IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F" MUMBAI

BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)

ITA No. 3499/MUM/2016
Assessment Year: 2011-12

Shri Harry Inder Dhaul 22, Rakhi Mahal, D.V. Road, Churchgate, Mumbai-400020.	Vs.	Addl. CIT Range-12(2) Aayakar Bhavan, M.K. Road, New Marine Lines Mumbai-400020.
PAN No. ABAPD1065B **Appellant**		**Respondent**

Assessee by : Mr. S.C. Tiwari, AR
Revenue by : Ms. Pooja Swaroop, DR

Date of Hearing : 13/02/2018
Date of pronouncement : 09/05/2018

ORDER

PER N.K. PRADHAN, AM

This is an appeal filed by the assessee. The relevant assessment year is 2011-12. The appeal is directed against the order of the Commissioner of Income Tax (Appeals)-28, Mumbai [in short 'CIT(A)']and arises out of the assessment completed u/s 143(3) of the Income Tax Act 1961, (the 'Act').

2. The grounds of appeal filed by the appellant/assessee read as under:

1) That on the facts and the circumstances of the case and in law, the Ld. CIT(A) has erred in upholding the addition of Rs.31,50,000/- made by the Assessing Officer.
2) That on the facts and the circumstances of the case and in law, Ld. CIT(A) has erred in appreciating that Assessing Officer is not justified in invoking the provisions of section 52(2)(vii).
3) That on the facts and in the circumstances of the appellant's case and in law, the Ld. CIT(A) has erred in not appreciating the Assessing Officer has incorrectly adopted 22.06.2010 as the date of the transaction.
4) That on the facts and in the circumstances of the appellant's case and in law, the Ld. CIT(A) has erred in not appreciating that Assessing Officer has incorrectly worked out fair market value of the shares of M/s Global Energy Pvt. Ltd. (GEPL) as on 22.06.2010 at the rate of Rs.31.05 per share.
5) The Ld. CIT(A)'s order being contrary to law, evidence and facts of the case should be set aside, amended or modified in the light of the ground deducted above.
6) The grounds of appeal above are independent of a without prejudice to each other.

3. Short facts apropos are that the appellant had purchased during the year under consideration, 30,00,000 shares of Global Energy Pvt. Ltd. ('GEPL') @ Rs.30/- each from Belgundi Cements Pvt. Ltd. ('BCPL') worth Rs.9 crores (face value of each share Rs.10/-). BCPL had received during the financial year (FY) 2009-10 relevant to the assessment year (AY) 2010-11, Rs.10 crores from the appellant and as such had a closing credit balance of Rs.10,23,00,000/-. Also BPCL had an outstanding amounting to Rs.38 crores towards Central Bank of India (CBI) as on

31.03.2009. In the FY 2010-11 relevant to the AY 2011-12, the appellant, as per the books of accounts of BCPL, had an opening credit balance of Rs.10.23 crores. On 22.06.2010, BCPL debited the appellant's account by Rs.9 crore being the market value of the shares of GEPL that it held.

BCPL is a closely held company of the family consisting of the appellant and his wife.

To summarize, the appellant had lent Rs.10.23 crores to BCPL to enable it to repay its outstanding loan of CBI. Also BCPL repaid Rs.1.15 crore to the appellant and for the balance money, BCPL transferred 30,00,000 shares of GEPL to the appellant at Rs.30/- per share.

3.1 During the course of assessment proceedings, the Assessing Officer (AO) observed that as per the provisions of section 56(2)(vii) of the Act, if an individual receives, in any previous year, from any person or persons on or after 01.10.2009, any shares and securities and the consideration for the same is less than the aggregate Fair Market Value (FMV) of these shares and securities by an amount of Rs.50,000/-, the aggregate FMV of these shares and securities as exceeds such consideration is treated as income chargeable under the head 'income from other sources'. Further, the AO held that a FMV of these shares and securities for the purpose of section 56 is to be determined as per Rule 11UA(1)(c) r.w. Rule 11U of the Income Tax Rules, 1962 (in short 'the Rule'). Therefore, the AO requested the assessee, during the course of assessment proceedings, to give the working of the FMV of 30,00,000 shares of GEPL received on 22.06.2010 and also explain the

applicability/otherwise of section 56(2)(vii). In response to it, the assessee vide reply dated 20.03.2014 submitted before the AO a working for determining the FMV of these shares, as per which the value is Rs.28.61/- per share. However, the AO noted that the FMV of these shares worked out to Rs.28.61/- as on 31.03.2010, whereas as per Rule 11UA r.w. Rule 11U applicable for the year under consideration (prior to 29.11.2012), the FMV of these shares was to be determined on the valuation date. The AO requested the assessee to work out the FMV of these shares as on 22.06.2010, the valuation date. In response to it, the assessee filed the following working before the AO:

