IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" DELHI

BEFORE KUL BHARAT, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

I.T.A. No. 8431/DEL/2019
Assessment Year 2015-16

ACIT Circle-7(2) New Delhi	Vs.	**Dhruv Milkose Pvt. Ltd.** LGF-46, World Trade Centre Barakhamba Lane New Delhi
TAN/PAN: AACCD9996K		
(Appellant)		(Respondent)

Appellant by:	Shri Pawan Chakrapani, FCA		
Respondent by:	Shri Vivek Kumar Upadhyay, Sr.DR		
Date of hearing:	18	01	2024
Date of pronouncement:	08	02	2024

O R D E R

PER PRADIP KUMAR KEDIA-A.M. :

The captioned appeal has been filed by the Revenue against the order of the Commissioner of Income Tax (Appeals)-III, New Delhi ('CIT(A)' in short) dated 22.08.2019 arising from the assessment order dated 28.12.2017 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2015-16.

2. As per the grounds of appeal, the Revenue has challenged the additions of Rs.4,09,11,014/- made by the AO on account of share premium received on the contours of Section 56(2)(viib) of the Act.

3. Briefly stated, the assessee filed return of income for Assessment Year 2015-16 in question, declaring total loss of Rs.1,30,40,430/-. The return filed by the assessee was subjected to scrutiny assessment. The AO in the course of the scrutiny assessment observed that the assessee-

company in the year under consideration has allotted 9223 number of equity shares of Rs.10/- each at a premium of Rs.4435.76/- per share amounting to Rs.4,09,11,014/- to M/s. SunEdison Solar Power India Pvt. Ltd. which is an existing shareholder and 100% holdings company of the assessee. The Assessing Officer disputed the amount of share premium received per share on the ground that the premium received exceeded the Fair Market Value (FMV) of such shares contemplated under Section 56(2)(viib) r.w. Rule 11UA of the Income Tax Rules, 1962. The AO rejected the DCF Method adopted by the assessee and adopted Net Asset Liability Method described in Rule 11UA of the Income Tax Rules, 1962 to ascertain the value of shares and thereby concluded that no premium of shares allotted is justified. An amount of Rs.4,09,11,014/- was thus added as deemed income under Section 56(2)(viib) of the Act to the loss returned by the assessee.

4. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) took note of the factual matrix as submitted by the assessee and the position of law prevailing in this regard. The CIT(A) found merit in the plea of the assessee that the provisions of Section 56(2)(viib) cannot be justifiably invoked in the peculiar facts of the case. The relevant operative paragraph of the first appellate order is reproduced hereunder:

> *"5.3 I have considered the facts of the case and the submission made by the AR. It has been contended that the appellant has set up a solar power plant which has started commercial production in FY 2011-12. The appellant had received share application money of Rs.4,10,03,250/- in FY 2011-12 from M/s. Sun Edison Solar Power India Pvt. Ltd. and during the year, the company has allotted 9223 number of shares to M/s. Sun Edison Solar Power India Pvt. Ltd having face value of Rs.10/- each at total amounting to Rs.4,10,03,244/- with a premium of Rs. 4,435.76/-per share. The company has adopted the DCF method to arrive at the fair market value of the shares to be issued for allotment of shares at Premium. It is further submitted that the shares were allotted by the appellant to its holding company which was holding 91% of the shares prior to this allotment. It is also submitted by the AR that prior to this issue, the balance 9% shares were held by one Mr. Sharad Maheshwari and the holding company M/s. Sun Edison Solar Power India Pvt. Ltd has bought these 9% shares also from Mr. Sharad Maheshwari @ Rs. 4444.44 per share which includes a premium of Rs. 4434.44 per share. In view of this, it has been contended that the issue of fresh shares @ Rs. 4445.76 (including premium of Rs. 4435.76 per share) to the holding company is at the fair market value of the shares. The AR has also contended that*

there is no doubt about the genuineness of the transactions. It-is further submitted that the statute provides option to the appellant to value the shares by using DCF method or based on the net worth as per Rule 11UA(2) and the appellant has duly got the shares valued from the valuer by using DCF method. It is contended that it is beyond the jurisdiction of the AO to insist upon following one particular method. The AR has submitted that there is no rationale in comparing the projected and actual figures. The AR was asked to justify the reasonableness of the projections based on which the shares have been valued by following DCF method. The AR submitted that the complete valuation report was filed before the AO and the same has not been considered by the AO. The AR has submitted all these details along with the details of the project installed by the appellant. The main arguments of the appellant to defend the valuation of shares as per the valuation report are as under:

i. The valuer has considered various factors including the feasibility report while doing the valuation;

ii. The valuer has considered Plant Load Factor (PLF) of 18.61% as against 19% specified by CERC (Central Electricity Regulatory Commission) in its publication, a copy of which was sought from the AR;

iii. The valuer has considered the price per unit at Rs. 17.91 which is fixed for all years as per the power purchase agreement(PPA) entered with DISCOM for 25 years whereas the AO has mentioned in the assessment order that the price per unit of solar power is continuously going down, which is not applicable to the applicant in view of the PPA (Para 3.7 of the assessment order);

iv. The tax rate has been taken at 20.0075% after considering the fact that the appellant is eligible for deduction u/s. 80IA of the Act and is also eligible for MAT Credit;

v. Since the shares have been issued to the holding company, there was no rationale to charge excess premium as the appellant could have issued more number of shares at lesser premium to get the same amount of Capital funding;

vi. The allottee i.e. the holding company has during the year purchased 1350 equity shares of the appellant company from Sh. Sharad Maheshwari at almost the same price of Rs. 4444.44 per share which shows the fair market value of the shares.

5.3.1 On perusal of the arguments of the appellant, it is observed that the appellant had an option of two methods to value the fair market value of the shares and it has chosen to value the shares as per the DC method for which valuation report was submitted. After considering the various factors adopted by the valuer to value each share as discussed above, I am of the view that it cannot be said that there was no reasonable basis for the projections made in the valuation report. In this regard, reference is also made to the decision of Hon'ble ITAT, Jaipur Bench in case of M/s. Rameshwaram Strong Glass (P) Ltd. V/s ITO, in which it has been held that when the law has specifically provided a method of valuation and the assessee exercised an option by choosing a particular method, changing the method or adopting a different method would be beyond the powers of the revenue authorities. It is further held that the DCF Method is essentially based on the projections (estimations) and hence these *projections cannot be compared with the actuals to expect the same figures as were projected.*

5.3.2 Further, reference is made to the decision of Hon'ble Delhi ITAT in the case of Stryton Exim India P. Ltd, vs ITO, in ITA No. 5982/Del/2018 in which vide order dated 23 October, 2018, it has been held that-

"The learned assessing officer as well as the learned commissioner appeals rejected the valuation report submitted by the assessee for the sole reason that projections shown by the assessee in the project report of the cash flow did not materialize in subsequent years. It was also the reason for rejection of these reports as the chartered accountant who valued the shares of the company has given a proper disclaimer while certifying the valuation. On careful consideration of the reasons given by the learned assessing officer the assessee has clearly stated that the valuation report is properly dated and further it may happen that the projected cash flow shown by the assessee at the time of the valuation did not materialize in subsequent year due to different business reasons such as delay in the project. The assessee has shown that there is a delay in the project and subsequently the LLC company has started earning the sum. If that be the case that if there is a variation in the discounted cash flow shown by the assessee with actual result in subsequent years, then the basic fallacy will arise that discounted future cash flow should be equal to the actual cash flow of the assessee. According to us it will result in absurdity. However it can also not be subscribed to the view that if there are wide variations in subsequent years with actual results compared with the projected cash fow submitted by the assessee, then in such situation if the projected cash floor is accepted then provisions of section 56(2)(vib) will become redundant. Therefore an objective evaluation of the valuation report submitted by the assessee deserves to be carried out. Further, the valuation report is prepared by the professionals such as chartered accountant, or merchant bankers for which their respective professional bodies have laid down specific disclosure requirements. Those disclosure requirements are binding on them. Therefore merely because they have given certain caveats and disclaimers, those factors should not sway the mind of the learned assessing officers or commissioner appeals."

5.4 In view of the above facts and the legal position, I am of the view that the AO cannot change the method of valuation of shares adopted by the assessees and the projected figures cannot be compared blindly with the actuals to state that the valuation report is not correct. However, the AO is competent and within his powers to look into the fact whether the valuation report is fair and reasonable. In the present case, the AO has not found any specific error in the valuation report. The valuer is bound to give disclaimers as the valuer cannot be expected to determine the exact value as the same is not feasible. As already discussed above, the valuer has adopted reasonable projections than the optimum figures for generation of revenue and the valuation of shares done by the valuer has got reasonable basis. Moreover, as argued by the AR, there is no excess premium charged because the holding company has during the year purchased 1350 equity shares of the appellant company from Sh. Sharad Maheshwari at almost the same price of Rs. 4444.44 per share which shows the fair market value of the shares. In view of these facts, the addition made by the AO is deleted and the grounds of appeal are *allowed.*

6. Ground no.5 of the appeal is related to the claim of unabsorbed depreciation pertaining to earlier years to be set off against the assessed income. Ground no. 6 of the appeal is related to the claim of MAT credit pertaining to AY 2013-14 to be adjusted against the tax liability. In this regard, the AR has also submitted that the appellant has filed a rectification application before the AO in respect of these claims and the same has not been disposed by the AO. In this regard, the AO is directed to verify the claim of the appellant and allow credit of prepaid taxes and unabsorbed depreciation in accordance with law. The grounds of appeal may be treated as allowed.

7. As a result, the appeal is allowed."

5. Aggrieved by the reversal of addition, the Revenue has preferred appeal before the Tribunal.

6. The ld. DR for the Revenue relied upon the action of the AO and submitted that by no stretch of imagination such huge premium on issue of share can be justified more so when the assessee is a loss making company. The ld. DR submitted that once the case of the assessee falls within the four corners of a deeming provision, such provision requires to be strictly construed and there is no scope for deviating from legal position enunciated in the provisions of the Act. The ld. DR thus sought cancellation of the order of the CIT(A) and restoration of the additions made by the Assessing Officer.

7. The ld. counsel for the assessee, on the other hand, submitted at the outset that the valuation of shares as per DCF Method has backed by valuation report. Besides, the shares have allotted to the holding-company i.e., existing shareholders and not to an outsider and therefore, it does not make any difference to a shareholder in bringing money to its subsidiary company at premium or at cost when seen holistically. A reference was made to the decision rendered by the Co-ordinate Bench of Tribunal in the case of *BLP Vayu (Projects-I) Pvt. Ltd. vs. Pr.CIT (20213) 151 taxmann.com 47* wherein it has been observed that such deeming fiction seeking to charge unjustified premium as taxable is wholly inapplicable for transactions between holding and its subsidiary company where no income could be said to have accrued to ultimate beneficiary, i.e., holding company. The ld. counsel submitted that the

present case is squarely covered by the observations made by the Co-ordinate Bench and thus no interference with the order of the CIT(A) is called for.

8. We have carefully considered the rival submissions and perused the case records.

8.1 The revenue has controverted the action of the CIT(A) on the touchstone of Section 56(2)(viib) of the Act towards allotment of shares to subscriber 'SunEdition Solar Power India Pvt. Ltd.' which is existing shareholder holding 100% of the equity shares of the assessee-company.

8.2 The issue is no longer res-integra. The effect of issue of shares to holding company at a premium has been examined by the Co-ordinate Bench of Tribunal in the case of *BLP Vayu (Projects-I) Pvt. Ltd. reported in (2023) 151 taxmann.com 47 (Del-Trib.)*. The relevant operative paragraph of the order of the Tribunal is hereunder:

> *"11.1 As per case records, it is an undisputed fact that the shares have been allotted at a premium to its 100% holding company. Thus, applicability of Section on 56(2)(viib) has to be seen in this perspective. The Co-ordinate Bench of Tribunal in DCIT vs. Ozone India Ltd. in ITA No.2081/Ahd/2018 order dated 13.04.2021 in the context of Section 56(2)(viib) has analyzed the deeming provisions of Section 56(2)(viib) of the Act threadbare and inter alia observed that the deeming clause requires to be given a schematic interpretation. The transaction of allotment of shares at a premium in the instant case is between holding company and it is subsidiary company and thus when seen holistically, there is no benefit derived by the assessee by issue of shares at certain premium notwithstanding that the share premium exceeds a fair market value in a given case. Instinctively, it is a transaction between the self, if so to say. The true purport of Section 56(2)(viib) was analyzed in Ozone case and it was observed that the objective behind the provisions of Section 56(2)(viib) is to prevent unlawful gains by issuing company in the garb of capital receipts. In the instant case, not only that the fair market value is supported by independent valuer report, the allotment has been made to the existing shareholder holding 100% equity and therefore, there is no change in the interest or control over the money by such issuance of shares. The object of deeming an unjustified premium charged on issue of share as taxable income under Section 56(2)(viib) is wholly inapplicable for transactions between holding and its subsidiary company where no income can be said to accrue to the ultimate beneficiary, i.e., holding company. The chargeability of deemed income arising from transactions between holding and subsidiary or vice versa militates against the solemn object of Section*

56(2)(viib) of the Act. In this backdrop, the extent of inquiry on the purported credibility of premium charged does not really matter as no prejudice can possibly result from the outcome of such inquiry. Thus, the condition for applicability of Section 263 for inquiry into the transactions between to interwoven holding and subsidiary company is of no consequence. We also affirmatively note the decision of SMC Bench in the case of KBC India Pvt. Ltd. vs. ITO in ITA No.9710/Del/2019 order dated 02.11.2022 (SMC) where it was observed that Section 56(2)(viib) could not be applied in the case of transaction between holding company and wholly owned subsidiary in the absence of any benefit occurring to any outsider."

8.2 The Co-ordinate Bench has essentially observed that where the allotment has been made to existing shareholders, the deeming provisions of Section 56(2)(viib) would not ordinarily be applicable. This apart, in the instant case, the assessee has also supported the premium determined on issue of shares by DCF Method. Thus, the premium charged is supportable by the valuation report and the premium has been charged to existing shareholder. Thus effectively, the benefit if any arising to the company in turn benefits to the subscriber having pre-existing right in the company. While applying Section 56(2)(viib), the purpose for which deeming provision has been inserted is not achieved in the instant case. Hence, in our view, the conclusion drawn by the CIT(A) cannot be faulted either on facts or in law.

9. Without reiterating the process reasoning adopted by the CIT(A), we endorse the same and decline to interfere therewith.

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

Order pronounced in the open Court on 08/02/2024

Sd/-	**Sd/-**
[KUL BHARAT] **JUDICIAL MEMBER**	**[PRADIP KUMAR KEDIA]** **ACCOUNTANT MEMBER**

DATED: **/02/2024**

Prabhat