

IN THE INCOME TAX APPELLATE TRIBUNAL "I" BENCH, MUMBAI

BEFORE SHRI SHAMIM YAHYA, AM AND SHRI RAM LAL NEGI, JM

I.T.A. No.3505/Mum/2018
(Assessment Year: 20113-14)

Mukand Sumi Metal Processing Limited 3 rd Floor, Bajaj Bhavan, Jamanlal Bajaj Marg, Mumbai-400 021	Vs.	The Principal Commissioner of Income Tax-3, Room No. 612, 6 th Floor, Aayakar Bhavan, M. K. Road, Mumbai-400 020
PAN/GIR No.		
(Appellant)	:	(Respondent)

Appellant by	:	Shri Kirit Kamdar/ Shri Gajendra Jain & Shri Parth Achwal
Respondent by	:	Shri Abhakala Chanda

Date of Hearing	:	08.08.2018
Date of Pronouncement	:	22.10.2018

ORDER

Per Shamim Yahya, A. M.:

This appeal by the assessee is directed against the order by the Pr. Commissioner of Income Tax -3, Mumbai ('Id.CIT for short) dated 19.03.2018 and pertains to the assessment year (A.Y.) 2013-14.

2. The grounds of appeal read as under:

Validity of revision under section 263:

- 1) On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax erred in making a revision under section 263 to set aside the assessment order dated 31 March 2016 passed under section 143(3) of the Income-tax Act, 1961 ('the Act').
- 2) On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax erred in holding that the assessment order dated 31

March 2016 passed under section 143(3) of the Act is erroneous in so far as it is prejudicial to the interests of the revenue.

Direction to the Assessing Officer to make enquiry and verification in respect of valuation of premium on the shares issued by the appellant:

3} On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax erred in directing the Assessing Officer to make enquiry and verification in respect of the valuation of premium on the shares issued by the appellant.

4) On the facts and in the circumstances of the case and in law, the Commissioner of Income-tax erred in not appreciating that once the provisions of section 56(2)(viib) of the Act have been held as not applicable in the order dated 19 March 2018, there is no requirement of making any enquiry or verification in respect of the valuation of premium on issue of shares.

Each of the above grounds of appeal are without prejudice to one another.

The appellant hereby reserves the right to add to, alter or amplify the above grounds of appeal.

I, A.M. Kulkarni, Director, Mukand Sumi Meta! Processing Limited, the appellant, do hereby declare that what is stated above is true to the best of my information and belief.

3. In this case, the Id. CIT observed that M/s. Mukand Limited and M/s. Sumitomo Corporation, Japan formed a joint venture for the manufacture of bright bars and wires in India. That during the year the assessee has allotted equity shares of Rs.10 each at a premium of Rs.90 each. Some of these shares were also allotted to M/s. Mukand Limited, a resident company. The Id. CIT noted that the valuation report in this regard was not based on dependable facts. That the improbable high valuation seemed to camouflage unpalatable device to introduce monies. That shares at premium has also been issued to companies who claimed to be non-resident but their status has not been established before the assessing officer. Further, the Id. CIT referred to the provisions of section 56(2)(viib). Accordingly, notice under section 263 was issued with assessee as under:

'From the case records, it is evident that M/s Mukand Limited and M/s Sumitomo Corporation, Japan, have formed a joint venture for the manufacture of bright bars and wires in India Mukund Ltd and Sumitomo. Japan will carry out the business

through the assessee company i.e M/s Mukand Sumi Metal Processing Ltd a joint venture company. As per the joint venture agreement dated 29/10/2012. various conditions were laid down for the start of business which included transfer of land at Lonad The assessee company has not carried out any business activity during the year under consideration which has been elaborately discussed and proven by the AO in para 5 of his assessment order u/s 143(3) dated 31/3/2016 while disallowing the claim of depreciation made by the assessee.