FMV per share as on 31.03.2010	Rs.28.61
Valuation of shares as on 31.03.2011 (per share) = Net worth /No. of shares = 166,46,77,754*/2,95,91,625 = Rs.39.36	
Incremental for FY 2010-11= Rs.39.36 – Rs.28.61 = Rs.10.75	
Proportionate for 22.06.2010 (83 days) = Rs.10.75 x 83/364 = Rs.2.44	
FMV per share as on 22.06.2010 = Rs.28.61 + Rs.2.44	Rs.31.05

Accordingly, the AO computed the FMV of these shares on the valuation date i.e. 22.06.2010 at Rs.31.05/- and brought to tax the excess amount of Rs.31,50,000/- u/s 56(2)(vii).

4. Aggrieved by the order of the AO, the assessee filed an appeal before the Ld. CIT(A). The Ld. CIT(A) held that (i) the definition of 'balance sheet' in Rule 11U prior to amendment stated that the same should be the balance sheet drawn up as on date of valuation, (ii) the amended rule gave an option to adopt the immediately preceding

approved and adopted balance sheet in cases where there was no balance sheet drawn up as on date of valuation, (iii) GEPL is a closely held company where the appellant and his wife are the only shareholders and therefore, there was nothing preventing them from drawing up a balance sheet as on valuation date.

Further the Ld. CIT(A) held that there was already a method of valuation of shares, which was sought to be amended by a new rule on 29.11.2012. The amendment, was therefore not clarificatory nor was it brought in for uniformity. The Rules 11U and 11UA as they stood for the FY 2010-11 relevant to the AY 2011-12 are material in this case.

The Ld. CIT(A) concluded that in the absence of a balance sheet as on 22.06.2010, the AO has done the next best thing by adopting a pro rata average of valuation of shares of GEPL as on 31.03.2010 and 31.03.2011. In view of the above observations the Ld. CIT(A) upheld the order of the AO in taxing the differential amount of Rs.1.05/- per share totaling to Rs.31,50,000/- u/s 56(2)(vii)(c) of the Act.

5. Before us, the Ld. counsel of the appellant submits that the value of the shares arrived at is in consonance with the principle for determining the FMV as per section 56(2)(vii) r.w. Rule 11UA and Rule 11U and available previous audited balance sheet taken as the base. It is stated that the only bone of contention in the present case is the date, which is to be taken as the base for the date of valuation of shares i.e. the audited balance sheet of the immediate preceding year i.e. 31.03.2010 or the balance sheet of the succeeding year i.e. 31.03.2011 for the date of

transaction i.e. 22.06.2010. It is stated that Ld. CIT(A) failed to appreciate the fact that the value of shares as on the date of transfer i.e. 22.06.2010 was not available as the balance sheet of the company as on June 2010 was not drawn; hence the base was taken to be the previous audited balance sheet as on 31.03.2010. As per the balance sheet as on 31.03.2010, the value of each share came to Rs.28.6/- whereas the transaction was done on a higher rate of Rs.30/- per share as mutually decided by the parties.

The Ld. counsel submits that the AO has used a wrong method of valuation, taking the base of the balance sheet as on 31.03.2011 and worked it backward to June 2010 to arrive at the value of the share and therefore, the said method is without any basis and not based on any method or principle governing valuation. It is stated that the AO failed to appreciate the fact that at the time of transaction, the balance sheet values as on 31.03.2011 was not available with the appellant, hence the valuation based on the same could never have been taken on the date of transfer and hence is wrong on facts and in law. Reliance was placed by him on Rule 11U(b) r.w. Rule 11UA.

