THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G" DELHI

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

I.T.A. No.1416/DEL/2020
Assessment Year 2016-17

ITO, Ward-24(1) New Delhi	Vs.	**Solitaire BTN Solar Pvt. Limited** 616A, 16A, 6th Floor, Devika Tower, Nehru Place New Delhi
TAN/PAN: AASCS0567R		
(Appellant)		(Respondent)

Appellant by:	Shri Gaurav Jain, Advocate Shri Vijay Singh, Chartered Accountant		
Respondent by:	Shri Gurpreet Singh, Sr.DR		
Date of hearing:	16	05	2024
Date of pronouncement:	12	06	2024

O R D E R

PER PRADIP KUMAR KEDIA-AM:

The captioned appeal has been filed by the Revenue against the first appellate order passed by the Commissioner of Income Tax (Appeals)-8, New Delhi ['CIT(A)' in short] dated 28.01.2020 under Section 250 of the Act arising from the assessment order dated 17.12.20218 passed by the Assessing Officer (AO) under section 143(3) of the Income Tax Act, 1961 (the Act) concerning A.Y. 2016-17.

2. The Grounds of Appeal raised by the Revenue read as under:

"On the facts and in the circumstances of the case, the ld. CIT(A) has erred in deleting the addition of Rs.3,60,83,000/- on account of premium amount in excess of FMV made by the AO u/s. 56(2)(viib) of the Income Tax Act, 1961."

3. Briefly stated, the assessee is engaged in the business of energy and infrastructure development and has received approval from TANGEDCO to set up 50MW solar plant in Tamil Nadu. The assessee filed its return of income declaring total income at 'Nil' for AY 2016-17 in question. The return filed by the assessee was subjected to scrutiny assessment under Section 143(3) of the Act.

3.1 During the course of the assessment proceeding, the AO *inter alia* observed that the assessee has issued and allotted 1,00,000 Optional Convertible Preference Shares (hereinafter referred to as 'OCPS') @ 1,000/- per OCPS to subscriber M/s. Hindustan Clean Energy Ltd. and received premium of Rs.9,90,00,000/-. The assessee clarified that it has received funds of Rs. 10 cr. for its flagship Solar power plant in the state of Tamil Nadu from its 100% holding company viz Hindustan Clean Energy Ltd. against which the assessee co. has allotted 1,00,000 Optionally Convertible Preference Shares (OCPS) of Rs. 1000/- having a face value of Rs. 10 at a premium of Rs. 990/-. The AO did not find the premium charged on issue of OCPS to be justifiable and thus rejected the FMV declared by the Assessee. The AO recomputed the Fair Market Value (FMV) of OCPS at Rs.639.17 as against Rs.1,000/- per OCPS received by the assessee. The AO observed that the share premium charged on issue of OCPS to M/s. Hindustan Clean Energy Ltd. is in excess of justifiable FMV and a sum of Rs.3,60,83,000/- was thus quantified as excessive premium collected over FMV which was held to be susceptible to tax on the touchstone of section 56(2)(viib) of the Act.

4. Aggrieved, the assessee preferred appeal before the CIT(A). It was emphasized by the Assessee that the subscriber company, M/s. Hindustan Clean Energy Ltd. is 100% holding company of the

assessee company and therefore, no motive of unlawful receipt of allegedly excess premium can be envisaged in such transactions between holding company and subsidiary company. No unlawful advantage *per se* can be said to have been derived on receipt of alleged excessive premium from the Holding co. The valuation report of the Chartered Accountant valuing the FMV of OCPS submitted before the AO was placed to support the valuation. Besides, the calculation of the FMV provided to the AO vide letter dated 10th December, 2018 was also referred. As per the calculation submitted in the aforesaid letter, the FMV of OCPS even as per NAV method, stands at Rs.993.49 per share which was wrongly calculated at Rs.639 per share by the AO. It was thus contended before the CIT(A) that the premium charged is in symmetry with the underlying value of the assessee company. It was also pointed out that the deeming provisions of Section 56(2)(viib) is not applicable since the OCPS have been allotted to none other than the holding company. The Rules applied for valuation of shares were also challenged. The CIT(A) recorded the submissions of the assessee in the first appellate order and on conspectus of facts, adjudicated the issue in favour of the assessee. The relevant operative paragraph of the order of the CIT(A) is reproduced hereunder for ready reference:

> *"4. Decision: I have considered the arguments advances by the Ld. A.R, written submissions and various decisions relied upon by them. For the sake of convenience, all the grounds of appeal have been taken together for adjudication.*
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> *4.1 Facts of the case are that during the F.Y relevant to the A.Y. 2015-16 the appellant had allotted 1,00,000 optional convertible preference shares (OCPS) to its holding company M/s Hindustan clean Energy Ltd @ 1000/- OCPS after determining the F.M.V. in accordance with Rule11UA(1)(c)(c)/DCF Method.*
>
> *4.2 Assessing Officer however, computed the F.M.V. on Net Assets Value at Rs. 639.17 per OCPS and considered the balance @ 360.83 per OCPS as excess premium and added the same u/s 56(2)(viib) of the*

Act.

4.3 After considering the totality of the facts and circumstances of the case, provisions of Law and decided cases, it is noticed that the facts and circumstances of the case, issues and applicable provisions of Law to the present case are covered by various cases relied upon by the appellant.

4.4 I have seen the balance sheet of the appellant and the assessment order. It is noticed that in the assessment order at page number 10 the AO has rightly taken the net asset value for shareholders, i.e. Rs. 1,77,42,664/- But denominator of 27759 number of shares is not correct. Because there are 10,000 equity shares and 17,759 OCPS, which are not equivalent. In this regard, balance sheet needs to be referred where number of shares outstanding as on 31.03.2015 are given, in point no. (d) of note 2 of the balance sheet it is cleared mentioned that every OCPS will be converted into 100 equity shares which means 1 OCPS is equivalent to 100 equity shares and vice versa. Accordingly, 10000 equity shares are equivalent to 100 (10000/100) OCPS. Therefore, for the purpose of getting actual value of OCPS, the equity has to be converted into equivalent OCPS so that correct value of shares could be calculated. Now effective number of OCPS is 17,859 (17759+100). Hence value of each OCPS is Rs.993.48 (17742664/17859).

4.5. The AO though adopted the net asset value as per the appellant. But he equated the OCPS with those of equity shares and totaled the quantities without converting them as per their weightage. When 1 OCPS was equivalent to 100 equity shares in such case totaling could be done only after applying the conversion factor. In the balance sheet of the appellant the opening allotted equity shares were 10,000, which were equivalent to 100 OCPS and Opening OCPS were 17,759 the total of these two will be equal to 17859 OCPS (17759+100) and not 27759 as taken by the AO. By dividing the net asset value of Rs. 1,77,42,664/- with 17859 OCPS would result in to Rs. 993.48 per OCPS. The appellant has allotted the 1,00,000 OCPS @Rs.1000/- per OCPS, which is quite reasonable. Thus, there is no exaggeration in the valuation of the shares/OCPS by the appellant. Therefore, the addition made by the AO deserve to be deleted.

4.6 Reliance is placed on the ITAT Delhi decision in the case of India Today Online Pvt. Ltd. vs. Income Tax Officer in ITA Nos. 6453 & 6454/Del/2018 dated 15-03-2019 reported in [2019] 104 taxmann.com 385 (Delhi - Trib.)/[2019] 176 ITD 459 (Delhi - Trib.) wherein it was held that -

"3.1 One of the cardinal principles of interpretation of fiscal statute is that they should be strictly construed and so long as the provision is free from any ambiguity, there should be no need to draw any analogy.

A deeming provision on the other hand is intended to enlarge the meaning of a particular word which includes matters which otherwise may or may not fall within the normal provision, therefore, it should be extended to the consequences and incidents which has been intended by the Legislature for a definite purpose and should not be extended beyond the mandate of the statute. Thus, deeming provisions require to be construed strictly. Here in this case the assessee has followed one of the options provided under such deeming provision and when such an option has been exercised, then same cannot be discarded to impose other option. The assessee's option has been rejected by the Ld. CIT(A) on the ground it does not stand the test of one of option, which he deems fit. Not only that valuation method adopted by the assessee to value its underlying asset, that is, Mail Today shares has been rejected on the ground that DC method applied is not correct. DCF method is a recognized method where future projections of various factors by applying hindsight view and it cannot be matched with actual performance, and what Ld. CIT(A) is trying to do is to evaluate from the actual to show that the Company was running into losses, therefore, DCF is not correct. Valuation under DCF is not exact science and can never be done with arithmetic precision, hence the valuation by a Valuer has to be accepted unless, specific discrepancy in the figures and factors taken are found. Then AO or CIT (A) may refer to the Valuer to examine the same."

4.7 As per various tribunal orders, it was held that as per Rule 11UA(2), assessee could opt for DCF method and if assessee had so opted for DCF method, AO could not discard the same and adopt other method i.e. NAV method of valuing shares. In case of M/s. Rameshwaram Strong Glass (P) Ltd. vs. The ITO [2018] 172 ITD 571 (Jaipur - Trib.), the tribunal had reproduced relevant portion of another tribunal order rendered in case of ITO vs. M/s Universal Polypack (India) Pvt. Ltd. In such case, tribunal held that if assessee had opted for DC method, AO could not challenge the same but AO was well within his rights to examine methodology adopted by assessee and underlying assumptions and if he was not satisfied, he could challenge the same and suggest necessary modifications/alterations provided same were based on sound reasoning and rationale basis. In same tribunal order, a judgment of Bombay High Court was also taken note of having been rendered in case of Vodafone M-Pesa Ltd. vs. PCIT. The projections should be based on reasonable expectations after considering macro and micro economic factors affecting the business and the same principle was followed by the management of the Company. Reliance is also placed in case of M/s. INNOVITI PAYMENT SOLUTIONS PVT. LTD. vs. The ITO, [2019] 102 taxmann.com 59 (Bangalore - Trib.), the tribunal in para 12 has held that:

"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. 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."

4.8 In view of the above, it is clearly evident that the addition made by the AO u/s 56(2)(viib) amounting to Rs. 3,60,83,000/- is not justified and hence deleted.

5. In the end, the appeal of the appellant is partly allowed."

5. Aggrieved by the reversal of additions made, the Revenue is in appeal before the Tribunal.

6. We have considered the rival submissions and perused the appellate order and the assessment order. The documents referred to as well as the case laws relied upon in the course of hearing by the respective sides have been taken into account.

6.1 The Revenue has controverted the action of the CIT(A) on the touchstone of Section 56(2)(viib) of the Act towards allotment of OCPS to the subscriber M/s. Hindustan Clean Energy Ltd. which is the existing shareholder, holding 100% of the equity shares of the assessee-company as a holding company. On facts, the defense of the assessee are three fold (a) the OCPS has been subscribed and allotted to its 100% holding co. and therefore the deeming fiction of s. 56(2)(viib) to charge the capital receipts to taxation is not applicable at the threshold (b) the compulsory convertible preference shares issued at similar premium which were to be compulsorily converted into equity shares was accepted in the completed assessment of earlier year. Such facts are a matter of record with only discernible difference this year being, the assessee in the instance has the 'option' available for conversion into equity

shares within specified period whereas in the earlier year, the conversion was built mandatory in the issue of CCPS without any option (c) while the face value of pref. share is Rs. 10 at a premium of Rs. 990 per OCPS, however if the option is exercised, the subscriber would be entitled to 100 equity shares per OCPS and thus the number of converted equity shares to be reckoned would be 1,00,00,000 nos. instead of 10,000 shares adopted by Assessing Officer; on comparison of converted equity shares, it would be found that no premium is charged at all.

6.2 It is further case on behalf of the assessee that Rule 11UA(2) which prescribes NAV method of valuation is attributable to unquoted equity shares whereas present case relates to valuation of OCPS which falls for consideration under Rule 11UA(1)(c)(c). The OCPS being other than equity shares, the valuation done by the 'accountant' (who may value the security by DCF method) is in accord the mandate of the Rule and cannot be displaced without any cogent reasons.

6.3 Without prejudice to aforesaid, it is further paddled on behalf of the assessee that even if NAV is method is seen to be applicable, the NAV is to be calculated after applying the conversion ratio to the pref shares and the NAV need to be calculated with reference to underlying equity entitled to the subscriber on conversion. The CIT(A) has duly accepted such contention of the assessee as logical in para 4.4 and 4.5 of the order (supra).

6.4 It is thus the case of the assessee that seen from any angle, the relief granted by the CIT(A) cannot be faulted.

7. We have weight the rival submissions and perused case records.

8. The legal 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-1) Pvt. Ltd.* reported in *(2023) 151 taxmann.com 47 (Del-Trib.) & DCIT vs. Kissandhan Agri Financial Services (P) Ltd. (2023) 150 taxmann.com 390 (Del-Trib).* The ITAT in such cases, it was essentially observed that legal fiction of S. 56(2)(viib) do not extend to subscription by holding co.

9. The relevant operative paragraph of the decision rendered in *BPL Vayu (supra)* is reproduced 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."

10. 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. In consonance with the view expressed, the addition under s.56(2)(viib) on the ground of FMV allegedly lesser than the premium charged on allotment of OCPS to parent co. i.e. holding co. is a damp squib. The addition is thus unsustainable in law on this ground alone.

11. Notwithstanding, we also address ourselves to the alternate plea with regard to correctness of FMV determined by the AO on the strength of NAV method. As noted, the NAV method is permissible only in the caseof issue of equity shares as per Rule 11UA(2) of the IT Rules. The converted equity shares on conversion of OCPS, when taken as a base for calculation of NAV, the premium charged would, statedly, be negligible or NIL as essentially found by the CIT(A) in paras 4.4 and 4.5 of its order. The CIT(A) has endorsed this line of reasoning. We do find traction in such plea of the assessee that the FMV arrived at by the assessee is apparently justifiable when the calculation of the NAV is calculated with reference to the equity shares to be allotted on conversion. We do not see any cogent reason to discard the calculation of FMV with reference to quantity of equity share to arise on exercise of option relatable to issue of OCPS. Otherwise, the provisions of Rule 11UA(1)(c)(c) would be

applicable which permits the Valuer to apply DCF method. Thus, seen from any angle, it is difficult to fault the valuation assigned for determination of FMV. Hence, action of the CIT(A) calls for no interference in terms of Rule 11UA(2) of the Rules.

12. In summation, the instant case where the convertible shares have been allotted to wholly owned 100% holding company, the benefit if any arising to the assessee company on account alleged excess premium, in turn, effectively benefits the subscribers themselves having pre-existing rights in the company. Thus, on a common sense approach, no purpose will be achieved by obtaining benefit by way of excess premium by the assessee from its own shareholder. The avowed purpose behind the insertion of deeming fiction under Section 56(2)(viib) of the Act to the charge so called excess premium as deemed income of the assessee, would not be achieved when the shares are allotted to the same set of shareholders. Thus in our view, the conclusion drawn by the CIT(A) cannot be faulted either on facts or in law. Hence, we decline to interfere.

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

. **Order pronounced in the open Court on 12/06/2024**

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

DATED: **/06/2024**

Prabhat