

the order of CIT(Appeals) and remand the issue with regard to determination of FMV of the shares afresh in accordance with law, after affording assessee and the AO opportunity of being heard.

9. In the result, the appeal by the revenue is treated as allowed for statistical purposes.

Pronounced in the open court on this 9th day of October, 2020.

Sd/-

Sd/-

(B R BASKARAN)
ACCOUNTANT MEMBER

(N V VASUDEVAN)
VICE PRESIDENT

Bangalore,
Dated, the 9th October, 2020.

/Desai S Murthy /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.