

IN THE INCOME TAX APPELLATE TRIBUNAL
Mumbai "I" Bench, Mumbai.

Before Shri B.R. Baskaran (AM) & Shri Pavan Kumar Gadale (JM)

I.T.A. No. 1607/Mum/2022 (A.Y. 2018-19)

Nearby Pte. Limited 03-10 Jit Poh Building 19 Keppel Road Singapore PAN : AAFCN8541F (Appellant)	Vs.	ACIT-International Taxation, Circle 3(3)(1), Air India Building, Nariman Point, Mumbai-21. (Respondent)
---	-----	--

Assessee by	Shri P.J. Pardiwala & Shri Fenil Bhatt
Department by	Shri Soumendu Kumar, Shri T Shankar
Date of Hearing	25.08.2023
Date of Pronouncement	30.08.2023

O R D E R

Per B.R.Baskaran (AM) :-

The assessee has filed this appeal challenging the order dated 20-05-2022 passed by the Assessing officer for Assessment Year 2018-19 u/s 143(3) r.w.s 144C(13) of the Act in pursuance of directions given by Ld Dispute Resolution Panel (DRP). The solitary issue urged in this appeal relates to the Capital gain computed by the AO as against the capital loss declared by the assessee.

2. The facts relating to the issue are discussed in brief. The assessee herein is a Singapore company. It acquired an Indian company named M/s Groupon India P Ltd from M/s Groupon Holdings B V in India on 31.07.2015 by purchasing 2,62,237 shares having face value of Rs.10/- each at Rs.5,774/- per share. Subsequently, the name of above said company was changed into M/s Nearby India P Ltd. The above said subsidiary company was engaged in the business of developing local e-commerce market place that would connect merchants with customers who require services and

goods offered by those merchants at a discount price to the customers. The above said subsidiary would earn commission income from those merchants. Subsequent to the initial investment made on 31st July, 2015, the assessee herein was making additional investments by purchasing shares from the above said subsidiary company from October, 2015 onwards from time to time in various quantities. The subsequent purchases of shares were made at a price of Rs.14,361/- per share, i.e., at a premium of Rs.14,351/- per share. The assessee so purchased shares upto 27th October, 2017. The total quantity of shares purchased by the assessee till that date was 3,38,822 shares.

3. On 30-11-2017, the assessee entered into an agreement with M/s Little Internet Pvt Ltd for selling its entire holdings in the above said subsidiary company at a price of Rs.7,094/- per share and the sale consideration was agreed to be received by way of receipt of 83,86,133 equity shares in Little Internet P Ltd at a price of Rs.265/- per share. Accordingly, the assessee computed Long term capital gain of Rs.5,18,13,460/- and short term capital loss of Rs.28,15,31,742/-.

4. The AO noticed that the last purchase of shares was made by the assessee at Rs.14,361/- per share on 27th October, 2017. However, the assessee has sold all the shares at Rs.7,094/- per share 30.11.2017, i.e., within a period of less than one and half month. Accordingly, he questioned the assessee as to how the value of shares was reduced by 50% within short span. Accordingly, he proposed to re-compute the capital gain by adopting Fair Market Value of shares at Rs.14,361/- per share. The assessee submitted that the sale value of shares has been determined on the basis of valuation report obtained by it from M/s Finshore Management Services limited, who had valued the shares under Discounted Cash Flow (DCF) method and arrived at the value of Rs.7,094/- per share. It was further submitted that the Fair market value of shares is required to be determined as per Rule 11UAA of Income tax Rules, only when the sale consideration

received or accruing to the assessee is less than the Fair market value. It was submitted that the above said subsidiary company was continuously making losses. Hence the Fair Market value determined under the above said rule (Net asset method) has worked out at a negative value of (-) Rs.630.29 per share, whereas the value of shares was arrived at Rs.7,094/- per share under DCF method. Accordingly, it was submitted that the sale consideration received by the assessee was more than the Fair Market Value and the same should be accepted.

5. The AO noticed that the assessee has considered the Balance sheet as on 31.3.2017 for arriving at the negative value of shares of (-) Rs.630.29, while the value of shares has to be determined as on the date of transfer of shares, which was 30-11-2017. Accordingly, the AO held that the negative value of (-) Rs.630.29 per share is not acceptable. He further noticed that the Valuation report under DCF was prepared on 10-12-2017, while the shares have been sold on 30-11-2017. The AO also observed that the valuer has prepared the valuation report on the basis of financial projections made available to him by the Management. However, the assessee did not provide any supporting to justify the financial projections made by the management. Accordingly, the AO did not accept the valuation report also. Accordingly, the AO adopted the sale consideration of shares at Rs.14,361/- per share. By applying the first proviso to sec.48 of the Act, the AO arrived at long term capital gain of Rs.2,25,19,34,918/- and short term capital gains of Rs.66,48,900/-. The AO did not apply DTAA provisions, since the assessee did not furnish Tax residency certificate. Accordingly, the AO passed the draft assessment order by determining the total income of the assessee at Rs.225,85,83,818/-, being the cumulative value of both the capital gains stated above.

6. The Ld DRP concurred with the view taken by the AO in the draft assessment order and accordingly rejected the objections filed by the assessee. In view of the same, the AO passed the final assessment order

determining the total income at Rs.225,85,83,818/-, as initially determined in the draft assessment order. The assessee is aggrieved by the addition so made by the AO.

7. The Id A.R submitted that the Capital gain is computed in accordance with the provisions of sec. 48 of the Act, where the “full value of consideration” received or accruing as a result of transfer of Capital asset is required to be taken into account. He submitted that the “Full value of consideration” declared by the assessee should be accepted except in the situations mentioned in sec. 50C and 50CA of the Act for the purposes of computing capital gain. He submitted that sec.50CA is applicable to the case of transfer of shares other than quoted share and hence, sec.50CA is applicable in this case, which states that the AO can substitute Fair market Value (FMV) in the place of “full value of consideration”, if the consideration received or accruing is less than the FMV. He submitted that the FMV is required to be computed as per Rule 11UAA. He submitted that the FMV computed as per above said rule was negative value of (-) Rs.630.20 per share. However, the assessee has sold the shares at Rs.7,094/- per share which is far more than the FMV. Accordingly, he submitted that there is no reason to invoke the provisions of sec.50CA of the Act.

8. The Ld A.R submitted that barring sec.50CA, there is no other provision in the Act, by virtue of which the AO could substitute ‘Full value of consideration’ declared by the assessee. Accordingly, he submitted that the AO was not justified in adopting the sale consideration of shares at Rs.14,361/- per share and Ld DRP was not justified in confirming the same. Accordingly, he submitted that the addition made by the AO is liable to be deleted. In support of his arguments, the Ld A.R placed his reliance on the following case laws:-

- (a) **CIT vs. George Henderson and Co Ltd** (1967)(66 ITR 622)(SC), wherein it was held that the expression “full consideration” in sec. 12B(2) of 1922 Act cannot be construed as having a reference to

market value of asset transferred but expression only means full value of thing received by transferor in exchange for capital asset transferred by him.

(b) **CIT vs. M/s B Arunkumar & Co** (ITA No.2337 of 2013 dated 8th March, 2016)(Bom), wherein the Hon'ble Bombay High Court upheld the view expressed by the Tribunal that where a transfer of a capital asset takes place by sale on receipt of a price, then the consideration fixed/bargained for by the parties should be accepted for the purpose of computing capital gains. It cannot be replaced by the market value or a notional value. The Tribunal, in this regard, had followed the decisions rendered in the case of George Henderson and Co Ltd (supra).

(c) **CIT vs. M/s Morarjee Textiles Ltd** (ITA No.738 of 2014 dated 24th Jan, 2017)(Bom), wherein it was held that revaluation of shares by substitution of full value of consideration by fair market value is impermissible. It was further held that the provisions of sec 50D, which provides for substitution of full value of consideration with market value can be invoked only if the AO comes to a finding that the consideration received is not ascertainable or cannot be determined.

9. The Ld A.R submitted that the AO has observed that the assessee has not furnished Tax Residency Certificate and hence provisions of DTAA could not be applied. Since the assessee has incurred capital loss, there was no requirement of availing DTAA benefits.

10. The Ld D.R, on the contrary, submitted that the assessee has arrived at the value of shares under Rule 11UAA by considering the Balance Sheet as at 31.3.2017, while the shares have been sold on 30.11.2017. As per the provisions of Rule 11UAA, the shares have to be value as on the date of transfer only. He submitted that the assessee has placed reliance on the Valuation report obtained by it under DCF method, but the said valuation report has been obtained after the date of transfer of shares. Further, the AO

has observed that the valuer has prepared the valuation report on the basis of information provided by the management and no material was placed in support of the said information. Hence the value arrived at under Rule 11UAA and the valuation report was rightly rejected by the AO. He submitted that the Tribunal may restore the matter back to the file of AO for examining the FMV again as done in the case of *M/s Town Essential P Ltd vs. CIT* (ITA No.139/Bang/2020 dated 30-06-2021).

11. In the rejoinder, the Ld A.R submitted that there is no much improvement in the book value of shares between 31.3.2017 and 31.3.2018. He submitted that the book value of share was negative figure, while the value arrived at under DCF method is 13 times more than the book value. Accordingly, he submitted that there is no proper reason to disbelieve the “full value of consideration” declared by the assessee.

12. We heard rival contentions and perused the record. We notice that the AO has disbelieved the sale consideration determined on 30-11-2017, by way of an agreement entered with the buyer at a price of Rs.7,094/- per share, only for the reason that the assessee had purchased the very same shares at price of Rs.14,351/- prior to about one month only. The reason of the AO appears to be that no prudent businessman will sell the shares at more than 50% discounted price. However, it was submitted by Ld A.R that the shares have been sold to an independent third party as per the agreement entered for sale/transfer of shares.

13. It is the case of the Ld A.R that the provisions of sec.50CA alone enable the AO to substitute “full value of consideration”, while computing capital gains. As per the said provisions, the AO has to arrive at a conclusion that the full value of consideration is less than the Fair Market Value of shares. The Income tax Rules, i.e. Rule 11UAA prescribes the methodology to arrive at the Fair Market Value. It is the case of the assessee that the FMV arrived under Net Asset Value method is negative figure of (-) Rs.630.29 per share.

However the assessee has arrived at the FMV under DCF method at Rs.7,094/- per share, which is far more than the value arrived under Net Asset Value method. It is the contention of the assessee that the full value consideration is more than the FMV and hence there is no reason to substitute the same with any other figure, which was not arrived by the AO under 11UA method. The case laws relied upon by the assessee supports the above said view point. We notice that the decision relied upon by Ld D.R, viz., M/s Town Essential Private Ltd is related to the provisions of sec.56(2)(viib) of Income tax Act and it only lays that the AO is not justified in tinkering with the methodology adopted by the assessee for valuing shares. Hence the said case law does not apply to the facts of the present case.

14. We agree with the above said contentions of the assessee. The Full value of consideration received by the assessee is Rs.7,094/- per share, while the value of share arrived under Net Asset Value method was (-)Rs.630.29. Since the full value of consideration received by the assessee is more than the FMV, there is no reason to tinker with the full value of consideration declared by the assessee. We notice that the AO did not accept the FMV computed under Rule 11UAA of Income tax Rules for the reasons that

(a) the value under Net Asset value method has been arrived at by considering the Balance Sheet as on 31.3.2017, while it should have been computed on the basis of Balance Sheet as on 30-11-2017, i.e., the date of transfer.

(b) the value under DCF method has been arrived at by the valuer on the basis of information provided by the management, which is not supported by any cogent material.

With regard to the above said first defect, it was submitted by the assessee that there is no much difference in the financial position between 31.3.2017 and 31.3.2018. It is the submission that the FMV as on 30-11-2017 or 31-3-2018 will not exceed the sale price of Rs.7,094/- per share. With regard to the second defect, it was submitted that the assessee could get sale price of Rs.7,094/- per share, which was many times more than the value arrived at

under Net asset value method and hence there is no reason to suspect and reject the valuation done under DCF method. In our view, the above said explanations of the assessee are reasonable and we find that the tax authorities have not disproved the above said explanations given by the assessee.

15. Accordingly, in the facts and circumstances of the case, we are of the view that the AO was not legally justified in tinkering with the Full value of consideration declared by the assessee and accordingly arriving at long term capital gains and short term capital gains. Accordingly, we set aside the order passed by the AO on this issue and direct him to accept the full value of consideration declared by the assessee and accordingly compute the capital gains/loss.

16. In the result, the appeal filed by the assessee is allowed.

Pronounced accordingly on 30.8.2023.

Sd/-
(Pavan Kumar Gadale)
Judicial Member

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

Mumbai.; Dated : 30/08/2023

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

PS