

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

**BEFORE SH. N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.5933/DEL/2018
Assessment Year: 2015-16

M/s. Cimex Land and Housing Pvt. Ltd. RZ-D-5, Mahavir Enclave, New Delhi-110045 PAN No. AACCC8805C	Vs	ITO, Ward – 6 (2) New Delhi
(APPELLANT)		(RESPONDENT)

Stay Application No.67/Del/2019
ITA No.5933/DEL/2018
Assessment Year: 2015-16

M/s. Cimex Land and Housing Pvt. Ltd. RZ-D-5, Mahavir Enclave, New Delhi-110045 PAN No. AACCC8805C	Vs	ITO, Ward – 6 (2) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Sh. Mahesh Kumar, CA
Respondent by	Ms. Ashima Neb, Sr. DR

Date of hearing:	25/02/2019
Date of Pronouncement:	25/02/2019

ORDER**PER N. K. BILLAIYA, AM:**

ITANo.5933/Del/2018 with this appeal the Ld. Counsel has challenged the correctness of the order of the CIT(A)-2, New Delhi dated 16.07.2018 pertaining to A. Y. 2015-16.

2. The sum and substance of the grievance of the assessee is that the CIT(A) erred in confirming addition of Rs.6.32 crores made u/s. 56 (2) (viib) of the Act.

3. The facts of the case are that the return of income for the year under consideration was selected for limited scrutiny through cass. Reasons for scrutiny selection is as under :-

1. Large share premium received during the year.
2. Low income in comparison to high loans/ advances/ investment in shares.
4. During the course of the scrutiny assessment proceedings the Assessing Officer asked the assessee to justify the increase in share application money from M/s. V. L. Estate Private Limited the details of which are as under :-

AY	No. of Shares	Face Value	Premium Per share	Total amount of share application money increased

2012-13	50375	10	790	4,03,00,000
2013-14	5000	10	790	40,00,000
2014-15	-	-	-	----
2015-16	24625	10	790	1,97,00,000
Total				6,40,00,000

5. In its reply the assessee strongly contended that provision of section 56 (2) (viib) of the Act are not applicable since the said provisions are inserted w.e.f. 01.04.2013. The assessee further justified its share premium by furnishing valuation report. After considering the facts and the submissions the Assessing Officer observed as under :-

"5. The reply of the assessee company is examined, considered and not found tenable on the basis of following facts and findings which are discussed in detail in the coming paras.

a) *You have claimed that share capital and premium increased in earlier years, as share application money and your cases were completed in scrutiny by the then AO. In this regard, it is pertinent to mention here that though you have increased only share application money and shares were not allotted in earlier years, you have allotted share capital on premium only in this FY 2014-15 relevant to AY 2015-16. The question of examination of share premium arises only in the year in which shares issued. Your case for AY 2015-16 is selected for limited scrutiny for verification of "Large share premium received during the year" (verify applicability of section 56(2) (viib) and Low income in comparison to high loans/advances/investment in shares.*

b) *You have claimed that M/s VL Estate (P) limited was investing intsalments, in this regard it is not out of place to mention here that the amount was given as share application money which is returnable without allotting the shares and cannot be treated as investments. It is clarified that once a company is making investment as share application money, the same can be returned back without allotting shares and it cannot be a reason for determining the premium for allotment of shares in subsequent years, as no shares were allotted in earlier years, Examination of basis of share premium can be verified only in*

the year when shares were allotted, i.e AY 2015-16.

c) *As shares were allotted at premium only in FY 2014-15 relevant to assessment year 2015-16, you have failed to furnish calculation for determining the premium as per Rule 11UA and any other documents to justify your claim for charging a huge premium of Rs 790/- and not any other documentary evidences to justify tire premium.*

For the calculation of share premium, you are relying upon valuation report of M/s Duggal & Associates, registered valuer, dated 5.4.2011, it is also pertinent to mention here that the shares were allotted on premium in the year under consideration in which it is mandatory to follow the methods prescribed for determining the value of share premium as per Rule 11UA it is not understood when the value of share has to be determined as per the method prescribed by the Act then there cannot be any other method for determining the value of share premium. In the year 2011, the provisions of rule 11UA was not inserted in the IT Rules. The same was inserted as sub rule (1) of IT Rules. The same was inserted as sub rule (1) of IT (fifteenth Amendment) Rules, 2012 w.e.f 29.11.2012, sub clause (C.) clearly elaborates the procedure for method of valuation of shares and securities, as the assessee is allotting share capital on premium in FY 2014-15, provisions of section 56(2)(viib) attracts, therefore, to justify premium, assessee company is duty bound to submit basis of calculation of share premium as rule 11UA report. The same is missing in the instance case, and assessee company has failed to justify premium. Assessee company has failed to justify the allotment of share at premium during FY 2014-15, as there is no effort to justify the premium with the working of assessee company in the succeeding years. Assessee company has merely advanced the money as short term loans and advances as "loans to others" and "advance to others".

e) Further, assessee company has claimed to file form-23 with ROC in regard which supports that the transaction is agreed at Rs 800 per share, no supporting evidences showing the year in which the Form-23 has been filed in ROC hence no comments warranted on this issue.

in view of the above discussion it is clear that after rule 11 UA came into existence there can not be any other method for determining the valuation of shares, than methods prescribed in rule 11 UA. Hence, the motive of assessee in adopting the method which is no where relevant in the present context is not understood, as the shares were issued in the period under consideration and rule 11 UA is applicable no other method for determining tire value of shares can be accepted.

The AR of the assessee was asked vide order sheet dated 8/12/2017 to justify the share premium received as per applicability of section 56(2)(viib). No justificatory reply has been filed by the AR of the assessee. Further, the financial statements of assessee company for the A.year 2015-16, 2016-17 and 2017-18 are analyzed and following facts comes into the light.

<i>Details</i>	<i>AY 2015-16</i>	<i>AY 2016-17</i>	<i>AY 2017-18</i>
<i>Revenue from operations</i>	0	0	0
<i>Work In progress</i>	1,11,46,109	1,12,87,442	1,13,20,902
<i>Short terms advances</i>	5,34,33,673	5,35,00,000	5,36,93,463

On this basis of above figures, which are available on e-filing portal, it is seen that balance sheet and P&L account has not moved at all in the direction to achieve towards the revenue generation, and to justify tire basis of share premium. Hence, it can be concluded on the basis above figures, that the premium taken by the assessee is not justified even on merits.”

6. The addition of Rs. 6.32 crores was made by the Assessing Officer. The assessee carried the matter before the CIT(A) but without any success.

7. Before us the Counsel for the assessee stated that Rs.4.03 crores were accepted as share application money for 50375 share in A. Y. 2012-13 of Rs.40 lacs was accepted as share application money for 5000 shares in A. Y. 2013-14.

8. The counsel stated that the share application money received in earlier assessment year cannot be considered during the year under consideration. The counsel further stated that only Rs.1.79 crores were received as share application money for 24625 shares in the year under consideration. The counsel further stated that provisions of section 56 (2) (viib) of the Act are not applicable in as much as the assessee has furnished valuation report which was not accepted by the Assessing Officer.

9. The DR strongly supported the findings of the Assessing Officer. It is the say of the DR that since in the assessment year 2012-2013 and 2013-14 only share application money was

received and no shares were allotted, the examination of the case from the perspective of applicability of section 56 (2) (viib) of the Act it is did not arise in those assessment years. It was only in A. Y. 2015-16 that the basis of share application money, shares were allotted to share applicants on premium and hence section 56 (2) (viib) of the Act is applicable. The DR concluded by saying that orders of the authorities below deserved to be upheld.

10. We have given a thoughtful consideration to the orders of the authorities below. Section 56 (2) (viib) of the Act inserted by the finance Act 2012 w.e.f. 1.04.2013 read :-

“{viib} where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares :

Provided that this clause shall not apply where the consideration for issue of shares is received –

- (i) by a venture capital undertaking from a venture capital company or a venture capital fund ; or*
- (ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.*

Explanation – For the purpose 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 maybe 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;*

- (b) *“venture capital company”, “venture capital fund” and “venture capital undertaking” shall have the meanings respectively assigned to them in clause (a), (b) and clause (c) of [Explanation] to clause (23 FB) of section 10;]*

10. It is true that the provision refers to consideration for issue of shares received in any previous year and it is equally true that Rs.4.03 crores was received in A. Y. 2012-13 and Rs. 40 lacs was received in A. Y. 2013-14 but the fact of the matter is that the entire share allotment was done during the year under consideration, therefore, it cannot be said that the assessee was not liable to justify its share premium supported by the valuation report as mentioned under Rule 11 U and 11 UA. We are of the considered view that the valuation report which was the counsel sought to file before us should have been filed before the Assessing Officer so that the same can be examined within the purview of rules 11 U and 11 UA.

11. In the interest of justice, we restore this issue to the files of the Assessing Officer. The assessee is directed to justify the share premium as per provisions of law and as per Rule 11 U and 11 UA of the IT Rules.

12. As mentioned elsewhere the part of the share application was received in earlier assessment years but since in those assessment years shares were not allotted, therefore, the share premium could not have been examined by the Assessing Officer

u/s 56 (2) (viib) of the Act. Since the entire transaction has crystallized during the year under consideration which also includes the share premium of Rs. 790 per share needs to be examined during the year under consideration only.

13. The Assessing Officer is directed to examine the justification of share premium as per the procedure prescribed under Rule 11 U and 11 UA of the IT Rules and decide the issue afresh after giving a reasonable opportunity of being heard to the assessee.

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

Stay Application No.67/Del/2019

15. Since the appeal of the assessee has been decided as above the stay petition becomes otiose.

Order pronounced in the open court on 25.02.2019.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

NEHA

Date:- 25.02.2019

Copy forwarded to:

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

Sd/-
(N. K. BILLAIYA)
ACCOUNTANT MEMBER

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	25.02.2019
Date on which the typed draft is placed before the dictating Member	
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	25.02.2019
Date on which the file goes to the Bench Clerk	
Date on which file goes to the Head Clerk.	
The date on which file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	

