

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'G': NEW DELHI)**

**BEFORE SHRI S RIFAUR RAHMAN, ACCOUNTANT MEMBER
AND
SHRI SUDHIR PAREEK, JUDICIAL MEMBER**

**ITA No:- 1572/Del/2024
(Assessment Year- 2017-18)**

Suri Agro Fresh Private Limited, C-129, New Sabzi Mandi Azad Pur, New Delhi-110033.	Vs.	DCIT, Circle 24(2), Delhi.
PAN No: AAJCS7908M		
APPELLANT		RESPONDENT

Assessee by : Shri Ashok Kumar, CA.
Revenue by : Ms. Harpreet Kaur, Sr. DR

Date of Hearing : 29.11.2024
Date of Pronouncement : 27.02.2025

ORDER

PER SUDHIR PAREEK, JM:

This appeal by the assessee is against the order of Commissioner of Income Tax (Appeal), ADDL/JCIT(A)-12, Mumbai, [hereinafter referred to as 'the Ld. CIT(A)] order dated 09.02.2024 pertaining to Assessment Year 2017-18.

1.1 The assessee has raised the following grounds of appeal:

“1. That having regard to the facts and circumstances of the case the Ld. CIT (Appeals) has erred in law and on facts in holding that provision of section 56(2)(viib) are clearly attracted where the equity shares were allotted to the existing shareholders.

2. That having regard to the facts and circumstances of the case the Ld. CIT (Appeals) has erred in law and on facts in upholding & confirming the addition made by Ld. AO Rs. 9,00,000/- on account of excess amount (as excess share premium) received on account of rounded off difference @ Rs. 0.09 (0.09 paisa) on allotment of 1.00 crore equity share to Mr. Hiten Suri and Mr. Sudhir Suri, being the existing shareholders.

3. The appellant craves leave to add, alter, modify and withdraw any grounds of appeal before or during the appellate proceedings.

2. Heard rival submissions and perused the material available on record.

3. Reiterating the grounds of appeal, the Ld. AR submitted that the Ld. CIT(A) erroneously held that provision of section 56(2)(viib) of the Act, clearly attracted where the equity shares were allotted to the existing shareholders. The Ld. AR also expressed grievance that the Ld. CIT(A) erroneously upheld and confirmed the addition made by Ld. AO Rs. 9,00,000/- on account of excess amount (as excess shares premium) received on account of rounded off difference @ Rs. 0.09 Paisa on allotment of 1.00 crore equity share to Mr. Hiten Suri and Mr. Sudhir Suri, being the existing shareholders and also

in view of the CBDT notification 81/20123 dated 25.08.2023 introduced a safe harbour of 10% variation in value by in rule 11UA of the Income Tax Rules, 1962 and so addition u/s 56(2)(viib) of the Act is unsustainable in law as the difference between issue price and value adopted by the AO is 2.1 i.e less than 10%.

3.1 The assessee has also raised an additional ground, which is reads as under:

“3” On the facts and circumstances of the case and in view of CBDT notification 81/2023 dated 25.09.2023 introducing safe harbor of 10% by curative amendment in Rule 11UA of the Income tax Rule s 1962, addition u/s 56(2)(viib) is unsustainable in law as the difference between fair value adopted by the AO and issue price is only 3% i.e. Less than 10%.”

4. The Ld. AR further submitted that the 50% of the shareholding is held by non-resident shareholder (foreign body corporate) and 50% shareholding held by Indian shareholders i.e. Mr. Sudhir Suri and Hitin Suri each holding 25% shareholding. He also submitted that assessee maintains regular books of accounts and subject to audit under Companies Act, 2013 as well as under Income Tax Act, 1961. He further submitted that the assessee company issued share @ 3% per shares whereas the valuation of shares as per

valuation report was Rs. 2.91 per shares, in order to round off the valuation price Rs. 2.91, these shares were allotted @ rs. 3 per shares and it means Rs. 2.91 rounded off to nearest rupee i.e. 3/- per shares.

5. The Ld. DR relied upon the orders of the authorities below.

6. The Ld. AO in his order observed that contention of the assessee is not tenable and assessee has issued preference share having fair market value of Rs. 2.91 @ 3 per share, therefore provisions of section 56(2)(viib) are applicable and so difference of Rs. 0.09 per share is being added to the income of the assessee.

7. Aggrieved by said order, the assessee preferred an appeal before the Ld. CIT(A) and which was dismissed by stating that the contention of the appellant is not acceptable because by self-admission he had issued a share having FMV of Rs. 2.91 at Rs. 3 to the resident shareholders and therefore, the provisions of section 56(2)(viib) are clearly attracted. The AO has rightly added Rs. 9,00,000/- which is the excess premium of 1.00 crores equity share allotted to Mr. Hiten Suri and Mr. Sudhir Suri @ Rs. 0.09, differential amount received in respect of shares issued to resident

shareholders. Perusal of the above orders, it is manifested that the both lower authorities were of the view that in this case provision of section 56(2)(viib) perfectly attracted and in this regard the Ld. AR submitted that shares were allotted to the existing shareholders in their existing share holding ratio and the shareholding allotment of the aforesaid shareholders remained the same and for this purpose, he draws our attention at page 14 of the paper book, audited financial statements which is placed at page no. 14 of the Paper Book, which is reproduced as under:

Details of shares held by each shareholder holding more than 5 % shares:				
Class of shares / Name of shareholder	As at 31 March, 2017		As at 31 March, 2016	
	Number of shares held	% holding	Number of shares held	% holding
Equity shares with voting rights				
Total Produce Ireland Ltd	36,258,500	50%	26,258,500	50%
Sudhir Suri	18,129,250	25%	13,129,250	25%
Hitin Suri	18,129,250	25%	13,129,250	25%
Total	72,517,000	100%	52,517,000	100%

Reconciliation of the number of shares and amount outstanding at the beginning and at the end of the reporting period:				
Particulars	As at 31 March, 2017		As at 31 March, 2016	
	Number of shares	Amount (Rs.)	Number of shares	Amount (Rs.)
Shares outstanding at the beginning of the year	52,517,000	52,517,000	52,517,000	52,517,000
Issued During the year	20,000,000	20,000,000	-	-
Shares outstanding at the end of the year	72,517,000	72,517,000	52,517,000	52,517,000

8. The Ld. AR, in this regard relied upon the order passed by the Co-ordinate Bench of ITAT, Delhi in the case of *ACIT vs. Dhruv Milkose Pvt. Ltd. in ITA No. 8431/Del/2019*, in which held that where the allotment has been made existing shareholders, the deeming provisions of section 56(2)(viib) would not ordinarily be applicable. The relevant para is reproduced as under:

"8.2 The issue is no longer res-integra. The effect of issue of shares to holding company at a premium has been examined by the Co-ordinate Bench of Tribunal in the case of BLP Vayu (Projects-I) Pvt. Ltd. reported in (2023) 151 taxmann.com 47 (Del-Trib.). The relevant operative paragraph of the order of the Tribunal is hereunder:

"11.1 As per case records, it is an undisputed fact that the shares have been allotted at a premium to its 100% holding company. Thus, applicability of Section on 56(2)(viib) has to be seen in this perspective. The Co-ordinate Bench of Tribunal in DCIT vs. Ozone India Ltd. in ITA No.2081/Ahd/2018 order dated 13.04.2021 in the context of Section 56(2)(viib) has analyzed the deeming provisions of Section 56(2)(viib) of the Act threadbare and inter alia observed that the deeming clause requires to be given a schematic interpretation. The transaction of allotment of shares at a premium in the instant case is between holding company and it is subsidiary company and thus when seen holistically, there is no benefit derived by the assessee by issue of shares at certain premium notwithstanding that the share premium exceeds a fair market value in a given case. Instinctively, it is a transaction between the self, if so to say. The true purport of Section 56(2)(viib) was analyzed in Ozone case and it was observed that the objective behind the provisions of Section 56(2)(viib) is to prevent unlawful gains by issuing company in the garb of capital receipts. In the instant case, not only that the fair market value is supported by independent valuer report, the allotment has been made to the existing shareholder holding 100% equity and therefore, there is no change in the interest or control over the money by such issuance of shares. The object of deeming an unjustified premium charged on issue of share as taxable income under Section 56(2)(viib) is wholly inapplicable for transactions between holding and its subsidiary company where no income can be said to accrue to the ultimate

beneficiary, i.e. holding company. The chargeability of deemed income arising from transactions between holding and subsidiary or vice versa militates against the solemn object of Section 56(2)(viib) of the Act. In this backdrop, the extent of inquiry on the purported credibility of premium charged does not really matter as no prejudice can possibly result from the outcome of such inquiry. Thus, the condition for applicability of Section 263 for inquiry into the transactions between to interwoven holding and subsidiary company is of no consequence. We also affirmatively note the decision of SMC Bench in the case of KBC India Pvt. Ltd. vs. ITO in ITA No.9710/Del/2019 order dated 02.11.2022 (SMC) where it was observed that Section 56(2)(viib) could not be applied in the case of transaction between holding company and wholly owned subsidiary in the absence of any benefit occurring to any outsider."

8.2 The Co-ordinate Bench has essentially observed that where the allotment has been made to existing shareholders, the deeming provisions of Section 56(2)(viib) would not ordinarily be applicable. This apart, in the instant case, the assessee has also supported the premium determined on issue of shares by DCF Method. Thus, the premium charged is supportable by the valuation report and the premium has been charged to existing shareholder. Thus effectively, the benefit if any arising to the company in turn benefits to the subscriber having pre-existing right in the company. While applying Section 56(2)(viib), the purpose for which deeming provision has been inserted is not achieved in the instant case. Hence, in our view, the conclusion drawn by the CIT(A) cannot be faulted either on facts or in law."

9. The Ld. AR also submitted that the CBDT in order to mitigate the hardship faced from the un-intended consequences of section 56(2)(viib) of the Act read with Rule 11UA, via notification 81/2023 dated 25.08.2023 has introduced a safe harbour of 10% variation in value. In support of this argument, the Ld. AR relied upon the order passed by the Co-ordinate Bench of ITAT, Delhi Benches, in

the case of *Sakshi Fincap Pvt. Ltd. vs. ITO*, in ITA No. – 8389/Del/2019, relevant para is reproduced as under:

“17. The amendment brought in Rule 11UA of the Act was introduced to mitigate the hardship faced by taxpayers by the un-intended invocation of Section 56(2) (viib) read with rule 11UA and therefore the same is a curative amendment. In view of the of the above mentioned judgment of Apex court and judgments of multiple bench's tribunals, it is established in law that where an amendment which is inserted to remedy unintended consequences and to make the proviso workable, an amendment which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole. Hence, in view of above mentioned submissions and judicial pronouncements curative amendment in Rule 11UA of the Income Tax Rules, 1962 introduced by CBDT notification 81/2023 dated 25.08.2023 will apply retrospectively and consequently, the addition of Rs.50,77,334 u/s 56(2) (viib) read with rule 11UA is unsustainable as the difference between issue price and value adopted by AO is 2.1% i.e. less than 10%.”

10. On the basis of foregoing discussion and established principle of law, we find material substance in the submission advanced on behalf of the assessee and there is strong ground exist to interfere with the order passed by the Ld. CIT(A) and accordingly, the order passed by the Ld. CIT(A) not sustainable in eyes of law and addition in question deserves to be deleted.

11. In the result, appeal of the assessee is allowed as indicated above.

Order pronounced in the Open Court on 27 .02.2025

Sd/-
(S RIFAUH RAHMAN)
ACCOUNTANT MEMBER

Sd/-
(SUDHIR PAREEK)
JUDICIAL MEMBER

Dated: 27/02/2025.

Pooja/-

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT NEW DELHI

1.	Date of dictation of Tribunal order	20.02.2025, 25.2.25
2.	Date on which the typed draft Tribunal Order is placed before the Dictating Member	21.02.2025, 25.2.25
3.	Date on which the typed draft Tribunal order is placed before the other Member	
4.	Date on which the approved draft Tribunal order comes to the Sr. PS/PS	
5.	Date on which the fair Tribunal order is placed before the Dictating Member for pronouncement	
6.	Date on which the signed order comes back to the Sr.PS/PS	
7.	Date on which the final Tribunal order is uploaded by the Sr.PS/PS on official website	
8.	Date on which the file goes to the Bench Clerk alongwith Tribunal order	
9.	Date of killing off the disposed of files on the judisis Portal of ITAT by the Bench Clerks	
10.	Date on which the file goes to the Supervisor (Judicial)	
11.	The date on which the file goes to the Assistant Registrar for endorsement of the order	
12.	Date of Despatch of the order	