

(2023) 02 ITAT CK 0017

Income Tax Appellate Tribunal (Delhi B Bench)

Case No: Income Tax Appeal No. 8523/DEL/2019

ACIT

APPELLANT

Vs

Drishti Soft Solutions Pvt. Ltd.

RESPONDENT

Date of Decision: Feb. 10, 2023**Acts Referred:**

- Income Tax Rules, 1962 - Rule 11UA
- Income Tax Act, 1961 - Section 10(23FB), 37, 37(1), 56(2)(viib), 143(3)

Hon'ble Judges: Anil Chaturvedi, (AM); Yogesh Kumar US, J**Bench:** Division Bench**Advocate:** K. M. Gupta, Rishabh Malhotra, T. James Singson**Final Decision:** Dismissed

Judgement

1. This appeal filed by the Revenue is directed against the order dated 19.09.2019 of the Commissioner of Income Tax (Appeals)-3, New Delhi relating to Assessment Year 2016-17.

2. Brief facts of the case as culled out from the material on record are as under :-

3. Assessee is a company stated to be engaged in the business of software development. Assessee electronically filed its return of income for A.Y. 2016-17 on 17.10.2016 declaring total income at Rs.1,69,85,280/-. The case of the assessee was selected for scrutiny and, thereafter, assessment was framed u/s 143(3) of the Act vide order dated 20.12.2018 and the total income was determined at Rs.24,26,59,340/-.

4. Aggrieved by the order of AO, assessee carried the matter before CIT(A) who vide order dated 19.09.2019 in Appeal No.3/10224/2018-19 granted substantial relief to the assessee. Aggrieved by the order of CIT(A), Revenue is now in appeal before the

Tribunal and has raised the following grounds:

“1. On the facts and circumstances of the case Ld. CIT(A) erred in deleting the addition of Rs.21,57,85,188/- on account of share premium valuation.

2. On the facts and circumstances of the case Ld. CIT(A) erred in deleting the addition of Rs.1,36,000/- being expense for valuation certification u/s 37(1) of the Act.

3. The appellant craves leave to add, amend or forego any ground(s) of appeal at any time before or during the hearing of this appeal.”

5. Ground No.1 is with respect to the deleting the addition of Rs.21,57,85,188/- on account of share premium valuation.

6. During the course of assessment proceedings and on perusing the Balance Sheet, AO noticed that during the year under consideration, assessee had issued 2,01,402 shares having face value at Rs.1/- each at a premium of Rs.1240.29/- per share and had thus issued shares at Rs.1241.29/- per share and the total share capital including premium collected by the assessee was Rs.24,99,98,288/-. The assessee was asked to furnish the justification of fund received in the form of share premium. Assessee inter alia submitted that during the year under consideration, assessee has raised PE funding from M/s. Forum Synergies India Trust, a Private Equity Fund incorporated in India. Assessee also submitted the copy of the valuation report, registration certificate of the investor with SEBI, share allotment form, Private Placement Offer Letter to support its contention. The submissions of the assessee was not found acceptable to AO. AO on perusing the valuation report furnished by the assessee, noted that the Chartered Accountant (CA) has used Discounted Cash Flow Method (DCFM) to arrive at the value of each share. He noted that the assumptions taken by the CA for the purpose of valuation of shares was not based on any reliable facts and the figures taken at the time of valuation did not match with the actual figures and, that there was a huge difference between projected figures and actual figures considered for working out the value of shares. He, therefore, concluded that the assumptions taken for the purpose of valuation was not realistic and did not match with the actual financial condition of the assessee. He, thereafter, by following the method of calculation of valuation of shares as prescribed under Rule 11UA of the Income-tax Rule, 1962, worked out the fair market value of each share at Rs.169.88/- per share and thus considered the difference of share premium Rs.1070.41 per share (Rs.1241.29 - Rs.169.88) multiplied by the number of shares issued as income from other sources taxable u/s 56(2)(viib) of the Act and thus made the addition of Rs.21,57,85,188/-.

7. Aggrieved by the order of AO, assessee carried the matter before CIT(A). Before CIT(A), assessee inter alia contended that the provision of Section 56(2)(viib) of the Act

are not applicable in view of the proviso of Section 56(2)(viib) of the Act. It was submitted that the provision of Section 56(2)(viib) of the Act would not be applicable where the consideration for issue of share is received by a venture capital undertaking from venture capital company or venture capital fund. It was further submitted that assessee was a venture capital undertaking, the investor was granted registration by the Securities and Exchange Board of India as a Venture Capital Fund and, therefore, it was qualified as Venture Capital Fund as per the definition of Section 10(23FB) of the Act. It was further submitted that since the company was not engaged in any of the activities or sectors which was specified in the negative list, therefore, the activities of the assessee did not fall in the negative list provided in the Act and, therefore, it qualified as a Capital Venture Undertaking as per the definition under section 10(23FB) of the Act. It was further submitted that the AO had erred in rejecting the valuation report obtained by the assessee from an independent valuer without considering the fact that no powers has been provided to Learned AO to examine the basis or reject the valuation report. Before CIT(A), assessee also relied on the various decisions which are reproduced by CIT(A) in his order. CIT(A) after considering the submissions of the assessee deleted the addition made by AO by observing as under:

“4.3 I have considered the facts of the case and the submissions made by the AR. It has been reiterated that the investor M/s. Forum Synergies India Trust (FSIT) is a venture capital fund (VCF) and the appellant is a venture capital undertaking. The AR has furnished the registration certificate granted by SEBI to FSIT on 30.09.2008 as per which FSIT has been registered as a VCF. It is also submitted that the appellant is also a venture capital undertaking as defined in Explanation (c) of Section 10(23FB) of the Act. The appellant has furnished the relevant documents to show that it satisfies the conditions required for being a venture capital undertaking to show that it satisfies the conditions required for being a venture capital undertaking and it has been submitted that all these documents and explanations were duly provided to the AO also during the course of assessment proceedings and the AO has not appreciated the same. It has been submitted that provisions of Section 56(2)(viib) of the Act are not applicable in the case where the shares are issued to a VCF by a venture capital undertaking as per the proviso to section 56(2)(viib) of the Act. In this regard, the provisions of section 56(2)(viib) of the Act are reproduced as under:

“56(2)(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 –

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

(iv) by a company from a class or classes of persons as may be notified by the Central Govt. 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 10; or

(ii) As may be substantiated by the company to the satisfaction of the AO, 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;

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

4.3.1 From the perusal of the above referred documents and the submissions made by the AR, it is clear that the appellant is a venture capital undertaking and it has issued shares to FSIT which is a venture capital fund (VCF) and as per the provisions of section 56(2)(viib) of the Act, no addition under the section can be made in such a case by the AO as discussed above. In view of this, the addition made by the AO is deleted and the grounds of appeal are allowed.”

8. Aggrieved by the order of CIT(A), Revenue is now before us.

9. Before us, Learned DR took us through the order of AO and strongly supported the order of AO.

10. Learned AR on the other hand reiterated the submissions made before lower authorities and further took us through the submissions made by the assessee before CIT(A), which are reproduced by CIT(A) in his order. He also placed reliance on the decisions cited before the CIT(A) and submitted that in view of those facts, CIT(A) has rightly held that no addition could be made and therefore, no interference to the order of CIT(A) is called for.

11. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to deleting the addition made by AO on account of issue of shares at a premium u/s 56(2)(viib) of the Act. It is an undisputed fact that during the year under consideration, assessee had issued 201402 shares (Compulsorily convertible preference shares) at a share premium of Rs.1240.29/- per share having face value of each Rs.1/- to M/s. Forum Synergies India Trust (FSIT). Before us, Learned AR has demonstrated that assessee is a domestic company and its shares are not listed at any Stock Exchange and it is not engaged in any of the business activities which are termed as negative list of business activities. It is also an undisputed fact that the investor of the shares to whom the assessee had allotted shares was Forum Synergies India Trust who has been granted registration by Securities and Exchange Board of India as Venture Capital Fund on 30th Sep 2008 and the registration granted by the SEBI has not been withdrawn by the SEBI during the year under consideration. Provision of Section 56(2)(viib) of the Act provides that where the company which is not a company in which the public are not substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares which exceeds the face value of such shares when the aggregate consideration was received for such shares as exceeds the fair market value of the shares, shall be deemed to be the income of the concerned company chargeable to tax under the head "income from other sources" for the relevant financial year. We further find that proviso of Section 56(2)(viib) of the Act provides that the provision of Section 56(2)(viib) would not be applicable where the consideration for issuance of shares is received by a venture capital undertaking from a venture capital company or a venture capital fund. As per Explanation (b) to Section 56(2)(viib) "venture capital company", "venture capital fund" and "venture capital undertaking" shall have the meaning assigned to them in clause (a), clause (b) and clause (c) of Explanation to clause (23FB) of Section 10. We find that CIT(A) after considering the submissions made by assessee and considering the material on record has given a finding that the investor, M/s. Forum Synergies India Trust (FSIT) is a Venture Capital Fund (VCF) and assessee is a Venture Capital Undertaking. The aforesaid finding of CIT(A) has not been demonstrated by Revenue to incorrect or not in accordance with the provisions of the Act. Further, before us, assessee has also demonstrated that the business of the assessee does not fall under the negative business list as specified by the Central Government. Before us, Revenue has not pointed to any fallacy in the findings of CIT(A) nor has demonstrated that the assessee's case does not fall under proviso to Section 56(2)(viib) of the Act. Considering the totality of the aforesaid facts, we find no reason to interfere with the order of CIT(A) on this issue and thus the ground of Revenue is dismissed.

12. Ground No.2 is with respect to the deleting the addition of Rs.1,36,000/- u/s 37(1) of the Act.

13. During the course of assessment proceedings and on perusing the professional fees paid by the assessee, AO noted that assessee had paid Rs.1,36,000/- to Vineet K. Gupta & Co. on account of Professional fee for share valuation certificate. The AO asked the assessee to justify the expense so as to justify its allowability u/s 37(1) of I.T. Act to which assessee inter alia submitted that the amount represented professional fees paid towards monthly retainership fees as also professional fees for valuation of PE Fund. It was further submitted that Vineet K. Gupta & Co. was engaged on monthly retainership basis to provide necessary assistance to the company in the course of due diligence of Company to be carried out for the investor by nominated partners from time to time. It was thus submitted that the expenses was incurred wholly or exclusively for the purpose of business and no new asset was created. It was thus submitted that the expenses were fully allowable u/s 37 of the Act. The submission of the assessee was not found acceptable to AO. AO held the expense to be not in the nature of routine business expenses but in the nature of capital expenses. He accordingly disallowed Rs.98,88,874/- which included Rs.1,36,000/- which is in dispute.

14. Aggrieved by the order of AO, assessee carried the matter before CIT(A). Before CIT(A), detailed submissions were made which have been reproduced by CIT(A) in his order. CIT(A) after considering the submissions made by the assessee granted partial relief to assessee by deleting the addition made on account of payment to Vineet Gupta and Co. and upheld the balance additions made by AO. While deleting the addition of the payment to Vineet Gupta and Co., CIT(A) held that the amount paid to Vineet K. Gupta & Co. was for its professional service which also included the monthly retainership fees for the year and it was for the regular business expenses and therefore cannot be treated as capital expenses. He accordingly deleted the addition made by AO. Aggrieved by the order of CIT(A), Revenue is now before us.

14. Before us, Learned DR took us to the findings of AO and supported the order of AO.

15. Learned AR on the other hand reiterated the submissions made before the lower authorities and pointed to the submissions before CIT(A) which has been reproduced by CIT(A) in his order. He submitted that expenses have been incurred during the course of business and for the purpose of business and therefore, CIT(A) is rightly deleted the addition. He thus, supported the order of CIT(A).

16. We have heard the rival submissions and perused the material available on record. The issue in the present ground is with respect to the deleting the addition of Rs.1,36,000/- that was made by AO and deleted by CIT(A). It is an undisputed fact that the aggregate amount of Rs.1,36,000/- has been paid to Vineet K. Gupta & Co. Chartered Accountant. It is the submission of the assessee that the payment is towards the professional fee, which include monthly retainership fees for the professional services. We find that CIT(A) after considering the submissions made by assessee has

given a finding that the expenses claimed by the assessee have been incurred during the regular course of business and cannot be treated as capital expenses. Before us, Revenue has not pointed to any fallacy in the findings of CIT(A). In such a situation, we find no reason to interfere with the order of CIT(A) and thus the ground of Revenue is dismissed.

17. In the result, appeal of the Revenue is dismissed.