2.1. During the year under consideration, the company had authorized equity shares of 3,00,00,000/-. It is also seen that the company had allotted 1.99.30,000 fully paid up equity shares @ Rs. 10 each/- at a premium of Rs. 90/- per share . Out of the 1.99.30.000 shares, the company had issued 1.19,68,000 equity shares to Mukand Ltd. a resident company.

2.2. On peruse: of the valuation report submitted by the Assessee dated 10/8/2012. it is seen that the valuer M/s SSPA & Co. Chartered Accountants, had followed the OCF method to work out the equity value of Rs. 2497 million. The said valuation is not justifiable or acceptable considering the fact that the company is incorporated only on 1/8/2012. It is not probable that within 10 days of creation of the company,, without any business activity or assets, this valuation could be made. Further, the assessee company could not have provided the Balance sheet's required for preparation of the valuation report on 10/8/2012. The basis and presumptions for Balance Sheet/s and the assumptions and presumptions for values adopted for DCF are neither stated nor explained. Bank A/cs copies have also not been furnished. Further, it is found that assets were transferred to the assessee company on 25/1/2013 which is after 5 months of submission of the valuation report. From the above, it is clear that the assessee company had no assets on the valuation date and no business activity was being carried out till the date of valuation. Therefore, it is clear that the valuation report by the valuer M/s SSPA & CO. CA is not based on dependable facts and evidences and prima facie not acceptable. This improbable high valuation also seems a camouflage and colourable device adopted to introduce monies/cash into the company.

2.3. Such shares at premium have also been issued to Sumitomo Corporation: Japan and Sumitomo Corporation Asia Pte Ltd. Singapore stating these two companies to be non-resident whereas this status has not been established before the AO nor was it enquired into by the AO.

3. Additionally please refer to Section 56(2)(viib) of the income Tax Act, 1961, which reads as under

'Income from other sources :

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 -

(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 exceeds the fair market value of the shares :

Provided that this clause shall not apply where the consideration for issue of shares is received —

- a) By a venture capital undertaking from a venture capital company or a venture capital fund or
- b) By a company from a class or classes of persons as may be notified by the Central Government on 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 good will, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature whichever is higher.

3.1, From the facts of the case and from the simplistic unsigned reply without any details whatsoever submitted by the assessee company during assessment proceedings, it is clear that the valuation and the premium charged is not justifiable and the premium received needs to be brought under the purview of Sec 56(2)(viib) of the Act on this account. It is also evident from case records that detailed verification and scrutiny of this valuation per share by DCF method adopted by you has not been furnished by you and has not been enquired into or verified by the Assessing Officer. Accordingly the order is passed by AO without making inquires or verification which should have been made. Additionally, in view of provision of Sec 56(2)(viib). there is an under assessment in this case of Rs.1,78,92,00.000/- (Rs.90/- * 1,99,30,000 (no of shares Issued to Mukund Ltd & others)).”

4. In response, the assessee submitted that provisions of section 56(2)(viib) were not applicable to the assessee as the company was to be treated as a company in which public it was substantially interested. Further the point was response was submitting that the issues raised by the learned CIT- have already been dealt with by the assessing officer.

The reply in detail as re-produced in the learned CIT-'s order is as under:

3.1 In the aforesaid notice, it has been mentioned that the premium received bit Mukand Sumi for issue of shares, ought to be taxed under section 56(2)(viib) of the Act.

3.2 In this regard, attention is invited to section 56(2)(viib), which reads as under:

"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" (emphasis supplied)

3.3 Thus, for section 56(2)(viib) to apply, all the following conditions should be met:

(a) Shares should be issued by a company, not being a company in which the public are substantially interested;

(b) The shares are issued to a person who is a resident;

(c) Such consideration exceeds the fair market value of the shares.

3.4 Thus, the first condition for section 56(2)(viib) to apply is that the issuer company should not be a company in which the public are substantially interested.

3.5 The term "company in which the public are substantially interested" is defined in section 2(18) of the Act. The said definition includes a company in which shares carrying not less than 50% of the voting power due held by a listed company.

3.6 It may be noted that Mukand Limited (a listed company) holds more than 50% of voting power in Mukand Surni. In this regard, attention is invited to Note 1 of the Notes to Account forming part of the Annual Report for FY 2012-13 (please refer Page No. 56) which evidences the fact that Mukand Siitiri is a subsidiary of Mukand Limited, which is a listed, company.

3.7 Accordingly, Mukand Surni qualifies as a "company in which the public are substantially interested" as per The provisions of section 2(18) of the Apt, and hence the provisions of section 56(2)(viib) are not applicable.

4 Other observations made in the notice issued under section 263:

4.1 Further to the above submissions, Mukund Surni objects to certain observations made in the notice dated 5 February 2018 issued under section 263, which are discussed below:

Para No. in the notice	Observations made in the notice	Remarks
2	The assessee company has not carried out any business activity during the year under consideration which has been elaborately discussed and proven by the AO in para 5 of his assessment order while disallowing the claim of depreciation made by the assessee.	At the outset, Mukand Sumi objects to the finding in the assessment order that no business activity has been carried out during the year under consideration. In this regard, Mukand Sumi has filed an appeal against the assessment order which is pending for disposal with the Commissioner (Appeals).
2.1	"It is also seen that the company has allotted 1,99,30,000 fully paid equity shares (a. R's.10 each at a premium of Rs, 90 per	In this regard, it is submitted that out of the 1,99,30,000 shares issued during the year, 40,000 shares issued on 28

	share."	September 2012 have been issued at face value.
2.2	<p>"On the perusal of the valuation report submitted by the Assessee dated 10/8/2012, it is seen that the valuer M/s. SSPA & Co., Chartered Accountants, had followed the DCF method to work out the equity value at Rs.2497 million. The said valuation is not justifiable or acceptable considering the fact that The company is incorporated only on 1.8.2012. It is not probable that within 10 days of creation of company, without any business activity or assets, I this valuation could be made. Further, the assessee company could not have provide the Balance sheets required for preparation of the valuation report on 10.8.2012. The basis and presumptions -for Balance Sheet and the assumptions and presumptions for values adopted for DCF are neither stated nor explained. Bank a/cs. copies have also not been furnished. Further, it is found that assets were transferred to the assessee company on 25.01.02013 whis is after 5 months of submissions of the valuation report. From the above, it is clear that he assessee company had no assets on the valuation date and no business activity was being earned out till the date of valuation."</p>	<p>In this regard, it is submitted that though the assessee company was fanned during the year under consideration, the valuation was made in respect of the business of bright bars and wires which was transferred from Mukand Limited to Mukand Sumi, The said business has been carried out by Mukand Limited since 1990 and commands a good value in the market. The valuation of shares of Mukand Sumi is primarily on account of the said business of bright bars and wires which is now held by Mukand Sumi.</p>
2.3	<p>"Such shares at premium have also been issued to Sumitomv Corporation. Japan arid Sumitorn.o Corporation Asia Pie. Ltd., Singapore stating these two companies to be non-resident whereas the status lias not been established before the AO nor was it enquired into by the AO."</p>	<p>It is very clear from the Annual Report, of Mukand Sumi that the said companies of the Sumitomo group are companies registered in Japan and Singapore respectively. These companies are dearly non-residents in India for tax purposes, In this regard, dining the course of the assessment proceedings, Mukancl Sumi had also submitted copies of FC-GPR filed for issue of shares to foreign investors, which clearly s}iow that the said investors are registered in Japan and Singapore respectively. (Copies of FC-GPR are enclosed at Page Nos.30-43). It is further submitted that the provisions of section 56(2)(viib) do not apply to shares issued to non-residents.</p>
3.1	<p>"It is also evident from the case records that detailed scrutiny and verification of this</p>	<p>It is submitted that Mukand Sumi had submitted a copy of the valuation</p>

	valuation per share by DCRF method adopted by you has not been furnished by you and has not been, enquired into or verified by the Assessing Officer."	report (determined using DCF method) during the course of the assessment proceedings. Further, the Assessing Officer had also asked to file details/justification for the premium received on issue of shares. Note/submission in this regard was filed by Mukand Sumi vide letter dated 15 March 2016. Thus, the relevant details have been filed by Mukand Sumi and the same have been verified by the Assessing Officer during the course the assessment proceedings.
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5. Considering the above, the learned CIT agreed that provisions of section 56(2)(viib) cannot be applied on the facts of the present case as the assessee falls under the definition of companies in which public are substantially interested as per section 2(18) of the I. T. Act. Despite observing so, the learned CIT- proceeded to remark that the assessing officer has not carried out any examination of the valuation made and he has not made specific enquiries on the issue of valuation. The learned CIT- held as under:

5. The assessee's submissions have been considered. From the facts of the case and from the replies submitted alongwith the requisite documents, it is clear that the provisions of sec 56(2)(viib) cannot be applied as Assessee falls under sec 2(10) of the I. T. Act, 1961.

5.1 However in so far as valuation of premium on shares is concerned, records indicate that the AO has not carried out any valuation or made specific enquiries on this issue nc.r has he verified it with reference to performances in Mukand Ltd or the bases adopted for valuation . It is also evident from case records that detailed verification and scrutiny of this valuation per share by DCF method adopted by the Assessee has not been looked into by the AO nor has the details been furnished by the Assessee during Assessment proceedings. The order on this issue was passed by the A.O. without making necessary enquiries or verification, which should have been done.

6. In view of the discussion above, the assessment order for A.Y. 2013-14 u/s. 143(3) dated 31.03.2016 is erroneous in so far it is prejudicial to the interest of revenue, and is required to be set aside u/s 263 of the I T Act for necessary enquiry and verification of the details and passing of an order on the issues afresh. Accordingly, I. Principal Commissioner of Income Tax - 3. Mumbai. in exercise of powers conferred upon me u/s 263 of the I. T. Act, 1961, hereby set aside the

order dated 31/03/2016 for A Y 2013-14 u/s 143(3) of the Income Tax Act 1961 to that extent and direct The AO to enquire, verify, analyse and evaluate and work out the valuation after giving sufficient opportunities to the assessee company to represent its case and pass the order accordingly.

6. Against the above order, the assessee is in appeal before us.
7. We have heard both the counsel and perused the records. We find that as evident from the detailed submission hereinabove, the provisions of section 56(2)(viib) invoked in the notice u/s. 263 by the ld. CIT is not applicable to the assessee company. As the assessee company was falling under section 2(18) of the Income Tax Act, 1961 being a company in which public are substantially interested. This fact has subsequently been duly accepted by the learned CIT- himself in the aforesaid order. Despite that he has held that assessing officer has not made detailed enquiry on the valuation of shares and he had set aside the matter to the file of assessing officer. We find that learned CIT is passing contradictory order when learned CIT- accepts that provisions of section 56(2)(viib) are not applicable to the assessee as this section provides for addition as income from other sources of share premium not properly explained in the hands of companies in which Public are not substantially interested. When the addition itself is not permissible what point will be served by the assessing officer's enquiries in this regard is beyond comprehension. Further, the A.O .has dealt with the issue. He has been provided with the valuation report. In these circumstances further enquiry as directed by the learned CIT- will not only be a futile exercise, it would serve no purpose whatsoever. We also note that the proviso to section 68 in this regard is also not applicable to company in which public

are substantially interested. This proviso mandates that the companies to whom *inter alia* shares at premium are issued should also satisfy the A.O.

Hence, we are of the opinion that the directions of the Id. CIT(A) can neither remove any error from the A.O.'s order nor cure any prejudice or loss to revenue.

8. In the background of the aforesaid discussion, this order u/s 263 passed by the Id. CIT is quashed.

9. In the result, the assessee's appeal stands allowed.

Order pronounced in the open court on 22.10.2018

Sd/-

Sd/-

(Ram Lal Negi)
Judicial Member

(Shamim Yahya)
Accountant Member

Mumbai; Dated : 22.10.2018

Roshani, Sr. PS

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT - concerned
5. DR, ITAT, Mumbai
6. Guard File

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai