IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH, MUMBAI

BEFORE SHRI MAHAVIR SINGH, VP&
SHRI S. RIFAUR RAHMAN, AM

आयकरअपीलसं./ I.T.A. No. 2050/Mum/2018
(**निर्धारणवर्ष** / Assessment Year: 2013-14)

M/s Impact RetailTech Fund Pvt. Ltd. 11 K.K. Marg, Mahalaxmi, Mumbai-400 034	**बनाम**/ Vs.	ITO -6(2)(4), Aayakar Bhavan, M. K. Road, Mumbai-400 020
स्थायीलेखासं ./जीआइआरसं ./PAN No. AABCE6521C		
(अपीलार्थी/**Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थीकीओरसे/ **Appellant by**	:	Shri Percy Pardiwala & Shri Sukh Sagar Syal, ARs
प्रत्यर्थीकीओरसे/**Respondentby**	:	Shri V. Sreekar, DR

सुनवाईकीतारीख/ **Date of Hearing**	:	06.01.2021
घोषणाकीतारीख / **Date of Pronouncement**	:	05.03.2021

आदेश / O R D E R

PER S. RIFAUR RAHMAN (ACCOUNTANTMEMBER):

The present appeal has been filed by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-12, in short 'Ld. CIT(A)', Mumbai, dated 29.01.2018 for AY 2013-14.

2. The brief facts of the case are, assessee filed its return of income on 19.02.2013 declaring total income of Rs. NIL. Subsequently, the case was selected for scrutiny and notices u/s 143(2) and 142(1) were issued and served on the assessee. In response, AR of the assessee filed the relevant information as called for.

3. The assessee is an investment holding company and holding the securities of unquoted companies. During the year, the assessee has shown Other income of Rs. 283,79,25,000/- .Against such income the assessee has debited various expenses such as Discount of issue of NCD, professional fee, Debenture issue expenses, Audit fee etc., aggregating to Rs. 13,55,79,897/- and declared the book profit at Rs.270,23,45,103/-.

4. In the computation of income, entire claim of expenses have been disallowed and resultant income has been further reduced by "Provision for investment done earlier year no longer required written off' to arrive at Business income of Rs. NIL, claiming it was added back in A.Y. 2011-12. While computing tax payable u/s 115JB, the provision as mentioned above has been reduced from the Book profit as well claiming that such

diminution in value of investment was added back while computing book profit of A.Y. 2011-12; to arrive at Book profit as per section 115JB at a loss of Rs. 13,55,79,897/-.

5. On verification of the Balance sheet as on 31.03.2013, AO observed that the assessee has received a sum of Rs. 313,63,93,516/- as Advance against Share capital. During the course of assessment proceedings the AR of the assessee was asked to file the details of actual allotment of shares against advance received in F.Y. 2012-13. Vide reply dated 15.02.2016, the assessee stated that in lieu of advance against share capital, the assessee had made allotment of equity shares in subsequent financial year i.e. F.Y. 2013-14. The assessee also filed copies of financial statement of F.Y.2013-14. On perusal of the same AO observed that the assessee has issued 10095425 number of equity share on premium of Rs. 2,990/- per share, the assessee did not have the sufficient authorized capital in the current year, to consume such huge sum by allotting share at par. There was no option for the assessee but allot the share at premium, if allotted at all. The assessee did not increase its authorized capital in subsequent years as well. Thus it is clear that the shares were to

be allotted on premium only against such advance received by the assessee.

6. After considering the detailed submission of assessee, AO held that the provision of section 56(2)(viib) is applicable in this case in respect of advance against share capital received during the year and made addition under the head 'Income from other sources'.

7. Aggrieved by the above order of AO, assessee preferred appeal before Ld. CIT(A) and Ld. CIT(A)after considering the submission of assessee, partly allowed the appeal of the assessee with the following observations:-

> *27. The Investment and Finance Division of Essar Investment Ltd (EIL) was demerged into Imperial Consultants and Securities P. Ltd (ICSPL) with effect from 01.04.2012. On perusal of the ledger account in the books of the appellant, in which the share application money received from ICSPL during the FY 2012-13 relevant to the present AY 2013-14 is credited, it is seen that the ledger account itself bears the title "Imperial Consultants and Securities P. Ltd.- Advance against equity" as opposed to the ledger account titled as "Essar Investment Ltd-Others" in the earlier two financial years. Further, it is noticed that the narration given in the said ledger account for the amounts received during the year clearly states that the receipts are towards Advance against equity. Similarly, it is noticed from the perusal of the ledger account in the books of account of ICSPL, wherein the amounts paid to the appellant during the year are debited, that the said*

payments to the appellant have been shown as Advance against equity and that the ledger account itself bears the title "Essar Retail Holding Ltd-Advance against equity" as opposed to the ledger account titled as "Essar Retail Holding Ltd- Others" in the earlier two financial years. Thus, having regard to the title of the relevant ledger account, the narration given in the ledger account for the amounts paid by EIL/ICSPL to the appellant and the absence of disclosure of said amounts as Advance against share capital in the balance sheet of the appellant as well as EIL/ICSPL in the financial years 2010-11 and 2011-12, it has to be inferred that the amounts of Rs.17.26 crores and Rs.142.00 crores received by the appellant from EIL during the FYs 2010-11 and 2011-12 respectively were in the nature of loans received from EIL and not Advances against share capital/share application money as claimed by the appellant.

28. In this regard, it was explained by the appellant that the share application money of Rs.159.26 crores received prior to FY 2012-13 was shown under Current liabilities in the balance sheet and that it was classified as Share application money only during FY 2012-13. On perusal of the balance sheet of the appellant as on 31/03/2011 and 31/03/2012 in the light of this explanation of the appellant, It is seen that the relevant amounts of Rs 17.26 crores and Rs 142.00 crores received during the FYs 2010-11 and 2011-12 have been shown in the balance sheet as "Unsecured loans and advances from related parties" under Other current liabilities. As already mentioned earlier, these amounts have been credited to the ledger account of "Essar Investment Ltd- Others" in the books of account of the appellant in these two financial years. It is further noticed that the balance of Rs 159.26 crores outstanding in the said ledger account as on 31/03/2012 has been transferred and credited to the ledger account of "Imperial Consultants and Securities P. Ltd.- Advance against equity" on 01/04/2012 during the FY relevant to the assessment year under consideration.

29. On the basis of the facts narrated above, it is seen that the amounts of Rs 17.26 crores and Rs 142.00 crores received by the appellant from EIL during the FYs 2010-11 and 2011-12 do not represent share application money/advance against share capital as claimed by the appellant. The said amounts represented unsecured loans received from EIL as evidenced by the ledger accounts in the books of the account of the appellant as well as EIL and audited balance sheets of the appellant as on 31/03/2011 and 31/03/2012. The said amounts aggregating to 159.26 crores therefore cannot be regarded as share application money received by appellant during the FYs 2010-11 and 2011-12. As the said amount of Rs 159.26 crores, which represented the outstanding unsecured loan from EIL as on 31/03/2012, was transferred and credited to the ledger account of "Imperial Consultants and Securities P. Ltd.- Advance against equity" on 01/04/2012 during the FY relevant to the present AY 2013-14, it has to be considered that the unsecured loan of Rs 159.26 crores from EIL was converted in to Share application money/Advance against share capital during the year under consideration only. Hence, the entire amount of Rs 313.63 crores shown as Advance against share capital as on 31/03/2013, which is the aggregate of the amount of unsecured loan of Rs 159.26 crores that was converted in to share application money during the year and share application money of Rs 154.37 crores received during the year, is required to be considered as the share application money received by the appellant during the year under consideration only. The legal contentions raised by the appellant are required to be examined in this factual background.

30. It has been contended by the appellant that the provisions of section 56(2)(viib) are applicable only in the year in which the shares are issued by the company and not in the year in which the share application money is received on the ground that the "consideration for issue of shares" arises only when the shares are issued. It has been contended that the share application money received by the company prior to Issue of shares does not bear the character of consideration for the issue of shares, since the shares come into existence only on their issue.

31. In this regard, it would be useful to refer to the provisions of section 56(2)(viib), which has been inserted in the Act by the Finance Act, 2012 w.e.f. 01.04.2013, which are as under:

56 (2) In particular, and without prejudice to the generality of the provisions of sub- section (1), the following incomes, shall be chargeable to income- tax under the head "income from other sources" namely :-

(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 that 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 purposes of this clause-

(a) the fair market value of the shares shall be the value-

i. As may be determined in accordance with such method as may be prescribed

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, which is higher;

(b) " venture capital company" venture capital fund" and "venture capital undertaking" shall have the meanings

respectively assigned to them in clause (a), clause(b) and clause (c) of [Explanation to clause (23FB) of section 10;]

32. As per the provisions of this section, the aggregate consideration received by a company for issue of shares that exceeds the fair market value of the shares shall be chargeable to Income-tax under the head Income from Other Sources where-

a) A company, not being a company in which the public are substantially interested, receives in any previous year.

b) From a person being a resident.

c) Any consideration for Issue of shares which exceeds the face value of such shares

33. As can be seen from the language employed in the section, the charging provisions of the section are triggered when a company receives in any previous year any consideration for issue of shares that exceeds the face value of such shares. The expression 'receives in any previous year" is used in conjunction with the expression "any consideration for issue of shares". This shows that where any amount is received during the previous year towards consideration for issue of shares, the provisions of section 56(2)(viib) are required to be invoked to ascertain whether such consideration exceeds the face value of the shares and whether the aggregate consideration exceeds the fair market value of the shares.

34. In the present case, share application money of Rs 313.63 crores has been received during the previous year relevant to the assessment year under consideration, as per the factual finding given earlier. Hence, the condition that the relevant amount considered for taxation U/s 56(2)(viib) is received during the previous year, is fulfilled in the present case. Hence, the aspect that requires to be examined now is whether the condition that such receipt during the year represents "consideration for issue of shares", so as to consider the said amount for application of the provisions of section 56(2)(viib).

35. In this regard, it is the contention of the appellant that since the shares were actually issued by the appellant against the said share application money of Rs 313.63 crores during the subsequent financial year 2013-14, the share application money acquired the character of "consideration for issue of shares" during the AY 2014-15 relevant to the FY 2013-14 and therefore the provisions of section 56(2)(viib) would be applicable for AY 2014-15 only and not for the assessment year under consideration. It has been contended that unless the terms of the issue of shares is finalised so as to specify the number of shares to be issued, the face value of the share and the premium per share, the excess of aggregate consideration received over the fair market value of the shares cannot be determined and therefore, the provisions of-section 56(2)(viib) can be applied only in the year of issue of shares.

36. The contentions of the appellant have been carefully examined and it is found that the same are not acceptable. The appellant has proceeded on the presumption that the terms of the issue of shares such as the number of shares to be issued, the face value of the shares and the premium per share are determined only at the time of actual issue of shares. However, there is no basis for making such presumption. On the other hand, such terms of the proposed issue of shares are determined and communicated to the persons to whom invitation is made by a company to apply for the shares and to pay the share application money. Such an invitation precedes the receipt of share application money from the existing/prospective shareholders. No investor will make payment of share application money to a company unless he evaluates the terms of the offer/invitation received from a company and finds the same to be a prudent investment. Hence, it is not correct to state that the terms of the proposed issue of shares have not been finalized at the time of receipt of share application money during the year in the case of the appellant and that they were finalized only at the time of actual issue of shares during the subsequent year.

37. The proposition that the terms of the proposed issue of the shares are finalized and made known to the existing/prospective shareholders prior to the payment of

share application money by them finds support from the instructions issued by the Ministry of corporate affairs for preparation of the balance sheet of company as a part of the Revised Schedule VI to the Companies Act, 1956 notified by the Ministry vide notification No. SO 447(E) dated 28.02.2011. In the said instructions for preparation of the balance sheet, it has been laid down at instruction appearing at serial No. 6G dealing with the disclosures to be mandatorily made in the notes to accounts in respect of Application money received for allotment of securities falling under "Other current liabilities" in the balance sheet that the terms and conditions regarding the number of shares proposed to be issued, the amount of premium if any and the period before which shares shall be allotted shall be disclosed in the notes to the accounts. The instruction further states that it shall also be disclosed whether the company has sufficient authorized capital to cover the share capital amount resulting from allotment the shares out of such share application money. The instruction also states that the period for which the share application money has been pending beyond the period for allotment as mentioned in the document inviting application for shares along with the reason for such share application money being pending shall be disclosed. It is further stated in the instruction that share application money not exceeding the issued capital and to the extent not refundable shall be shown under the head Equity and the share application money to the extent it is refundable shall be separately shown under Other current liabilities.

38. The above mentioned instruction for preparation of the balance sheet contained in the revised Schedule VI to the Companies Act, 1956 is applicable mandatorily to all the companies, including private companies as that of the appellant for the Financial Statements to be prepared for the financial year commencing on or after 01.04.2011. As can be understood from the above instruction, a document inviting application for shares is required to be issued containing the terms and conditions for the proposed issue of share and such terms include the number of shares proposed to be issued, the amount of premium if any and the period before which shares shall be allotted. This instruction brings out the fact that when a company is in

receipt of share application money, the same is in response to a document issued inviting application for shares wherein such terms and conditions are conveyed to the prospective investors.

39. In the light of the above, the claim of the appellant that the terms and conditions for the issue of shares were finalized only at the time of the actual issue of shares during subsequent year and therefore, it has to be treated that the consideration for the issue of shares has been received during the subsequent year only is found to be incorrect and untenable. Having regard to the instructions contained in the Revised Schedule VI to the Companies Act, 1956 referred to above, it is required to be inferred that the appellant had finalized the terms of the proposed issue of shares during the previous year relevant to the assessment year under consideration itself, when the appellant was in receipt of the share application money of Rs 313.63 crores. The resolution of the Board of directors dated 07.03.2014 furnished by the appellant in order to show that the terms of allotment of shares were finalised at the time of the issue of shares on the said date is considered to be a self serving document without any evidentiary value in light of the statutory requirement laid down in Revised Schedule VI to the Companies Act, 1956 discussed above. Once such an inference on facts is drawn that the appellant had finalized the terms of the proposed issue of shares during the year itself, the share application money received by the appellant during the year on the basis of such terms and conditions qualifies to be treated as "Consideration for issue of shares".

40. In this connection, it is pertinent to point out that though the appellant stated in its contentions that that the consideration for issue of shares was received in the subsequent year when the shares were issued against the share application money and the provisions of section 56(2)(viib) would therefore be applicable for the AY 2014-15, the appellant has also stated that there is no income chargeable to tax under section 56(2)(viib) in the hands of the appellant in AY 2014-15 on account of the reason that the relevant balance sheet to be considered for valuation of the shares would be the balance sheet drawn up as on

31,03.2013 since the valuation date is 07,03.2014 and the fair market value of the shares on the basis of the said balance sheet works out to Rs.3299/-per share as against the consideration of Rs.3000/- per share at which the appellant issued the shares. As observed by the AO, the appellant reversed the provision for diminution in the value of its investment of Rs.283.79 crores in the shares of TMSL made by it in the earlier FY 2010-11 during the financial year 2012-13 relevant to the present assessment year. By writing back the said provision during the year, the appellant was able to increase the value of the assets held by it in the balance sheet as on 31.03.2013 by the said sum of Rs.283.79 crores and the same resulted in arriving at fair market value of the shares at Rs.3299/- per share based on balance sheet as on 31.03.2013 compared to the fair market value of the shares computed at Rs. Nil by the AO on the basis of the balance sheet as on 31.03.2012. On perusal of the financial statements of TMSL for the FYs 2011-12 and 2012-13, It is seen that the said company continued to incur heavy losses during these two years also which were to the tune of Rs. 105.20 crores and Rs 56.71 crores respectively compared to Rs. 200.15 crores loss incurred in FY 2010-11. The write back was made though the accumulated losses continued to increase. When TMSL had such huge accumulated losses amounting to Rs.874.39 crores as on 31.03.2013 and it had not yet made net profit in any year, there was no bonafide reason for writing back the provision during the FY 2012-13 and it is reasonable to infer that the write back of the provision was made only for the purpose of enhancing the book value of the assets in the balance sheet as on 31.03.2013 and thereby enable computation of the fair market value of the shares at an amount that would not result in income chargeable to tax as per the provisions of 56(2) (viib) for AY 2014-15 when the shares were issued by the appellant at Rs 3,000/- per share.

41. The contention of the appellant that the advance receipt of money from the proposed shareholder by way of share application money cannot partake the nature of "Consideration for issue of shares" since no promisor-promisee relationship exists between the proposed shareholder and company is considered to be untenable in

the light of the inference of fact drawn in the preceding paragraphs that the appellant had finalized the terms of the proposed issue of shares during the year itself and a document inviting application for shares containing the said terms was issued to the prospective /shareholders before the receipt of the share application money during the year. Further, the contention of the appellant that since shares do not come in to existence before they are issued by the company, there cannot be receipt of consideration for the issue of the shares before the shares are issued is also considered to be untenable since the prospective shareholders pay the share application money in response to the invitation made by the company to them to subscribe to the shares, along with relevant terms of the proposed issue of shares. The share application money so paid partakes the character of "Consideration for issue of shares" since the same was paid in acceptance of the invitation/offer to issue shares made by company at the specified terms.

42. It has also been contended by the appellant that the computation provisions as specified in rule 11U and 11UA will fail in the case of the appellant, if the provisions of section 56(2)(viib) are invoked for the present assessment year since the definition of "valuation date" in rule 11U(j) was amended with effect from 29.11.2012 only so as to make it applicable for computing the fair market value of the shares for the purpose of section 56(2)(viib) and the adoption of the balance sheet of the appellant as on 31.03.2012 as the basis for computing the fair market value of the shares on invoking the provisions of section 56(2)(viib) for the present assessment year will be contrary to the provisions of the Act and Rules since the rule dealing with the valuation of the shares for the purpose of section 56(2)(viib) was not applicable prior to 29,11.2012. This contention of the appellant is also found to be without merit. The definition of "valuation date" in rule 11U(j) was amended with effect from 29.11.2012 to insert the word "consideration" so as to make it applicable for valuation of shares for the purpose of section 56(2)(viib). After such amendment, valuation date was defined to mean the date on which the property or consideration, as the case may be, is received by the assessee. In the case of the appellant, if

the provisions of section 56(2)(viib) are invoked for the present assessment year by treating the receipt of share application money as the receipt of consideration for issue of shares, the date of receipt of the share application money has to be considered as the valuation date as per the amended definition of valuation date. Since the share application money has been received on several dates during the year, the last date of receipt being 30.03.2013, the valuation date has to be taken as 30.03.2013. As the said valuation date falls after 29.11.2012, there is no failure of the computation provisions as contended by appellant.

43. As per the definition of "balance sheet" in Rule 11U(b), the balance sheet drawn up as on the valuation date has to be considered for the purpose of determining the fair market value of the share and where no balance sheet has been drawn up on the valuation date, the balance sheet drawn up as on a date Immediately preceding the valuation date which has been approved and adopted by the shareholders is required to be taken in to account for the purpose of valuation. In the present case, since the valuation date is 30.03.2013 and since no balance sheet has been drawn up as on the said date, the balance sheet as on 31.03.2012, which represents the balance sheet drawn up as on a date immediately preceding the valuation date which has been approved and adopted by the shareholders, is required to be taken in to account for the purpose of valuation. Hence, consideration of the balance sheet of the appellant as on 31.03.2012 is in accordance with the amended Rule 11U with effect from 29.11.2012 and there is no violation of the provisions of the Act and the Rules in doing so, as contended by the appellant.

44. It was also contended by the appellant that if the receipt of share application money is treated as receipt of consideration for issue of shares, it would result in multiple valuation dates as per the definition of valuation date in Rule 11U(j) since the share application money was received on different dates during the financial years 2010-11 to 2012-13 and it becomes impractical to arrive at the fair market value of the shares in such a situation. It was therefore contended that in the absence of specific

provisions in the Act/Rules with regard to computation, of FMV of unquoted equity shares at different valuation dates, the computation provisions fail and consequently, the charging provisions of section 56(2)(viib) cannot be enforced. This contention is found to be unacceptable in light of the factual finding already made earlier in this order that the entire share application money of Rs 313.63 crores has been received during the FY 2012-13 only and not in multiple financial years. In the light of the said factual finding, there is only one valuation date i.e., 30.03.2013 being the last day of receipt of share application money during the year.

45. It was also contended by the appellant that the provisions of section 56(2)(viib) cannot be invoked in the case of the appellant with regard to the share application money received from its own holding company keeping in view the object behind the insertion of the said section in the Act. It was stated that the memorandum to the Finance Act, 2012 classified the insertion of Section 56(2)(viib) under the heading '"measures to prevent generation and circulation of an unaccounted money" and based on the same, it was contended that since a transaction between the holding company and its wholly owned subsidiary company' cannot be equated with generation and circulation of unaccounted money, the provisions of section 56(2)(viib) cannot be invoked in the case of the appellant having regard to the intention of the legislature. This contention of the appellant is considered to be without merit. The language of the section does not exclude the applicability of the provisions of the section to transactions between a holding company and a subsidiary company. In the absence of any such express exclusion of such transactions from the scope of this section, it cannot be said that the transaction between a holding company and a subsidiary company are outside the purview of the provisions of this section. It has been held by the Hon'ble Karnataka High Court in the case of Patil Vijaykumar & Ors Vs Union of India 151 ITR 48 that when-the meaning of the words is clear and unambiguous, the court has to give effect to it whatever be the consequences, as the court has no jurisdiction to mitigate harsh consequences of the statute, if any. In the case of Tarulata Shyam & Ors Vs CIT

108 ITR 345, the Hon'ble Supreme Court held that once it is shown that the case of the assesses comes within the letter of law, he must be taxed however great the hardship may appear to the judicial mind. Hence, this contention of the appellant is considered to be unacceptable.

46. In view of the above, various contentions advanced by the appellant against the consideration of the share application money received during the year as the receipt of the consideration for issue of the shares and invoking the provisions of section 56(2)(viib) have been found to be unacceptable. At the same time, it is seen that the authorized share capital of the appellant company during the year under consideration is Rs 1.00 crore represented by 10 lakh shares having a face value of Rs 10 each. The issued, subscribed and paid up share capital during the year is Rs 6 lakh represented by 60,000 shares. Hence, the maximum number of shares for which the appellant could have invited the existing/prospective shareholders to the subscribe to the proposed issue of shares during the year is 9,40,000 shares. In view of this, the share application money received by the appellant computed at Rs 3,000 per share (at the terms at which shares were actually issued in the subsequent year) in respect of 9,40,000 shares which works out to Rs 282.00 crores only can be considered as the receipt towards consideration for issue of shares during the present assessment year. The balance share application money of Rs 31.63 crores has to considered as the receipt towards consideration for issue of shares in the subsequent AY 2014-15 when the authorized share capital has been increased to Rs 2.00 crores represented by 20 lakh shares having a face value of Rs 10 each.

47. In view of the detailed discussion in the preceding paragraphs, it is held that the share application money to the extent of Rs 282.00 crores received by the appellant during the year represents receipt of "consideration for Issue of shares" during the year for the purpose of the provisions of section 56(2)(viib) of the Act. Hence, the AOs action of invoking the provisions of section 56(2)(viib) for the instant AY 2013-14 is upheld to the extent of the share application money of Rs.282.00 crores, The fair market value of the share on the valuation date computed by the

AO at Rs NIL on the basis of the balance sheet as on 31.03.2012 is also upheld as per the discussion made earlier in this regard. Accordingly, the income to be assessed as Income from other sources as per the provisions of section 56(2)(viib) works out to Rs.282.00 crores being the excess of the aggregate consideration received for issue of shares over the fair market value of the shares.

48. As a result, ***the addition made by the AO u/s 56(2)(viib) is therefore upheld to the extent of Rs.282.00 crores out of the addition of Rs. 313,63,93,516/-,*** *As regards the balance amount of share application money of Rs. 31,13,63,93,516/- received during the year, the AO is directed to take necessary action as per the provisions of the law in AY 2014-15 for applying the provisions of section 56(2)(vii) of the Act. This ground is therefore* ***partly allowed.***

8. Now before us, the assessee has preferred the appeal by raising the following grounds of appeal as under:-

1(a) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the Id. AO in invoking the provisions of section 56(2)(viib) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") and thereby erred in making addition of Rs.282,00,00,000/- under the head "Income from Other Sources", for the reasons which are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made-there under.

1(b) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in invoking the provisions u/s 56(2)(viib) of the Act under the head "Income from Other Sources" by drawing an inference that terms of proposed issue of shares were finalised in Financial Year (FY) 2012-13 without appreciating that such terms were finalised only at the time of actual issue of shares in FY 2013-14 relevant to Assessment Year (AY) 2014-15 and the said sum received was always in the nature of advance against

equity from FY 2010-11 to FY 2012-13 as the unquoted equity shares were issued and allotted in FY 2013-14 relevant to AY 2014-15.

1(c) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in considering advance against equity as receipt of "consideration for issue of shares", for the reasons which are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

1(d) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding and confirming the action of Id. AO in adopting 30/03/2013 being last date of receipt of advance against equity as the valuation date and thereby considering the Balance Sheet drawn up as on 31/03/2012 (i.e., Balance Sheet drawn up immediately preceding the valuation date) for the purpose of determination of fair market value of unquoted equity shares under Rule 11U read with Rule 11UA(2) of the Income-tax Rules, 1962, for the reasons which are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

1(e) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of Id. AO in computing the Fair Market Value of the unquoted equity shares at Rs. Nil on the basis of Balance Sheet drawn up as on 31/03/2012.

1(f) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in drawing an inference that writing back of provision for diminution of investments in The Mobile Stores Ltd was made only for the purpose of enhancing the book value of the assets as on 31/03/2013.

1(g) On the facts and circumstances of the case and in law, the Ld. lower authorities erred in invoking the provisions of section 56(2)(viib) of the Act to transactions between the holding company and wholly owned subsidiary company (i.e., subsidiary company) without keeping in view the object behind insertion of the said section in the Act.

2 (a) Without prejudice to ground of appeal no. 1,the Ld. CIT(A) has erred in confirming the addition of Rs. 159,26,24,655/- being advance towards equity which was received, prior to 31st March, 2012, u/s 56(2)(viib) of the Act without appreciating that provisions of section 56(2)(viib) of the Act was inserted with effect from 1st April, 2013, relevant to AY 2013-14.

2(b) On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in considering Rs.159,26,24,655/- received by appellant company from Essar Investments Limited (EIL) during the FY 2010-11 and FY 2011-12 as unsecured loan without appreciating that it was always an advance against equity received in the said financial years and as such the reasons assigned for doing so are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in giving direction to Id. AO for taking necessary action towards balance amount of Rs. 31,63,93,516/- (inadvertently mentioned as Rs. 31,13,63,93,516/-) for applying the provisions of section 56(2)(viib) (inadvertently mentioned as section 56(2)(vii)) of the Act in AY 2014-15, for the reasons which are wrong and contrary to the facts and circumstances of the case, the provisions of Income Tax Act, 1961 and the Rules made there under.

The above grounds of appeal are independent of and without prejudice to each other.

The appellant craves leave to add, alter, amend and/or modify all or any of the above grounds of appeal on or before the date of hearing as may be advised.

9. At the outset, Ld. AR Shri Persi Pardiwala appearing on behalf of the assessee argued before us and submitted written submissions, which are as under:-

1. The assessee is an investment holding company. It was incorporated as a wholly owned subsidiary of Essar Investments Limited ('EIL'). Pursuant to the demerger of the investment and finance division of EIL to Imperial Consultants and Securities Private Limited ('ICSPL') with effect from 1st April 2010 (being the appointed date as per the scheme of demerger), the assessee became a wholly owned subsidiary of ICSPL. The assessee holds shares of various unlisted companies. One of such companies, which is a wholly owned subsidiary of the assessee, is The Mobile Stores Limited ('TMSL').

Transaction;-

2. The transaction which is the subject matter of the present appeal is the issue of 10,95,425 equity shares at a price of Rs. 3,000 per share to the assessee's holding company, ICSPL.

3. It may be useful to trace the history and the object behind this transaction before dwelling into its implications under the Income-tax Act, 1961 ('the Act')- Theassessee's subsidiary, TMSL, is engaged in the business of retailing and marketing of telecom products including mobile handsets and providing related services. TMSL incurred heavy losses in the initial years of its business with losses after tax running into Rs. 186.53 crores in the F.Y. 2008-09, Rs. 170.88 crores in the F.Y. 2009-10 and Rs. 200.15 crores in the F.Y. 2010-11 (details on page 202 of the paperbook).

Events upto the end of the F.Y. 2010-11;

4. Owing to the adverse financial position of TMSL, the assessee made a provision for diminution in the value of its investment in TMSL of Rs. 283,79,25,000. The reduction of the value of investment on account of the provision is disclosed in Schedule 5- Investments of the Audited Financial Statements of the assessee for the F.Y. 2010-11 (on page 80 of the paper-book).

5. The assessee, in order to support TMSL and thereby protect its investments decided that it was expedient to infuse funds into the entity. It was decided that the assessee

would issue shares to its holding company and invest the funds so received in TMSL by way of subscribing to its shares. In this regard, the then holding company of the assessee, i.e. EIL, passed a Board Resolution on 20th March, 2010 (on page 245 of the paperbook) resolving that it would provide financial assistance upto Rs. 200 crores to the assessee as advance towards share application money for subscription of equity shares of the assessee. To this end, a sum of Rs. 17.26 crores was advanced to the assessee in the F.Y. 2010-11 (details on page 247 of the paperbook). In this regard, attention is invited to schedule 9-Notes to accounts of Audited Financial Statements of the assessee for F.Y. 2010-11 (on page number 84 of the paperbook). The relevant part of the schedule is as follows-

"The Company has agreed to provide further assistance in the form of equity/quasi equity/debt to The Mobile Stores Ltd., subsidiary, to the extent of Rs. 240 cr. The funding of the same will be by issue of further equity to Essar Investments Ltd.. holding company."

Events in the F.Y. 2011-12:

6. Further sums aggregating Rs. 142 crores were advanced to the assessee by EIL in the F.Y. 2011-12 (details on page 178 of the paperbook).

7. Subsequently, the investment and finance division of EIL was demerged into ICSPL, which led to ICSPL becoming the holding company of the assessee. ICSPL then passed a Board Resolution on 30th March, 2012 (on page 246 of the paperbook) resolving to provide further financial assistance of upto Rs. 200 crores to the assessee as advance towards share application money for subscription of equity shares of the assessee.

Events in the F.Y. 2012-13;

8. In view of the above Board Resolution, another sum of Rs. 154.37 crores was advanced by ICSPL to the assessee in the financial year relevant to the present appeal, i.e. F.Y. 2012-13 (details on page 247 of the paperbook). These advances towards share capital are disclosed on the face of the balance sheet of the assessee for the F.Y. 2012-13 (on

page 38 of the paperbook). To the same effect, is a disclosure in Note 18 of Notes of Accounts of the Audited Financial Statements for the F.Y. 2012-13 (on page 46 of the paperbook), which is reproduced hereunder:

"During the year, Company has received advance against equity share from its holding company, Imperial Consultants & Sec. Pvt. Limited amounting to Rs. 1,543,768,861 (FY2O12 - Rs. 1,592,624,655) and total cumulative balance as at year end is Rs. 3,136,393,516. As per agreed terms, the advance received is non-refundable and the shares shall be allotted by March 2015. No interest is payable on the advance received against equity shares. The company is in process of finalizing the detailed terms and conditions including the number of shares proposed to be issued and the issue price."

Thus, it is evident from Note 18 of Notes to Accounts of the Audited Financial Statements of assessee for the F.Y. 2012-13 that the terms for proposed issue of unquoted equity shares were not finalized in the said year. Thus, the said sum was always in the nature of advance against equity upto F.Y. 2012-13.

9. Correspondingly, ICSPL also disclosed the advances as 'Advances to Related Parties (including advances for purchase of investments)' in Note 15- Short Term Loans & Advances of its Audited Financial Statements for F.Y. 2012-13 (on page 70 of the paperbook).

10. By the end of the F.Y. 2012-13, the financial position of TMSL had improved significantly. The losses after tax, which stood at Rs. 200.15 crores in F.Y. 2010-11 had reduced to Rs. 56.71 crores in this year. In view of the same, the assessee decided to write back the provision for diminution in the value of investments created in F.Y. 2010-11 in accordance with Accounting Standard-13. The same is disclosed in Note 8-Non Current Investments of the Audited Financial Statements of assessee for F.Y. 2012-13 (on page 43 of the paperbook). Moreover, the write back of provision for diminution in value of investments in TMSL of Rs. 283,79,25,0007- was substantiated through Business Performance presentation of TMSL (Page No. 191-201 of Paperbook) alongwith justification for write back of

provision made for diminution in value of investments (Page No. 202-203 of Paperbook) and Audited Financial Statements of TMSL for FY 2010-11 (Page No. 104-130 of Paperbook) and FY 2012-13 (Page No. 131-164 of Paperbook).

Events in the F.Y. 2013-14;

11. In F.Y. 2013-14, 10,95,425 equity shares were issued to ICSPL, at a price of Rs. 3,000 per share, for a total issue price of Rs. 328.63 crores. The Board of directors approved the issue of equity shares on right basis by way of Resolution dated 17th December, 2013 (on page 215 of the paperbook). The shareholders approved the said issue in EGM vide resolution dated 31st January, 2014 (on page 217 of the paperbook). Finally, the issue of shares on the above terms was approved by the Board of directors vide Resolution dated 7th March, 2014 (on page 219 of the paperbook). As required under section 75 of the Companies Act, 1956, a return of allotment in Form 2 was filed with the Registrar of Companies (on page 167 of the paperbook), which also discloses the date ofallotment to be 7th March, 2014. The details regarding the issue of shares are also disclosed in the assessee's Audited Financial Statements for F.Y. 2013-14. In this regard, reference may be made to Note 2 which provides details of share capital (on page 94 of the paperbook) and Note is(C) which provides details of related party transactions (on page 99 of the paperbook). Reference may also be made to Note 18 (on page 99 of the paperbook), the relevant extract of which is reproduced hereunder-

"During the year, Company has received advance against share capital from its holding company, Imperial Consultants & Securities Private Limited amounting to Rs. 23,50,00,000 (FY 2013- Rs. 1,543,768,861) and total cumulative balance as at year end is Rs. 8,50,00,000 (FY 2013- Rs. 3,136,393,516). The company has already issued equity shares against the Advance against Share capital amounting to Rs. 3,286,275,000 on 7th March, 2014. Subsequent to the year, allotment of equity shares having face value of Rs. 10 each has been made on 28 May, 2014."

Thus, from the above, it is evident that the terms as regards the pricing and number of shares to be allotted were finalized only at the time of the actual issue of the shares in the FY 2013-14.

12. In view of above stated facts, the relevant details regarding the receipt of advances from the holding company towards issue of shares, creation and the subsequent write back of provision for diminution in the value of investments (being the shares of TMSL) and the eventual issue of shares are tabulated hereunder-

F.Y.	***Advances received towards share capital (Rs.)***	***Provisionfor diminution in the value of investments created/* written *back (Rs.)***	***Issue of shares***
2010-11	**17.26 crores (from EIL)**	**283.79 crores (provision created)**	**-**
F.Y.	**Advances *received towards share capital (Rs.)***	***Provisionfor diminution in the value of investments created/* written *back (Rs.)***	***Issue of shares***
2011-12	**142 crores (from EIL)**	**-**	**-**
2O12-13	**154.37 crores (from ICSPL)**	**283.79 crores (provision written back)**	**-**
2013-14	**-**	**-**	**10,95,425 equity shares issued to ICSPL at a price of Rs. 3,000 per share**

Legal submissions-

13. In view of the above facts, three broad issues arise for consideration in the present appeal-

- Keeping in mind the object behind introducing section 56(2)(viib), i.e., to deter the generation and use of unaccounted money, can such provisions apply in the instant case of issue of shares by a wholly owned subsidiary to its holding company, especially where there is no allegation of generation or use of any unaccounted money?

- Which leg of the transaction will lead to the invocation of section 56(2)(viib) - the date of receipt of advances towards equity, the date of finalisation of terms of the issue or the date of issue of shares and consequently what would be the valuation date and balance sheet date for the purpose of Rule 11U read with Rule 11UA of the Income-tax Rules, 1962?

- Can the Assessing Officer ('AO') tinker with the value of assets for the purpose of Rule 11UA (2) which requires the adoption of 'book value of the assets in the balance sheet'?

The findings of the lower authorities qua each of the three issues and the assessee's submissions thereon are stated in the ensuing paragraphs.

I. <u>Object behind section 56(2)(viib);</u>

14. Section 56(2)(viib) was introduced vide the Finance Act, 2012 with effect from the A.Y. 2013-14 with an intent to deter the generation and use of unaccounted money. In this regard, reliance is placed on the Finance Minister's Budget Speech given at the time of introduction of the Finance Bill, 2012. Para 155 of the Budget Speech is reproduced-

'155. I propose a series of measures to deter the generation and use of unaccounted money. To this end, I propose-

Increasing the onus of proof on closely held companies for funds received from shareholders as well as taxing share premium in excess of fair market value."

15. Similarly, the Memorandum explaining the provisions of the Finance Bill, 2012 classified the amendment under the head 'Measures to prevent generation and circulation of unaccounted money'. Undisputedly, the object behind the introduction of the provision was to bring to tax only those cases of issue of shares where unaccounted income was sought to be introduced into the books in the guise of premium for issue of shares. This is further substantiated from the fact that this provision was introduced along with the introduction of the proviso to section 68 of the Act which places the onus on a company in explaining the nature and source of a sum credited in the books, which consists of share application money, share capital or share premium. Even the Finance Minister's Budget speech, referred to above, puts both the provisions in the same basket as measures to tackle introduction of unaccounted money into the system. It may be appreciated that the FinanceMinister's Budget speech, while moving-the Finance Bill is very crucial in interpreting the provision. Reliance in this regard is placed on the judgment of the Hon'ble Supreme Court in the case of KP Varghese vs. FTO (1981) (131 ITR 597), wherein it was held as under-

"Now it is true that the speeches made by the Members of the Legislature on the floor of the House when a Bill for enacting a statutory provision is being debated are inadmissible for the purpose of interpreting the statutory provision but the speech made by the mover of the Bill explaining the reason for the introduction of the Bill can certainly be referred to for the purpose of ascertaining the mischief sought to be remedied by the legislation and the object and purpose for which the legislation is enacted. This is in accord with the recent trend in juristic thought not only in western countries but also in India that interpretation of a statute being an exercise in the ascertainment of meaning, everything which is logically relevant should be admissible. In fact there are at least three decisions of this Court, one in Sole Trustee, Loka Shikshana Trust vs. CIT[1975] 101 ITR 234, the other in Indian Chamber of Commerce vs. CIT(1975) 101 ITR 796 and the third in Addl CIT vs. SuratArt Silk Cloth Manufacturers Association [1978]:121 ITR i where the speech made by the Finance Minister, while introducing

the exclusionary clause in section 2(15) of the Act, was relied upon but the Court for the purpose of ascertaining what was the reason for introducing that clause."

16. In addition to the above, there have been a series of decisions of the Tribunal, where the invocation of section 56(2)(viib) has been negated in view of the absence of any evidence to suggest that any unaccounted money was sought to be introduced in the transaction of issue of shares. In this regard, reliance is placed on the following decisions-

(i) In the case of Cinestaan Entertainment P. Ltd. vs. ITO (2019) (177 ITD 809) (Delhi) (para 27) (sr. no. 4 in the legal compilation), the Tribunal held that where nothing was brought on record to show that any kind of tax abuse or laundering of unaccounted money was being done, the provisions of section 56(2)(viib) could not be pressed into service.

(ii) In the case of DCIT vs. Pali Fabrics P. Ltd. (2019) (no taxmann.com 310) (Mum) (para 16) (sr. no. 14 in the legal compilation), the Tribunal noted that section 56(2)(viib) as well as the proviso to section 68 were introduced together so as to only deal with those cases where there was an allegation that any income from undisclosed sources was being introduced and where the assessee had failed to prove the genuineness of the transaction. In the absence of any such circumstance, the provisions of section 56(2)(viib) could not apply.

(iii)In the case of Rameshwaram Strong Glass Pvt, Ltd. vs. ITO (2018) (172 ITD 571) (Jpr) (para 4.5.6) (sr. no. 16 in the legal compilation), the Tribunal held that where shares were allotted to related persons, there was no scope of introduction of any unaccounted income through allotment at an unreasonably high price and, accordingly, the provisions of section 56(2)(viib) could not apply.

(iv) Dealing with the provisions of section 56(2)(vii) of the Act, the Tribunal in the case of ACIT vs. Subhodh Menon (2019) (175 ITD 449) (Mum) (para 17) (sr. no. 25 in the legal compilation), held that since the provisions were introduced as a counter evasion measure to prevent money

laundering of unaccounted income, it would not apply to bonafide business transactions.

17. In the instant case, it is an uncontroverted factual position that the shares were issued by the assessee to its holding company, ICSPL, and the funds obtained therefrom were infused into TMSL by way of subscribing to its shares in order to revive it from its adverse financial position. This was done in terms of the Board resolutions dated 2Oth March 2010 (EIL) and 30th March 2012 (ICSPL). Furthermore, since the money has simply flown from holding company to its subsidiary, it is not anybody's case and it cannot be that any unaccounted money has been laundered in the process. In any event, all the details, such as relevant ledger accounts, audited financial statements, board resolutions, return of allotment, valuation reports etc. are on record. Therefore, the genuineness of the entire transaction is beyond any shadow of doubt.

18. It may be further appreciated that the entire transaction, right from the receipt of advances to issue of shares, to the outward investment in TMSL is on capital account. At no stage in the entire transaction, has any income accrued or any unaccounted income come into existence. Moreover, no such allegations/doubts have been raised by the Department. Thus, the amount received was always on capital account and was not in the nature of revenue receipt. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of Siemens Public Communication Network P. Ltd. vs. CIT (2017) (390ITR i) (para 3) (sr. no. 22 in the legal compilation), wherein it was held as under-

"The above apart, the voluntary payments made by the parent Company to its loss making Indian company can also be understood to be payments made in order to protect the capital investment oftheAssessee Company. If that is so, we will have no hesitation to hold that the payments made to the Assessee Company by the parent Company for Assessment Years in question cannot be held to be revenue receipts."

19. In fact, the assesse had issued shares at premium to maintain low capital base so that servicing of share capital

is easy and better in future. This can be explained by the following example:

Particulars	*Amount (Rs.)*	*Amount (Rs.)*
Example l: Shares are not issued at premium		
1,000 equity shares of Rs. 10 each		*10,000*
Example 2: Shares are issued at premium		
500 equity shares of Rs. 10 each	*5,000*	
Add: Securities Premium (500 equity shares of Rs. 10 per share)	*5,ooo*	*10,000*

By referring to the above example, subsequently, if the company declares a dividend or issues bonus shares/ right shares, then, the company would have to declare dividend only on 500 equity shares instead of 1,000 equity shares. Accordingly, bykeeping a low capital base, the company would be able to serve its capital better and effectively.

20. In view of the above, it is submitted that the provisions of section 56(2)(viib) cannot apply to the instant transaction at the threshold as there is no benefit accruing or arising to shareholder or to the assessee under 100% shareholding structure since the rights of the shareholder and the obligations of the assessee have remained unchanged.

21. Accordingly, a transaction between holding company and its wholly owned subsidiary company cannot be equated with generation/circulation of unaccounted money. Therefore, having regard to the intention of Legislature in

the assessee's case, provisions of Section 56(2)(viib) of the Act cannot be invoked.

22. Such being the case, the subsequent issues as to the determination of the Valuation date' for the purpose of Rule 11U and Rule 11UA and the correctness of the assessee's valuation become academic. Be that as it may, the assessee's submissions on these aspects are stated hereunder.

II. Valuation date and balance sheet date for the purpose of Rule nU read with Rule 11UA-

23. At the outset, the relevant provisions of section 56(2)(viib) of the Act are reproduced hereunder-

"(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:

Explanation.—For the purposes of this clause,— (a) the fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher."

24. The question which is required to be answered is that at what stage of the transaction of issue of equity shares does the provision get triggered and, consequently, on which date, a comparison has to be made between the price at which the shares are issued and the fair market value of

the shares as per section 56(2)(viib) read with rules 11U and 11UA(2).

25. It is the case of the AO that the provisions of section 56(2)(viib) are triggered at the time of receipt of money towards the issue of shares and that the actual issue of shares is not relevant for invoking the section. In the present case, the advances towards the issue of shares were received in 25 tranches over a period of three years (from the F.Y. 2010-11 to F.Y. 2012-13), the last tranche being received on 30th March, 2013 (details on pages 248 to 250 of the paperbook). The AO considered this date of 30th March, 2013 to be the Valuation date' for the purpose of examining the provisions of section 56(2)(viib). Accordingly, in terms of rule 11U (b), the balance sheet of 31st March, 2012 was considered, being the last balance sheet drawn up prior to the valuation date. The AO opined that as on 31st March, 2012, the book value of the liabilities exceeded the book value of the assets for the purpose of valuation under rule 11UA (2), and, therefore, the fair market value of the shares was NIL. Accordingly, the entire receipt towards the issue of shares, i.e. Rs. 313.64 crores (17.26 crores received in the F.Y. 2010-11, Rs. 142 crores received in the F.Y. 2011-12 and Rs. 154.37 crores received in the F.Y. 2012-13) was added as the income of the assessee under section 56(2)(viib) of the Act.

26. On appeal, the CIT(A) observed that the receipt alone will not trigger the provisions of section 56(2)(viib) of the Act. It is only when the receipt is attributed towards the consideration for issue of shares will the section apply. The CIT(A) was of the opinion that the receipt takes the colour of consideration upon the finalisation of the terms of issue of shares. The CIT(A) was of the opinion that the terms of the issue must have been finalised in the F.Y. 2012-13, i.e., the previous year relevant to the present assessment year. In holding so, the CIT(A) brushed aside the assessee's Board resolutions and the financial statements of the subsequent year which stated that the terms were in fact finalised in the F.Y. 2013-14. The CIT(A) was of the opinion that these are self-serving documents and ought to be ignored.

27. It may be appreciated that the AO's contention of adopting the date of receipt of money as the triggering event for the purpose of section 56(2)(viib) has been rejected by the CIT(A) as the CIT(A) has held that the date of finalisation of the terms is the relevant event. The Department has not challenged the order of the CIT(A). It is, therefore, submitted that the Hon'ble Bench has to settle the above dispute as arising between the two surviving contentions- the assessee's contention of the date of allotment being the relevant date or the CIT(A)'s contention of the date of finalisation of the terms being the relevant date and, even assuming, it is the latter, what must be regarded as the date of finalisation of the terms having regard to evidence on record.

28. Contrary to the stands of the AO and the CIT(A), it is the assessee's assertion that the event which triggers the applicability of section 56(2)(viib), subject to other arguments, is the issue/allotment of shares. It is at such a stage that the share application money (if any, received hitherto) becomes the consideration for the issue of shares. Attention is invited to the Explanation to section 56(2)(viib), which provides the method of determining the fair market value of shares. It may be noted that under the Explanation, there can be two different values (under (a)(i) and (a)(ii) respectively) and the higher of the two values is to be considered as the fair market value of shares. The first value, under Explanation (a)(i), refers to the valuation under the prescribed method, i.e. under rule 11UA(2) and the second value, under Explanation (a)(ii), refers to the value calculated including the value of intangible assets on the date of issue of shares. It may be appreciated that since the Explanation requires the adoption of higher of the two values and the second value is explicitly required to be calculated on the date of issue of shares, it follows that the first value, i.e., under rule 11UA(2) will also have to be undertaken on the same date since it is necessary that the two values being compared be of the same date. Adopting the first value on any other date would make the provision unworkable.

29. It may further be appreciated that adopting the value as on the date of receipt of money (as suggested by the AO)

or the date of finalisation of the terms (as suggested by the CIT(A)) would lead to absurd results. It is very much possible that inspite of receipt of share application money or finalisation of the terms, the shares may eventually be never issued. This could be for several reasons. For instance, the concerned authorities under Company law or SEBI may not sanction the share issue, or there might not be sufficient authorised capital or the issuer company may get dissolved. In such an eventuality, if the date of receipt of share application money or the date of finalisation of terms is adopted as the triggering event, it would mean that an addition is made under section 56(2)(viib) without an actual eventual issue of shares, which is strictly against the mandate of the section. As a matter of fact, in the present case, such an absurdity has presented itself. Since, in the relevant previous year, there wasn't sufficient authorised share capital, the CIT(A) has artificially split the section and spread its effect over two years. To the extent of availability of authorised share capital in this year, an addition of Rs. 282 crores has been confirmed in this year and addition to the extent of the balance authorised share capital of Rs. 31.63 crores has been directed to be considered in the next year. It is submitted that the section does not provide for such an artificial split, which in itself shows that the conclusion of the CIT(A) is wrong and leads to manifestly absurd results.

30. It may also be noted that if the date of receipt of share application money is adopted as the triggering event, then, there would be numerous valuation dates (on every date of receipt). This could mean that for the same share issue transaction, on some valuation dates, the fair market value could be less than the issue price leading to the applicability of the provision, while on some other valuation dates, the fair market value could be in excess of the issue price, which would not invite the applicability of the provision. This again shows the incongruity of the department's assertion.

31. It is submitted that paying of share application money is only an offer to subscribe to the shares by the payer. It is only after the event of allotment is completed, the shares come into being and the rights of a shareholder in the

company accrue. Therefore, the acceptance of the offer by way of allotment of shares results in the conclusion of an enforceable contract. In this regard, reliance is placed on the following-

(i) In the case of Sri Gopal Jalan & Co. vs. Calcutta Stock Exchange Association Limited (1963) (33 Comp Case 862) (SC) (sr. no. 24 in the legal compilation), the Hon'ble Supreme Court delineated the entire process of allotment of shares in the following words-

"What is termed 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares. To take the common case, the offer is to take a certain number of shares, or such a less number of shares as may be allotted. That offer is accepted by the allotment either of the total number mentioned in me offer or a less number, to be taken by the person who made the offer. This constitutes a binding contract to take that number according to the offer and acceptance...

So Farwell L. J. said in Mostly v. Koffufontein Mines Lid. [1911] 1 Ch. 73 84 "As regards the construction of these particular articles it is plain that the words 'creation', 'issue', and 'allotment' are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital: first, it is created: till it is created the capital does not exist at all. When it is created in may remain unissued for years, as indeed it was here ; the market did not allow of a favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in Spitzel v. Chinese Corporation, [1899] 80 LT. 347, he says : What is an allotment of shares? Broadly speaking, it is an appropriation by the directors or the managing body of the company of shares to a particular person...

It is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in company law allotment means the appropriation out of the previously unappropriated capital of a company of a certain number

of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence. "

(ii) The Hon'ble Bombay High Court in the case of Sesa Goa Ltd. vs. State of Maharashtra (2008) (WP no. 254 0/2008) held as under-

"In the present case, the question of misappropriation of the amount which was paid towards the purchase of shares of SIL does not arise as once shares were allotted to the Respondent the monies became the property of the Company over which she had no right. As already observed there was no entrustment of the property nor was there entrustment of any dominion over the property. Once the shares are allotted the money paid for the purchase of the shares becomes part of the assets/property of the Company. The only interest that a shareholder could have is to the dividend in respect of his shareholding, the right to attend meetings of the shareholders and to vote at such meetings."

(iii) Reliance is also placed on the following extracts from the authoritative commentary on company law- Palmer's Company Law. In para 22.01 (on page 5 of the legal compilation), it is observed- "An application is an offer by the applicant and, like any other offer to make a simple contract, may, subject to what is said below in connection with an application pursuant to a prospectus issued generally, be revoked at any time before acceptance." Similarly, in para 22.08 (on page 9 of the legal compilation), it is observed- "While the application for shares is normally an offer to take the shares, acceptance is achieved by allotment notified to the applicant." Reference may also be made to para 49.05 of the commentary (on page 21 of the legal compilation)- "A applies to the company for an allotment of a specified number of shares, and agrees to accept the same or any less number that may be allotted to him. In response to this application, the directors resolve that a specified number of shares be allotted to him, and notice of such allotment is given to him. This constitutes the agreement, and his name should at once be entered on the register."

(iv) Attention is also invited to the following decisions of the Tribunal, wherein, while dealing with the applicability of section 14A read with Rule 8D, it has been held that share application money cannot be considered as an investment because till the time the share application money is converted into shares, the applicant does not have any rights of a shareholder-

- *ITO vs. LGW Ltd. (2015) (174 TTJ 553) (Kol) (para 6) (sr. no. 9 in the legal compilation)*

- *MSA Securities Services P. Ltd. vs. ACIT (2013) (58 SOT 44) (Chennai) (para 12) (sr. no. 12 in the legal compilation)*

- *Rainy Investments P. Ltd. vs. ACIT (2013) (56 SOT 61) (Mum) (para 4) (sr. no. 15 in the legal compilation)*

32. It may be observed that when the section uses the expression- "any consideration for issue of shares that exceeds the face value of such shares", what it seeks to cover is the amount of share premium on the issue of shares. It may be noted that share premium arises only on issue of shares and not prior to it. In this regard, reliance is placed on section 78 of the Companies Act, 1956, which reads as under-

"78. Application of premiums received on issue of shares-

(i) Where a company issues shares at a premium, whether for cash or otherwise, a sum equal to the aggregate amount or value of the premiums on those shares shall be transferred to an account, to be called "the i[securities] premium account"

33. It may be noted that there are at least two decisions of the Tribunal, which have dealt with this very issue and it has been held that it is the date of issue of shares, which triggers the provisions of section s6(2)(viib) and the valuation date has to be determined accordingly. Attention's invited to a recent decision of the Bangalore Tribunal in the case of Taaq Music Pvt. Ltd. vs. ITO (2020) (ITA i6i/Bang/2o) (para 5) (sr. no. 32 in the legal compilation), wherein it was held as under:

"We find that though the expression used in Sec.56(2)(viib) of the Act is "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", those words are followed by the words "for issue of shares". The relevant point of time at which consideration received as "share application money pending allotment" becomes "consideration for issue of shares", when shares are allotted/issued to the share applicant. It is only on such act of allotment that the consideration received as share application money becomes consideration for issue of shares. Admittedly, shares were issued in the previous year relevant to AY 2013-14 and therefore the provisions of Sec.56(2)(viib) stood attracted in the present case. The above conclusion is also fortified by the definition of "fair market value" for the purpose of Sec.56(2)(viib) given in Explanation (a)(ii) to Sec. 56(2)((viib) which provides that the fair market value of the shares shall be the value 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. We, therefore, uphold the order of the revenue authorities on this aspect of applicability of Sec.56(2)(viib) to AY 2013-14 in the facts and circumstances of the case. We may also add that the law is well settled that in the matter of determination of total income, the law as it exists on the 1st day of the previous year is applicable and therefore the provisions ofSec.56(2)(viib) of the Act applies to AY 2013-14."

34. To the same effect is the decision of the Hon'ble Delhi Tribunal in the case of Cimex Land and Housing P. Ltd. vs. ITO (2019) (104 taxmann.com 240) (sr. no. 3 in the legal compilation), wherein it was held as under:

"10.1 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.os 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 it 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.

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. 7QQ per share needs to be examined during the year under consideration only."

35. It may be noted that in both the aforesaid decisions, it was the stand of the revenue that the provisions of the section apply in the year in which allotment of the shares takes place and the same was accepted. It is submitted that having adopted such contention, which enabled them to bring to tax a sum under section 56(2)(viib) even though the amounts were received prior to the introduction of the provision, it would not be open to the revenue to urge to the contrary as it is not open to a party to approbate and reprobate.

36. It is submitted that if some amount is received but the underlying substantive event has not taken place, the receipt will assume the character of a liability. Once the underlying event happens, the liability will get converted into income and in the present case consideration. Till that time, it will continue as a liability despite the fact that it was received. The accrual and receipt of income can happen at the same time or the accrual can precede the receipt of income but in no case, the accrual can be said to be later than the receipt. The word 'accrual' is used in contradistinction to the word 'receipt' and indicates a right to receive. It represents a stage anterior to thepoint of time when the income becomes receivable and connotes a

character of income which is more or less inchoate and which is something less than receipt. The assessee should have acquired a right to receive payment though the receipt may take place later (debitum in praesenti, solvendum in future). There can be no accrual if the right to receive is not perfect or is in doubt or in jeopardy. Reference in this regard is made to the following judgments-

- *Karur Vysya Bank Ltd. vs. ACIT (2020) (120 taxmann.com 331) (Mad) (para 16)*

- *Dalmia Dairy Industries Ltd. vs. ITO (1986) (19ITD 61) (Delhi) (para 18)*

- *Associated Law Advisors vs. ITO (2017) (167 ITD 695) (Delhi) (para 11)*

- *BR Sundaram (Deed.) vs. CIT(i978) (117ITR 960) (Mad) (para 3)*

37. Attention is also invited to the provisions of section 56(2)(ix), which uses similar language.

"(ix) any sum of money received as an advance or otherwise in the course of negotiations for transfer of a capital asset, if,—

(a) such sum is forfeited; and

(b) the negotiations do not result in transfer of such capital asset;"

In the context of this provision also, it has been held by the Tribunal that what invokes the section is not the receipt of money, but the substantive event, i.e., the forfeiture. In this regard, reference is made to the decision of the Hon'ble Delhi Tribunal in the case of RS Triveni Foods Pvt. Ltd. vs. ITO (2019) (ITA 739/Del/i9) (para 13) (sr. no. 17 in the legal compilation), wherein it was held as under-

"13. In so far as the argument of the Ld. Counsel that the provision of section 56(2)(ix) would not be applicable on the facts of the present case because the said section has come w.e.f. 1.4.2015 and assessee has not received any sum or advance in this year, therefore, this provision would

not be applicable. We are unable to subscribe to such an argument, because the deeming provision is attracted in the event when any sum is forfeited out of any sum and money received as advance or otherwise in the course of negotiations for the transfer of a capital asset. Here the factum of forfeiture of the FCDs has taken place in this year; therefore, taxability qua the forfeiture amount has to be seen in this year. Such an argument of the Ld. Counsel, in our opinion, is untenable."

38. In view of the above position, it is submitted that the relevant date for the purpose of section 56(2)(viib) is the date of allotment of shares. In the present case, the shares have been allotted on 7th March, 2014 as is borne out from Form 2 (on page 167 of the paperbook) and the Board Resolution of the same date (on page 219 of the paperbook). The fact that the shares were allotted in the F.Y. 2013-14 has also been accepted by the AO as well as the CIT(A). In this regard, reference may be made to para 5.4.3 of the AO's order- "From the facts, it is established that assessee has issued share on premium (though in next year)..." and para 7 of the order of the CIT(A)- "The AO observed that the appellant issued 10,95,425 equity shares of face value of Rs. 10/- per share at a premium ofRs. 2,990/- per share to ICSPL during the subsequent financial year 2013-14 relevant to AY 2014-15."

39. Applying rule 11UA(2) read with rule 11U (b) to the above face pattern, it would follow that the balance sheet as on 31st March. 2013 will have to be considered for the purpose of valuation, being the last drawn balance sheet prior to the valuation date of 7th March. 2014.

40. In any event, the Department's assertion that the balance sheet as on 31st March, 2012 should be considered, is not capable of being given effect as rule 11UA(2) was not on the statute at such point of time. The rule was introduced subsequently on 29th November, 2012. There is nothing in the rule which allows for its retrospective application. Such being the position, the case of the AO has no legs to stand on.

41. There is another way of examining this situation. It is the department's case that the last date of receipt of money,

being 30th March, 2013, should be considered as the valuation date and, accordingly, the last drawn balance sheet as on 31st March, 2012 should be adopted for the purpose of valuation. It is submitted that even if one were to accept the department's contention that 30 March, 2013 should be considered as the valuation date, still, the balance sheet closest to the valuation date should be considered, i.e., the balance sheet as on 31st March, 2013, which is a day apart and not an year old balance sheet as on 31st March, 2012. This is because it is impracticable and impossible to expect a company to get its accounts audited on each date when there is a receipt of the sum of money. In this regard, reliance is placed on the judgment of the Hon'ble Supreme Court in the case of S. Viji vs. Commissioner of Gift-tax (1998) (229 ITR 421) (sr. no. 19 in the legal compilation). In this case, the Hon'ble Supreme Court was dealing with the provisions of section 6 of the Gift-tax Act, 1958. The relevant rule, i.e. rule 5 of the Gift-tax Rules is on page 452 of the legal compilation. In this regard, the Explanation to rule 5 provides as under-

"Explanation- For the purpose of this rule, "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 date on which the gift was made and, where there is no such balance sheet, the balance sheet drawn up on a date immediately preceding that date, and, in the absence of both, the balance sheet drawn up on a date immediately after the date on which the gift was made."

Therefore, the language of the rule is materially similar to the language of rule 11U(b) of the Income-tax Rules, 1962.

In this background, the Hon'ble Supreme Court held that where the gift was made on 28th March, 1973, the balance sheet of 31st March, 1973 would give a much more realistic picture than the balance sheet of 31st March, 1972. In this regard, the following observations of the Hon'ble Supreme Court are noteworthy-

"The GTO has to find out the correct value of the shares as on the date of the gift. The gift was made only three days before the financial year ending on 31-3-1973- The

balance sheet as on 31-3-1973 will give a more realistic picture of the value of the assets of the company than the balance sheet as on 31-3-1972. Therefore, for calculating the break-up value of the shares, the balance sheet figures as on 31-3-1973 would be more relevant. The contention made on behalf of the assessee, if upheld, would lead to an absurd result. If the gift was made on 28-3-1973, the value will have to be computed in accordance with the balance sheet figures as on 31-3-1972. But if the gift was made three days later on 31-3-1973, the valuation made on the basis of balance sheet as on 31-3-1973 may be much higher even though there is no change in the value of the assets of the company between 28-3-1973 and 31-3-1973. There is no justification for coming to this conclusion. The break-up value method is adopted to find out the correct value of the shares on the date of the gift. The figures of the balance sheet of the year ended on 31-3-1973 will give a more realistic picture of the value of the assets of the company than the figures as on 31-3-1972."

42. Applying the above ratio to the facts of the present case, it ought to be held that even if the Department's contention of taking valuation date as 30 March, 2013 is accepted, the balance sheet to be adopted for the purpose of Rule 11U(b) read with Rule 11UA (2) would be the balance sheet drawn up on 31st March, 2013, being the closest date. It is reiterated that this submission is without prejudice to the primary submission of the assessee that the valuation date should be the date of allotment of shares, i.e., 7th March, 2014 and accordingly, the balance sheet date, being the last drawn balance sheet should be 31st March, 2013, on which date the fair market value under Rule 11UA (2) was Rs. 3,299.16 per share. Such value, being in excess of the issue price of Rs. 3,000 per share, there cannot be adverse action under section 56(2)(viib). It may also be noted that the fair market value as on 31st March, 2014 is also Rs. 3,000 per share. Accordingly, similar consequences will follow if either of the two balance sheets are adopted for the purpose of valuation.*

43. It is reiterated that the assessee has submitted ample evidence in the form of Board Resolutions and notes to financial statements which unequivocally state that the

terms of the issue were finalised in the F.Y. 2013-14. Therefore, even if the assertion of the CIT(A) for accepting the year of finalisation to be the relevant year for section 56(2)(viib) was accepted, the event would fall within the financial year 2013-14 and the relevant balance sheet date would still be 31st March, 2013. The finding of the CIT(A) that the terms must have been finalised in the F.Y. 2012-13 is only an assumption, not backed by an iota of evidence. It is evident from Note 18 of Notes to Accounts of Audited Financial Statements of assessee for FY 2012-13 that the terms for the proposed issue of unquoted equity shares were not finalized in the said year. It will be appreciated that the terms as regard the pricing and number of shares were finalized only at the time of actual issue of shares in FY 2013-14. Thus, the said sum was always in the nature of advance against equity upto FY 2012-13. Apart from making a bald statement that the documentation filed by the assessee evidencing the fact of the terms being finalised in the F.Y. 2013-14 are self serving documents, the CIT(A) has not given any reason for reaching this conclusion. It is submitted that if a party brings on record certified evidence, which has been accepted by the concerned authorities, it cannot be brushed aside and ignored as being self-serving evidence unless there is some contrary material to suggest that the substance of the evidence is incorrect or was not acted upon.

III. ***Valuation of the assets for the purpose of Rule 11UA (2)***

44. As mentioned earlier, in the F.Y. 2010-11, the assessee had created a provision for diminution in the value of its investments, being the shares of its subsidiary-TMSL. In view of such provision, the effective book value of the investment in TMSL had become NIL as on the financial year ended on 31.03.2011. Owing to the improvement in the financial position of TMSL in the F.Y. 2012-13, the assessee, following Accounting Standard-13, decided to reverse the provision. In view of the reversal of the provision, the value of the investment in TMSL stood restored to Rs. 283,79,25,000.

45. It is the case of the Department that the turnaround in the financial position of TMSL was not enough to justify a write back of the provision in the F.Y. 2012-13. Accordingly, it has been contended that the write back should be ignored and the value of investments should be considered NIL for the purpose of calculating the fair market value under rule 11UA(2).

46. The relevant portion of rule 11UA(2) is extracted hereunder:

"(2) Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (i), the fair market value of unquoted equity shares for the purposes of sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), at

the option of the assessee, namely:—

(a) the fair market value of unquoted equity shares = (A-L) x (PV)/(PE)

where,

A = book value of the assets in the balance-sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance-sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

L = book value of liabilities shown in the balance-sheet..."

47. At the outset it may be observed, that the rule requires adoption of the book value of the assets in the balance sheet. It does not permit the assessee or the department to substitute any other value with such book value. It is submitted that in view of the clear mandate of the rule, the action of the AO in ignoring the book value of the assessee's investments, such books having been audited

without qualification, and substituting such value with a perceived fair value is unfounded and beyond the prescription of the rule.

48. In this regard, reliance is placed on the judgment of the Hon'ble Bombay High Court in the case of Commissioner of Wealth-tax vs. GMAbhayankar (1995) (214ITR 269) (sr. no. 5 in the legal compilation). In this case, the High Court was dealing with rule ID of the Wealth-tax Rules, 1957. The relevant portion of the rule provided- "The value of all the liabilities as shown in the balance sheet of such company shall be deducted from the value of all its assets shown in that balance sheet." The High Court held that what has to be considered is only the book value of the assets in the balance sheet and adopting any other value would be against the mandate of the rule. It is submitted that the language of rule 1D is similar to the language of rule 11UA (2).

49. Reliance is also placed on the judgment of the Hon'ble Supreme Court in the case of Apollo Tyres Ltd. vs. CIT (2002) (255 ITR 273) (sr. no. 1 in the legal compilation), wherein it has been held that the values shown in the balance sheet, prepared in accordance with the relevant provisions of the Companies Act, and audited as such, are binding on the Department. Although the Supreme Court was dealing with the provisions of section 115J of the Act, the ratio would apply with equal force to any other provision requiring the adoption of the values of a balance sheet.

50. Lastly, reliance is placed on the following decisions, wherein the different benches of the Tribunal, while dealing with the provisions of rule 11UA(2) itself, have held that there is no room for substituting the book value of the assets with any other value-

- *Minda SM Technocast P. Ltd. vs. ACIT (2018) (170 ITD 12) (Delhi) (para 6.4) (sr. no. 11 in the legal compilation)*

- *Smiti Holding & Trading Co. P. Ltd. vs. PCIT (2018) (99 taxmanm.com 157) (Mum) (para 6.2) (sr. nq. 23 in the legal compilation)*

• *Cinestaan Entertainment P. Ltd. vs. ITO (2019) (177 ITD 809) (Delhi) (para 31) (sr. no. 4 in the legal compilation)*

51. It may also be useful to refer to the provisions of rule 11UA(i), which provides the valuation mechanism for the other provisions of section 56(2), i.e. other than section 56(2)(viib). In this regard, rule 11UA(i)(c)(b), after its amendment by the Income-tax (Twentieth Amendment) Rules, 2017, w.e.f. 1-4-2018, permits the substitution of book value of some of the assets with the fair market value. The relevant portion of the amended rule is reproduced-

"(b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely:—

the fair market value of unquoted equity shares =(A+B+C+D - L)x (PV)/(PE), where,

A= book value of all the assets (other than jewellery, artistic work, shares. securities and immovable property) in the balance-sheet as reduced by,— (i) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any; and

(ii) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

B = the price which the jewellery and artistic work would fetch if sold in the open market on the basis of the valuation report obtained from a registered valuer;

C =fair market value of shares and securities as determined in the manner provided in this rule:

D = the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of the immovable property;

L= book value of liabilities shown in the balance sheet

52. Therefore, it is submitted that the provisions of rule 11UA(2) [relevant for valuation for the purpose of section

56(2)(viib)] seen in contrast with the provisions of rule 11 UA(i) [relevant for valuation for the purposes of other provisions of section 56(2)] leaves no room for doubt that for the purpose of sub-rule (2), only the book values in the balance sheet can be considered. Adopting any other value, as has been done by the AO in the present case, falls foul of the clear mandate of the rule. Accordingly, the book value of the assessee's investments in TMSL of Rs. 283,79,25,000 must be adopted for the purpose of valuation under rule 11UA(2).

53. Without prejudice to the above, it is submitted that the assessee had in any event justified the correctness of its action of reversing the provision for diminution. In this regard, reference may be made to the 'Business Performance Presentation' of TMSL, wherein it was explained in great detail as to how the profitability of TMSL had improved significantly and that how it was expected to improve even further in the subsequent years. It was also pointed out to the AO that the EBIDTA of TMSL had improved from a loss of Rs. 102.18 crores in the F.Y. 2010-11 (when the provision was created) (on page 202 of paperbook) to a loss of Rs. 15.04 crores in the F.Y. 2012-13 (when the provision was reversed) (on page 145 of paperbook), which shows an improvement of 85%. Similarly, the Loss after tax had also improved from Rs. 200.15 crores in the F.Y. 2010-11 to Rs. 56.71 crores in the F.Y. 2012-13, an improvement of 72%. This fact is also evident from Para 9 of the Director's Report of the appellant company for FY 2012-13 (Page No. 32 of Paperbook), wherein it was mentioned that in the light of prospective turnaround in the business of TMSL, theprovision of diminution in value of investment has been written back during the year under consideration

54. Further, the very fact that the assessee continued to infuse funds into TMSL shows that it was in the process of a financial recovery and there was enough commercial justification to write back the provision. In any event, it is a settled legal position that the Department cannot stand in the shoes of an assessee and doubt its commercial wisdom.

55. In view of the above, it is submitted that the action of the AO in ignoring the write back of the provision and taking the value of investment in TMSL at NIL as opposed to the book value of Rs. 283,79,25,000 is in gross violation of the law and ought to be struck down. Thus, in light of undisputed fact that ***the shares were issued and allotted in FY2013-14 and since the consideration (Rs. 3,000 per share) does not exceed the FMV (Rs. 3,299.16 per share) of unquoted equity shares, supported by*** *the valuation report dated 3.12.2013, determined on basis of book value of assets and liabilities as shown in audited Balance Sheet as on 31st March 2013,* ***the provisions of section 56(2)(viib) of the Act cannot be appliedfor the assessment year under consideration.***

Alternate submissions-

56. In the alternate and without prejudice to any of the above, it is submitted that even if an addition is to be sustained in the subject assessment year, the advances received in the preceding financial years (Rs. 17.26 crores received in the F.Y. 2010-11 and Rs. 142 crores received in the F.Y. 2011-12) cannot be brought to tax as these were received prior to the conception of section 56(2)(viib), which was introduced by the Finance Act, 2012 with effect from 1st April, 2013. The Department's assertion in this regard that even though the money was received in the preceding years, it was 'received as share application money' in this year is completely misconceived. Once a sum of money has been received in an earlier year, it cannot be said that it is received again in a later year.

57 Without prejudice to the primary submissions of the assessee, it is urged that the action of the CIT(A) in directing the AO to take necessary action in the next assessment year with respect to the addition not sustained in this year, i.e. to the extent of Rs. 31.64 crores, is completely unfounded. There is nothing in section 56(2)(viib), which permits such an artificial splitting and spreading of the section over multiple years. As a matter of fact, this conclusion of the CIT(A) reached in view of the fact that there wasn't enough authorised share capital in this year is itself proof of the fact that the

entire basis of making the addition, prior to the actual issue of shares is unworkable.

10. On the other hand, Ld. DR submitted written submissions, which are as under:-

1. The basic issues emanating from the AO's order as well as CIT(A) order in the captioned case are .

i. Whether the provisions of section 56(2)(viib) of the Income Tax Act,1961 are attracted in this case or not?

ii. If it is attracted whether the same applicable for the year under consideration or not ?The amounts received during earlier Asst. Years 2011-12 and 2012-13 be considered as consideration received in this year or not?

iii. The year of Consideration of issue of shares is in AY 2014-15 or AY 2013-14?

iv. What is the quantum to be considered for the purpose of section 56(2)(viib) for the A.Y.2013-14.

2. The primary question has to be analysed as per Income Tax Act,1961 as to whether the provisions of section 56(2)(viib) are attracted in this case or not?. To ascertain this issue vis a vis the provisions of the relevant section 56(2)(viib) is reproduced hereunder:

Section 56 (2) (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:

Explanation. – For the purposes of this clause,—

(a) the fair market value of the shares shall be the value—

(i) as may be determined in accordance with such method as may be prescribed; or

(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature, whichever is higher.

***3 (3.1) This Section 56(2)(viib)** of the Income Tax Act,1961 was introduced in the Finance Act 2012 which requires a Company (issuer), not being a company in which the public are substantially interested, to issue shares at Fair Market Value (FMV). Any consideration received by such issuing Company **in excess of the FMV**, to the extent it exceeds the face value of such shall be liable to tax.*

*For the purpose of this section, FMV shall be the value, **Higher** of the following:*

(a) as may be determined in accordance with such methods as may be prescribed(Methods prescribed under Rule 11UA are Book value Method (NAV) and Discounted Cash flow method); or

(b) 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…..

3.2 Here the appellant is a corporate entity in which public are not substantially interested. Therefore, primarily the said appellant fits into this section. Appellant had

received consideration for issue of shares from a resident in the previous year . The consideration received was fairly in excess of FMV , therefore from literal interpretation of the Act and the relevant section 56(2)(viib) appellant's case fits into all the conditions as stipulated by the Act for the consideration to tax the excess portion.

3.3 In this regard, the attention of the Hon'ble bench is invited to the relevant paragraphs of CIT(A)'s order. Paragraph No 31 of the CIT(A) order reproduced the statutory provision of sec.56(2)(viib) and in para no. 32 it was brought out to the fact that how the section is applicable to the appellant's case. CIT(A) brought out the fact that the appellant ***not being a corporate entity in which public are substantially interested . It had received from a resident in the previous year for any consideration for issue of shares which exceeds the face value of such shares.*** *Further clarity on this aspect has been brought out and highlighted by CIT(A)'s order in para 33 and 34 that the amount of Rs.313.63 Crores received in the previous year and the same is represents"* ***Consideration for issue of shares".***

3.4 In the light of the above facts, the primary question as to whether the provisions of section 56(2)(viib) are attracted in this case or not is answered as YES.

4. Since the answer for the primary question is positive on the applicability of the relevant section, now it is imperative to look into the second question whether the same is applicable for the year under consideration or not?. As seen from the balance sheet of the appellant as on 31/03/2013 , it was shown as Rs.313.63 crores as ***"Advance against share capital".*** *The important factual aspect here to mention before the Hon'ble bench's consideration is that absolutely* ***no amount was shown under the above head in the balance sheet of the appellant as on 31/03/2012.*** *Since no amount was there in the same head earlier and the entire amount has been flown into appellant's accounts in this previous year, the plain fact emerges from these accounts is that entire amount of Rs.313.63 has come into the accounts as share capital in this year only. CIT(A) has rightly brought out*

the facts on analysis of the accounts in the AY.2013-14 . Whereas as on 31/03/2011 and as on 31/03/2012 ,no amount has been shown as "advance against share capital".It is also pointed out from the relevant extracts of the accounts that the amount of Rs.17.26 crores and Rs.142 crores in the respective F. years 2010-11 and 2011-12, it was recorded in the books as " Loans received from Essar Investment Ltd(EIL). This clarifies that the said amounts are only loans and advances and ***not as advance paid against share capital****. CIT(A) has depicted the flow of the event in a systematic manner and the nature of such funds flown into the accounts of the appellant in para no 25, 26,27,28 and 29. From these facts, it clarifies that the funds reflected in the appellant's balance sheets for the F.Y.2010-11 and 2011-12 are only loans and advances and not by any stretch of imagination be* ***"advances for share Capital".***

4.1 As emerged facts from AO's order and CIT(A)'s order in the relevant paragraphs about sec.56(2)(viib) and its applicability in the appellant's case is undoubtedly for the previous year relevant to the AY.2013-14.

5. Now the main aspect of the appellant's contention that since shares have been alloted during the AY 2014-15 relevant to the FY 2013-14 and therefore the provisions of section 56(2)(viib) would applicable for AY 2014-15 only. It is glaringly clear that all the terms of the proposed issue of shares are determined and communicated to the persons to whom invitation is made by a company to apply for shares and to pay the share application money. In appellant invitation for issue of shares itself the terms would be finalised and upon such offer , persons would apply for issue of such shares. It means such an invitation precedes the receipts of share application money either from existing or prospective shareholders. Investors analyses such terms well in advance ,then only investors will enter into such investments. Any investor's investment depends unless it proves to be prudent and beneficial to them. This proves that since the terms are finalised before investment and upon satisfaction of such offer or invitation itself , investors have come forward and made such investments. All these events occurred in the relevant

previous year i.e. FY.2012-13. Further CIT(A) had brought the facts that the appellant 's notes of accounts to mandatory disclosures at instruction appearing at serial No.6G in respect of application money received for allotment of securities falling under" Other current liabilities" in the balance sheet mentions the conditions for issue of shares, premium etc. All the relevant statutory provisions strictly to be adhered and procedure to be followed as per schedule VI to the Companies Act,1956 notified by the Ministry vide notification No. SO447€ dated 28.02.2011 are analysed by CIT(A) in para No 37 of the captioned order. Paragraphs 37, 38 39 ,40and 41 of CIT(A)'s order brings that how important for any corporate entity to follow the procedures as stipulated by the companies Act,1956 while finalising the terms of issue of shares and any consideration for share application money or premium to be finalised. The Schedule VI of Companies Act ,1956 has been revised to arrest loopholes while issuing of shares by the corporate entities. From these procedures it can be inferred that the appellant had finalised the terms of the proposed issue of shares during the year itself, the share application money received by the appellant during the year on the basis of such terms and conditions qualifies to be treated as "Consideration for issue of Shares".

5.1 Since the terms of the proposed issue of shares are finalised and a document inviting application for shares containing the said terms was issued to the prospective shareholders before the receipt of the share application money during the relevant year under consideration. Further it was also a fact that all the relevant money has been received in the year under consideration. These facts are elaborately discussed by CIT(A) in its order in para No 41 of the order. Though the minutes of the corporate entity finalised in the early April about the allocation of shares , however the fact remains that all the terms have been finalised, money received, offer and acceptance has been completed , value of share application money, premium has been finalised .Valuation of such shares been completed by the appellant in the relevant year i.e., FY2012-13. In short entire process of such allocation of shares has been finalised in the

captioned year i.e. AY 2013-14 , therefore the year to be considered is AY 2013-14 and not AY 2014-15 as contended by the appellant.

6. The final question what quantum to be considered for the relevant year under consideration is also dealt at length by CIT(A) order in the para Nos 44, 45 and 46, therefore it may not required to be elaborated further.

7. ***Analysis of the appellant's written submissions:***

Appellant had brought out the relevant objective behind introduction of such section by his Highness and the then Finance Minister in the Finance Act,2012.

" Increasing the onus of proof on closely held companies for funds received from shareholders as well as taxing share premium in excess of fair market value. "

The objective behind such provision is mainly to streamline the fund flows amongst corporate entities and also to bring out more accountability. It is imperative here to mention that the onus has been increased on corporate entities and this deeming clause is to bring transparency and accountability and also to tax excess premium as a matter of deterrent. This not only curbs unaccounted money flows into corporate entities but also brings a strict vigilance into corporate activities. There was no discretion whatsoever has been given to the assessing authority but to tax the excess amount. The revised schedule VI to the Companies Act also is a move towards this direction. This provision has left no scope to tax officers to apply the section according to their whims and fancies but to strictly to adhere as per the terms of the statute. Therefore no assessing officer is allowed by any other manner other than the strict verbatim of this section. Neither the AO nor CIT(A) in the said case are given any discretionary powers to act in any other manner other than what the literal meaning of the statute that in the present case both followed in its letter and spirit.

All the judicial pronouncements in this aspect are not only on the presence of unaccounted money but also on increasing onus of the corporate entities to bring the excess

share premium to taxation applying this deeming income provision.

7.1 It is also worth mentioning what was pointed by the appellant in its written submission in page 15 para 31 citing the case of Sri Gopal Jalan & Co vs Calcutta Stock Exchange Association Ltd (SC)

" what is termed as 'allotment' is generally neither more nor less than the acceptance by the company of the offer to take shares"

It is much relevant in the present case that what was offered by the corporate entity has been accepted by the investors without any change in our case. That means in its totality all the substance and form of offer has been accepted in the said case in the relevant year , therefore this is very much fits into the definition of allotment as mentioned in the said apex court judgement .

7.2 The Hon'ble jurisdictional High court's decision in Sesa Goa Ltd as mentioned by the appellant in its written submissions in page 16 is on misappropriation of the amount paid for purchase of shares and right to attend meetings of share holders and vote. These facts are not applicable to our present case. Therefore the same may not be considered.

7.3 Appellant's commentary on offer and acceptance by citing Palmer's Company law is also not factual fit into the relevant case. In this case the appellant made an offer to its investors and the same is accepted by its investors by paying adequate consideration. It is also a fact that entire consideration in our case has been fully received . According to Contract Law, all the essential ingredients such ***offer, acceptance and full and complete consideration was also received in the relevant previous year.*** *In the appellant's case neither substance or form has been changed in any manner. All the terms are fully adhered. No alteration/ modifications of the terms were found. Mere citing the allotment in the early of the subsequent financial year is only a formality and all the terms as per Contract Law have already been taken care of in the appellant's case. It is also worth mentioning here*

that once the terms of the contract are complete such offer, acceptance and adequate consideration, then such contract shall be treated as complete irrespective of formalities such as registration or allotment of shares etc.

7.4 Appellant also cited various decisions in page No 17 of its written submissions stating that money cannot be considered as investment unless it is converted. These facts do not fit in our case mainly because the share capital has already been received in our case, its no more in the state of advance, since consideration is complete and all the terms are fulfilled and have not been altered. It is also a fact that subsequently neither the value of consideration nor investors and the quantum of allocation in the books of the appellant have been changed. This glaringly supports the argument of the revenue that in the said case the contract is complete.

7.5 In the case of Taaq Music Pvt Ltd Vs ITO decision of the Hon'ble Bangalore Tribunal also not fit into the facts of our case. It is a fact that as long as it is still in the form of advance , appellant's arguments may be considered . However both AO and CIT(A) factually demonstrated that the appellant representation of advances are no more advances but are actual consideration for issue of shares. Since actual consideration for issue of shares is complete in our case then the above said case supports our proposition.

7.6. During earlier hearings all the judicial pronouncements cited by the appellant have been discussed and refuted with facts and demonstrated how those facts are not applicable to our present case. All these case laws are on the issue pending allotment or the method of valuation or on some other fact. However our facts are completely different of what was cited by the appellant in its support.

8. From the above, the facts of the case summarised as under:

a). As per Contract Law all the ingredients such as offer , acceptance and adequate consideration in the relevant previous year have been completed.

b). The valuation has been done the appellant in the relevant year under consideration and the figures in the valuation report have not been changed or altered.

c). The judicial pronouncements cited by the appellant are on the issue of pending allotment whereas ***our case is on consideration for issue of shares****. This is clear as per statute.*

d). As the consideration for issue of shares is complete without any alteration of the terms of the offer and acceptance , assessing authorities have not been given any discretion to leave such taxation of excess share capital but to tax.

e). Our case is on the consideration for issue of shares not on allotment of shares wherein allotment is only a mere formality. In the present case neither terms nor quantum of allocation nor in any manner the share allocation has been changed . It is also a fact that the entre consideration has been received in the relevant year under consideration , therefore assessing authority does not have discretion but to tax in the relevant year under consideration.

f). Both AO and CIT(A) have thoroughly and systematically brought the excess share premium for taxation on the issue of consideration for issue of shares as per letter and spirit of the statute. Therefore the same may kindly be considered

11. In rejoinder, Ld. AR submitted as under:-

1. In response to the assessee's written submissions dated 28th December, 2020, the Department had filed its submissions on 4th January, 2021. Following is a rejoinder to some of the averments made in the Department's submissions, To the extent the Department, in its submissions, has relied on the findings of the AO and the CIT(A), the assessee's submissions dated 28th December, 2020 may be considered and to avoid repetition, such averments are not being responded to separately in this rejoinder.

2. In paras one to six of the Department's submissions, some facts have been set out and the observations from the order of the CIT(A) have been relied upon. The said contentions have been responded to in the assessee's submissions dated 28th December, 2020. Specifically, attention is invited to para 5.1 of the Department's submissions, wherein it has been stated that 'Since the terms of the proposed issue of shares are finalised and a document inviting application for shares containing the said terms was issued to the prospective shareholders before the receipt of the share application money during the relevant year under consideration.' It is submitted that this statement is factually incorrect. No document inviting application for shares was ever issued by the assessee to the prospective shareholders before the receipt of the share application money, nor is it the case ofthe AO or the CIT(A) that any such document was issued at that stage. The assertion, therefore, is not borne out from the record.

3. It is reiterated that the assessee has submitted ample evidence in the form of Board Resolutions and notes to financial statements which unequivocally state that the terms of the issue were finalised in the FY 2013-14.

4. In the instant case, it is an uncontroverted factual position that holding company, M/s Essar Investments Limited (EIL)/M/s Imperial Consultants and Securities Private Limited (ICSPL), continued to infuse funds by way of financial assistance which were made in terms of Board resolutions dated 20th March 2010 (EIL) and 30th March 2012 (ICSPL); and the funds obtained therefrom were infused into The Mobile Stores Limited (TMSL) by way of subscribing to its shares in order to revive it from its adverse financial position. No other terms were finalised between the companies. In this regard, attention is invited to Schedule 9-Notes to accounts of the assessee's Audited Financial Statements for FY 2010-11 (on page 84 of the paperbook) and Board Resolutions passed by EIL on 20th March, 2010 (on page 245 of the paperbook) and by ICSPL on 30th March, 2012 (on page 246 of the paperbook).

5. Further, it is evident from Note No. 18 of Notes to Accounts of Audited Financial Statements of the assessee

for the F.Y. 2012-13 (on page 46 of the paperbook) that the terms for proposed issue of unquoted equity shares were also not finalized in the said year. In fact, there was no acceptance by the assessee in the F.Y. 2012-13. The Board of directors approved the issue of equity shares on right basis by way of Resolution dated 17th December, 2013 (on page 215 of the paperbook). The shareholders approved the said issue in EGM vide resolution dated 31st January, 2014 (on page 217 of the paperbook). Finally, the issue of shares on the above terms was approved by the Board of directors vide Resolution dated 7th March, 2014 (on page 219 of the paperbook).

6. In fact, the statement in the Department's submission that the valuation of shares was also made in the F.Y. 2012-13 is also contrary to record which is evident from the fact that the valuation report was dated 3rd December, 2013 (on page 220 of the paperbook).

7. Thus, it will be appreciated that the terms as regard the pricing and number of shares were finalized only at the time of actual issue of shares in the F.Y. 2013-14. Thus, the said sum was always in the nature of advance against equity upto F.Y. 2012-13.

8. It is submitted that the assessee has brought ample documents on record which are certified evidence whereas the assertion made by the Department in its submission, is not borne out from the record.

9. In para 7 of the submissions, reliance has been placed on the Finance Minister's speech given at the time of introduction of the Finance Bill, 2012 wherein it has been stated that the onus of proof on closely held companies for funds received from shareholders has been increased. It is submitted that the part of the Speech relied on by the Department was made while introducting the first proviso to section 68 of the Act, which was also introduced by way of the same Finance Bill, in which section s6(2)(viib) was introduced. These observations do not pertain to section 56(2)(viib) of the Act, which is the subject matter of consideration in this appeal.

10. In para 7.1 of the submissions, Department has extracted one line from the judgment of the Hon'ble Supreme Court in the case of Sri Gopal Jalan & Co. vs. Calcutta Stock Exchange Association Limited (1963) (33 Comp Case 862) (SC), which reads as follows- 'what is termed as allotment is generally neither more nor less than the acceptance by the company of the offer to take shares'. It is submitted that the import of this observation has been explained by the Supreme Court in the subsequent portion of the judgment. For the sake of convenience, the relevant portion is reproduced hereunder-

That offer is accepted by the allotment either of the total number mentioned in the offer or a less number, to be taken to the person who made the offer.

This constitutes a binding contract to take that number according to the offer and acceptance...

The process described by Chitty J. is very familiar in company law. Under the Act, a company having a share capital is required to state in its memorandum the amount of that capital and the division thereof into shares of a fixed amount: See section 13(4). This is what is called the authorised capital of the company. Then the company proceeds to issue the shares depending on the condition of the market. That only means inviting applications for these shares. When the applications are received, it accepts them and this is what is generally called allotment. No doubt there may be an allotment of shares with out an application, but no instance exists where that word is used to describe a transaction whereby one becomes a shareholder otherwise than by appropriation to him of a share out of the previously un-appropriated share capital.

So Farwell L. J. said in Mostly v. Kqffyfontein Mines Lid. [1911] i Ch. 73 84 "As regards the construction of these particular articles it is plain that the words 'creation', 'issue', and 'allotment' are used with the three different meanings familiar to business people as well as to lawyers. There are three steps with regard to new capital: first, it is created: till it is created the capital does not exist at all. When it is created in may remain unissued for years, as indeed it was here; the market did not allow of a

favourable opportunity of placing it. When it is issued it may be issued on such terms as appear for the moment expedient. Next comes allotment. To take the words of Stirling J. in Spitzel v. Chinese Corporation, [1899] 80 LT. 347,37/16 says : What is an allotment of shares? Broadly speaking, it is an appropriation bu the directors or the managing body of the company of shares to a particular person...

It is beyond doubt from the authorities to which we have earlier referred, and there are many more which could be cited to show the same position, that in company law allotment means the appropriation out of the previously unappropriated capital of a company of a certain number of shares to a person. Till such allotment the shares do not exist as such. It is on allotment in this sense that the shares come into existence.'

11. As can be seen from the above, the Supreme Court has clarified that acceptance by the company of the offer to take shares is done by the directors by appropriating shares to a particular person by way of an actual allotment. In the case of the assessee, the Board of Directors have passed a final resolution on 7th March, 2014, i.e. in the subsequent financial year, by appropriating the shares to the holding company by way of allotment.

12. In para 7.2 of the submissions, it has been stated that the judgment of the jurisdictional High Court in the case of Sesa Goa Ltd. vs. State of Maharashtra (2008) (WP no. 254 0/2008) was dealing with a case of misappropriation of the amount paid for purchase of shares and is not applicable to the present case. It is submitted that the Department has failed to appreciate that the assessee's reliance was only on the legal findings of the High Court, which are reproduced on page 16 of assessee's submissions and extracted hereunder-

'As already observed there was no entrustment of the property nor was there entrustment of any dominion over the property. Once the shares are allotted the money paid for the purchase of the shares becomes part of the assets/property of the Company.'

Thus, it is the assessee's submission that till the time of allotment, the advance towards equity is a liability despite the fact that the amount was received. The assessee does not have any indeafisible right to the consideration till any time before the acceptance of the offer of ICSPL by way of allotment/issue of shares.

13. In para 7.3 and 8.a) of the submissions, the assessee's reliance on the commentary, Palmer's Company Law, has been sought to be distinguished by urging that in the present case, the transaction was concluded in this year as the assessee's offer to the investors was accepted by them by paying adequate consideration. It is submitted that the Department has misconstrued the observations in the commentary. The commentary states that the acceptance of the offer is complete when the issuer company (i.e. the assessee in this case) accepts the prospective investor's offer, and having alloted the shares to such investor, notifies it of such allotment. The acceptance has to be qua the issuer company and not the investor. In any event, as highlighted in the commentary, acceptance is complete only upon the notification of the allotment of shares. The relevant extracts of the commentary are reproduced on page 16 of the assessee's submissions. In the present case, undoubtedly, the allotment of shares has happened on 7th March, 2014 and the said fact is not disputed by the AO or the CIT(A).

14. In paras 7.4 to 7.6 and para 8.c) of the submissions, it has been stated that the judgments relied on by the assessee do not deal with the present dispute as to when does the receipt of money take the colour of consideration for the issue of shares. More specifically, the assessee's reliance on the decision of the Bangalore Tribunal in the case of Taaq Music Pvt. Ltd. vs. ITO (2020) (ITA i6i/Bang/2o) is sought to be refuted. In this regard, it may be noted that the assessee has in its written submissions explained the relevance of each of the decisions relied upon. Apart from making a general statement as above, the Department has not pointed out as to how such judgments are not relevant to the present dispute. The Bangalore Tribunal in the case of Taaq (supra) dealing with the very same issue which arises for consideration in the present appeal has held that

the receipt of money takes the colour of consideration upon the actual allotment of shares. The relevant observations of the decision have been reproduced in para 33 of the assessee's submission.

15. In para 8.b), the Department has only stated that the figures in the valuation report have not undergone any change. No infirmity in the said valuation report has been pointed out.

16. In para 8.d), the Department has urged that the assessing authorities have no option but to tax the excess share capital. It is submitted that as per the assessee's valuation report dated 3rd December, 2013 (on page 220 of the paperbook), the issue price is less than the fair market value as per Rule 11UA(2). In its submissions, the Department has not challenged the correctness of the valuation report. Accordingly, there is no excess, as urged by the Department, so as to bring any amount to tax under section s6(2)(viib) of the Act.

17. In para 8.e) and f), the Department has urged that allotment of shares is only a formality and the entire consideration has been received by the assessee during the relevant previsous year. In this regard, it is reiterated that it is the event of allotment which brings the shares into existence and the investor gets the rights of a shareholder. Further, as noted in a series of decisions referenced in the assessee's submissions, the application money becomes consideration for issue of shares only upon the actual allotment/issue. When the entire section is based on the issue of shares, it is absurd to suggest that the event of issue is irrelevant.

12. Considered the rival submissions and material placed on record. We notice from the record that the assessee is an investment holding company, wholly-owned subsidiary of EIL, pursuant to the merger of the investment and finance division of EIL, the assessee became a wholly owned subsidiary of ICSPL.

The assessee has invested in various unlisted companies including M/s The Mobile Stores Ltd (TMSL), which is wholly-owned subsidiary of the assessee company. From the records we notice that TMSL incurred huge losses in the initial years of its business. Owing to the huge adverse financial position of TMSL, in financial year 2010-11, assessee has revalued its investment in TMSL and reduced the value of investment on account of provision to the extent of ₹ 283.79 crores (page 80 of the paper book). Because of the above said revaluation of the investment, the net worth of the assessee company has become nil or negative. In order to improve the financial position of TMSL, the holding company of the assessee passed a resolution on 20 March 2010 to provide financial assistance to the assessee in order to immerse the same in TMSL. Accordingly, assessee received unsecured loans from its holding company until previous assessment year that is AYs 2012– 13 to the extent of ₹ 159.26 crores. During this assessment year, assessee passed a journal entry by converting the above said unsecured loan as advance towards share capital and during this assessment year, assessee received further advances towards share capital to the

extent of ₹ 154.37 crores. The total cumulative balance of the advance towards share capital stood at the year-end is ₹ 313.64 crores. During this assessment year, assessee wrote back the provision created in assessment year 2011 – 12 to the extent of ₹ 283.79 crores at the year end.

13. The assessing officer noticed that the assessee has received final tranche of advances on 30.03.2013 and assessee has treated the whole advances as an liability in its balance sheet. He noticed that assessee had issued share capital in the subsequent assessment year at the rate of ₹ 3000 per share (with a premium of ₹ 2990 per share). The assessing officer invoked the provisions of section 56 (2) (viib) since the advance received by the assessee were in excess of fair market value of the shares as on the final date of receipt of advances towards share capital ie., on 30.03.2013. The assessing officer rejected the event of actual issue of shares in the subsequent assessment year. The question before us is whether the advances against share capital is a liability or it is receipt towards share capital. The next question will be, whether the legislature actually intended to tax the investment in the sick or capital eroded companies. At this stage,

we notice that the net worth of the assessee company is nil or negative until the final tranche of receipt of advance towards share capital. Because of this situation, the assessing officer invoked the provisions of section 56(2)(viib) and he not only brought to tax the share premium, he also brought to tax the face value of the share capital. In our view, this is a bizarre situation in which the company with the eroded capital can never receive any investment from its holding company nor planned to receive any investment.

14. At this stage, we notice that AO invoked the provision of section 56(2)(viib) merely because the fair market value of the shares are NIL and the advances received towards share capital over above the fair market value is taxable under section 56(2)(viib). The argument of the tax authorities are that no prudent investor will invest more than fair market value. Yes, we agree that no prudent investor will invest but prudent businessman will invest in order to safeguard the investment in the subsidiary or to revive the subsidiary company. The tax authorities invoked the provision u/s 56(2)(viib) without bringing on record whether the investment received by the assessee are

genuine or not. We notice that the provision introduced by the legislature in order to curb the practice of generation and circulation of unaccounted money. In the current case, the tax authorities have not brought on record any generation or circulation of unaccounted money. Rather they acknowledged that the funds were invested by the holding company and received by the subsidiary company as advance towards share capital. It is not disputed that the net worth of the company is NIL because of investment in step down subsidiary company (due to provision towards revaluation of investment). It is also not disputed that the funds were moved from the holding company to the assessee and the funds were re-invested in the step down subsidiary company in order to revive the step down subsidiary in that process, the investment in such step down company is safeguarded.

15. Here is the situation, the funds intended for investment in the step down subsidiary company routed through the subsidiary company (i.e. assessee) and merely because the fair market value of the assessee is NIL or negative, the tax authorities are invoking the deeming provisions to tax the advance towards

share capital in the hands of the assessee merely because the deeming provision is attracted.

16. The tax authorities i.e. Ld. CIT(A) and Ld. DR argued that the terms of proposed issue of shares are finalized and a document inviting application for shares containing the said terms were issued to prospective shareholders before issue of share application. We find facts on record are different. The advances were received by the assessee only to refinance the same to step down subsidiary, it is evident from the resolution passed by the holding company way back in FY 2010 and evident from the pattern of transfer of funds. It was unsecured loan and later converted into advance towards share capital. The terms were finalized by the holding company and intended for investment in the loss making subsidiary, the assessee company is only pass through entity. The holding company is willing to accept any terms as long as the intended purpose is achieved. The holding company accepted the terms of issuing shares at premium of Rs. 2990/- and accordingly, assessee issued the shares at Rs. 3000/- per share. This is based on the actual valuation of shares after the write back of the provision created to

reduce the value of the investment made in the subsidiary TMSL. All these activities are preferably within the legal framework of Company's Act and other related allied laws and procedures.

17. The AO and Ld. CIT(A) interpreted the provisions of section 56(2)(viib) by strictly on literal meaning as below:-

> "A company, not being a company in which the public are substantially interested, receives in any previous year, from a person being a resident, any consideration for issue of shares which exceeds the face value of such shares."

18. The Ld. CIT(A) has stressed the interpretation of the words in the above definition i.e. 'receives in any previous year' and the expression 'any consideration for issue of shares'. Ld. CIT(A) stressed the point that "where any amount is received during the previous year towards consideration for issue of shares", then the provision of section 56(2)(viib) are attracted to ascertain whether such consideration the face value of the shares or aggregate consideration exceeds the fair market value of the shares. Based on the above interpretation, he came to the conclusion that assessee has received advance towards share

capital during this year to the extent of Rs. 282 crores and the assessee has finalized the terms of issue of such shares during this assessment year only. Further, Ld. CIT(A) relied on the Revised Schedule VI to Companies Act, in which assessee has to declare the portion of share application separately and declaration of unsecured loan etc. to sustain the receipt of advance towards share capital as the addition under section 56(2)(viib). We notice that Ld. CIT(A) has interpreted the section 56(2)(viib) without any finding on the generation and circulation of black money in the assessee's case and further, he interpreted the words 'receipts of consideration for issue of shares during the previous year'. We do not agree with the above interpretation. The receipt of consideration for issue of shares to mean the proceeds for exchange of ownership for the value. The term consideration means "something in return" i.e. Quid Pro Quo". The receipt is exchanged with the ownership in the company. In the given case, the holding company passed the resolution to finance TMSL through the assessee and the funds intended for TMSL, which is step down subsidiary and the funds were remitted to the assessee as an advance towards share capital during this impugned

assessment year (we do not intend to discuss the quantum of actual receipt of the advance during this assessment year at this stage. It is a separate discussion since assessee has only passed journal entries to convert the unsecured loan into advance towards share capital). The consideration means the promise of the assessee to issue shares against the advances received. In our view, the receipt of advances are a liability and will never take the character of the ownership until it is converted into share capital. The assessee can never enjoy the receipt of money from the investor until the ownership for the money received is not passed on i.e. by allotment of shares. The receipt of consideration during the previous year means the year in which the ownership or allotment of shares are passed on to the allottee in exchange for the investment of money.

19. The tax authorities interpretation that when the receipt of money and mere agreement for allotment of shares without actual allotment of shares will make the consideration complete as per the contractual laws. In our view, unless and until the event of allotment of shares takes place, the assessee cannot become the owner of the funds invested in the company. The event of

allotment will change the colour of funds received by the assessee from liability to the ownership. In our considered view, the provision of section 56(2)(viib) are attracted only in the year of allotment of shares i.e. assessment year 2014-15. We rely on the decision of Hon'ble Bombay High Court in the case of Sesa Goa Ltd (supra).

20. In case we accept the proposition of tax authorities then any fund received by the sick or capital eroded subsidiary companies will be more than the fair market price of the shares. In that case, such companies will never intend to receive any funding from any person not even from the holding company because any funds received against expansion or plan to revive the business will automatically get attracted to the deeming provision under section 56(2)(viib). In normal condition, all the required funds were first invested in such subsidiary companies and subsequently the terms are finalized only when such subsidiaries are in the process of recovery. By merely transferring funds as unsecured loan or advances towards share capital will not trigger the deeming provision under section 56(2)(viib). We do not foresee that the legislature must have

intended to tax such legitimate investment under section 56(2)(viib). This is a peculiar case where not only share premium are brought under the deeming provision but including face value of shares. In our view, the tax authorities have mechanically invoked the deeming provision without actually investigating whether the assessee has actually indulged in any money laundering activities. The tax authorities are not expected to act mechanically without appreciating the soul and purpose of introduction of the particular and specific provision. We get strength from the following decisions of Co-ordinate benches:-

(i) In the case of Cinestaan Entertainment P. Ltd. vs. ITO (2019) (177 ITD 809) (Delhi), wherein it was held that where nothing was brought on record to show that any kind of tax abuse or laundering of unaccounted money was being done, the provisions of section s6(2)(viib) could not be pressed into service.

(ii) In the case of DCIT vs. Pali Fabrics P. Ltd. (2019) (no taxmann.com 310) (Mum), wherein it was held that section 56(2)(viib) as well as the proviso to section 68 were introduced together so as to only deal with those

cases where there was an allegation that any income from undisclosed sources was being introduced and where the assessee had failed to prove the genuineness of the transaction. In the absence of any such circumstance, the provisions of section 56(2)(viib) could not apply.

(iii) In the case of Rameshwaram Strong Glass Put. Ltd. vs. ITO (2018) (172 ITD 571) (Jpr), wherein it was held that where shares were allotted to related persons, there was no scope of introduction of any unaccounted income through allotment at an unreasonably high price and, accordingly, the provisions of section 56(2)(viib) could not apply.

(iv) In the case of ACIT vs. Subhodh Menon (2019) (175 ITD 449) (Mum), wherein it was held that since the provisions were introduced as a counter evasion measure to prevent money laundering of unaccounted income, it would not apply to *bonafide* business transactions.

21. We also notice that Ld. DR made submission that the entire consideration has been received in the relevant year under consideration, therefore assessing authority does not have

discretion but to tax in the relevant year under consideration. We do not agree to the above submission. The tax authorities are holding the position of quasi judicial and they have to interpret the law in true sense and act judiciously. They just not expected to act as tax collectors rather tax administrators. They have to bring on record all those events which attracts the deeming provisions and also bring on record the purpose for which the particular Acts are legislated. They have to investigate further to highlight whether particular case falls within the ambit of money laundering or legitimate investment activities. They have to distinguish the activities in proper perspective. They are not mere tax collectors.

22. Considering the above discussion, in our view, the provision of section 56(2)(viib) is applicable only in the year in which assessee issued actual share capital and AO is directed to drop the additions initiated under section 56(2)(viib) during this assessment year, therefore order of Ld. CIT(A) is set aside.

23. We notice that assessee has raised other issues like adoption of valuation date, for the purpose of valuation which

balance sheet to be adopted, writing back of provision for diminution of investments etc. are not adjudicated at this moment as it will be for academic purpose. Hence, it is kept open.

24. Considering the above discussion, we allow the grounds No. 1(a) and 1(b) raised by the assessee and other grounds are dismissed.

25. In the net result, appeal filed by the assessee is **partly allowed.**

Order pronounced in the open court on 05.03.2021.

Sd/-	*Sd/-*
(Mahavir Singh)	(S. Rifaur Rahman)
Vice President	Accountant Member

मुंबई Mumbai;दिनांकDated : 05.03.2021
Sr.PS. Dhananjay

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकरआयुक्त(अपील) / The CIT(A)
4. आयकरआयुक्त/ CIT- concerned
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard File

आदेशानुसार/ BY ORDER,

उप/सहायकपंजीकार (Dy./Asstt.Registrar)
आयकरअपीलीयअधिकरण, मुंबई/ **ITAT, Mumbai**