

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH, 'C': NEW DELHI**

**(Through Video Conferencing)**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER AND  
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER**

**ITA No.7175/DEL/2018  
[Assessment Year: 2014-15]**

M/s High Wings Construction Pvt. Limited, CA M.R. Sahu, M. Sahu & Associates, Chartered Accountants, House No.651, 1 <sup>st</sup> Floor, Sector-10A, Nr. Meenakshi Public School, Gurgaon, Haryana-122001	ITO, Ward-11(3), Room No.420D, 3 <sup>rd</sup> Floor, C.R. Building, I.P. Estate, New Delhi-110002
<b>PAN-AACCH5675D</b>	
Assessee	Revenue

Assessee by	Sh. M.R.Sahu, CA
Revenue by	Ms. Anima, Sr. DR

<b>Date of Hearing</b>	<b>15.06.2021</b>
<b>Date of Pronouncement</b>	<b>19.07.2021</b>

**ORDER**

**PER R.K. PANDA, AM,**

This appeal filed by the assessee is directed against the order dated 04.07.2018 of the learned CIT(A)-35, New Delhi, relating to Assessment Year 2014-15.

2. Facts of the case, in brief, are that the assessee is a company and filed its return of income on 31.03.2015 declaring NIL income. The case was selected for scrutiny under CASS and statutory notice u/s 143(2) of the Act was issued and sent to the assessee. However, the said notice was returned by the postal department with the comments 'Left'. Accordingly, fresh notice was issued by the AO and the same was served on the assessee through its Director and also through e-mail. During the course of assessment proceedings, notice u/s 142(1) of the Act alongwith a questionnaire was also issued and served upon the assessee. However, there was no compliance to the said notice. Such non-compliance has been elaborated by the AO at page 2 of the assessment order. In view of the persistent non-compliance, the AO inferred that the assessee has nothing to submit to the queries raised in the notice issued u/s 142(1) of the Act. He, therefore, issued another show-cause notice u/s 144 of the Act giving final opportunity to the assessee to furnish details which also remained non-complied with. Since, the assessee did not appear before the AO nor the books of accounts were produced, the AO proceeded to complete the assessment u/s 144 of the Act.

3. The AO observed from the balance sheet of the assessee company, which was download from website of ROC as well as that filed alongwith the return of income that the assessee during the year under consideration has allotted 254166 shares of Rs.10/- each at a premium of Rs.110/- per share. Since, the assessee did not respond to the query raised by the AO on this issue i.e. allotment of shares at a premium of 1100% of the share value and to explain as to why share premium so received may not be treated as its income as per provisions of the Income Tax Act, 1961. The AO, referring to the provisions of section 56(2)(viib) of the Act and Rule 11UA of the Rules, proceeded to make the addition. He noted that in the instant case, no report of merchant banker or accountant exists. The director of the assessee company who appeared before the AO has stated verbally that they are agriculturist by profession and had wanted to purchase the agricultural land, which is the only asset available with the company. It was stated that only to bypass the Stamp Duty they fell in to the trap of the seller and ended up in acquiring the company. It was also intimated that the land under consideration is forbidden for any other commercial activity by the competent

authority and only agricultural activity can be undertaken on the same land. The above facts, though verbally submitted by the Director get confirmed by the Assessing Officer from the fact that the assessee company is not making any compliance to the statutory provisions. Neither, it is furnishing return of income, nor it is filing any document before ROC. The earlier directors of the company, namely Shri Bijender Singh Lohia and Ravinder Singh Lohia have resigned from the company and in their place Gir Raj Bhati and Jitender Bhati have become Directors. He further noted that besides the land at Sohna, the assessee company is not having any asset or any other apparatus which can justify the value paid for the shares. According to the AO, even for discounted free cash flow method, there has to be some income earning apparatus for future but clearly the same is also missing in the present case. He noted that the shareholders of the assessee company are agriculturists who have sold other lands hold by them invested the proceeds in the assessee company only for the sole motive of acquisition of land. He noted that the land in question has been purchased by the assessee company between Financial year 2010-11 & 2011-12 and the same cannot be held to

having any premium during this short period of holding so as to justify the premium at which the shares have been allotted. However, the assessee company is not doing any business and incurring only statutory expenses. It has shown losses in all the years for which the returns have been filed. He noted that the book value of liabilities in the present case is more than the book value of asset therefore, the fair market value of shares was below par. Therefore, he was of the opinion that the shares under the facts and circumstances shares should have been allotted at par. Since, there was no other details available before him, therefore, applying the provisions of section 56(2)(viib) of the Act, the AO held that the assessee company has received excess sum of Rs.110 per share on 254166/- shares issued during the year. Therefore, he made addition of Rs.2,79,58,260/- to the total income of the assessee.

4. Before the learned CIT(A), the assessee filed detailed submission alongwith certain additional evidences. The learned CIT(A) called for a remand report from the AO. After considering the remand report of the AO and rejoinder filed by the assessee on such remand report, he upheld the action of the AO by observing as under:-

*4.2.3.2, The appellant has stated that the procedural matters which was considered by the AO in his remand report dated 01/02/2018 for discarding the share valuation certificate like Income Tax Return for subsequent years was not filed, Financials was not Audited and the company has argued that all procedural matters are duly complied and necessary documentary evidences was submitted during appellate proceedings. The appellant company submitted that for the purpose of determination of Fair Market Value of unquoted share provisions of section 56(2)(viib) read with rule 11UA(2) allows the appellant to choose any of the method of valuation given in clause (a) or in clause (b) and accordingly in the present case, the appellant choose method prescribed in Rule 11UA (2) (b) and the Fair Market Value of the equity share having face value of Rs10/- each was. determined at Rs121/- by the Chartered Accountant M/s P.K. Lakhani & Co, Chartered Accountants vide their share valuation report dated 11<sup>th</sup> February , 2014. The appellant has stated that a deeming provision or a legal fiction, as it is commonly called, is one whose mandate does not exist but for such provision. The appellant has further submitted that in the case of closely holding company for computing the fair market value of unquoted equity shares under section 56(2)(vlib) methods are prescribed under Rule 11UA(2) clause (a) and (b), out of which appellant may choose at his choice any of the method for finding Fair Market Value of Unquoted Equity Shares . Clause (b) of Rule 11UA(2) specified Fair Market Values of unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method. The appellant has submitted that procedural defects like filling of Income of Returns, Audited Financials etc. for subsequent years pointed out by AO and considering those defects AO rejected the Share Valuation Report.*

*4.2.3.3. The facts of the case have been considered and the additional evidence has been perused. I agree with the view taken by the AO in the remand report and it is held that the valuation report has been prepared on the basis of Projected Financials of the appellant company for the next five financials years ended March, 2018 i.e. from F.Y. 2013-14 to 2017-18 as per the Discounted Free Cash Flow Methodology ("DFCF")- On perusal of ITR filed for A.Y. 2014-15, it is seen that the appellant company is not doing any business, and was incurring statutory expenses, it has shown loss. Therefore, it is held that the valuation report is actually an afterthought by the appellant company.*

*4.2.3.4. It is seen that during the year under consideration the appellant company has allotted shares*

254166 shares of Rs.10/- each, at a premium of Rs.110/- per share and the allotment of shares at a premium of 1100% of the share value was done by the appellant company.

The appellant company has submitted that during assessment proceedings, the AO issued notices under section 133(6) to each share holders and information under section 133(6) from share holders acknowledged on 29/09/2016 and the AO was Satisfied with the information collected under section 133(6) towards Identity, Genuineness and Creditworthiness of the share holders, hence no addition was made under section 68 by the AO. This argument of the appellant is rejected and reliance is placed on the following decision of the Hon'ble Kerela High Court, v/herein, it has been held that 'Excess share premium rightly taxed by AO even if genuineness of transaction was proved'. The facts of the case are given below:

a) Assessee, a private limited Company, issued shares at a premium above the face value. It did not offer any amount so received as income for the purpose of taxation under the Income-tax Act. A notice under Section 143(2) was issued and assessee was have disclosed the genuineness of the persons, who purchased the said shares on a premium .

b) Assessing Officer (AO) then attempted to tax the amounts so received under Section 56(2)(viib). Assessee contended the notice issued was only with respect to the source from which the funds were received and the same had been disclosed and there was no scope for a further proceeding, especially under Section 56(2)(viib). The High Court held in favour of revenue as under:

1) Clause (viib) of section 56(2) is triggered at stage of computation of income itself when share application money received, from a resident, by a Company, in which public are not substantially interested is above face value.

2) Thus, aggregate consideration received for shares as exceeds fair market value will be included as income from other sources. However, as per section 68, as substituted with provisos, when resident investor is not able to explain nature and source for credit seen in books of account of Company or explanation offered is not satisfactory then entire credit would be charged to income-tax for that previous year.

3) Thus, ITAT was right in concluding that order passed by Assessing Officer treating share premium received by assessee on issue of shares was to be assessed as 'income from other sources' under section 56(2)(viib) even though assessee had disclosed genuineness of persons who purchased shares on a premium.

*In view of the provisions of section 56(2)(viib) of the Act, the appellant company has received excess sum of Rs.110 per share on 254,166 shares issued during the year. Hence, the sum of Rs.27958260/-(254166 x 110) is chargeable to income tax under the head 'Income from other sources' and the Assessing Officer's order on this issue is upheld. Appeal on ground nos. 1 to 6 are dismissed."*

5. Aggrieved with such order of the learned CIT(A), the assessee is in appeal before this Tribunal by raising following grounds:-

1. *That on the facts, and in the circumstances of the case and in law , both the lower authorities have erred in passing the orders without properly appreciating the facts and that he further erred in grossly ignoring various submissions, explanations and information submitted by the appellant from time to time which ought to have been considered before passing the impugned order. This action of both the authorities is in clear breach of law and Principles of Natural Justice and therefore impugned order of AO deserves to be quashed.*

2. *That on the facts, and in the circumstances of the case and in law, Ld. CIT(A) grossly erred in confirming order of AO passed under section 144 making addition of entire share premium of Rs.2,79,58,260/- under section 56(2)(viib) which was made arbitrarily , capriciously and without considering the Share Valuation Certificate submitted by the Appellant in the course of Appellate proceedings . This action of lower authorities is clear in breach of law and goes against the mandatory principles lays down by the Courts in the case of" Best Judgement Assessment."*

3. *That on the facts, and in the circumstances of the case and in law, Ld.CIT (A) grossly erred in sustaining order of AO without appreciating the fact that Share Valuation Certificate under Discounted Cash Flow Method (DCF) submitted by the*

*Appellant was discarded by AO in the remand report due to defect in procedural matters where as such defect in procedural matters were subsequently removed and documentary evidences were duly placed before Ld. CIT(A).*

4. *That without prejudice to the contention raised in Ground No.3 above, the Ld. CIT(A) was wrong in confirming the order of AO on the basis of remand report of AO where in in the remand report AO arbitrarily discarded the share valuation method followed by the Appellant without having sufficient material against the value arrived by following Discounted Cash Flow Method (DCF).*

5. *That on the facts, and in the circumstances of the case and in law, Ld.CIT (A) grossly erred in rejecting the share valuation certificate submitted by the Appellant under Discounted Cash Flow Method (DCF) without appreciating the fact that section 56(2)(viib) read with rule 11UA gives option to the assessee to adopt any of the methods for computation of Fair Market Value of Unquoted Shares and AO is duty bound to consider the higher of two values.*

6. *That on the facts , and in the circumstances of the case and in law, that provisions of section 56(2)(viib) can not be invoked in the case of appellant company because by virtue of cash being brought in to assessee-company by ' Share Holders' for allotment of shares with high premium, benefit had only passed on to 'relatives' as there is no scope in the Act to tax when cash is transferred to by a 'relative' to another 'relative' as defined in Explanation ('e) of section 56(2)(vii).*

7. *That the Ld. CIT(A) has grossly erred in relying on the judgment of Hon'ble Kerala High Court in the case of **Sunrise Academy of Medical Specialities (India) Pvt Ltd Vs. ITO (2018) 94 taxmann.com 181 (Kerala HC)** totally inapplicable to the facts of the case of the appellant and has further grossly erred in not considering the ratio of the Judicial Precedents pronounced by Courts similar to the facts of the appellant's case which was drawn to the attention of the Ld.CIT(A) during appellate proceedings."*

6. The learned counsel for the assessee strongly challenged the order of the learned CIT(A) in confirming the addition made by the AO. He submitted that land is not depreciable assets and for computing the price of the shares

market value has to be considered. The learned counsel for the assessee filed the following chart and submitted that the net asset value/ market value per shares comes to Rs.137 whereas, the assessee issued shares at a premium of Rs.110/-:-

Particulars	Historical Cost Method (Rs.)	Mkt. Value Method (Rs.)
Inventories (Land)	26,168,750/-	3,20,00,000/-
Cash & Cash Equivalents	1,38,196/-	1,38,196/-
Short Term Loans and Advances	60,00,000/-	60,00,000/-
Total Assets (A)	32,306,946/-	38,138,196/-
Other Current Liabilities	18,61,822/-	18,61,822/-
Net Assets (A-B)=(c)	30,445,124/-	36,276,374/-
Nos. Of Equity Shares=(D)	2,64,166 Nos	2,64,166 Nos
Net Asset Value/Market Value Per Share=(C/D)=(E)”	115/-	137/-

7. The learned counsel for the assessee further submitted that the assessee has filed a valuation report from M/s M. Choudhary & Associates and the AO has not found any defect in the valuation report. Further, no other evidence is available with the AO to show that the fair market value of the land is incorrect. He submitted that the audited financials at 31<sup>st</sup> March 2014 was available on records, the learned CIT(A) has again failed to give the credit to the extent of the valuation of Rs.115/- per equity shares based on net asset value method. The above facts clearly show that the learned CIT(A) is acting

for the benefit of the Revenue. He submitted that since as per valuation certificate of land, market value per equity share of Rs.137 being higher than the issue price per equity share of Rs.120/-, therefore, the addition of Rs.2,79,58,260/- made u/s 56(2)(viib) by the AO deserves to be deleted in full having regard to the provisions of section 56(2)(viib) read with Explanation (a)(ii). The learned counsel for the assessee relied upon the following decisions:-

1. M/s Nabh Multitrade Pvt. Ltd. vs ITO ITA No.269/JP/2018, order dated 09/10/2010(Jaipur Trib.)
2. India Convention and Culture Centre (p.) Ltd. vs ITO (2019) 111 taxmann.com 252(Del. Trib.)
3. Unnati Inorganics (p.) Ltd. vs ITO (2019) 109 taxmann.com 165 (Ahd. Trib.)

8. The learned Counsel for the assessee submitted that the company is the owner of the land admeasuring 2.56 acres located at Village Bandhwari, Dist. Gurgaon, Haryana, at the time of issue of equity shares carrying book value of Rs.26,168,750/- as per the audited financials for the financial year ended on 31<sup>st</sup> March 2014. Referring to page 71 of the paper book, the learned counsel for the assessee submitted that the circle rate of the land as per the land revenue records for the Financial Year 2013-14 was Rs.1,12,00,000/- per acre.

He submitted that if the circle rate of the land is considered then fair market value per equity share comes to Rs.124.94 whereas the assessee has issued the shares at Rs.120/-, therefore, no addition is called for u/s 56(2)(viib) of the Act.

9. In his next plank of argument, the learned counsel for the assessee drew the attention of the Bench to the following table and submitted that equity shares of Rs.10/- each were allotted at a premium of Rs.110/- per share to the family members and others who are relatives of the Directors.

Sl. No.	Name of Share Holder	No. Of Equity Shares Allotted	Share Capital Amt.(Rs.)	Share Premium Amt (Rs.)	Relationship with the Directors
1	Amit Kumar	41,666 Nos	4,16,660/-	45,83,260/-	Real Brother of the Director Jitender Bhati
2	Manju Devi	75,000 Nos.	7,50,000/-	82,50,000/-	Wife of the Director Gir Raj Bhati
3	Sansar Devi	1,37,500 Nos.	13,75,000/-	1,51,25,000	Mother of the Director Jitender Bhati
<b>Total</b>		<b>2,54,166 Nos</b>	<b>25,41,660/-</b>	<b>2,79,58,260</b>	

10. He submitted that the identity, creditworthiness and genuineness of the transaction was satisfied before the AO for which he has not made addition u/s 68 of the Act but he has

proceeded to make addition u/s 56(2)(viib) of the Act and Rule 11UA(2) of the Rules. The learned counsel for the assessee submitted that the share valuation report under discounted cash flow method was rejected by the CIT(A) and the AO without finding any serious defect. He submitted that since, the assessee has got the valuation done from a prescribed expert as per the prescribed method, therefore, in absence of any contrary material, the lower authorities could not have rejected such certificate. Relying on various decisions, the learned counsel for the assessee, submitted that the order of the learned CIT(A) be set-aside and the ground raised by the assessee be allowed.

11. The learned DR on the other hand, heavily relied on the order of the AO and the learned CIT(A). He submitted that the assessee did not appear before the AO and did not file the requisite details for which the AO was constrained to pass the order u/s 144 of the Act. He submitted that before the learned CIT(A) also, the assessee could not substantiate with documentary evidence regarding issue of shares at high premium of Rs.110 per share of Rs.10/- especially when it has not shown any business and was only incurring statutory

expenses and filing loss return. He submitted that the learned CIT(A) has given valid reasons for which the same does not call for any interference. He accordingly submitted that the grounds raised by the assessee should be dismissed.

12. We have considered the rival arguments made by both the sides, perused the orders of the Assessing Officer and the learned CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the assessee in the instant case has issued 254166 shares of Rs.10 each at a premium of Rs.110 per share during the year. Since, the allotment of share was at a premium of 1100% of the share value, the AO asked the assessee to substantiate the issue of such shares at higher premium. Since, there was no compliance to the statutory notice issued by the AO, he had no other option but to complete the assessment u/s 144 of the Act, wherein, he made addition of Rs.2,79,58,260/- by invoking provisions of section 56(2)(viib) of the Act r.w.r. 11UA of the Rules. While doing so, he also noted the verbal statement of the Director that they are agriculturist by profession and had wanted to purchase the agricultural land, which is the only asset available in the

company. It was further stated that only to bypass the Stamp Duty they fell in to the trap of the seller and ended up in acquiring the company. We find the learned CIT(A) after considering the remand report of the AO and the submission of the assessee to such remand report sustained the addition made by the AO, the reasons of which have already been reproduced in the preceding paragraphs. It is the submission of the learned Counsel for the assessee that the learned CIT(A) without any valid reason and without finding any defect in the fair market valuation certificate of the land done by M/s M. Choudhary & Associates upheld the action of the AO. It is also his submission that the learned CIT(A) has not found any defect in the valuation report so filed before him. It is also his submission that the fair market value of the equity shares at the time of issue of share was based on the market value of the land as determined by the registered valuer comes to Rs.137/-, whereas the assessee has issued the shares of Rs.10/- each at a premium of Rs.110/- only which is much less than the market value of the shares. It is also the submission of the learned counsel for the assessee that the equity shares so issued at a premium were subscribed by the family members of

the director and therefore no addition u/s 56(2)(viib) of the Act is called for.

13. We find the assessment in the instant case was completed u/s 144 of the Act due to persistent non-compliance of the assessee to the statutory notices issued by the AO. Although, the assessee has filed certain documents in shape of additional evidences before the learned CIT(A), however, the arguments made before the Tribunal were not made before the learned CIT(A). The argument of the assessee that the shares were subscribed by the family members of the Directors and their relatives was never argued before the learned CIT(A). Since, the full details were not filed before the AO and the powers of the AO during the remand proceedings are limited and the various arguments and case law decisions cited before us were not cited before the lower authorities, therefore, considering the totality of the facts of the case and in the interest of justice, we deem it proper to restore this issue to the file of the AO with a direction to grant one more opportunity to the assessee to substantiate its case. The assessee is also hereby directed to appear before the AO and produce all the relevant details justifying the issue of shares of face value of

Rs.10/- at a premium of Rs.110/-. The AO shall decide the issue as per fact and law after giving due opportunity of being heard to the assessee. We hold and direct accordingly. The grounds raised by the assessee are accordingly allowed for statistical purpose.

14. In the result, the appeal filed by the assessee is allowed for statistical purpose.

Order was pronounced in the open court on 19/07/2021.

**Sd/-**  
**[SUDHANSHU SRIVASTAVA]**  
**JUDICIAL MEMBER**

**Delhi;** Dated: 19/07/2021.

*Shekhar, Sr. P.S*

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

**Sd/-**  
**[R.K.PANDA]**  
**ACCOUNTANT MEMBER**

Asst. Registrar,  
ITAT, New Delhi