

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No. 30/Ind/2023
(Assessment Year:2014-15)

Extol Wind Ltd. 104, Jahangirbad Barkhedi Road, Bhopal	Vs.	ITO Ward 1(3) Bhopal
(Appellant / Assessee)		(Respondent/ Revenue)
PAN: AAACE 8607 N		
Assessee by	Shri Pawan Ved, AR	
Revenue by	Shri Ashish Porwal, Sr. DR	
Date of Hearing	11.07.2023	
Date of Pronouncement	14.07.2023	

O R D E R

Per Vijay Pal Rao, JM:

This appeal by the assessee is directed against the order dated 06.12.2022 of Commissioner of Income Tax(Appeal), National Faceless Appeal Centre (NFAC), Delhi, for Assessment Year 2014-15. The assessee has raised following grounds of appeal:

“1. Ld. CIT(A) erred in confirming addition of share premium on right issue of shares added by LAO of Rs.16,33,995/-.

2. The appellant deserves award of cost of this appeal s the orders passed by the lower authorities are clearly perverse and without considering proper facts of the case.

3. The appellant reserves right to add amend or alter any of the ground of appeal as above.”

2. The solitary issue arises in this appeal of the assessee is whether in the facts and circumstances of the case the Id. CIT(A) is justified in confirming the addition of share premium made by the AO under provisions of section 56(2)(viib) of the Act. During the year under consideration the assessee has issued share @ Rs.80 per share of having face value of Rs.10 at a premium of Rs.70 per share. Since the assessee received a consideration for issue of shares which exceeds face value of such shares, therefore, the AO asked the assessee to furnish the explanation in this regard and give calculation of fair market value of per share. The assessee submitted the calculation vide reply dated 23.12.2016. After considering the reply of the assessee the AO adopted the fair market value of each share at Rs.76.04 per share only as against issue price of Rs.80 per share and consequently made the addition of Rs.16,33,995/- being difference between the issue price and fair market value of the shares issued by the assessee u/s 56(2)(viib). The assessee challenged the action of the AO before the Id. CIT(A) but could not succeed.

3. Before the Tribunal the Id. AR of the assessee has submitted that the difference of fair market value adopted by the AO and the issue price is less than 1.5% and therefore, the issue price is within the limit of safe harbor of 5% and therefore, no addition is called for in respect of difference which is less than 1.5% between the issue price and fair market value adopted by the AO. Id. AR has further submitted that real value of shares issued by the assessee is much more than the fair market value adopted by the AO. He has referred to the schedule of fixed assets of the assessee and submitted that the assessee is having an opening balance of land of Rs.12,22,63,600/- and if appreciation of the land value during the year is taken into account then the fair market value of the shares would be much higher than the issue price of Rs.80 per share. He has also referred to the non-current investments details at page no.18 of the paper book and submitted that the assessee is having a considerable shareholding in the sister concern M/s Extol Industries Ltd. to the tune of Rs.12,79,85,000/- and fixed asset of the sister concern also includes the

land bank, therefore the correct and true value of the shares issued by the assessee is more than the issue price. He has also contended that the present issue is right issue and allotment is made to the existing shareholder therefore, there will be no benefit or loss to anybody by issuing the shares to the existing shareholders. In support of his contention he has relied upon the decision of the Mumbai Bench of the Tribunal in case of *ACIT vs. Subhodh Menon dated 07.12.2018 in ITANo. 676 & 2776/Mum/2015*. Ld. AR has further submitted that the AO has not issued a show cause notice to the assessee before making the addition u/s 56(2)(viib) of the Act. The Assessing Officer has just asking the assessee to produce the necessary details and fair market value of the shares which were furnished by the assessee being net worth of the assessee company but the assessee was not given opportunity to furnish the value of the shares issued as per the prescribed method as provided in explanation to section 56(2)(viib) of the Act. Ld. AR has submitted that as per the Rule 11UA the fair market value of the shares shall be determined in accordance with the method provided thereunder. He has referred to the proceeding details of the CIT(A) and submitted that the case of the assessee was lastly fixed on 06.12.2022 and assessee was asked to file the written submissions on or before the said date whereas the impugned order has been passed by the CIT(A) on 06.12.2022 and was send through e-mail at 11:16 AM. He has filed an e-mail copy to show that the order was received by the assessee on 06.12.2022 at 11:16 AM and thereby the window of filing written submission were already closed at 11:16 AM and assessee was not given opportunity to submit the written submission. Therefore, there is a violation of principle of natural justice while passing impugned order by the CIT(A). He has submitted that the tax evasion provisions cannot be invoked to a genuine transaction as held by the *Hon'ble Supreme Court in case of K.P. Varghese vs. ITO 7 taxmann.com 13 (SC)*.

4. On the other hand, Ld. DR has submitted that there is no provisions of safe harbor Rule in section 56(2)(viib) of the Act. Therefore, the question of considering same does not arise. He has further submitted that once

there is a difference in issue price and the fair market value of the shares issued by the assessee the provisions of section 56(2)(viib) are applicable and the differential amount is deemed to be income of the assessee. In support of his contention he has relied upon the decision of Mumbai Bench of this Tribunal in case of *Royal Accord Realtors (P.) Ltd. vs. DCIT 195 ITD 287*.

5. Ld. DR has also relied upon the judgment of Hon'ble Kerala High Court in the case of *Sunrise Academy of Medical Specialities (India) (P.) Ltd. vs. ITO 409 ITR 109* and submitted that the Hon'ble High Court has held that any premium received by the assessee on sale of shares, in excess of its face value would be treated as income from other sources in terms of provision of section 56(2)(viib) of the Act. He has relied upon the orders of the authorities below.

6. In rejoinder the Ld. AR of the assessee has submitted that the decision of Hon'ble Kerala High Court is on the issue whether the provision of section 56 or section 68 are applicable in case of the share premium received by the assessee and therefore, the judgment on the said issue cannot be applied on the merits of the issue of addition made u/s 56(2)(viib) of the Act.

7. We have considered the rival submissions as well as relevant material on record. The AO has made the addition on the basis of fair market value adopted as per the net worth of the assessee company. Clause (a) of explanation to section 56(2)(viib) provides that the fair market value of the share shall be the value as may be determined in accordance with such method as may be prescribed or as may be substantiated by the company to the satisfaction of the AO based on the value of assets including intangible assets on the date of issue of shares. It is asset including intangible assets whichever is higher. For ready reference we reproduce clause (a) of explanation to section 56(2)(viib) as under:

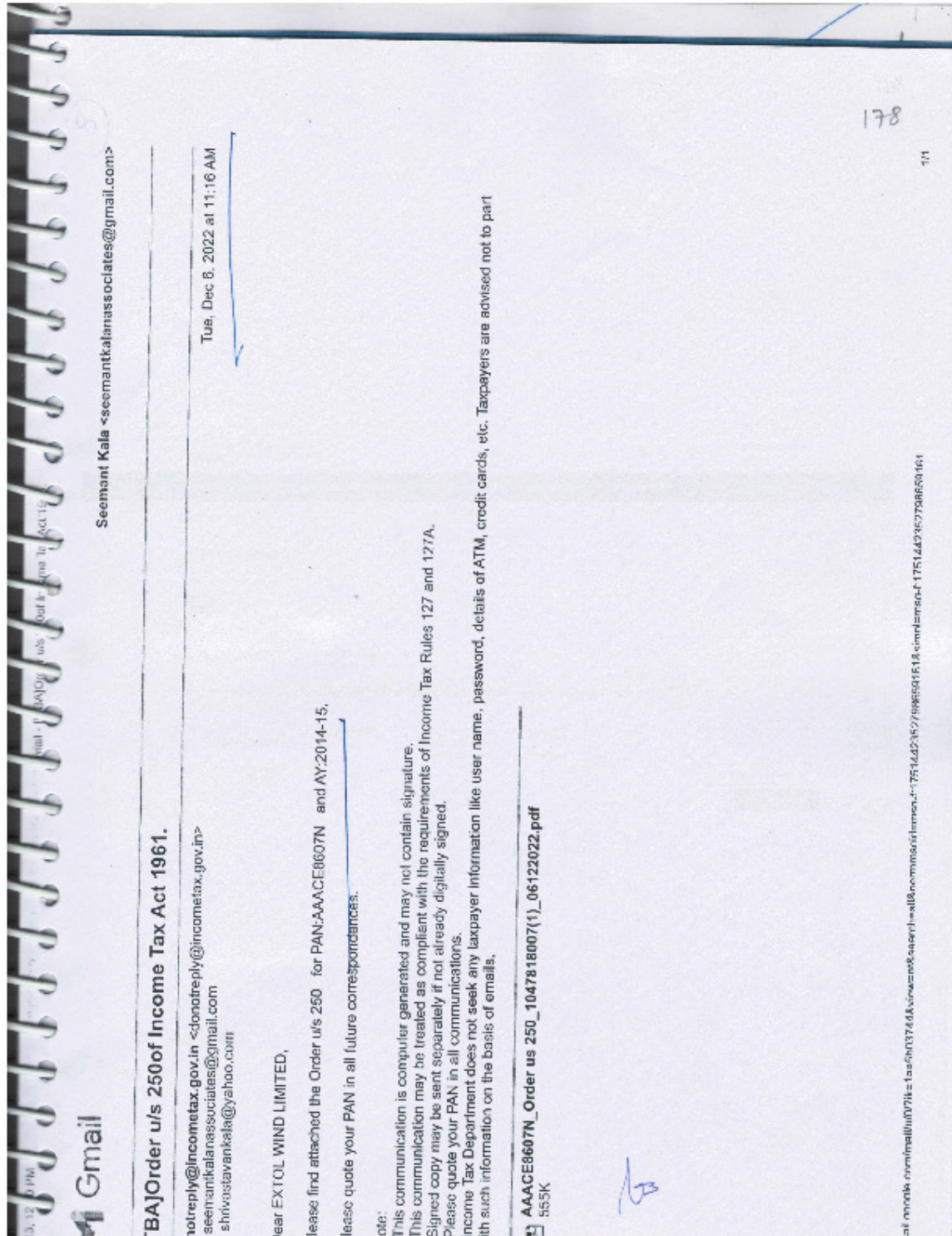
Explanation-For the purposes of this clause-

(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,

8. Therefore, the fair market value of the share shall be determined by considering the method prescribed under Rule 11UA or value of the shares based on the asset including intangible assets of the assessee i.e. substantiated by the assessee. The value so determined under the prescribed method as per Rule 11UA and substantiated by the assessee whichever is higher shall be taken into account. We find that the AO has directly adopted fair market value based on the net worth of the assessee and no opportunity was given to the assessee before making addition to show that the value of the share issued by the assessee is not less than the issue price including premium. Further the CIT(A) has asked the assessee to file the written submission on or before 06.12.2022 but the impugned order was passed by the CIT(A) on the same date and that too before 11:16 AM as it is apparent from the copy of e-mail filed by the assessee which shows that the assessee received e-mail from revenue on 06.12.2022 at 11:16 AM with the attachment of impugned order. The details of the e-mail filed by the assessee are as under:



9. Thus, it is clear that the Ld. CIT(A) has passed the impugned order in the morning of 06.12.2022 whereas the assessee was given a time to file the written submission on or before 06.12.2022 once the impugned

order was passed in the morning itself then the assessee was deprived from the opportunity to file the written submission and consequently there is a violation of principle of natural justice while passing the impugned order. The decisions relied upon by Ld. AR of the assessee are not relevant and applicable in the fact of the present case as those decisions were in respect of the shareholders who invested the money in the share at premium. Even otherwise when the fair market value of the shares of the assessee are not determined as per clause (a) of explanation to section 56(2)(viib) then the matter requires fresh consideration specifically on the point of determination of fair market value of the shares in accordance with the prescribed method as well as substantiated by assessee and the value so determined in accordance with these methods and whichever is higher shall be taken into consideration. Accordingly, in the facts and circumstance of the case and in the interest of justice we set aside the impugned orders of the authorities below *qua* this issue and remand the matter to the record of the AO for re-adjudication of this issue after considering fair market value of the shares to be determined on the basis of the method prescribed as per Rule 11UA as well as substantiated by assessee and then adopt the value whichever is higher. Needless to say before passing fresh order the assessee be given appropriate opportunity of hearing as well as considering the case laws relied upon by the assessee.

10. In the result, appeal of assessee is allowed for statistical purposes.

Order pronounced in the open court on 14.07.2023.

Sd/-
(B.M. BIYANI)
Accountant Member

Sd/-
(VIJAY PAL RAO)
Judicial Member

Indore, 14.07.2023

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

By order

Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore