

THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai
Shri Shamim Yahya (AM) & Shri Pavankumar Gadale (JM)

I.T.A. No. 3897/Mum/2017 (Assessment Year 2010-11)

DCIT-CC-2(4) Room No. 802 8 th Floor Old CGO Annex Bldg M.K. Road Mumbai-400 020.	Vs.	M/s. Concord Enviro Systems Pvt. Ltd. 101, HDIL Tower Anant Kanekar Marg Banddra East Mumbai-400 051. PAN : AAACC8962C
(Appellant)		(Respondent)

Assessee by	Shri Percy Pardiwala
Department by	Shri V. Sreekar
Date of Hearing	05.05.2021
Date of Pronouncement	26.07.2021

ORDER

Per Shamim Yahya (AM) :-

This is an appeal by the Revenue against the order of learned CIT(A) dated 20.3.2017 and pertains to assessment year 2010-11.

2. Grounds of appeal read as under :-

i. " On facts and circumstances of the case and in law the Ld CIT(A) erred in deleting the additions made u/s 68 of Rs 40,20,04,997/-on account of difference in share premium received and the fair value of equity shares as per the report of the registered valuer not taking into consideration the fact that the assessee failed to forward any cogent reasons as to why the shares were allocated at such a huge premium vis-a-vis the valuation report as obtained by the assessee itself from the registered valuer"

ii. "On the facts and circumstances of the case the Ld CIT(A) erred in deleting the additions made by the Assessing Officer as per the provisions of sec 56(2) of Rs 26,42,73,393/- towards the difference in the fair market value of shares of Rochem separation systems (India) Private Limited stating that clause (vii) of sec 56(2) cannot be applied retrospectively, not taking into consideration the fact that section 56(1) clearly and unambiguously provides that income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income tax under the head Income from other sources and accordingly the Assessing Officer correctly taxed the

benefit accrued to the assessee by buying the shares at lesser price than that of fair market value."

iii. "On the facts and circumstances of the case the Ld CIT(A) erred in deleting the additions made by the Assessing Officer as per the provisions of sec 56(2) of Rs 26,42,73,393/- towards the difference in the fair market value of shares of Rochem separation systems (India) Private Limited stating that clause (vii) of sec 56(2) cannot be applied retrospectively, not taking into consideration the fact that the amendment made to sec 56(2) adding clause (vii) is curative in nature and should apply to all pending assessments."

iii. The appellant craves leave to add, to amend and/ or to alter any of the grounds of appeal, if need be.

iv. The appellant, therefore, prays that on grounds stated above, the order of learned CIT(A)-48, Mumbai may be set aside and that of the Assessing Officer restored.

3. *Apropos* addition under section 68 of the Act.

Brief facts of the case are that assessee-company is a private company. During the year under consideration, assessee's company received funds from M/s. India Waste Water Treatment Company (I.W.W.T.C) a private equity firm based in Mauritius, for this assessee has issued 30 equity shares of Rs. 100 each and Rs. 4,20,000/- CCPS of Rs.1,000 each to the said party. The equity share were issued at a premium of Rs.63,233 per share. The CCPS were issued at par value of Rs.1000 per share. The CCPS were subsequently converted into equity shares during the subsequent assessment year AY 2011-12 at a premium of Rs. 37,991.78 per share. Thus, the assessee has received a sum of Rs. 42.19 crore from IWWTC, Mauritius during the year under consideration in this regard AO observed that as per the details furnished by the assessee itself, it is seen that the valuation of equity share was got done by it through a competent valuer for the purpose of filing it before Reserve Bank of India for obtaining permission for issue of shares to a non resident i.e. IWWTC. The said valuation report, prepared by M/s Kalyaniwala & Mistry, CA suggested the fair market value of the equity shares at Rs. 1806.75, as on 31-03-2009, as per the valuation guidelines taking the average of NAV at Rs. 1200.19 and the PECV value at Rs.2,413.32 per share. As regards the valuation of CCPS, the valuer

considered it as appropriate to work out the highest possible value of CCPS and accordingly, arrived at the fair value of Rs.47.24 per CCPS.

4. The AO found these transactions to be suspicious, he held as under:-

It is further seen that 0.01% dividend is payable on subscription price of CCPS prior to any redemption or conversion (at Rs.0.1 per CCPS per annum) in accordance with the terms of issue of CCPS and it does not indicate that consideration of a higher share value per CCPS would be appropriate. In the factual background the genuineness of transaction is under question as it is neither acceptable nor believable that any investor would make such kind of investment wherein the subscription prices are shown to be 35.05 times and 21.17 times of the fair values arrived at in the case of equity shares and CCPS respectively. The transaction as shown above are not natural ones and when put to test on human probability the genuineness of the transaction stands disproved. The assessee has come up with various make believe theories to justify its stand, however, it has miserably failed to lead any evidence to justify huge premium, which is many times higher than the value arrived at by various applicable methods, received by it from its foreign investor. As per the provisions of the section 68 of the IT Act, the assessee is required to explain the nature and source of any credit entry appearing in its books of accounts. It means explaining the source alone is not enough. Nature should also be explained and it is then only that the genuineness of the transaction can be believed to be true. Further as per the provisions of this section, if the explanation offered by the assessee is not satisfactory, then the amount may be charged to income tax. Therefore, if the assessee explains that amount received is share premium, but there is absolutely no justification for the quantum of premium, then it can safely held that nature of premium is not proved and the case gets covered by section 68 of the I.T. Act. In this connection reliance is placed on the Hon'ble Supreme Court Decision in the case of Shreelekha Banerjee (1963) as reported in 49 ITR 112, wherein it is held that addition for unexplained cash credit is justified simply if assessee fails to offer an explanation or the explanation offered by assessee is not found to be satisfactory by the A.O.

In this connection further reliance is also placed on the following decisions of Hon'ble ITAT Delhi:

- Zars Trading Pvt. Ltd. (2010) ITA No. 3284/Del/2009 dated 26.06.2010
- Kushara Real Estate Pvt. Ltd. ITA No. 4247/Del/2009 (2010).

In both these cases the matter was restored back to the file of the A.O. by Hon'ble Tribunal to decide about the reasonableness of the share premium taken by the assessee company. This impliedly holds view that the quantum of premium is unreasonable, addition can be made u/s 68 of the Act. The assessee has placed reliance on various judicial pronouncements, however, it is seen that the cases relied upon are not relevant to the facts of this case. In view of the above it is held that though the assessee has given explanation with

regard to source of credit entry in its books of accounts, however its explanation with regard to huge share premium taken by it is not satisfactorily explained. As stated above the assessee has taken share premium on equity shares at 35.05 times higher than its fair value. Similarly in respect of CCPS the subscription is taken at 21.17 times higher than its fair value. It is pertinent to mention fair value being talked about here are the one which assessee itself has relied upon while submitting documents to Reserve Bank of India for subscription of share capital.

In view of the facts as discussed above the contention of the assessee with regard to accepting share premium at a much higher rate than its fair value/book value is not acceptable as the same is without any proper explanation or evidence. Therefore, the higher share premium claimed to be taken by the assessee, as worked as under, is required to be added to its total income u/s 68 of the I.T. Act as the assessee has failed to satisfactorily explain the nature of such transaction.

Particulars	No.of units	Fair Value Rs.	Premium taken Rs.	Difference Rs. (4-3)	Higher premium taken Rs. (5x2)
1	2	3	4	5	6
Equity Share	30	1806.75	63,333.33	61,526.58	18,45,797
CCPS	4,20,000	47.24	1000.00	952.76	40,01,59,200
Total					40,20,04,997

Thus in view of the facts as discussed above an addition of Rs.40,20,04,997/-, as worked out above, is made to the total income of the assessee company u/s 68 of the Act as the assessee has failed to satisfactorily explain the nature of credit transactions appearing in its books of accounts and the reasonableness of the quantum of premium on equity share and CCPS taken by it. Penalty proceedings u/s 271(l)(c) are initiated separately for furnishing of inaccurate particulars of income thereby leading to concealment of incomes.

5. Against the above order assessee's appeal before the Ld.CIT(A). Ld.CIT(A) granted relief to the assessee by holding as under:-

"Upon assessee's appeal learned CIT(A) noted that this issue though the Assessing Officer used the term premium but effectively the difference between the issue price as per agreement and certified valuation obtained by assessee itself, which has been considered as unexplained cash credit under section 68 of the Act. He referred that information was sought from the relevant tax authority in Mauritius under the exchange of information practice of Indo Mauritius DTAA in order to verify the genuine of transaction.

He did not go through or examine the information obtained. He chose to refer Assessing Officer's observation in office note which was said to infirmity part of assessment records. He proceeded to accept assessee's submission. His order in this regard read as under :-

"I have carefully considered the submissions made by the appellant and the contention of the learned AR of the appellant and also gone through the facts and records. It is seen from the record that the appellant has issued 30 equity shares of Rs.100 each and 420,000 CCPS of Rs. 1,000 each to M/s India Waste Water Treatment Company, a private equity firm located in Mauritius. The equity shares are issued at a premium of Rs.63,233 per share. The CCPS are issued at par value of Rs.1000 per share. The CCPS were subsequently converted into equity shares during the subsequent year (i.e. AY 2011-12) at a premium of Rs.37,991.78 per share. The appellant had received an amount of Rs.42.19 crore from IWWTC, Mauritius during the year under consideration.

After conducting inquiries relating to receipt of this amount against share capital consisting of equity as well as preference, the AO was of the view that both these shares were issued at a price which was much higher than its valuation made by the competent valuer i.e. M/s. Kalyaniwala & Mistry, CA. The valuation report which was obtained from them for the purpose of statutory compliance certified the value of equity shares to be Rs. 1,806.75 as on 31st March, 2009. The value of CCPS was arrived at Rs.47.24 per CCPS. Thus, the AO observed that the subscription prices are shown to be 35.05 times and 21.17 times of the fair values arrived at in the case of equity shares and CCPS respectively. The AO held that the appellant was required to explain the nature and source of any credit entry appearing in its books of accounts. According to the AO, the appellant has failed to justify the issue price of shares received in excess of the certified valuation and hence treated the difference as income of the appellant under the provisions of Section 68. Though AO has used the term premium for both i.e. equity shares and CCPS, it is effectively the difference between the issue price as per agreement and certified valuation obtained by the appellant itself which has been considered as unexplained cash credit u/s. 68 of the Act.

It is seen from the records that the information was sought from the relevant tax authorities in Mauritius under Exchange of Information Article of Indo-Mauritius DTAA in order to verify the genuineness of the transaction. The required information was received on the basis of which the AO has observed as under in the Office Note which forms part of the assessment records:

"3. During the year under consideration, there was an increase of Rs. 42. 19 crore in the capital of the assessee company and the entire fund was received from M/s. India Waste Water Treatment Company (I.W.W.T.C.) Mauritius. In order to verify the genuineness of the transaction the matter was referred to F.T. & T.R., New Delhi for

verification of the source of funds invested by I.W.W. T. C. Mauritius. The required information was received from the Board vide letters F.No. 504/177/2013-FTNTR -IV/1527 dated 30.12.2013. On verification of the same it is seen that the entire amount was funded to I.W.W.T.C. by its holding company at Mauritius namely N.P.E.India Holdings P.C.C., Mauritius (NPE). It was further reported that M/s. N.P.E. Mauritius is a subsidiary of and is funded by Messrs Natixis Pvt Equity International which is incorporated in France. Therefore, for further verification the matter was also referred to F.T. & T.R. New Delhi for exchange of information in the case of Messrs Natixis Pvt Equity International, France. The reply from F.T & T.R., New Delhi in respect of Messrs Natixis Pvt Ltd Equity International, France is not yet received till the finalization of this order. However, on the basis of information received from the Mauritius Revenue authorities in the case of I.W.W.T.C. and N.P.E. India Holdings P.C.C. Mauritius, it is seen that there is no evidence to suggest that the fund received by the assessee company is routed through India or it belongs to assessee company and it has been channelized back to it through IWWTC, Mauritius. It is further reported that the Directors of the assessee company are in no way connected to or related to with M/s. I.W.W.T.C. or N.P.e. and they have not entered into any separate transaction with these Mauritius based companies. Looking to the detailed reports received from the Mauritius Revenue Authorities, no adverse view is being taken in the case of assessee company so far as the source of share capital fund received of Rs. 42.19 crore is concerned. Since the assessment is getting time bared on 31.03.2014 the same is being finalized accordingly as stated above. However, the information is yet to be received from F.T. & T.R. New Delhi in respect of reference made in the case of Natixis Pvt Equity International, France. If there are any adverse findings in the report of the F.T & T.R. New Delhi when it is received later on, the case may be reopened accordingly for taking appropriate remedial action for the same."

Thus, it is crystal clear that the AO has not doubted the source of the impugned amount of Rs.42.19 crore received by the appellant at all. The AO was once again requested to offer his comment in view of the required information received through Exchange of Information as well as on the observations made in the office note as mentioned above. The AO submitted its reply vide letter dated 3.3.2017 wherein he mentioned as follows:

Vide your paragraph 4 of your goodselve's letter under reference it has been mentioned office note appears in contravention to the findings given in the assessment order where in the been made u/s. 68 of the I. T. Act. In this regard, it is submitted that as mentioned in earlier paragraphs the addition in this case is not made on account of source of funds but on account of assessee's failure to explain satisfactorily the nature of funds. Therefore, there is no contradiction as construed by your goodselves."

It may be noted that the AO has also received the information about Natixis Private Equity International, France which was pending at the time of

concluding the assessment proceedings vide letter dated 18.7.2014 and no adverse observations have been made impacting the issue under consideration.

The only issue which requires to be considered is whether the appellant has been able to explain the nature of funds received by it or not. The only basis on which the AO is of the view that it was not in the nature of share capital is the difference between the price at which the shares were issued by the appellant and the certified valuation of the same shares obtained by the appellant itself. I am unable to agree with the AO's contention that mere such a difference can lead to rejection of the appellant's explanation regarding 'nature' of the amount received by it. Having accepted part of the amount to be in the nature of share capital, part of the same amount received from the same person cannot be doubted merely because the pricing of that transaction is not acceptable to the AO.

It is an undisputed fact that the appellant company has received the amount of Rs.42.19 crores from an investor for issuing 26% stake in the company. M/s India Waste Water Treatment Company who has invested this amount is a registered company in Mauritius with registration number C090980 established on 13 October 2009 as a wholly owned subsidiary of NPE India Holdings PCC, Mauritius which is in turn held by Natixis Private Equity International ('NPEI'), France. It has been stated by the appellant that NPEI is incorporated in France and is the private equity investment arm of Natixis (4th largest French Bank listed on the Paris Stock Exchange) dedicated to international investments.

It is also undisputed that the amount of Rs.42.19 crore has been received through foreign remittance made by IWWTC which is in turn funded by its immediate holding company. The appellant has also provided the current status of shares which were allotted to IWWTC. It is noticed that IWWTC sold 11,056 shares which it was owning in the appellant company to another Mauritius entity named AF Holdings on 7.8.2015 at an aggregate price of Rs.58 crores. Necessary documents have been submitted by the appellant in this regard. Thus, the same number of shares for which the appellant received Rs.42.10 crore fetched an amount of Rs.58 crores for the investor after a period of more than five years.

There is not an iota of evidences on record which suggest that the appellant had disguised its own undisclosed income under the garb of share capital received from IWWTC. The AO has failed in bringing anything on record to disbelieve the explanation furnished by the appellant regarding the 'nature' of the amount under consideration. The value at which the shares can be issued is the prerogative of the assessee. No adverse inference can be drawn against the appellant merely because it has been able to negotiate a better price with the investor for allotment of its shares.

Regarding the valuation of shares as obtained by the appellant, it has been stated that it was obtained only for the purpose of statutory requirement as enforced by RBI and it was not the basis of negotiating the price of shares between the appellant and the investor. Further, such valuation has been

made purely on the basis of the book values of the assets of the appellant company as on 31st March, 2009 and without considering the real market prices of its assets which include shares of its various group companies.

The necessary provisions under which the difference between the price at which shares have been issued and their fair market value can be taxed are found in clause (viib) of Section 56(2) which is effective from 1st April, 2013 and not applicable to the year under consideration. In this regard, the following observations made by Bombay High Court in the case of Vodafone India Services (P.) Ltd.vs.Union of India 369 ITR 511 are useful:

"41. We also find merit in the submission on behalf of the petitioners that w.e.f. 1 April 2013, the definition of income under Section 2(24)(xvi) of the Act includes within its scope the provisions of Section 56(2) (vii-b) of the Act, This indicates the intent of the Parliament to tax issue of shares to a resident, when the issue price is above its fair market value. In the instant case, the Revenue's case is that the issue price of equity share is below the fair market value of the shares issued to a non-resident. Thus Parliament has consciously not brought to tax amounts received from a non-resident for issue of shares, as it would discourage capital inflow from abroad. The revenue has not been able to meet the above submission but have in their written submission only submitted that the above provisions would have no application to the present facts."

It has been specifically observed by the Court that the said provisions are made applicable only in case of issue of shares to a resident. It is the conscious decision of the Parliament to not to apply the similar provisions in case of issue of shares to a non-resident as it would discourage capital inflow from abroad. Relying on this decision, I am of the view that no income can be charged in the hands of the appellant in respect of raising of share capital from a non-resident more particularly when the identity, creditworthiness and genuineness of the transaction have been established by the appellant and not disputed.

In view of the foregoing, I find that the AO was not justified in making an addition under Section 68 of the Act. Therefore, the AO is directed to delete the addition of Rs.40,20,04,997/- made u/s. 68. This Ground of Appeal is thus allowed."

6. Against this order Revenue is in appeal before us. We have heard both the parties and perused the record. We find that as evident from, the assesee has received funds from IWWTC, Mauritius. This Mauritius company entire fund received funds from N.P.E India Holdings P.C.C., Mauritius(NPE), further M/s. N.P.E Mauritius is a subsidiary of and is funded by Messrs Natixis Pvt Equity International which is incorporated in France. The above information is coming out of the order of the Ld.CIT(A) when he mentions this was found when the

genuineness of the transactions was referred to F.T. & T.R. New Delhi for verification of the source of funds invested by IWWTC. There is no whisper whatsoever about this aspect in the order of the AO. Ld.CIT(A) has noted about this information obtained, but has chosen not to verify the same himself, he has chosen to referred to the notes of the AO on this issue, which was said to be forming part of a assessment records. There is no reference whatsoever to the actual information received from resources. Ld.CIT(A) by referring to the note sheet of the AO observed that AO has no doubt of transaction from IWWTC and N.P.E India. However, In this regard to Ld.CIT(A) was very well aware that funds to N.P.E. India Holdings, Mauritius were from Natixis Pvt Equity International France here also the Ld.CIT(A) did not refer to the information obtained about this French company. Rather, he referred that AO has received information about this company, which was pending at the time of concluding of assessment proceedings and no adverse observation has been made impacting the issue under consideration. Here there is no detail as to where the Assessing Officer made such observations, when the information by way of a letter dated 17.7.2014 was received, while the Assessing Officer's order is dated 18.3.2014. There is no mention as to what information about the French company was received.

7. From the aforesaid it is evident that Assessing Officer has passed the order without any reference, whatsoever to the enquiry conducted about the source of fund from overseas concern. Learned CIT(A) refers to the inquiry report from Mauritius and France. But learned CIT(A) instead of going through vital documents himself proceeded to place his reliance on the observations of the Assessing Officer not in assessment order nor in any remand report, but in some "office notes". In our considered opinion, this is a complete dereliction of duty on the part of Ld.CIT(A). It is settled law that the powers of CIT(A) are coterminous with that AO. It has been held in the Supreme Court decision in Kapurchand Shrimal that it is the duty of the appellate authority to correct the errors in the order of the authority below. Here, we find that Ld.CIT(A) by not examining the documents obtained under the exchange of information

mechanism regarding the source of funds of the layered transactions has completely misled himself. There is no case that any remand report was obtained. When the issue is not dealt with in Assessing Officer's order and it is also not the case that any remand report was obtained, we are amazed at the opaque observation, learned CIT(A) is making.

8. Furthermore, we find that assessee's own valuation by a approval valuer showed significantly lower value for the shares issued as compared to that transacted. In this regard, the claim of the assessee duly accepted by the Ld.CIT(A) is that this was only for the purpose of filing before RBI for obtaining permission for issue of shares to a non residents.

9. In this regard, we note that no party can be permitted to approbate and reprobate i.e. cannot take shifting stands on the same transactions. This view has been duly reiterated by the Hon'ble Supreme Court in the case of Suzuki Parasrampurua Suitings Pvt. Ltd. Vs. Official Liquidator of Mahindra Petro Chemical Ltd. Civil Appeal No. 10322/2017 dated 08/10/2018. There is no cogent explanation whatsoever that when the value of shares which was certified and valued and given to RBI are much lower, how can the shares be issued at hugely higher value. This further accentuates the opaque nature of the layered transaction shifting the onus on the assessee to discharge the onus cast upon it. Merely stating that actual valuation made by the valuer is low but the negotiated value is much higher can by no stretch of imagination be a cogent explanation.

10. Furthermore, we find that Ld. Counsel of the assessee has contested that AO has accepted part of the transaction and is doubting the rest, which is not sustainable. In this regard, we note that an error on the part of the AO cannot be fatal to the case of the revenue. Which is more so, when Ld.CIT(A) has chosen not to examine the issue himself properly and in this regard also we find support from the aforesaid decision of Hon'ble Supreme Court in the case of Kapurchand Shrimal (supra) i.e. it is the duty of the appellate authority to

correct the errors in the orders of the authorities below. If, the AO mistakenly agrees for a part of the amount to be claimed, the same analogy cannot explain the rest of the same, when the unexplained nature is palpably evident. Further, it has been pleaded on behalf of the assessee that issue of share premium could not have been examined in the impugned assessment year. We note that this is not at all issue of premium simplisiter, it is issue of difference between the valuation of shares done by the approved valuer himself of the assessee which was submitted to RBI and the value of transaction. Hence, the facts are different to the case laws relied upon by the assessee's counsel.

11. To summarize Ld.CIT(A) has erred inasmuch as, he has not examined the information obtained about the various offshore companies of Mauritius and France from whom the information was obtained and from where the source is layered. Secondly, there is no cogent explanation of difference between the values as given to the RBI and that given to Income tax Authorities on the touchstone of the legal maxim of approbate and reprobate as referred by Hon'ble Supreme Court in the case of Suzuki Parasrampurua Suitings Pvt. Ltd. (supra). Further the issue in substance here is not addition under section 56 but addition under section 68. In this view of the matter also the case laws referred by learned Counsel of the assessee are not applicable. Furthermore the decision of Green Infra of Hon'ble Bombay High Court was not dealing with layered remittance from source abroad. Moreover the issue here clearly is assessee applying opaque device which comes under the ken of exposition of Hon'ble Supreme Court decision in Mc Dowell & Co. Ltd. (supra) With the above observation, we remit the issue to the file of learned CIT(A) for fresh adjudication. Needless to add, assessee should be granted adequate opportunity of being heard.

Apropos second issue :

12. On this issue the Assessing Officer noted that on verification of details furnished in the course of assessment proceedings it is seen that during the year under consideration the assessee company has, inter-alia, purchased

39,999 equity shares of Rochem Separation Systems (I) Pvt. Ltd. (hereinafter referred as "RSSIPL") for a total consideration of Rs.4,81,20,000/- at an average rate of Rs.1203/- per share. However, it is ascertained from the case records of M/s RSSIPL and the Directors and other related persons of the group that book value, exclusive of good will, of the equity shares of RSSIPL was Rs.6,875/- per share on the date of such transfer of shares. In view of the above vide order sheet noting dated 11.02.2013 the assessee was requested to explain as to why not the purchase transaction of equity share from the related parties be considered as sham transactions and it was requested to explain the bonafide of the same if the said transaction have been claimed to be natural one and not in the category of colourable devise. The assessee was also asked to explain the ultimate motive of the directors in entry into such transactions resulting into undue benefit passing into the hands of the company without paying legitimate taxes thereon.

13. The assessee in response to the same stated that there is no provision in law wherein the declared value of purchase consideration of an asset can be enhanced unless there is an evidence of payment of any such consideration outside the books of account. Fair market value could not be put in the place of cost of acquisition during the relevant period as the concept of arms length price in such transaction was missing from the statute. That the law also did not prohibit to acquire any property at a consideration which was lower than the fair market value. That the shares in Rochem Separation Systems (India) Pvt. Ltd. have been transferred in the name of the assessee by the transferors due to which the said company has become a subsidiary company of the assessee by virtue of a scheme whereby foreign equity shareholders also joined the assessee. Further submission of the assessee are that the amendment in the act to cover by way of a deemed income on purchases of shares by a company where purchase consideration was lower than the market value has been brought in the statute w.e.f. 01.06.2010 i.e. from the period relevant to the A.Y. 2011-12 and was not applicable in the relevant period. The assessee

company submitted that it purchased the share of M/s Rochem Separation Systems (India) Private Limited from the following persons:

Particulars	No. of shares	Amount (Rs.)
Prerak Gael	10,000	1,20,00,000/-
Preyas Goel	10,000	1,20,00,000/-
Pushpa Goel	18,000	2,16,00,000/-
Namrata Goel	1,000	12, 00, 000 /-
Nidhi Goel	1,000	12, 00, 000/-
Total	40,000	

One share is held by Mr. Prayas Goel as nominee.

14. From the above the Assessing Officer observed that the assessee itself has admitted that the share transactions are not done at arms length price i.e. the book value of share price which was shown in the books of RSSIPL. He also noted that the assessee-company and RSSIPL are controlled by the associated enterprise as defined in section 92A(1). The assessee in this regard reiterated that price has been mutually agreed upon. In this regard the Assessing Officer referred to the provisions of section 56(1) and 56(2) of the Act. He was of the opinion that the assessee is taxable in this regard. He further regarded the transactions as sham and that the assessee was applying subterfuges. The Assessing Officer referred to the decision of Hon'ble Supreme Court in the case of McDowell and Co. Ltd. Vs. CTO (154 ITR 148). He finally concluded as under :-

“In view of the facts as discussed above the contention of the assessee as made out in this issue are rejected in the manner as discussed above and the difference between the fair market value of the shares purchased during the year and the value of its purchase consideration as declared by the assessee is required to be added to the total income of the assessee u/s 56(1) of the I.T. Act. Here it would be pertinent to mention that the fair market value of the shares purchased by the assessee company was initially worked out at Rs.6875/-, as on 31.03.2009, and communicated to the assessee in earlier show cause letter / order sheet noting. However, the same was not correct as it was not worked out on the basis of the prescribed formulae applicable for calculating it. Therefore, in the course of assessment hearing on 10.03.2014 the A.R. of the assessee company was asked to work out the fair market value of the shares of RSSIPL as on 31.3.2009. Shri Gaurav Bansal, CA who was present for hearing on 10.03.2014 worked out the fair market value of

the equity share of RSSIPL as on 31.03.2009 at Rs.7067/- per share. The fair market value is worked out as under:

i) Share capital of RSSIPL as on 31.03.2009	Rs. 40,00,000/-
ii) Reserve and surplus ..	Rs. 27,86,82,024/-
Total	Rs. 28,26,82,024/-

Therefore, Rs.28,26,82,024/- divided by 40,000 shares = Rs.7067/- per share. The fair market value of Rs.7067/- per share as on 31.03.2009 is also confirmed on order sheet noting by the A.R. of the assessee in the course of hearing on 10.03.2014. However, as the transaction relating to the purchase of shares by the assessee company has taken place on 24.08.2009, as per the share purchase agreement, the net profit generated by M/s RSSIPL from 01.04.2009 to 23.08.2009 also requires to be added to the fair market value of the shares calculated as above. In the absence of any details having been furnished by the assessee the net profit of M/s RSSIPL as on 23.08.2009 is worked out on proportionate basis as under:

Particulars	Amount Rs.
Profit earned by M/s RSSIPL during F.Y. 2009-10 and transferred to its reserves and surplus	7,47,80,711/-
Therefore proportionate profit for 145 days till 23.08.2008 is 7,47,80,711/- x 145 /365	2,97,07,405/-
So Rs. 2,97,07,405/- divided by 40,000 shares :-	743/- per share

So the proportionate profit of Rs.743/- earned per share by M/s RSSIPL 01.04.2009 to 23.08.2009 also requires to be added to the fair market value equity share of Rs.7067/- worked out as on 31.03.2009. Therefore, the fair market value of the equity share of M/s RSSIPL as on 23.08.2009 is worked out at Rs.7810/- per share. The difference between the fair market value, which is Rs.7810/- as on the date of transaction and the purchase consideration of Rs.1,203/- for each share as shown by the assessee in respect of 39,999 shares works out to Rs.26,42,73,393/- and the same is therefore added to the total income of the assessee as discussed above. Penalty proceedings u/s 271(1)(c) are initiated separately for furnishing in accurate particulars of income thereby leading to concealment of income.”

15. Upon assessee's appeal learned CIT(A) held that provisions of section 56(2) are not applicable for the current assessment year. He further held that transaction is capital and hence it is outside the scope of addition in this regard he referred to the decision of Hon'ble Bombay High Court in the case of Vodafone India Services (P) Ltd. Vs. UOI (50 taxmann.com 300). He concluded as under :-

“In this case, Hon'ble Jurisdictional High Court was concerned with the taxability of the difference between the price at which shares were issued and

its fair market value. The same principles should even apply in case of difference between the price at which shares have been purchased and their fair market value.

In view of the foregoing, I find that the learned AO was not justified in making an addition under section 56(1) of the Act. Therefore the AO is directed to delete the addition of Rs.26,42,73,393/- made u/s. 56 of the Act. This Ground of Appeal is thus allowed.”

16. Against this order Revenue is in appeal before us.

17. We have heard both the counsels and perused the record. On this issue, we note that assessee has purchased shares of RSSIPL a private limited company for a purchase consideration of Rs. 4,81,20,000/- from five persons at an average rate of Rs.1,203/- per share. However, the AO has found that actual value of shares was much higher as the same was approximately Rs.6,875/-. The AO was of the opinion that the transaction is sham and not natural one. In explanation to this assessee claimed that there is no provision of law wherein the declared value of purchase consideration of an asset can be enhanced, unless there is an evidence of payment of any such consideration outside the books. Further, it was pleaded that the necessary provision was not existing in the statute books to tax such amounts. The Ld.CIT(A) has aggrieved with the view of the assessee that the said sum is not taxable u/s. 56. He referred to the decision of Hon'ble Bombay High Court in Vodafone India Services Pvt. Ltd. (supra) and found that the principles are same.

18. Upon careful consideration, we note that even assessee has accepted that the value given for the shares purchase is much lower than the actual value thereof. It is settled law that putting a wrong section is not fatal to the assessment. We note that section 69B of the I.T. Act deals with the amount of investments as under:-

“Where in any financial year the assessee has made investments or is found to be the owner of any bullion, jewellery or other valuable article, the Assessing Officer finds that the amount expended on making such investments or in acquiring such bullion, jewellery or other valuable article exceeds the amount recorded in this behalf in the books of account maintained by the assessee for any source of income, and the assessee offers no explanation about such excess amount or the explanation offered by him

is not, in the opinion of the Assessing Officer, satisfactory, the excess amount may be deemed to be income of the assessee for such financial year.”

19. We find that the above section applies on all fours on the present transaction. The assessee had made investments in the shares of the company. The AO has applied the ratio from the Supreme Court decision in the Mcdowell & Company Ltd. (supra) that the value of the shares are much higher than what is recorded by the assessee in its books. The assessee does not dispute that the value is higher. Hence, assessee is admittedly using opaque colourable device and subterfuge. The brayer explanation given by the assessee that though, it is admitted that the value is much high, there is no provision in the statutory books to tax such is totally untenable, in view of the sanguine provisions of the Act referred above. The reference to the provisions of section 56 in this regard is totally irrelevant. We may gainfully refer to the concern section 56(viia) as under:

(*viia*) where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from any person or persons, on or after the 1st day of June, 2010[but before the 1st day of April, 2017], any property, being shares of a company not being a company in which the public are substantially interested,—

(*i*) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(*ii*) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (*via*) or clause (*vic*) or clause (*vicb*) or clause (*vid*) or clause (*vii*) of [section 47](#).

Explanation.—For the purposes of this clause, “fair market value” of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the *Explanation* to clause (*vii*);]

20. The above fall under the head income from other sources. There is nothing mentioned in the Act, which proscribes the application of section 69B

is cases such as the present one. In this view of the matter in our considered opinion here as noted above since there is use of opaque colourable device the reference to ITAT decision in Rupee Finance and Management (120 ITD 539) does not fructify the assessee's case. Thus, Ld.CIT(A) has erred in allowing the assessee's appeal despite the fact that the assessee's investment falls under provisions of section 69B. The decision of Hon'ble Bombay High Court in Vodafone India Services P. Ltd. (supra) is not at all applicable on the facts of the present case. In this regard, we note that there is some lack of clarity regarding the valuation aspect of the shares as the AO has started with a figure of Rs. 6,875/- and finally considered the value at Rs. 7,067/-. Moreover, valuation aspect was never examined by learned CIT(A). Hence, the valuation aspect needs to be examined by the first appellate authority. Since we have remitted the first issue to the file of Ld.CIT(A), we deem it appropriate to remit this issue also to the file of Ld.CIT(A). Ld.CIT(A) is directed to consider this issue also afresh. In remitting the matter on this issue also we draw support from Hon'ble Apex Court in the case of Kapurchand Srimal (supra).

21. In the result, appeal filed by the revenue is allowed for statistical purpose.

Pronounced in the open court on 26.7.2021.

Sd/-
(PAVANKUMAR GADALE)
JUDICIAL MEMBER

Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

Mumbai; Dated : 26/07/2021

Copy of the Order forwarded to :

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

//True Copy//

BY ORDER,

(Assistant Registrar)
ITAT, Mumbai

PS