

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'I(2) + SMC-1' NEW DELHI**

**BEFORE MS SUCHITRA KAMBLE, JUDICIAL MEMBER,
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER**

ITA No. 489/DEL/2017 (A.Y 2013-14)

Abhinav International Pvt. Ltd. C-24, Greater Kailash Enclave-1 New Delhi PAN: AADCA8631P (APPELLANT)	Vs	DCIT Circle 1(1) New Delhi (RESPONDENT)
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Appellant by	Sh. Shailesh Gupta, Adv
Respondent by	Sh. Pradeep Singh Gautam, Sr. DR

Date of Hearing	05.03.2020
Date of Pronouncement	02.06.2020

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 09/11/2016 passed by CIT(A)-1, New Delhi for Assessment Year 2013-14.

2. The grounds of appeal are as under:-

"1. In the facts & circumstances of the case, The Ld. CIT(A) has wrongly upheld the disallowance made by Ld. A.O. u/s 14A under rule 8D2(iii) of the Income Tax Act, 1961 of expenditure of Rs. 2,97,725/- on account of exempt income.

2. In the facts & circumstances of the case, The Ld. CIT(A) has wrongly enhanced the disallowance made by Ld. A.O. u/s 36(l)(iii) of the Income Tax Act, 1961 of Rs. 79,08,068/- on account of interest paid for money borrowed.

3. In the facts & circumstances of the case, The Ld. CIT(A) has wrongly upheld the disallowance made by Ld. A.O. u/s 56(viib) of the Income Tax Act, 1961 of Rs. 34,38,000/- on account of valuation of premium received on issue

of shares”

3. The assessee company is engaged in the business of investment in shares. Return of income was filed on 8/9/2013 declaring a loss of Rs. 1,17,70,956/-. Assessment u/s 143(3) was made on 19/2/2016 determining total income at Rs. 32,44,078/- in the assessment order. The Assessing Officer disallowed expenses pertaining to earning exempt income of Rs. 21,33,361/-. The Assessing Officer also disallowed interest and loan processing charges for diversion of interest bearing funds to the sister concerns to the extent of Rs. 60,72,432/-. The Assessing Officer also added Rs. 34,38,000/- on account of excess premium received on sale of shares to Shoveller Infra Commission Ltd.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A) and CIT(A) partly allowed the appeal of the assessee.

5. As regards Ground No. 1 relating to disallowance u/s 14A read with Rule 8D(2)(iii) of expenditure of Rs. 2,97,725/- on account of exempt income, the Ld. AR submitted that under Rule 8D (2)(ii) of Income Tax Rules, 1962, Assessing Officer can disallow interest paid on borrowed capital to the extent if that borrowed sum is used for the buying of tax free investment. The assessee did not purchase any tax free investment during the year under consideration. Besides this, the assessee took loan from Tata Financial Services Ltd. as on 31.03.2012 on which the assessee had paid interest during the year. The assessee as on 01.04.2012 had shareholder's fund Rs. 5,94,09,786.96 as well as interest free borrowing from Directors and Associate concerns amounting to Rs. 97,25,000/- and value of investment on that date was Rs. 6,70,45,064.23/-. The Ld. AR further submitted that the assessee never used interest bearing borrowed money for purchase of investment. The Assessing Officer ignored this fact while making addition u/s 14A, the assessee used his own money to buy investment. The Ld. AR further submitted that the assessee

had received only dividend income of Rs. 54,84,140/- & FDR interest of Rs. 1238/- during the year under consideration and claimed Rs. 84,07,531/- as total expenditure under the head PGBP. Breakup of total expenditure of Rs. 84,07,531/- is Audit fees of Rs. 19,663/-, ROC filing fees of Rs. 9,709/-, Legal & Professional charges of Rs. 47,80,100/-, interest on secured loan of Rs.35,26,028/-, Demat charges of Rs. 61,868/-, interest paid on TDS of Rs. 6,574/- and bank charges of Rs. 3,588/-. The Assessing Officer erred in disallowing an amount of Rs. 2,97,725/- u/r 8D(2)(iii) attributing the expenditure to exempt income as total common expenditure claimed in return of income is only Rs. 94,768/- which comprises of mainly audit fees, roc filing fees, bank charges and demat charges etc. These expenditure are the statutory obligation of a company whether it has exempt income or non exempt income. As regards to Legal and Professional charges and interest paid on secured loan these expenditures are directly attributable to other taxable income and on the other side the Assessing Officer also made addition of Legal & professional charges, interest paid on secured loan and interest paid on TDS. The Ld. AR submitted that the Assessing Officer while passing assessment order did not satisfied himself about total expenditure claimed by the assessee and erred in disallowance of Rs. 2,97,725/-.

6. The Ld. DR relied upon the assessment order and the order of the CIT(A).

7. We have heard both the parties and perused the material available on record. During the year the assessee received dividend income of Rs. 54,84,142/-. The assessee made investment of Rs. 22,00,000/- in the shares of Glofin Investment & Finance of Rs. 22,00,000/- and other investments were made in earlier years. The assessee paid interest of Rs. 35,26,028/- for the loans taken by it from Tata Capital Finance Services as on 31.12.2012. Thus there is no correlation between the investment made in the shares of other company with the borrowing of funds during the year. Hence, the CIT(A) rightly held that interest disallowed has to be restricted to the extent of funds invested

in Glofin Investment & Finance during the year. The disallowance of interest under Rule 8D(2)(ii) worked out by the CIT(A) as under:

$$\begin{aligned} a \times b / c & \quad \text{i.e. Rs.35,26,028/-} \times \text{Rs. 22,00,000} / \text{Rs. 11,43,78,415/-} \\ & = \text{Rs. 67,821/-} \end{aligned}$$

As per this working the CIT(A) held that the interest pertaining to the investments made during the year works out to Rs. 67,821/- under Rule 8D(2)(ii). The disallowance under Rule 8D(2)(iii) being $\frac{1}{2}\%$ of the value of average investments had been rightly disallowed at Rs.2,97,725/-. Thus, there is no need to interfere with the findings of the CIT(A). Ground No. 1 is dismissed.

8. As regards to Ground No. 2 relating to wrongly enhancing the disallowance made by the Assessing Officer u/s 36(1)(iii) of the Income Tax Act, 1961 of Rs. 79,08,068/- on account of interest paid for money borrowed, the Ld. AR submitted that the assessee had borrowed Rs. 13,00,00,000/- from Tata Capital Finance Services Limited on 31.12.2012. To avail loan, the assessee paid Rs. 43,82,040/- to Tata Capital Finance Services Limited as processing charges and deducted & deposited TDS on the amount of processing charges. The Assessee gave this borrowed fund to its sister/associates concerns as interest free advance as under:

i)	Hanung Infra & Power Ltd.	Rs. 5,00,00,000/-
ii)	C K Software Pvt. Ltd.	Rs. 5,00,00,000/-
iii)	Glofin Investment Pvt. Ltd.	Rs. 2,60,00,000/-
	TOTAL	Rs.12,60,00,000/-

There is stipulated condition in the Terms and Conditions of Loan agreement under the head 'purpose of loan facility' that loan fund to be utilized to infuse funds into subsidiaries/JVs and for equity infusion. Further these aforementioned sister/associates concerns invested this borrowed fund in another associate/sister concern Hanung Toys & Textiles Ltd. (a listed company) as a fresh allotment of equity shares. The Ld. AR relied upon the

decision of the Hon'ble Supreme Court in case of Hero Cycles (P) Ltd. vs. CIT (2015) 379 ITR 347 (SC).

9. The Ld. DR relied upon the assessment order and the order of the CIT(A).

10. We have heard both the parties and perused the material available on record. From the perusal of the facts, it can be seen that the loan was taken for the purpose of 'equity infusion' in the associate concerns. Since, the entire fund was diverted for equity infusion in the associate concerns, the Assessing Officer held that the funds borrowed were not utilized for business purposes. Hence, interest expenditure and other associate expenditure were not incurred wholly and exclusively for business purposes. The reliance of the decision of the Hon'ble Supreme Court in case of Hero Cycles (P) Ltd. vs. CIT (2015) 379 ITR 347 (SC) will not be applicable in the present case as advance to subsidiary company became imperative as a business expediency in view of undertaking given to financial institutions by assessee to effect that it would provide additional margin to subsidiary company to meet working capital for meeting any cash losses. But in the present case, funds were specifically borrowed for infusion of equity in the associate concerns which is totally different aspect from the case of Hero Cycles (Supra). Hence the CIT(A) rightly confirmed the addition. Ground No. 2 is dismissed.

11. As regards to Ground No. 3 against the order of the CIT (A) in upholding the disallowance/addition made by the Assessing Officer under section 56 (2) (viii b) of the act of ₹ 34,38,000/- on account of valuation of premium received on issue of shares. The fact shows that Assessee Company had allotted 90,000 shares of ₹ 10 each to Messer Shoveller Infracon limited at the premium of Rs 40/- per share. The total shares allotment made by the assessee company amounts to Rs. 4500000/-. The Assessing Officer asked the assessee to file valuation report in support of the share premium charged by the assessee with

reference to its assets and liability as per Rule 11UA of The Income Tax Rules. The assessee submitted the valuation as per letter dated 8/2/2016, that the book value of those shares is at Rs 11.80 per share. The assessee also submitted that it has invested its funds in equity of listed and non-listed companies. Value of the shares is recorded in the books of the company of all those shares at its cost. At the time of issue of the shares, assessee valued those shares, which are listed at the listed price in the exchange, and in case of unlisted shares, the value is taken at the book value. It is submitted that if the value of the listed shares are taken at their listed price on that date, the value of the share of the assessee company comes to Rs 71.04 per share. It is below the issue price of Rs 50/- per share at which fresh allotment are made. Therefore, the shares issued to the new allottee are at the price which is less than the price of ₹ 71.04 per share. Thus, in nutshell the argument of the assessee is that if the cost price i.e. Book value of listed shares is replaced by their traded price, then, the book value of the share of Assessee Company comes to ₹ 71.04 per share. If, the value of the listed shares is also taken at the book value of the share i.e. ₹ 10 per share of such listed shares, the book value of the assessee company is at ₹ 11.80 per share. The AO rejected the argument of the assessee and held that when the assessee itself is saying that the book value of the shares of assessee company is ₹ 11.80 per share, assessee has accepted ₹ 38.20 per share in excess of its book value and made the addition of ₹ 3438000/- under section 56(2) of the income tax act.

12. The assessee approached the CIT (A) submitting that the fair market value of the share can be substantiated by the company to the satisfaction of the assessing officer, based on the value on the date of the issue of shares of its assets, which is higher than the value which is derived in accordance with the valuation rules, therefore, the higher value should be accepted. The CIT(A) also rejected the argument of the assessee stating that assessee has not given any material in support of its claim as to how the book value of the share has been worked out at ₹ 71.04 per share. Further the assessee itself has worked out the

book value of its shares at Rs. 11.80 per share and therefore the Assessing Officer has correctly treated Rs. 34,38,000/- as income of the assessee under section 56 (2) (viiiib) of the act. Therefore, assessee is in appeal before us.

13. The Ld. AR submitted that as on 31st March 2013 the company was having shares of Hanung Toys and Textiles Limited whose book value (cost) was Rs 3,83,38,380/- being 2738000 equity shares whose market rate was Rs 138.80 per share having market value of Rs 38,00,34,400/- whereas its book value was only Rs 3,83,38,380/-. He submitted that assessee has substituted the book value of the shares of listed entity by taking market value of the listed shares as on that date. He submitted that all other unlisted equity shares are considered at that book value only. Thus, he submitted that listed equities book value was Rs 14/- per share, whereas the market value was Rs 138.80 per share, which has been added to the book value of the other assets of the company, resulted into the fair market value of the shares of the assessee company at Rs.71.04 per share. He also referred to the definition of 'fair market value of the shares' as provided under section 56 (2) (viiiib) of the act and submitted that if the assessee can substantiate to the satisfaction of the assessing officer, based on the value as on the date of the issue of its shares, which is higher than the value determined in accordance with the method prescribed under the income tax rules, assessee has an option to adopt the fair market value, whichever is higher. He therefore submitted that case of the assessee falls under sub clause (ii) of the definition of the 'fair market value of the shares'. Therefore, he submitted that the actions of the lower authorities are not in accordance with the law.

14. The Ld. DR vehemently supported the orders of the lower authorities and stated that when the assessee itself is value in shares at book value at Rs 11.80 per share, the revenue authorities are justified in making the above addition.

15. We have carefully considered the rival contention and perused the orders of the lower authorities. According to the provisions of the law the fair market value of the equity shares for the purpose of the taxation according to Section 56 (2) of the act is determined as under:-

“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 goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,

whichever is higher;”

Thus, the option is available with the assessee to either determine the fair market value of the shares, being higher of :-

- a. according to the valuation rules determined in accordance with the rules provided or
- b. to substantiate to the satisfaction of the assessing officer based on the value on the date of issue of shares office assets.

In the present case, the assessee is saying that value of the shares owned by the assessee company of the listed companies which are recorded at the book value (cost price) is far less than the listed price (traded price) of those shares,

therefore, same should be taken while determining the fair market value of its shares in accordance with the provisions of section 56 (2) of the act. Principally, we agree with the argument of the Ld. AR, that if assessee can substantiate that fair market value of its shares is higher than the valuation determined in accordance with the rules framed there under, then, higher of the above should be considered for working out income u/s 56 (2) of the act. However, assessee has to satisfy the assessing officer and it is only the satisfaction of the assessing officer, which is required for working out fair market value of shares. As the lower authorities stated that assessee has not produced anything to substantiate the above claim of the assessee, they disbelieved it. Before us, assessee has submitted the quotation at the National stock exchange of share price of Hanung Toys and Textiles Ltd on 7 November 2012 at ₹ 138.80 per share. However, these details have not been noted by the lower authorities. In view of the above facts, we set aside this ground back to the file of the Assessing Officer with a direction to the assessee to substantiate the fair market value of its shares by incorporating the market value of the listed equities owned by it, as demonstrated before us. The assessing officer may examine the claim of the assessee on the merits of the case and then decide the fair market value of the shares of the assessee company as on the date on which the new issue of shares has been allotted to the new allottees. In the result, ground number three of the appeal of the assessee is allowed with above direction.

16. In result, appeal of the assessee is partly allowed.

Order pronounced on this 02nd Day of June, 2020.

Sd/-

**(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER**

Sd/-

**(SUCHITRA KAMBLE)
JUDICIAL MEMBER**

Dated: 02/06/2020
R. Naheed

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	13.03.2020
Date on which the typed draft is placed before the dictating Member	16.03.2020
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	02.06.2020
Date on which the file goes to the Bench Clerk	02.06.2020
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	