The Ld. counsel submits that the Ld. CIT(A) did not follow the amended definition of balance sheet provided in Rule 11U(b) merely on the ground that the said amendment to the Rule came only w.e.f. 29.11.2012 i.e. post the date of transaction. It is stated that the Ld. CIT(A) failed to appreciate the well-settled principle of law that amended rules of procedure which are beneficiary would be applicable to all pending proceedings. Reliance is placed by him on the decision in

(i) *C.W.S. (India) Ltd. v. CIT* (1994) 73 Taxman 174 (SC), (ii) *Urvi Chirag Sheth v. ITO* (2016) 70 taxmann.com 33 ITAT Ahmedabad, (iii) *DCIT v. Paras D. Gundecha* (2015) 62 taxmann.com 170 ITAT Mumbai, (iv) *K.P. Varghese v. ITO* (1981) 7 Taxman 13 (SC), (v) *CIT, Gauhati v. Sati Oil Udyog Ltd.* (2015) 56 taxmann.com 285 (SC), (vi) *CIT v. Tainwala Chemicals & Plastics India Ltd.* (2013) 34 taxmann.om 159 (Bom.), (vii) *CIT v. Berry Plastics (P.) Ltd*. (2013) 35 taxmann.com 296 (Guj.) and (viii) *CIT v. B.C. Srinivasa Setty* (1981) 5 Taxman 1 (SC).

The Ld. counsel also files a 'Paper Book' (*P/B*) containing (i) Copy of Acknowledgement of return of income, Return of Income, Form No. 3CA, Audit report and Computation of Total Income for AY 2011-12, (ii) Copy of resolution passed on 12.10.2009 along with Valuation GEPL Share as on 31.03.2010 and 31.03.2011, (iii) Copy of letter dated 21.03.2016 filed before CIT(A) (iv) Copy of letter dated 21.03.2016 filed before CIT(A) along with enclosure and (v) Copy of letter dated 20.03.2014 filed before AO.

6. *Per contra*, the Ld. DR submits that the Rules 11U and 11UA as they stood for the FY 2010-11 relevant to the AY 2011-12 are material in this case. It is stated that the test of retrospectivity has been laid down by the Hon'ble Bombay High Court in *Godrej & Boyce Mfg. Co. Ltd.* (2010) 194 Taxman 203 (Bom) which has been reproduced by the Ld. CIT(A) at para 5.3 of his order dated 22.04.2016. It is argued that none of the case laws relied on by the Ld. counsel of the appellant refer to the provisions of section 56(2)(vii)(c) of the Act.

The Ld. DR further submits that the valuation of unquoted equity shares is to be based on a balance sheet as drawn up on the valuation date i.e. 22.06.2010. Nothing was preventing the appellant from drawing up the balance sheet of GEPL as on that date for this limited purpose. More so, in the light of the fact that the appellant and his wife were the only shareholders in GEPL.

For the above reasons, the Ld. DR submits that the order of the Ld. CIT(A) confirming the addition of Rs.31,50,000/- made by the AO u/s 56(2)(vii)(c) be upheld.

7. We have heard the rival submissions and perused the relevant materials on record. The reasons for decisions are given below.

We begin with the decisions relied on by the Ld. counsel. In *C.W.S. (India) Ltd.* (supra), it is held that "though literary construction might be the general rule in construing taxing enactments as contended by the assessee, it did not mean that it should be adopted even if it leads to a discriminatory or incongruous result. Interpretation of statutes cannot be mechanical exercise. Object of all the rules of interpretation is to give effect to the object of the enactment having regard to the language used. The intention of the Parliament in enacting section 40(a)(v) can be gleaned from the memorandum explaining the provisions of the Finance Bill, 1968, which sets out the object behind this clause".

In *Urvi Chirag Sheth* (supra), it has been held that interest awarded by Court on motor accident compensation, being a capital receipt, is not taxable as income.

In *Paras D. Gundecha* (supra), it is held that where assessee received certain sum out of family settlement, the same was not taxable u/s 56(2)(v).

In *K.P. Varghese* (supra), it is held in case of capital gains u/s 52 (2) that understatement of consideration in a transfer of property is a necessary condition for attracting applicability of section 52(2) and it is not enough for the revenue to show that FMV of property as on date of transfer exceeds full value of consideration declared by the assessee in respect of transfer by an amount of not less than 15% of value so declared.

In *Sati Oil Udyog Ltd*. (supra), it is held that amendment made to section 143(1A) by Finance Act 1993, with retrospective effect from 01.04.1999, was constitutionally valid.

In *Tainwala Chemicals & Plastics India Ltd.* (supra), it is held that the Tribunal has rightly allowed the assessee's claim holding that AO had merely alleged that shares were sold at very low price, but he had not discharged burden, which was cast upon him in terms of decision of the Apex Court in *K.P. Varghese* (supra).

In *Berry Plastics (P.) Ltd*. (supra), it is held that in respect of valuation of land and building, DVO's report may be a useful tool in hands of AO, nevertheless it is an estimation and without there being anything more, it cannot form basis for addition u/s 69B.

In *B.C. Srinivasa Setty* (supra), it is held that the "goodwill" generated in a newly commenced business cannot be described as an "asset" within the term of section 45, and, therefore, its transfer is not subject to income-tax under the head "Capital Gains".

We have mentioned above the ratio laid down in the decisions relied on by the Ld. counsel of the appellant. We will examine the same against the backdrop of facts *infra*.

7.1 To recapitulate the background facts, the appellant had lent Rs.10.23 crores to BCPL to enable it to repay its outstanding loan of CBI. Then BCPL repaid Rs.1.15 crores to the appellant. For the balance amount, BCPL transferred 30,00,000 shares of GEPL to the appellant at Rs.30/- per share. The appellant and his wife are only shareholders in GEPL.

The contentious issues are nicely summed up by the appellant in his written submission dated 21.03.2016 filed before the Ld. CIT(A) (Page 66 of *P/B*) and these are (i) whether the date of valuation should be as per the balance sheet available as on 31.03.2010 or the succeeding balance sheet, (ii) whether the definition of balance sheet in Rule 11U(b), which was amended in the statute book w.e.f. 29.11.2012 and would be binding on pending proceedings for AY 2011-12 and have retrospective effect.

In respect of the first question we find that GEPL is a closely held company wherein the appellant and his wife are the only shareholders. In response to a query raised by the AO, the appellant filed before him a

working of the FMV per share of GEPL as on 22.06.2010 which comes to Rs.31.05/-. For this purpose, the appellant has taken the valuation of shares as on 31.03.2011. We have reproduced it at para 3.1 hereinbefore. We find that the Ld. CIT(A) has rightly observed that "there was nothing preventing the appellant from drawing up the balance sheet of GEPL as on that date for the limited purpose". As GEPL is a closely held company, we concur with the above finding of the Ld. CIT(A).

Now we turn to the second question. The method for the determination of FMV of property other than immovable property has been provided in Rules 11U and 11UA *vide* Notification No. 23/2010/F. No. 142/21/2009-SO (TPL) dated 08.04.2010: [2010] 322 ITR (St.) 25. The meaning of "balance sheet" has been given in Rule 11U(b) of the Rules and the same has been substituted by the IT (15th Amendment) Rules, 2012, w.e.f. 29.11.2012 and the same has been relied upon by the Ld. counsel. Prior to their substitution, clause (b) reads as under:

> (b) "balance sheet", in relation to any company, means the balance-sheet of such company (including the notes annexed thereto and forming part of the accounts) as drawn up on the valuation date;

7.2 In view of the above factual matrix, it is crystal clear that the case of the appellant is distinguishable from the cases relied on by the Ld. counsel.

7.3 The legal nodus confronting us has been considered by the Constitution Bench of the Hon'ble Supreme Court in *CIT v. Vatika Township Pvt. Ltd.* (2015) 1 SCC. Their Lordships held at para 27-31 and 35 as under:

> *"General Principles concerning retrospectivity*
>
> **27.** A legislation, be it a statutory Act or a statutory Rule or a statutory Notification, may physically consists of words printed on papers. However, conceptually it is a great deal more than an ordinary prose. There is a special peculiarity in the mode of verbal communication by a legislation. A legislation is not just a series of statements, such as one finds in a work of fiction/non-fiction or even in a judgment of a court of law. There is a technique required to draft a legislation as well as to understand a legislation. Former technique is known as legislative drafting and latter one is to be found in the various principles of 'Interpretation of Statutes'. Vis-à-vis ordinary prose, a legislation differs in its provenance, lay-out and features as also in the implication as to its meaning that arise by presumptions as to the intent of the maker thereof.
>
> **28.** Of the various rules guiding how a legislation has to be interpreted, one established rule is that unless a contrary intention appears, a legislation is presumed not to be intended to have a retrospective operation. The idea behind the rule is that a current law should govern current activities. Law passed today cannot apply to the events of the past. If we do something today, we do it keeping in view the law of today and in force and not tomorrow's backward adjustment of it. Our belief in the nature of the law is founded on the bedrock that every human being is entitled to arrange his affairs by relying on the existing law and should not find that his plans have been retrospectively upset. This principle of law is known as *lex prospicit non respicit* : law looks forward not backward. As was observed in *Phillips* v. *Eyre*

