**IN THE INCOME TAX APPELLATE TRIBUNAL**
**'B' BENCH, BANGALORE**

**BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER AND**
**SHRI SOUNDARARAJAN K, JUDICIAL MEMBER**

| ITA No. 310/Bang/2023 |
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| Assessment Years : 2018-19 |

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| Pisces EServices Pvt. Ltd.,<br>Prestige Startech, Block C,<br>Koramangala,<br>Hosur Road,<br>Bangalore-560 095.<br><br>**PAN – AAGCP 5410 J** | Vs. | The Dy. Commissioner of Income Tax,<br>Circle-3(1)(1),<br>Bangalore.<br>. |
| APPELLANT | | RESPONDENT |

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| Assessee by | : | Shri KR Pradeep & Ms. Girija G.P, Advocates |
| Revenue by | : | Shri Vilas Shinde, CIT (DR) |

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| Date of hearing | : | 29.05.2024 |
| Date of Pronouncement | : | 25.07.2024 |

## O R D E R

**PER WASEEM AHMED, ACCOUNTANT MEMBER:**

This is an appeal filed by the assessee against the order passed by the NFAC, Delhi dated 20/02/2023 in DIN No. ITBA/NFAC/S/250/ 2022-23/1049933180(1) for the assessment year 2018-19.

2. The only issue raised by the assessee is that the ld. CIT(A) erred in confirming the addition of Rs. 1,86,77,17,914/- under the provisions of sec. 56(2)(viib) of the Act.

2.1 The necessary facts are that the assessee in the present case, a private limited company, is engaged in the business of food delivery.

The assessee at the start of the financial year and during the financial year was the subsidiary company of a foreign company viz., Delivery Hero based in Germany. The holding company got the share value done of the assessee company for transfer of its shareholding in the assessee company to the company viz. ANI Technologies Pvt. Ltd., the holding company of OLA Group. The valuer viz. Ernst and Young Merchant Banking Services Ltd., valued the shares of the assessee company dated 30/11/2017 at Rs.13.94 per share based on discounted cash flow method. In the valuation exercise, while using the discounted cash flow method, the valuer has projected the sales, expenses, and the profit of the assessee company from December 2017 and the calendar years beginning from 2018 to 2023 with the compounded annual growth rate of 34% of the revenue. As such, the holding company of the assessee transferred its entire shareholding to ANI Technologies Pvt. Ltd., at Rs. 13.94 per share having a face value of Rs.10 per share.

3. After the transfer of the shares as discussed above, the assessee company issued 14,66,02,662 shares to ANI Technologies Pvt. Ltd., at Rs.13.94 inclusive of a face value of Rs. 10 and share premium of Rs. 3.94 per share. The assessee accordingly received share capital and share premium from ANI Technologies Pvt. Ltd., for a sum of Rs. 57,76,14,488/- and Rs. 1,46,60,26,600/- aggregating to Rs. 2,04,36,41,108/- only.

4. However, the AO during the assessment proceedings observed that the assessee has been incurring losses from assessment years 2013-14 to 2019-20 persistently whereas there has been huge growth in the turnover and profit in the project report. Moreover, there was a disclaimer given by the valuer in the project report that they have not carried out due diligence procedures on the financial statements but

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prepared the project report based on the information as submitted by the assessee. As such, the valuer has relied upon the information submitted by the management of the assessee company.

5. In such circumstances, the AO was of the view that the valuation has been done by the valuer to achieve the desired valuation of the share i.e. Rs. 13.94 per share, which is far away from the reality. Furthermore, the figures given in the project report did not match, which can be verified from the financial statements of the last years prepared by the assessee. According to the AO, the value per share of the company as per the net assets value method (NAV) as prescribed u/s 56(2)(viib) of the Act r.w. Rule 11U(a) of the Income-tax Rule comes out at Rs. 1.20 per share only. Thus, the AO was of the view that valuation of the shares done using the discounted cash flow method is far from reality. As such the valuation was done so as to obtain the desired valuation of the shares. Hence, the AO sought an explanation from the assessee.

6. The assessee in response to the notice issued by the AO submitted that the share valuation was done by the independent merchant banker as per the provisions of law and after considering the growth of the comparable companies such as Swiggi, Zomoto etc. As per the assessee, there were losses in the initial financial years and, therefore, the historical data cannot be made a basis for predicting the projections. As such, it is the future prospect and growth potential that should be used while valuing the shares under a discounted cash flow method.

7. The assessee also submitted that there was a transaction between the parties viz. delivery hero and ANI Technologies, wherein the shares were transferred by delivery hero to ANI Technologies at a

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price of Rs. 13.94 per share based on the valuation report. As such, the transaction between the delivery hero and ANI Technologies Pvt. Ltd. was between unconnected parties, therefore, the same basis can be adopted for the issue of share to ANI Technologies Pvt. Ltd.

8. The assessee has also submitted that the purpose of introducing provisions of sec. 56(2)(viib) of the Act was to curb the unethical practice carried out by the assessee for bringing unaccounted money in the accounted form in the company. The same was clarified by explaining the provision and the object of the same by the finance minister.

9. According to the assessee, it is like a startup company though the same has not been registered as startup company due to the turnover criteria. But if the objects are seen for the issuance of shares, the company is nothing but a startup company only.

10. Without prejudice to the above, the assessee also submitted that the provisions of sec. 56(2)(viib) of the Act mandates to bring the amount of premium to the tax under the deeming provisions if it is charged more than the fair market value. Therefore, only the amount of share premium exceeding the share market value should only to be considered for the purpose of addition as provided under the deeming provisions of sec. 56(2)((viib) of the Act. However, the AO disagreed with the submission of the assessee on the reasoning that the projections can be made only after considering the historical data, which is more reliable. As such, the assessee has been incurring losses consistently and, therefore, the projections made by the valuer are not reliable.

11. According to the AO, the assessee has not registered with a startup company and, there was also no investment from venture capitalist, therefore, the assessee company does not fall under the

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exception of the startup companies. The provisions of sec. 56(2)(viib) of the Act are without any ambiguity, whereas the speech of the Finance Minister was in general context and, therefore, the speech cannot referred. Thus, the AO rejected the claim of the assessee and treated the share capital issued more than the valuation determined under NAV method amounting to Rs. 1,86,77,17,914/- as income of the assessee and added to the total income.

12. Aggrieved, the assessee preferred an appeal to the ld. CIT(A). The assessee submitted before the ld. CIT(A) that DCF method is one of the method for the valuation of the shares recognized under the provisions of sec. 56(2)(viib) of the Act, complying the guidelines issued by RBI and in pursuance of the provisions of sec. 62(1) of the Companies Act. Furthermore, in the startup company, there are losses in the initial years, which turn into profit with the passage of time, therefore, it is only future prospect and growth based on which the projections are made under DCF method. The valuation report was prepared by the merchant banker after considering the growth of the food industry as projected by google, Swiggy, Zomato etc.

13. The assessee also submitted that the projections in the valuation report were not achieved since the assessee changed its business model from the financial year 2018-19 from food delivery to food sale business through cloud kitchen. Furthermore, the provisions of sec. 56(1)(viib) of the Act were brought to curb unaccounted, and manipulated transactions and therefore, the same cannot be applied in the case of a genuine transaction. The assessee also pointed out that the method for valuing the shares is the domain of an expert. As such neither the assessee nor the AO can question the valuation report prepared by an expert until and unless there is some arithmetical or

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fundamental error pointed out by the AO. Likewise, the AO does not have any jurisdiction to change the method adopted by the assesee.

14. Alternatively, the assessee contended that it is only share premium which can be made subject to the addition under the deeming provisions of sec. 56(2)(viib) of the Act.

15. However, the ld. CIT(A) was not satisfied with the contention of the assessee and confirmed the order of the AO by reiterating the findings contained in the assessment year. The ld. CIT(A) also observed that the project report in dispute was prepared only for the transfer of shares by Delivery Hero to ANI Technologies Pvt. Ltd., and, therefore, the same cannot be adopted for the issuance of shares by the assessee company to ANI Technologies Pvt. Ltd.

16. Being aggrieved by the order of the ld. CIT(A), the assessee is in appeal before us.

17. The ld. AR before us filed a paper book running from pages 1 to 497 and contended that the AO has exceeded jurisdiction by challenging the method adopted by the assessee i.e. valuation of shares from DCF to NAV method.

18. As per the ld. AR, the valuation of the shares made by the assessee was accepted under the Companies Act/ FEMA and RBI. It was also submitted that while valuing the shares under DCF method the future prospect/ growth is considered, which has been done in the instant case after referring to the data of comparable companies. Accordingly, the ld. AR prayed before us that no addition is warranted in the given facts and circumstances under the provisions of sec. 56(viib) of the Act.

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19. On the other hand, the ld. DR vehemently supported the order of the authorities below.

20. We have heard the rival contentions of both the parties and perused the materials available on record. In the present case, the assessee company was the wholly owned subsidiary of Delivery Hero and during the year the assessee company was taken over by ANI Technologies. After takeover by ANI Technology, the assessee company has issued fresh 14,66,02,662 shares to the company namely ANI Technologies having face value of ₹ 10 and premium of ₹ 3.94 per share aggregating to ₹ 13.94 per share. The value per share of ₹ 13.94 was based on the valuation report prepared by Ernest & Young Merchant Bankers Private Limited which was made at the behest of Delivery Hero while transferring the shares to ANI Technologies. As such, Delivery Hero was holding 2,78,43,155 shares in the assessee company out of which 2,01,32,581 shares were transferred to ANI Technology during the year under consideration @ 13.94 per share. Admittedly both the entities hero Delivery Hero and ANI Technology are unrelated parties and the same was also not disputed by the Revenue.

20.1 The assessee while issuing the shares to ANI Technologies has adopted the same basis for determining the value per share of its company. However, the AO pointed out certain infirmities in the valuation report and rejected the same which have already been elaborated in the preceding paragraph. Thereafter, the AO determined the value of the share of the assessee company at ₹ 1.20 considering the NAV method.
The 1st controversy arises whether the AO can substitute with the valuation method adopted by the assessee for computation of Fair Market Value. In the present case, the assessee has adopted the DCF

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method which was rejected by the Revenue by adopting the NAV Method. As such the provision of rule 11UA(2) of the Income Rule provides two method of the valuation of fair market value of unquoted share for the purpose of section 56(2)(viib) of the Act. the relevant provision of rule 11UA(2) of Income Tax Rule 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:—*
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> *(a) the fair market value of unquoted equity shares = (A – L)/ (PE) X (PV)*
>
> *Where,*
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> *************************
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> *(b) the fair market value of the unquoted equity shares determined by a merchant banker [2][***] as per the Discounted Free Cash Flow method.]*

20.2 From the perusal of the above rule, it is transpired that option to choose the method provided under clause (a) or clause (b) is available with assessee. Admittedly, the method adopted by the assessee i.e. DCF method for determining fair market value was one of the methods prescribed under the provisions of section 56(2)(viib) read with income tax rule 11UA of Income Tax Rule. The AO cannot interfere in the method selected for the valuation of the shares. However, the AO can scrutinize the contents or working of the method adopted by the assessee so as to find out the fair valuation. In case, the AO is not satisfied with the working of the assessee, then the AO may draw fresh valuation or get fresh valuation report from independent valuer, but such fresh valuation can only be done as per the method adopted by the assessee as in the present case assessee adopted DCF method. As such the AO cannot change the method from DCF to NAV method. In holding so, we draw support and guidance from the judgment of Hon'ble

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Bombay High Court in the case of *Vodafone M-Pesa Ltd.* v. *Pr. CIT* [2018] 92 taxmann.com 73/256 Taxman 240 where it was held as under:

> *"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 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."*

20.3 We also draw support and guidance from the order this Tribunal in case of M/s Innoviti Payment Solution Pvt Ltd. vs. ITO reported in 102 taxmann.com 59 (Bangalore-Trib), the relevant observation of the coordinate bench reads as under:

> *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.*

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*(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.*

20.4 Thus, we are of the view that the AO has exceeded his jurisdiction by rejecting the method adopted by the assessee and brought another method for valuing the shares of the company. In view of the above we hold that the action of the AO by substituting the method for the valuation of shares which was subsequently upheld by the learned CIT(A) is contrary to the provisions of law and therefore the same is not sustainable.

20.5 In addition to the above, it is very pertinent to note that there was a transaction between the independent parties namely Delivery Hero and ANI Technology for transfer of the shares of the assessee company at a price of ₹ 13.94 per share. The Delivery Hero is a foreign company which transferred equity share to a resident company i.e. ANI Technology. The value of the share i.e. Rs. 13.94 per share was accepted under the provisions of FEMA and RBI requirements, the Pricing Guidelines for downstream investment. Thus, it transpired that the price at which M/s Delivery Hero transferred the equity share of assessee company to ANI Technology was in accordance with the requirement of FEMA and RBI. In such circumstances, we are of the view that the same value adopted by the assessee cannot be disturbed for issuing shares to M/s ANI Technologies. In the light of the above stated discussion, we are of the view that the transaction in question cannot be disturbed under the provisions of section 56(2)(viib) of the Act. Accordingly, we set aside the order of the ld. CIT-A and direct the AO to

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delete the addition made by him. Hence, the ground of appeal of the assessee is hereby allowed.

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

Order pronounced in court on 25th day of July, 2024

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| Sd/- | Sd/- |
| **(SOUNDARARAJAN K)** | **(WASEEM AHMED)** |
| Judicial Member | Accountant Member |

Bangalore
Dated, 25th July, 2024

/ vms /

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

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