[1870] LR 6 QB 1, a retrospective legislation is contrary to the general principle that legislation by which the conduct of mankind is to be regulated when introduced for the first time to deal with future acts ought not to change the character of past transactions carried on upon the faith of the then existing law.

29. The obvious basis of the principle against retrospectivity is the principle of 'fairness', which must be the basis of every legal rule as was observed in the decision in *L'Office Cherifien des Phosphates* v. *Yamashita-Shinnihon Steamship Co. Ltd*. [1994] 1 AC 486. Thus, legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect; unless the legislation is for purpose of supplying an obvious omission in a former legislation or to explain a former legislation. We need not note the cornucopia of case law available on the subject because aforesaid legal position clearly emerges from the various decisions and this legal position was conceded by the counsel for the parties. In any case, we shall refer to few judgments containing this dicta, a little later.

30. We would also like to point out, for the sake of completeness, that where a benefit is conferred by a legislation, the rule against a retrospective construction is different. If a legislation confers a benefit on some persons but without inflicting a corresponding detriment on some other person or on the public generally, and where to confer such benefit appears to have been the legislators' object, then the presumption would be that such a legislation, giving it a purposive construction, would warrant it to be given a retrospective effect. This exactly is the justification to treat procedural provisions as retrospective. In *Government of India* v. *Indian Tobacco Association* [2005] 7 SCC 396, the doctrine of fairness was held to be relevant factor to construe a statute conferring a benefit, in the context of it to be

given a retrospective operation. The same doctrine of fairness, to hold that a statute was retrospective in nature, was applied in the case of *Vijay* v. *State of Maharashtra* [2006] 6 SCC 286*.* It was held that where a law is enacted for the benefit of community as a whole, even in the absence of a provision the statute may be held to be retrospective in nature. However, we are confronted with any such situation here.

31. In such cases, retrospectively is attached to benefit the persons in contradistinction to the provision imposing some burden or liability where the presumption attaches towards prospectivity. In the instant case, the proviso added to Section 113 of the Act is not beneficial to the assessee. On the contrary, it is a provision which is onerous to the assessee. Therefore, in a case like this, we have to proceed with the normal rule of presumption against retrospective operation. Thus, the rule against retrospective operation is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication. Dogmatically framed, the rule is no more than a presumption, and thus could be displaced by out weighing factors.

*** *** *** ***

35. We would also like to reproduce hereunder the following observations made by this Court in the case of Govinddas v. ITO [1978] 103 ITR 123, while holding Section 171 (6) of the Income- Tax Act to be prospective and inapplicable for any assessment year prior to 1st April, 1962, the date on which the Income Tax Act came into force:

> "11. Now it is a well settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an

existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English courts is that

> 'all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.'
>
> (emphasis supplied)"

7.4 The present factual matrix is to be tested on the anvil of the aforesaid enunciation of law. We hold that the AO has rightly arrived at the FMV per share as on 22.06.2010 at Rs.31.05/- as worked out by the assessee. Also he has rightly followed Rule 11U as applicable for the FY 2010-11 relevant to the AY 2011-12. To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose.

It is made clear that all the case-laws relied on by both sides have been duly taken into consideration while deciding the matter. The omission of reference to some of such cases in the order is either due to

their irrelevance or to ease the order from the burden of the repetitive *ratio decidendi* laid down in such decisions.

8. In the result, the appeal is dismissed.

Order pronounced in the open Court on 09/05/2018.

Sd/-	Sd/-
(SAKTIJIT DEY)	(N.K. PRADHAN)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai;
Dated: 09/05/2018
Rahul Sharma, Sr. P.S.

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.

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai