

**INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH "C": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
SHRI L.P. SAHU, ACCOUNTANT MEMBER**

ITA Nos. 6453 & 6454/Del/2018  
Assessment Years 2013-14 & 2014-15

India Today Online Pvt. Ltd. F-26, Connaught Circus, New Delhi.	Vs.	ITO Ward-12(2) New Delhi PAN AAACI8107M
<b>(Appellant)</b>		<b>(Respondent)</b>

Assessee by:	Shri Salil Aggarwal, Advocate Shailesh Gupta, Advocate
Department by :	Shri A.K. Mishra, CIT(DR)
Date of Hearing	03/01/2019
Date of pronouncement	15/03/2019

**ORDER**

**PER AMIT SHUKLA, J.M.:**

The aforesaid appeals have been filed by the assessee against separate impugned orders, dated 27.9.2018 for the assessment year 2013-14; and 28.9.2018 for the assessment year 2014-15, passed by Ld. CIT (Appeals) IV New Delhi for the quantum of assessment passed u/s 143(3). Since issues involved in both the appeals are by and large common, therefore, same were heard together and have been disposed of by way of this consolidated order.

2. We will first take up the appeal for the assessment year 2013-14, wherein the assessee is aggrieved by enhancement made by the Ld. CIT(A) for sum of Rs. 48,16,66,660/- made on account of valuation of shares u/s 56(2)(viib). The facts in brief are that the assessee company is engaged in the business of development, design and maintenance of website and sale and purchase of shares. The assessee company has received share application money, firstly, in the financial year 2010-11, i.e., in the assessment year 2011-12 for sums aggregating to Rs. 21,35,00,000/-; secondly, in financial year 2011-12, i.e., in the assessment year 2012-13 for sum of Rs. 50,90,00,00/-, aggregating to Rs. 72,25,00,000/-; and lastly, further received share application money in financial year 2012-13 for sum of Rs. 16,96,01,580/-. All the share application money was received from M/s. Living Media India Ltd. The value of the shares shown by the assessee was Rs. 30 per share, i.e., face value of Rs. 10 and premium of Rs. 20/-. Ld. AO required the assessee to justify the difference between premium charged and the book value of the shares and why the difference should not be added back in terms of section 56(2)(viib). In response, the assessee submitted that during the year the assessee company had allotted / issued shares to M/s. Living Media India Ltd. at the price of Rs. 30 per share based on the valuation report certified by an independent Chartered Accountant. The valuation report filed by the assessee has been reproduced in the impugned assessment order. The relevant valuation report as noted in the assessment order is reproduced hereunder: -

	<i>Book Value</i>	<i>Market Value</i>
Trade Receivable	160.000	160,000
Cash & Bank Balance	103.114	103,114
Share Application Money paid to Mail Today	167.500,035	167,500.035
Investment (Mail Today)	1.120,144.960	2,861.657,768

<i>Asset (A)</i>	<b>1,287,908,109</b>	<b>3,029,420,917</b>
TDS Payable	4.363.060	4.363.060
Other Current Liabilities	583.059	583.059
Provision for Interest on Loan	39.267.539	39.267.539
Liabilities (B)	<b>44,483,658</b>	<b>44,483,658</b>
<b>C=(A+B)</b>	<b>1,243,424,451</b>	<b>2,984,397,259</b>
Unsecured Loan (Thomson Press India Limited)	819.187,525	819,187,525
<b>Total Firm Value</b>	4.24.236.926	2.165.749.734
<b>Net Finn Value</b>	<b>424,236,926</b>	<b>2,165,749,734</b>
Share Capital (Including Share Application Money)	7,22,60,000	7,22,60,000
Value of Share	<b>77.06</b>	29.97

3. AO however noted that % age of shareholding of assessee company in Mail Today was 64% instead of 67% shown by the assessee. He further noted that the total value of stake of assessee in the report of Mail Today has been shown at Rs. 22 crores, whereas value in the report given by the assessee was shown at Rs. 27.5 crores. The percentage of the shares has also been wrongly calculated 67% as against 64%. Therefore, the value of stake held by the assessee in Mail Today comes to Rs. 270.08 as against Rs. 286.16 shown by the assessee company and accordingly, the value of the shares would come to Rs. 25.75. Since assessee company has issued 5,07,94,056 number of shares at a premium of Rs. 20/- and accordingly the excess value comes to Rs. 2.25 which is taxable for income from other source as per the provision of section 56(2)(viib) comes out of Rs.11,42,86,626/- which was added back by him to the income of the assessee. But nowhere AO has disturbed the method or value substantiated by the assessee, except for the aforesaid reason.

4. Aggrieved by the said assessment order the assessee filed an appeal before Ld. CIT(A). In so far as the addition of Rs. 11,42,86,626/- made by the AO, Ld. CIT (A) has deleted the said addition on the ground that, since 5,07,94,056 shares were actually allotted in the financial year pertaining to next assessment year, therefore, no addition can be made in terms of section 56(2)(viib) as same cannot be made in the year of the receipt of the funds but can only be made in the year when shares were issues or allotted.

### **Enhancement by the CIT(A)**

5. However, the Ld. CIT(A) had issued notice for enhancement which for the sake of ready reference is reproduced as under: -

*“8.3 The show cause notice issued to the appellant is as under:*

*“ ... The appeal for the AY 2013-14 is pending before this office, wherein, you have filed grounds of appeal against the addition amounting to Rs.11,42,86,626/-, made by the AO in terms of the provisions of Section 56(2)(viib) of the Act.*

*2. On perusal of the assessment order passed by the AO, the submissions and the documents placed by you on record before me during the appellate proceedings, it is noticed that the receipt and utilization of Share Application Money during the AY 2013-14 and 2014-15 is as under:*

#### **AY 2013-14**

<i>Opening balance</i>	<i>Rs. 72,25,00,000/-</i>
<i>Received during the year</i>	<i>Rs. 135,42,20,114/-</i>
<i>Utilized for issuing shares</i>	<i>Rs. 72,25,00,000/-</i>
<i>Closing balance</i>	<i>Rs.135,42,20,114/-</i>

*A total of 2,40,83,333 shares @ 30 per share were issued during AY2013-14.*

**AY 2014-15**

Opening balance	Rs.135,42,20,114/-
Received during the year	Rs. 16,96,01,580/-
Utilized for issuing shares	Rs. 152,38,21,694/-
Closing balance	Rs. Nil

A total of 5,07,94,056 shares @ 30 per share were issued during AY 2014-15.

3. In this connection, the assessment records of the case were called for from the AO and have also been perused.

4. It is noticed that the issue of applicability of section 56(2)(viib) of the Act was examined by the assessing officer in AY 2013-14 wherein the company vide letter dated 18.03.2016 (filed before the assessing officer) had submitted that an amount of Rs. 72.25 crores as share application money (consideration for shares issued in AY 2013-14) was received during AY 2011- 12 and AY 2012-13. The company had also submitted that the provisions of section 56(2)(viib) of the Act are applicable from 1.4.2013 i.e. AY 2013-14 and onwards. The company had also argued that since the section 56(2)(viib) was not on statute at the time of receipt of Share Application Money of Rs. 72.25 crores, therefore, same is not applicable at the time of actual allotment of shares i.e. during AY 2013-14. As regards to the applicability of section 56(2)(viib) of the Act on the SAM of Rs. 135.42 crores received during the AY 2013-14, the company vide the same letter dated 18.03.2016 had argued that the applicability of section 56(2)(viib) of the Act should be examined in AY 2014-15 (in the year of allotment) and not in the AY 2013-14 (in the year of receipt of money). However, the AO proceeded to make u/s 56(2)(viib) of the Act corresponding to SAM of Rs. 135.42 crores received during the AY 2013-14. Thereafter,

*the AO made addition corresponding to SAM of Rs. 135.42 crores in AY 2014-15 (in the year of issue of shares) as well.*

*5. The main issue involved in the case is that the addition u/s 56(2)(viib) should be made in the year of actual receipt of SAM or in the year of issue of shares. In this connection, it may be mentioned that the share application money is a liability recorded in the books of a company, which is likely to be returned if shares are not allotted whereas share premium is not a liability for the company rather it is a capital receipt to the company and company is not under any obligation to return it back. Moreover, the share applicant has a right to take its money back till it changes its character i.e. converted into share capital. But the investor cannot get back the share premium. The only option available to the investor is to get the dividend from the company or gain/loss upon sale of this investment.*

*6. The section 56(2)(viib) of the Act uses the words "where a company receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value" meaning by that the consideration for issue of share can be received by the assessee in any of previous year including the relevant previous year. It does not state that the consideration should be received only during the year. Section 56(2)(viib) simply states that when the share premium is entered into books of the assessee and the share premium combined with the face value exceeds the fair market value of the shares of the assessee company, at that point of time, the provisions of section 56(2)(viib) get triggered. Thus, I propose to hold that the addition u/s 56(2)(viib) of the Act should be made in the year of issue of shares irrespective to the year of receipt of share application money because the character of share application money changes to*

*'Share premium' only at the time of issue of shares and till then it remains a liability.*

*7. Another issue involved in this case is the fair market value of shares at the time of issue. Though, the assessing officer did not per se challenge the Valuation Report during the AY 2013-14, however, during the assessment proceedings for AY 2014-15, the assessing officer examined the valuation report including the person who prepared the valuation report for the shares of M/s Mail Today News Paper Private Limited. It may be mentioned here that the value of shares of M/s India Today Online Private Limited is being derived from the value of shares of M/s Mail Today News Paper Private Limited and therefore financial statement and audit report of M/s Mail Today News Paper Pvt. Ltd. assumes importance in determination of fair market value of shares.*

*8. A perusal of copy of financial statement and Audit report for M/s Mail Today Newspapers Private Limited for the year ending on 31.3.2013 as available on assessment records reveals following observations made by the Auditor M/s S R Batliboi & Co. LLP.*

*"Emphasis of Matter*

*We draw attention to Note 2 of the financial statements. As at March 31,2013, the Company has accumulated losses of Rs. 3,20,39,42,192 (Previous year Rs. 2,90,70,45,533) against equity of Rs. 3,10,65,04,984 (Previous year Rs. 2,62,12,00,047). The company has incurred losses of Rs. 29,68,96,659 during the year and also has net current liabilities of Rs. 6,54,29,827 as at March 31, 2013 consequent of which ability of the company to continue as a going concern is entirely dependent on financial and operational support from existing investor and successful*

*implementation of business plan. These mitigating factors have been more fully disclosed in Note 2 of accompanying financial statements, in view of which the accompanying financial statements have been prepared under the going concern assumption, and consequently, no adjustment have been considered necessary to the carrying value of classification of balance sheet accounts."*

9. *The relevant portion of Note 2 is as under:*

*"During the current year, the company has incurred losses of Rs. 29,68,96,659 (Previous year 52,79,24,628) thereby resulting in accumulated losses of Rs. 3,20,39,42,192 against shareholders funds of Rs. 3,10,65,04,984, which has substantially eroded its net worth as on date.*

*Management based on future business plans of the Company and potential infusion of the funds from existing shareholders/others expects to expand and generate positive cash flows. In view of this, these financial statements are prepared on going concern basis."*

10. *The above suggests:*

- (i) The Auditor has categorically mentioned that the net worth of the company has been eroded and accumulated losses are more than the Shareholders funds.*
- (ii) There are doubts that the company shall be able to continue as a going concern unless funds are invested by the shareholders.*
- (iii) It is entirely dependent on financial and operational support from existing investor and successful implementation of business plan.*

*In such situation, the FMV of the shares of such company cannot be 4-5 times of the face value as claimed.*

*11. The above discussion coupled with the statement of Shri Joy Kumar Jain recorded by the assessing officer and other material suggests that the FMV of shares of M/s Mail Today Newspapers Private Limited is negative as on 31.3.2012 and 31.3.2013 as against Rs. 40.16 (valuation report dated 20.07.2012) and Rs. 44.78 (as taken in valuation report dated 25.07.2013). The assessing officer during the proceedings for AY 2014-15 has established that the valuation report for the shares of M/s Mail Today News Paper Private Limited as furnished by you cannot be relied upon and as a result the valuation report for the shares of M/s India Today Online Private Limited can also not be relied upon.*

*12. Following clear points emerge from the above discussion:*

- (i) The addition u/s 56(2)(viib) should be made in the year in which the shares are actually issued irrespective to the year in which share application money is received.*
- (ii) The shares of M/s India Today Online Private Limited derive value entirely from its investment in M/s Mail Today News Paper Private Limited.*
- (iii) The valuation report for the shares of M/s Mail Today News Paper Private Limited as on 31.3.2012 as furnished by you cannot be relied upon and as a result the valuation report for the shares of M/s India Today Online Private Limited can also not be relied upon.*

*13. Since, the net worth of M/s Mail Today Newspapers Private Limited as on 31.3.2012 is negative, therefore, while computing the FMV of the shares of M/s India Today Online Private -" Limited*

as on 31.3.2012, the FMV of shares of M /s Mail Today Newspapers Private Limited at the most can be taken at face value i.e. Rs. 10 per share. Thus, the FMV of shares of M/s India Today Online Private Limited as on 31.3.2012 is worked out as under:

#### Assets

Value of shares in M/s Mail Today Newspapers @ 10per share	Rs.67,23,39,330
Other assets (as per balance sheet as on 31.3.2012)	Rs.1,97,63,165
Total assets	Rs.69,21,02,495
<b>Liability</b>	
Short term borrowings (as per balance sheet as on 31.3.2012)	Rs.81,91,87,525
Trade Payable (as per balance sheet as on 31.3.2012)	Rs. 1,50,000
Other current liabilities (as per balance sheet as on 31.3.2012)	Rs. 7,25,737
Short Term provisions (as per balance sheet as on 31.3.2012)	Rs.4,36,30,599
Share Application Money	Rs.72,25,00,000
FMV= (Total assets - Total Liabilities)/ number of shares as on 31.3.2012)	
FMV= (69,21,02,495 -158,54,68,124)/10000 = -89336 per share	

14. In view of above, it is clear that during AY 2013-14, shares were issued at a price more than FMV of shares of the assessee company. Thus, the provisions of section 56(2)(viib) are applicable with reference to shares issued during AY 2013-14. Since 2,40,83,333 shares @ 30 per share having face value of Rs. 10 per share were issued during AY 2013-14, therefore, I propose to make an enhancement of Rs. 48,16,66,660 (Rs. 20 x 2,40,83,333) for the AY 2013-14.

15. In this regard, you are show caused and requested to file your reply by 20/09/2018 as to why the income assessed by the AO not be enhanced and the amount of Rs.48,16,66,660/- not be

*added to your income for the assessment year 2013-14 under Section 56(2)(viib) of the Act.”*

6. In response, assessee filed detailed reply which has been incorporated from pages 46 to 64 of the appellate order. In sum and substance, the assessee first of all objected to the jurisdiction to make enhancement on the ground that this issue was never discussed by the AO or arises from the assessment order, because the valuation and valuation method submitted by the assessee has been accepted by the AO and the only reason for making the addition by the AO was on account of the difference in percentage of holding of shares in the share holding of assessee in Mail Today and accordingly he has reduced the value per share from Rs. 30 to Rs. 27.75. Another objection of the assessee was that the share application money has been received in the earlier years and same were allotted in the month of September, 2012 and till that period neither the provision of section 56(2)(viib) was there in the statute nor Rule 11U & 11UA was prescribed. Apart from that, assessee has given detailed submission as to why the value given by the independent valuer vide report dated 16.8.2012 and 27.12.2012. Further, the value of shares was also substantiated by the assessee based on various factors. Firstly, such valuation was supported by the past history, like assessee had sold its share holding in M/s. Mail Today Newspaper Pvt. Ltd. to M/s. TV Today Network Ltd. in assessment year 2011-12 to the extent of 19,63,502 shares at Rs. 43.29 per share on which assessee has offered the capital gain duly accepted by the revenue. Then same cannot be disputed in the impugned assessment year. Secondly, the AO of M/s. Mail Today has accepted the value of Rs. 43.29 while making the assessment u/s 143(3) and which later on in his order passed u/s 154 has been worked out at Rs. 40. Thus, once value of Rs. 40 has been accepted by the AO, then assessee who has valued

the share at Rs. 30 in this year, then same cannot be held to be less than or more than fair market value. Lastly, it was also submitted that M/s. Mail Today Ltd has also issued the shares to non-resident third party at Rs. 43.29 and which was also informed to the RBI and was duly approved and accepted by the RBI.

7. However, Ld. CIT(A) has rejected the entire contentions raised by the assessee at various counts in his detailed order contained from pages 66 to 94 of appellate order. In sum and substance, the reasoning given by the Ld. CIT(A) in all the issues can be summarised in the following manner: -

- i) In so far as assessee's objection with regard to jurisdiction of the CIT (A) to enhance the income which is the subject matter of appeal, the Ld. CIT(A) held that the income of Rs. 48,16,66,660/- proposed to be added u/s 56(2)(viib) is inextricably linked to the issue under consideration and formed part of the assessment record as AO has examined the issue of applicability of 56(2)(viib) in his assessment order; and also the assessee company vide letter dated 18.3.2016 had submitted that amount of Rs. 72.25 crores as share application money was received in the assessment year 2011-12 and 2012-13 and the provision of this section is applicable only from assessment year 2013-14 onwards. He further held that in view of the Supreme Court decision in the case of **CIT vs. Nirbheram Deluram**, reported in 91 Taxman 181, held that appellate powers are not confined to the matters considered by the AO and therefore, it was open for the Appellate Commissioner to make addition regarding new source of income not considered by the AO. He also distinguished the judgment of Delhi High Court in the case of **CIT vs. Sardari Lal & Co. 251 ITR 864**, holding that CIT(A)

has no power to enhance by discovering new source of income not considered by the AO. However, in the present case the income sought to be enhanced was inextricably linked to the issue under consideration. Therefore, it cannot be said that enhancement is being considered by discovering any new source of income.

- ii) In so far as assessee's contention that share application money was received in the earlier year and therefore provision of section 56(2)(vii)(b) cannot be made applicable, he held that assessee itself has stated that the addition made by the AO for sums of Rs. 11,42,86,626/- cannot be made, because shares were allotted and issued in this year and the said provision cannot be made applicable in the year of receipt. Here in this case, once shares have been allotted in this year then, whether the money was received in the earlier year is of no consequence which is clear from the provision of section 56(2)(viib).
- iii) In so far as reliance placed by the assessee at two valuation reports dated 16.8.2012 and 27.12.2012, he held that clause (a) of *Explanation* section 56(2)(viib) provides for two methods for computation of the fair market value of the shares issued by the company, one which is provided in the rules, i.e., 11U & 11UA and other one is residuary method which provides assistance to the assessee to substantiate the value to the satisfaction of the AO on the date of issue of shares. Here in this case no where assessee was able to substantiate the particulars of the shares of the company as on date of issue of shares and therefore assessee's case would not fall within the ambit of sub clause (ii) of clause (a) of the *Explanation*. The assessee has only discussed about value and valuation of the subsidiary of the assessee

company and not the date of issuance of the shares. Thereafter, after quoting extensively the provision of section 11U and 11UA, he held that value of unquoted equity shares shall be the value based on the valuation which has been determined in the manner prescribed in clause (a) or clause (b) of rule 11UA, which provides for computation of value of shares based on book value in the balance sheet and clause (b) provides for the computation of fair market value of unquoted equity shares by the merchant banker or as per discounted cash flow method. He held in so far as DCF method is concerned the same has to be on the date of receipt of consideration and here in this case same was received in the financial year 2011-12 and here in this case DCF valuation has been conducted by the Chartered Accountant who was not even a follow member which is the condition prescribed under Rule 11U. In so far as report dated 27.12.2012 is concerned, he held that the same is not in accordance with rule 11UA, because, firstly, it is after the date of issuance of shares; and secondly, the market value of the shares had determined on Rs. 77.06 per share, whereas in the earlier report dated 27.12.2012 the fair market value of the shares was less than Rs. 30, this shows such a huge variation within the span of four months which is not only unreasonable but also unjustified. The valuation report dated 16.8.2012 was based on unaudited financials, whereas report dated 27.12.2012 is based on audited financials and both reports have been issued by the same Chartered Accountant firms. Further, in the valuation report dated 16.8.2012 NAV method has been adopted whereas in valuation report dated 27.12.2012, DCF method has been adopted. There is no NAV method prescribed under Rule 11UA which is applicable in the instant year and therefore, report

dated 16.8.2012 is liable to be rejected. Even going by the valuation report of 27.12.2012 though DCF method has been mentioned however valuer has ultimately applied NAV method only.

iv) He further noted that valuer in his report dated 27.12.2012 has mentioned the value of the shares of investment made by the assessee company in Mail Today News Paper Pvt. Ltd. has been valued under DCF method and balance all the assets are valued at book value. However, DCF method would not be applicable to compute the value of the subsidiary company and no such express provision is provided in law. Law only mandates applicability of DCF for computing the value of the equity shares of the assessee company.

v) If the value of investment in subsidiary or associate company is to be added to compute the value of the company, then Rule 11UA provides for book value appearing in the balance sheet. Accordingly, he rejected both the valuation report after detailed discussion and thereafter he proceeded to make his own valuation. Apart from that he also noted following facts: -

*“It is an important aspect considering the fact that as on 31.3.2012, the book value of appellant’s investment in M/s. Mail Today is 126,81,44,942/- as against its total assets of Rs. 128,79,08,107/-. Similarly, on 31.3.2013, the book value of appellant’s investment in M/s Mail Today is 158,03,68,050/- as against its total assets of Rs. 169,49,95,674/-.*

*The valuation reports submitted by the appellant at different points of time suggest that the value of shares of M/s India Today Online Private Limited is mainly being derived from the value of shares of M/s Mail Today News Paper Private Limited and*

*therefore, financial statement and audit report of M/s Mail Today News Paper Pvt. Ltd. assumes importance in determination of fair market value of Shares.”*

vi) Thereafter, Ld. CIT (A) noted certain observations made by the auditor in the audit report of Mail Today for the year ending 31<sup>st</sup> Marcy, 2013, which read as under: -

*“We draw attention to Note 2 of the financial statements. As at March 31, 2013, the Company has accumulated losses of Rs. 3,20,39,42,192 (Previous year Rs.2,90,70,45,533) against equity of Rs. 3,10,65,04,984 (Previous year Rs. 2,62,12,00,047). The company has incurred losses of Rs. 29,68,96,659 during the year and also has net current liabilities of Rs. 6,54,29,827 as at March 31, 2013 consequent of which ability of the company to continue as a going concern is entirely dependent on financial and operational support from existing investor and successful implementation of business plan. These mitigating factors have been more fully disclosed in Note 2 of accompanying financial statements, in view of which the accompanying financial statements have been prepared under the going concern assumption, and consequently, no adjustment have been considered necessary to the carrying value of classification of balance sheet accounts.”*

8.47 *The relevant portion of Note 2 is as under:*

*“During the current year, the company has incurred losses of Rs. 29,68,96,659 (Previous year 52,79,24,628) thereby resulting in accumulated losses of Rs. 3,20,39,42,192 against shareholders funds of Rs. 3,10,65,04,984, which has substantially eroded its net worth as on date.*

*Management based on future business plans of the Company and potential infusion of the funds from existing shareholders/others expects to expand and generate positive cash flows. In view of this, these financial statements are prepared on going concern basis.”*

8. From such an observation Ld. CIT(A) deduced that the auditor of Mail Today itself has mentioned that net worth of the company has been eroded and accumulated losses are more than the shareholders funds and there are doubts regarding the ability of the company to continue as going concern and is entirely dependent on financial and operational support from existing investors. The reserves and surplus of the company as on 31<sup>st</sup> March 2013 was in negative more than Rs. 136 crores. In such a situation, the FMV of the shares of such company cannot be 4 to 5 times of the face value as claimed. Further, such valuation report of shares of Mail Today as done by the valuer cannot be ignored. Once the value of the shares of Mail Today is in negative as on 31.3.2012 and 31.3.2013, the face value of fair market value of Mail Today cannot be more than the face value i.e. Rs. 10.

9. Ld. CIT(A) further held that, since the date of valuation and the date of receipt of consideration which mainly falls in the financial year 2011-12, hence audited balance for Asstt. Year 2011-12 has to be considered and since such balance sheet was not submitted in the AGM of the shareholders which happen only on 25.9.2012, therefore, audited balance sheet for the financial year 2011-12 has to be considered for the purpose of computing the formula. Thereafter, he applied book value as per Rule 11UA and held that fair market value unquoted and quoted shares come to Rs. (-) 19,323/-; and therefore, once there is such a huge negative value then only the face value of Rs. 10 can be taken and Rs. 20/- which is premium has to be reduced

in accordance with provision of section 56(2)(viib). Accordingly, he made enhancement of Rs. 20 per share for 2,40,83,333 equity shares allotted during the year.

10. Ld. CIT(A) has also rejected the assessee's contention and reliance placed on the valuation done and accepted in the assessment orders for Mail Today Newspaper Private Limited and also shares sold to third party to non-resident, after detailed reasoning and observed that such an assessment order is not binding upon him as he is not bound with the view adopted by the AO. Accordingly, he made the enhancement of Rs. 48,16,66,660/- (Rs. 20 x 2,40,83,333).

**Argument placed on behalf of the Appellant:**

11. Before us, Ld. Counsel for the assessee Shri Salil Agarwal after narrating the entire facts and issues involved and giving the various chronology of events as to when the share application money was received in the earlier years and the date on which the shares were allotted, submitted that, the valuation and the fair market value of the share application money received and shares allotted by the assessee was substantiated by the assessee before the AO in terms of *sub section (ii) of clause (a) of Explanation to section 56(2)(viib)*. The valuation method and overall value of the shares was accepted by the AO. The AO has only erred in computing the valuation of the shares by adopting the value partly based on the provisional figures and partly on the audited figures. The discrepancy as per the valuation report and the valuation made by the AO in the assessment order for the assessment year 2013-14 and 2014-15 was highlighted and was elaborated before us in the following manner: -

<i>Particulars</i>	<i>Valuation on the basis valuation report dated 16.08.2012 on the basis of provisional financial statements</i>	<i>Valuation on the basis of valuation report dated 27.12.2012 on the basis of audited financial statements</i>	<i>Valuation so made by AO in order of assessment for AY 2013-14 dated 22.03.2016 (at pages 5 and 6 of AO's order)</i>	<i>Valuation so made by AO in order of assessment for AY 2014-15 dated 21.12.2016 (at pages 5 and 6 of AO's order)</i>
Trade Receivables	1,60,000	1,60,000	1,60,000	<ul style="list-style-type: none"> <li>The learned AO at page 6 of Assessment order has inferred that the value/ net worth of shares of M/s Mail Today is negative, thus, its shares cannot fetch Rs. 40 in the open market. In doing so, the learned AO failed to appreciate the fact that in the preceding AY 2013-14, value of Rs. 40 per share has been accepted by AO himself in assessment order.</li> <li>The learned AO rejected the method of valuation of shares of assessee company under section 56(2)(viib) read with</li> </ul>
Cash & Bank Balance	1,03,114	1,03,109	1,03,114	
Share application money paid to Mail Today	16,75,00,035	1,95,00,056	16,75,00,035	
Investment in Mail Today (@ Rs. 40 per share)	286,16,57,768	270,06,19,055	270,08,00,000	
<b>Total Assets (A)</b>	<b>302,94,20,917/-</b>	<b>272,03,82,220</b>	<b>286,85,63,149</b>	
TDS payable	43,63,060	-	43,63,060	<p>Explanation a(ii) and applied valuation as per Rule 11UA.</p> <p>However, while applying Rule 11UA the learned AO failed to apply the complete formula and failed to take factor of Rs. 10, and if said factor would have been taken, the value of assessee's share would have been Rs. 70 (even going by the method so applied by learned AO)</p>
Other Current Liabilities	8,53,059	8,75,737	8,53,059	
Provision for interest on loan	3,92,67,539	4,36,30,599	3,92,67,539	
<b>Total Liabilities (B)</b>	<b>4,48,83,658</b>	<b>4,45,06,336</b>	<b>4,48,83,658</b>	
<b>Total Firm Value (C) = (A) - (B)</b>	<b>298,49,37,259</b>	<b>267,58,75,884</b>	<b>282,36,79,491</b>	

Unsecured Loan (Thomson Press India Limited)	81,91,87,525	81,91,87,525	81,91,87,525
Net Firm Value	216,57,49,734	185,66,88,359	200,44,91,966
Share Capital [no. Of shares]	7,22,60,000	2,40,93,333	7,22,60,000
<b>Value of per share</b>	<b>29.97/-</b>	<b>77.06</b>	<b>27.75</b>

12. Thereafter, he submitted that the Learned AO during the course of assessment proceedings for AY 2013-14 had accepted and was satisfied with the Net Asset Value method so applied by assessee company to value its shares as per Explanation clause (a), sub clause (ii) to section 56(2)(viib), however the learned AO wrongly took the number of shares as 7,22,60,000 as against the correct number of 2,40,93,333 and if only the number of shares is corrected in the working so done by learned AO, then the value per share would work out at Rs. 83.19 per share, which is far in excess of the so worked out by assessee and as such, there would be no need of any addition under section 56(2)(viib) of the Act.

13. Ld. Counsel submitted that the intention of the Legislature to bring to section 56(2)(viib) was to curb the menace of unaccounted money and there is no allegation of unaccounted money in the present case, because share application money was invested by holding company to its subsidiary and the entire transaction is through bank. Therefore, at the threshold provision of section 56(2)(viib) would not be applicable on the facts of the assessee's case. In support he strongly

relied upon the ITAT Chennai Bench in the case of Vaani Estates (P) Ltd. vs ITO 172 ITR 571.

14. Without prejudice the aforesaid submissions he submitted that the learned AO during the course of assessment proceedings for AY 2013-14 had accepted and was satisfied with the Net Asset Value method so applied by assessee company to value its shares as per Explanation (a) (ii) to section 56(2)(viib), and again reiterated that the learned AO had wrongly took the number of shares as 7,22,60,000 as against the correct number of 2,40,93,333. Thus, the rejection of said method by learned CIT (A) is misconceived in law, as Explanation (a) (ii) requires for the satisfaction of assessing officer and once the AO was satisfied, then the CIT (A) can only examine whether the said valuation is correct or not and he cannot change the method of valuation, as such. He submitted that, it is trite law that "when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and not otherwise". In this regard he placed reliance on the following judgments:

(i) CIT vs SPL Siddhartha Ltd. (Delhi HC) reported in 345 ITR 223.

(ii) Azimuth Investments Ltd. vs ACIT (Delhi) ITA No. 283/De1/2013.

15. He further submitted that the provisions of section 56(2)(viib) have been brought in the statute book, w.e.f. 01.04.2013 and even the Rules specified 11U and 11UA [for determining value of shares as per Explanation (a) (i) to section 56(2)(viib)] have been inserted w.e.f. 29.11.2012. Admittedly when the shares were issued on 08.09.2012, then neither the substantive provision was there in the statute books nor even the computation provision was notified. Thus, there was no occasion to apply the formula laid down in the said rules. He submitted that it is also a settled law that in the absence of machinery

provisions, the computation fails and consequently, the substantive provision would also fail. In support, he relied upon the judgment of Hon'ble Supreme Court in the case of Commissioner of Income-Tax, vs. B. C. Srinivasa Setty, reported in 128 ITR 294.

16. Ld. Counsel further submitted that addition so enhanced by a sum of Rs. 48,16, 66,660/- in AY 2013-14 was not the "subject matter of assessment" before learned AO, which is evident from the order of assessment so passed by learned AO and also as per the findings so recorded by learned CIT (A) at pages 64 and 65 of his order. No query was ever raised by the AO with respect to the issuance of shares of a sum of Rs. 72, 25, 00, 000/-. The learned CIT (A) has merely relied on the reply furnished by assessee company dated 18.03.2016 (placed at pages 20A to 20L of the paper book), that to nowhere indicates remotely that, the said issue was examined or mind was applied by learned AO. Thus, enhancement so made is without jurisdiction which is not permissible in law as has been held by Hon'ble Apex Court in the case of **CIT vs. Rai Bahadur Hardutroy Motilal Chamaria**, reported in **66 ITR 443**.

17. Further, on the issue of scope of enhancement he submitted that Ld. CIT(A) can only acquire jurisdiction for enhancement only when AO has examined the issue from point of view of its taxability and or applied his mind on any of the issue. If the issue has not been examined or touched by AO then enhancement is not permissible on such issue. In support, Ld. Counsel strongly relied upon the decision of Jurisdictional High Court in the case of **CIT vs. Sardarilal & Company** wherein the Hon'ble Delhi High Court has reiterated the principles laid down by the Hon'ble Supreme Court in the case of **CIT vs. Rai Bahadur Hardutroy Motilal Chamariya (supra)**.

18. He further submitted that the assessee company had received Rs. 72,25,00,000/- as share application money in AYs 2011-12 and 2012-13 vide board resolution dated 20.12.2010, whereas, shares were issued on 08.09.2012 at a face value of Rs. 10 and premium of Rs. 20 per share. Thus, 2,40,83,333 shares were issued for a consideration of Rs. 72,25,00,000/- on 08.09.2012, i.e., share premium of Rs. 48,26,66,660/- and face value of Rs. 24,08,33,330/-. As far as facts of the instant case are concerned for the AY 2013-14, it is an undisputed fact that assessee has not received any sum for share for Rs. 72,25,00,000/- in AY 2013-14, in fact the said sum was received in preceding AYs 2011-12 and 2012-13, wherein, provisions of section 56(2)(viib) were inapplicable which was brought in the statute books only w.e.f. 01.04.2013. Thus, addition so enhanced by learned CIT (A) is without jurisdiction and is liable to be deleted. If such a provision was brought w.e.f. 1.4.2013 and even the rule specified u/s 11U and 11UA has been inserted w.e.f. 29.11.2012, then same cannot be held to be applicable when the shares were issued on 8.9.2012. He further submitted that the learned AO in the order of assessment for AY 2013-14 dated 22.03.2016 at pages 5 and 6 of the said order, had accepted the Net Asset Value method so applied by assessee company to value its shares as per Explanation a (ii) to section 56(2)(viib), however, the learned AO wrongly took the number of shares as 7,22,60,000 as against the correct number of 2,40,93,333. Thus, the learned AO worked out the value of assessee company's shares at Rs. 27.75 per share was erroneous as against Rs. 30 per share. If the working of the AO is accepted as such except for taking actual shares issued, then value would come to 77.06 per share, instead issued at Rs. 30 per share by assessee and also declared by the assessee company. The AO had had wrongly worked out the addition of Rs. 11,42,86,626/- by taking the difference of Rs.

2.25 on 5,07,04,056 number of shares issued in the AY 2014-15 simply on the ground of percentage of holding of Mail Today. Though the learned CIT (A) while passing the impugned order for AY 2013-14 dated 27.09.2018, granted relief to the assessee with respect to addition of Rs. 11,42,86,626/-, on the ground that section 56(2)(viib) is attracted only in the year of issuance of shares and not in the year of receipt of share application money, as share application money received in AY 2013-14 was Rs. 135,42,20,114/- and shares for the same were only issued in AY 2014-15.

18. Ld. Counsel, further submitted that in response to the show cause notice of enhancement assessee has substantiated the fair market value of the shares in a very detailed manner. In his written submission he has summarised the assessee's contention as under: -

*“ (i) It is most respectfully submitted that the learned AO in the order of assessment for AY 2013-14 had not disputed the fact that Investment made by assessee company in M/s Mail Today's shares have correctly been made by assessee company at Rs. 40, fair market value, while valuing shares of assessee company in A Y 2013 - 14 and further, even the said fair market value of Rs. 40 has been accepted by the AO of M/s Mail Today in AY 2013-14 and AY 2014-15, brief details of assessment history of M/s Mail Today is highlighted below (Pg 285 to 287 of the paper book):*

*a. AO of M/s Mail Today has accepted the value of Rs.43.29 while making assessments u/s 143(3) of the Income tax Act, 1961 (kindly see pages 208 to 213 of paper book);*

*b. Subsequently, vide order passed under section 154 of the Act for AY 2013-14, the fair market value per share was worked out by AO at Rs. 40, thus, a disallowance was made of Rs. 3.29 per share under section 56(2)(viib) by the AO of Mail Today in AY*

2013-14. That means, the fair market value of Rs. 40 is accepted by the AO of M/s Mail Today.

c. That further, the detail of disallowance made under section 56(2)(viib) for AY 2013- 14 in the shape of chart.

d. That further, in AY 2014-15, M/s Mail Today suo moto made disallowance under section 56(2)(viib) at the rate of Rs. 3.06 per share, in its computation of income, that means, fair market value of its shares was worked out at Rs. 40.23 and the said working was accepted by AO in order of assessment passed under section 143(3) of the Act.

e. Further, M/s Mail Today Newspaper Ltd. has also issued the shares to a non -resident third party at Rs.43.29 and Mail Today had also informed issuance of shares at this value to RBI as well, which is duly accepted and approved by RBI

f. That further, reliance is placed on Master Circular No. 15 dated 01.07.2014 issued by RBI, wherein, Pricing guidelines have been mentioned as follows (which shows the value of share of Mis Mail Today is also accepted by RBI):

*Fresh issue of shares: Price of fresh shares issued to persons resident outside India under the FDI Scheme, shall be:*

- *on the basis of SEBI guidelines in case of listed companies.*
- *not less than fair value of shares determined by a SEBI registered Merchant Banker or a Chartered Accountant as per as per any internationally accepted pricing methodology on arm's length basis.*

(ii) *That further, in AY 2011-12, the assessee company had also sold its shareholding in M/s Mail Today Newspapers Pvt. Ltd., to M/s TV Today Network Ltd. at an extent of 19, 63,502 shares at Rs.*

43.29 and due capital gain was offered by the assessee - appellant, which was accepted by Revenue and as such, once the value of shares of M/s Mail Today has been accepted in assessee's own case for AY 2011-12, then the same cannot be disputed in the impugned assessment year as has been done by learned CIT (A). Reliance is placed on the judgment of Hon'ble Apex Court in the case of CIT vs Excel Industries Ltd. reported in 358 ITR 295.

- (iii) That further, the assessee company had valued the shares of M/s Mail Today @ Rs. 40 per share on the basis of valuation of shares as per report provided by M/s Mail Today as on 20.07.2012, wherein, the valuer applied Discounted Cash Flow Method in order to value the shares of M/s Mail Today at Rs. 40 per share, and the said report has also been accepted by Revenue in the case of M/s Mail Today. That further, even the learned AO in AY 2013-14 has accepted the same. However, in AY 2014 -15, the learned AO has disputed the said valuation on the basis of financial losses in M/s Mail Today and also on statement of valuer of M/s TV Today Network Ltd., which has got the valuation of shares done of M/s Mail Today for its own purposes.
- (iv) Now, here it is submitted that the valuation of shares of M/s Mail Today has been done on "Discounted Cash Flow Method", whereas, the learned AO in AY 2014-15 has merely gone by the financial statements and has held that since, the company is running into losses, it cannot command Rs. 40 per share in the open market. In this regard, it is submitted that valuation of share is not only dependent on the financials, rather the valuer of M/s Mail Today has taken a holistic view and has valued its shares at Rs. 40 after taking the forecasted revenue growth for a period of 5 years, forecasted free cash flows for a period of 5 years, discount

rate, terminal growth rate and terminal value. Thus, rejection of valuation report of M/s Mail Today merely on the basis of losses in financial statements is- not correct unless and until specific discrepancies could have been pointed in the valuation report so furnished through an independent valuation officer.

- (v) Apart there from, learned AO and CIT (A) in AY 2014-15 have also mentioned about the valuation report of Mail Today Newspapers Pvt. Ltd. prepared by M/s Joy Financial Consulting Pvt. Ltd. for M/s TV Today Network Ltd., who was examined by AO of the assessee - appellant in AY 2014-15. In fact, in doing so, the learned AO has grossly erred in law and on facts by failing to appreciate the fact that the aforesaid report was obtained by M/s TV Today Network Ltd. and is dated 24.05.2013 which report had been prepared on analysis of the value of the equity shares of Mail Today Newspapers Pvt. Ltd. as at 31.03.2013. The aforesaid report was in fact obtained by listed public limited company and as per the report obtained by them since they had acquired shares in Mail Today Newspapers Pvt. Ltd., and even going by the said report the value as adopted was Rs. 44.78/- per share.
- (vi) That further, the valuation of shares of M/s Mail Today is also governed by the fact that a well-known media house listed company M/s TV Today Network Ltd. was an investor in M/s Mail Today, which fact has totally been brushed aside by your goodself and thus, the valuation of shares of M/s Mail Today cannot be solely worked out on the basis of financial statements, and further reliance placed on statement of M/s Joy Kumar Jain in piecemeal is also not justified, as in the said statement, the concerned valuer has also stated that he has not done valuation in the case of assessee - appellant and further, nowhere, he has denied the valuation of Rs. 44.78/- computed by him. Thus, the

statement of Mr. Joy Kumar Jain rather supports the case of assessee - appellant and in any case, the same was never provided for rebuttal and has directly come in the order of assessment and as such no adverse inference can be drawn on the basis of said statement or in alternative, if your goodself wants to rely on the said statement, then the statement may be provided for rebuttal and the assessee - appellant would also like to cross - examine the said valuer.

vii) That the learned CIT (A) in the impugned order has arbitrarily brushed aside the aforesaid submissions so made by assessee company and had proceeded to invoke Rule 11U and 11UA of the Income Tax Rule, which was never made part of discussion by learned AO in the order of assessment nor even by learned CIT (A) in the show cause notice of enhancement dated 13.09.2018. Rather, the learned CIT (A) accepted the method of valuation of assessee company in the show cause notice dated 13.09.2018, however, only tinkered with the value of shares of M/s Mail Today to Rs. 10 as against Rs. 40 taken by the assessee company (which was duly explained to CIT(A) as above). Thus, it is most humbly submitted that the order so passed by learned CIT (A) is vitiated in law as the same is without following the principles of natural justice, reliance is placed on the following judgments:

(i) *Hind Samachar Ltd. vs ACIT (P&H HC) reported in 335 ITR 277.*

(ii) *Prateek Resorts & Builders Pvt. Ltd. (Allahabad HC) reported 199 Taxman 140 (Magz).*

viii) Thus, the submission of the assessee company is that the issues raised in the enhancement notice dated 13.09.2018 were duly replied by the assessee, whereas, addition so made by learned CIT (A) by applying Rule 11U and 11UA were never confronted in the

*enhancement notice by learned CIT (A) and has directly come in the appellate order dated 27.09.2018 and as such, the addition so enhanced by learned CIT (A) is vitiated in law.”*

19. Mr. Salil Agarwal further referring to the sub clause (ii) of clause (a) of Explanation to section 56 (2) (viib), vehemently submitted that, once assessee has exercised the option of sub clause (ii), then what has been substantiated by the assessee to the satisfaction of the AO assumes significance. Ld. CIT(A) cannot resort to sub clause (i) of clause (a) so as to resort to valuation method prescribed in 11U and 11UA. Here assessee has been able to substantiate the value on the basis of valuation report dated 27.12.2012 which report has wrongly been rejected by Ld. CIT(A), because same has been partly accepted by the AO in his order for the assessment year 2013-14. He again reiterated that assessee has also substantiated the said fair market value on the basis of the finding given by the Assessing Officer in the assessment order of M/s. Mail Today in Asstt. Year 2013-14 and 2014-15 and also drew our attention to the details of assessment history of Mail Today. He further submitted that the valuation of the shares of Mail Today was finally accepted @ Rs. 40 per share on the basis of valuation of shares provided by M/s. Mail Today as on 20.7.2012, wherein the valuer applied DCF method in order to value the share of M/s. Mail Today. The only point raised by the AO in assessment year 2014-15 and Ld. CIT(A) in assessment year 2013-14 is that, there were financial losses in M/s. Mail Today and in statement of Valuer of M/s. TV Today Network Ltd. which had tried to value the Mail Today for its own purpose had stated that the net worth of Mail Today was negative. Nowhere the valuation of shares of M/s Mail Today has been done on "Discounted Cash Flow Method", whereas, the learned AO in AY 2014-15 has merely gone by the financial statements of Mail Today and has held that, since the

company is running into losses, it cannot command Rs. 40 per share in the open market. In this regard, he submitted that valuation of share is not merely dependent on the financials, rather the Valuation report submitted by the assessee for valuing the shares of M/s Mail Today has taken a holistic view and has valued its shares at Rs. 40 after taking factors like, the forecasted revenue growth for a period of 5 years, forecasted free cash flows for a period of 5 years, discount rate, terminal growth rate and terminal value. Thus, rejection of valuation report of M/s Mail Today merely on the basis of losses in financial statements of Mail Today is not correct unless and until specific discrepancies could have been pointed in the valuation report so furnished through an independent department valuation officer. Apart there from, learned AO in his order for AY 2014-15 and CIT (A) have also mentioned about the valuation report of Mail Today Newspapers Pvt. Ltd. prepared by M/s Joy Financial Consulting Pvt. Ltd. for M/s TV Today Network Ltd., who was examined by AO of the assessee in AY 2014-15. In fact, in doing so, the learned AO has exceeded in his jurisdiction wherein he failed to appreciate the fact that the aforesaid report was obtained by M/s TV Today Network Ltd. and is dated 24.05.2013 which report had been prepared on analysis of the value of the equity shares of Mail Today Newspapers Pvt. Ltd. as at 31.03.2013. The aforesaid report was in fact obtained by listed public limited company and as per the report obtained by them, as they had acquired shares in Mail Today Newspapers Pvt. Ltd. He pointed out that even going by the said report the value as adopted by their Valuer was Rs. 44.78/- per share. Further, the valuation of shares of M/s Mail Today is also governed by the fact that a well known media house listed company M/s TV Today Network Ltd. was an investor in M/s Mail Today, which fact has totally been brushed aside by both the authorities and thus, the valuation of shares of M/s

Mail Today cannot be solely worked out on the basis of financial statements. Even the reliance placed on statement of M/s Joy Kumar Jain in piecemeal cannot be held to be justified, as in the said statement, the concerned valuer has also stated that he has not done valuation in the case of assessee and further, nowhere, he has denied the valuation of Rs. 44.78/- computed by him. Thus, the statement of Mr. Joy Kumar Jain rather supports the case of assessee. In any case the statement cannot be relied upon as the same was never provided for rebuttal and has directly come in the order of assessment and as such no adverse inference can be drawn on the basis of said statement. In the alternative, if the said statement is to be relied, then the said statement should be provided for rebuttal and the assessee - would also like to cross examine the said Valuer.

20. It was further submitted that the said report has been accepted by the assessing officer of M/s TV Today Network Ltd. in the order of assessment passed under section 143(3) and the said valuation report has been held to be correct and thus, reliance on the third-party report in the case of assessee company and that too against the assessee company is uncalled for and unjustified.

21. That the third and fourth finding of learned CIT (A) that the assessee has valued its shares on Net Asset Method, which is not a prescribed method under the Act, Ld. Counsel submitted that, it is not legally correct, as Explanation (a) (ii) to section 56(2)(viib) provides a specific right to assessee company to value its shares and substantiate the same before the assessing officer, thus, the method so adopted by the valuer of assessee company was as per the aforesaid clause and only the higher value as worked out in Explanation (a) (i) or (ii) can be adopted. Thus, the working of assessee which was as per Explanation (a) (ii) to section 56(2)(viib) should have been adopted as it is high as

compared to sub-clause (i); and reliance placed by learned CIT (A) solely on the working as per Explanation (a)(i) to section 56(2)(viib) is legally untenable and needs to be rejected. Further, the learned CIT (A) at pages 86 to 89 of his order has applied Rule 11UA(2)(a), i.e., the 'book value method' and has worked out a negative figure of Rs (-) 89,336 per share being the value per share of assessee company. That while doing so, the learned CIT (A) has failed to appreciate that section 56(2)(viib) provides for fair market value, as to higher of calculations made in a (i) and a (ii) and as such, since the working so substantiated by assessee company is as per Explanation a (ii) and is higher than the value worked out as prescribed in Rule II U and II UA, thus, the same should have been adopted for the purposes of valuation of shares of assessee company. As such, the valuation so made by assessee company should have been accepted.

**Submissions made on behalf of Department:**

22. On the other hand, Ld. CIT(DR) strongly relied upon the various observations made by the Ld. CIT(A) and submitted that all the objections raise by the Ld. Counsel has been addressed in detail by the Ld. CIT(A) in his order. He also submitted the issue of jurisdiction of enhancement has been considered by the Ld. CIT(A) and has categorically given the finding that the issues raised by him were inextricably linked with the issue raised by the AO and there is no new source of income which has been considered. He further submitted that provision of section 56(2)(viib) would be clearly applicable in the present case, because same is applicable on the date of issue of shares and said issue of shares admittedly were in the relevant financial year which falls in the assessment year 2013-14, since when these provision have been made applicable. Ld. CIT(A) has clearly brought out as to how assessee could not substantiate the value on the issue

of issuance of shares and also referred to various observations given in the detailed order passed by Ld. CIT(A) which was read out by him in detail. He further submitted that Assessing Officer of Mail Today has nowhere discussed the valuation of the shares and has simply accepted the value given by the assessee and therefore, such an assessment order from Mail Today can not have any persuasive or binding precedence. Further, when the valuation shown by the assessee before the AO was not found to be correct, then the correct valuation has to be determined and same can only be done under sub-clause (i) of clause (a) of Explanation, which prescribes for method provided in Rule 11 U & UA. No infirmity can be found in such a valuation. The Ld. CIT(A) has not determine the valuation as per 11UA but also took note of the fact that the net worth of Mail Today shares were negative due to heavy losses and thus, premium of Rs. 20 cannot be justified. He thus, strongly supported the order of the Ld. CIT(A).

### **DECISION**

23. We have heard the rival submissions and also perused the relevant finding given in the impugned order as well as material referred to before us. The sole issue involved here in this appeal is with regard to enhancement of income of Rs. 48,16,66,660/- by adopting the fair market value of the shares issued during the year at Rs. 10/- per share and thereby disallowing the premium of Rs. 20 paid on such shares aggregating to 2,40,83,333 shares during the year after invoking the provision of section 56(2)(viib). The facts have already been discussed above in detail, however for the purpose of our adjudication, in a succinct manner, relevant facts are reiterated. The assessee company has received sum of Rs. 72,25,00,000/- as a share application money in the assessment years 2011-12 and 2012-13. In lieu of such share application money received in earlier years,

2,40,83,333 shares were issued on 8<sup>th</sup> September, 2012 for a consideration of Rs. 72,25,00,000/- having a share premium of Rs. 48,16,66,660/- and face value of Rs. 2,40,83,330/-, that is, on face value of Rs. 10 and premium of Rs. 20 shares. One important fact which is to be kept in the mind that the value of shares of M/s India Today Online Private Limited, i.e., assessee, is mainly being derived from the value of shares of M/s Mail Today News Paper Private Limited. The AO though in the assessment order has referred to provision of section 56(2)(viib) and also required the assessee to justify the premium received on share application money, but he did not doubt the method adopted by the assessee to value the shares to substantiate the fair market value. In response the assessee had submitted that it had issued shares to Mail Media at a price of Rs. 30 per share based on the valuation report certified by independent Chartered Accountant, the valuation report submitted by the assessee has already been incorporated above. Ld. AO did not tinker with such a valuation except for holding that assessee has taken the percentage of share holding of Mail Today Newspaper Private Limited at 67%, whereas it was 64% as per the audit report of Mail Today. Based on this, he has taken the value of the shares at Rs. 27.75 and thereafter made the addition of Rs. 2.25 on the entire shares 5,07,04,056 and thereby made the addition of Rs. 11,42,86,626/-. However, while considering the number of shares issued during the year AO has taken the entire figure of shares issued in various years which gave a skewed result. Now this addition stands deleted by the Ld. CIT(A) on the ground that only transaction of allotment of shares was of 2,40,83,333 shares and the shares aggregating to 5,07,94,056 were actually allotted in the next assessment year and therefore, no addition can be made in terms of section 56 (vi)(b) in this year.

24. Thereafter, Ld. CIT(A) proceeded to make enhancement of income on the ground that during the year, the shares aggregating to 2,40,83,333 were allotted during this year for which premium of Rs. 20 per share was paid which needs to be examined. The main reason for the proposal to make enhancement was as under: -

- (i) Issue of applicability of section 56(2)(viib) with respect to share application money received in AY 2011-12 and 2012-13 was examined by learned AO during the course of assessment, as there is a reply furnished by assessee dated 18.03.2016 during the course of assessment proceedings.
- (ii) Addition under section 56(2)(viib) should be made in the year in which shares are actually issued irrespective of the year in which share application money is received
- (iii) The shares of assessee derive value entirely from its investment in M/s Mail Today News Paper Pvt. Ltd., therefore value of Mail Today has to be examined.
- (iv) The valuation of shares of M/s. Mail Today News Paper Pvt. Ltd. @ Rs. 40 per share as determined in the case of Mail Today and as determine by the assessee cannot be accepted, as the said company is running into loses and the value of shares of M/s. Mail Today cannot be more than the face value of Rs. 10 per share.

25. First of all, we have to examine, whether the value of the shares allotted by the assessee during the year on the share application money received in the earlier years shown by the assessee at Rs. 30 has been substantiated by the assessee either at the time of receiving the share application money or at the time of issuance of the shares. From the perusal of the record and the findings given in the impugned orders, we find that here in this case the Ld. AO in the

assessment order has not tinkered with the valuation of the shares shown by the assessee *albeit* has gone by the fact that the percentage of shares holding of assessee in Mail Today was 64% and not 67% as calculated by the auditor. Apart from that, in the valuation made by the AO in the assessment order as pointed out by the Ld. Counsel, there were error on part of the AO to factor in the value for 7,22,60,000 shares which in fact during the year was only 2,40,83,333. Barring this, he has accepted entire Valuation report dated 27.12.2012, which was on the basis of audited financial statement. Another important fact emerging from the records is that, the fair market value of the shares of Mail Today from which assessee company derives its value, has been accepted by the AO in the assessment order of Mail Today in the assessment year 2013-14 and 2014-15 at Rs. 40/- in the assessment order, which again was based on DCF method adopted in the Valuation report. The history of such assessment has been heavily reiterated by the Ld. Counsel before us. The said fair market value of Rs. 40 of Mail Today was further corroborated by the fact that, Mail Today had also issued the shares to a non-resident entity at Rs. 43.29/-. Not only that, in the earlier assessment year, i.e., assessment year 2011-12, the assessee company had sold its shareholding in M/s. Mail Today Newspaper Pvt. Ltd. to M/s. TV today Ltd. to extent of 40302 shares at Rs. 43.29 per share on which capital gain was offered by the assessee and the same has been accepted by the revenue in the scrutiny proceedings passed u/s 143(3). Thus, at the time of receiving of share application money and issuance of the shares there was a past precedence in assessee's own case in Asstt. Year 2011-12, where higher value of the shares has been accepted. The basis of the value of assessee company's share were substantiated by various precedence and material placed on record apart from Valuation report.

26. From a plain reading of section 56(2)(viib), it is quite perceptible that the section envisages that, any consideration received for issue of shares which exceeds the face value should not exceed the fair market value. The relevant provision provides that where a company (not being a company in which the public are substantially interested) receives in any previous year from any resident person, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration for receipt of shares should not exceed the fair market value of the shares. Such excess value shall be deemed to be the income of the concerned company chargeable to tax under the head “income from other sources” for the relevant financial year. In other words, the aggregate consideration received for such shares as exceeds the FMV of the shares shall be the income of the issuer company. The clause (a) of *Explanation* to section 56(2) (viib) reads 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.***

Thus, the fair market value of the shares can be determined, either in accordance with method prescribed which now has been given in Rule

11U and 11UA; **or** as may be substantiated by the company to the satisfaction of the AO based on the value on the date of issuance of shares. The statute provides that in either of the method, whichever is the higher fair market value of the shares shall be adopted. Here in this case, assessee has stated that the value substantiated by the company to the satisfaction of the AO is higher.

27. Now whether such a satisfaction of the AO can be substantiated by the Ld. CIT(A) by stating that it should be determined as per sub-clause (i). As observed by us, AO has not doubted the substantiation of the value of the shares and the valuation method except on the points as highlighted above. In our opinion, when AO has accepted the valuation method which was also based on several precedence on the date of the issuance of the shares, then Ld. CIT(A) cannot acquire jurisdiction to tinker with such a valuation or valuation method. Here in this case, the Ld. CIT(A) has doubted the substantiation of the value of the shares on the ground that the valuation report submitted by the assessee of the independent valuer is not correct on various counts; and one of the prime reasons stated by him is that valuer has not adopted the method prescribed in 11UA. It would be very pertinent to note that shares were allotted on 8<sup>th</sup> September, 2012, when neither the provision of section 56 (2) (viib) was there in the statute nor the prescribed method of rule 11U and 11UA was notified, as same was brought in the Rules for the purpose of section 56(2)(viib), w.e.f. 29.11.2012, i.e., after more than two months from the date of the allotment of the shares. There was no prescribed method of Rule 11 U & UA for determination the market value on the date of allotment of shares. In such a situation, it would implausible to hold that the Valuation report of the independent Valuer is not correct, since method adopted by him is not in accordance with 11UA. Once the computation mechanism as per new prescribed method was not

available at the time of issuance of shares, then it is unfathomable to apply such method so as to reject the assessee's valuation and assessee cannot be expected to comply with the method when it was notified subsequent to the date of allotment of the shares. Accordingly, we hold that it would not be fair to make any kind of enhancement or addition simply based on provision of section 11UA.

28. Be that it may be, here in this case the Ld. CIT(A) has heavily relied upon the fact that there were heavy losses in the Mail Today and valuer of M/s. TV Today Ltd. had mentioned in his project report that Mail Today's net worth was in negative and therefore, such a value of Rs. 40 or Rs. 30 cannot be justified for which Ld. CIT(A) has given a detailed working. In sum and substance, the reasoning given by the Ld. CIT(A) for rejection of valuation report so furnished by the assessee are as under: -

- (i) That as per *Explanation* (a) (ii) to section 56(2)(viib) the fair market value of share needed to be substantiated on the date of issue of shares by assessee, which has not been done by assessee, hence same has to be rejected.
- (ii) That the valuation of investment of assessee in Mail Today Newspapers Pvt. Ltd at a fair market value of Rs. 40 per share is not justified as the said company is running into constant financial losses.
- (iii) That the reports so furnished by assessee are not as per the prescribed Rules 11U and 11UA and the reports so furnished by assessee are based on Net Asset Value Method, which is not a prescribed method under the Act/Rules and therefore, the reports so furnished by assessee are to be rejected.
- (iv) The learned CIT (A) had applied 'book value method' to work out the fair market value of shares of Mail Today and

assessee company under rule 11 UA(2)(b), which as per him was in negative.

- (v) He has rejected the contention with regards to consistency for the purposes of valuation of investments in Mail Today.

29. First of all, one has to see the justification of the fair market value as given in *Explanation (a)* which provides for determination in either of the following two manner; *firstly*, which may be determined in accordance with method prescribed, i.e., 11U & 11UA; **or** *secondly*, the company substantiates the fair market value to the satisfaction of the Assessing Officer based on the value of the date of issuance of shares. As already held above, assessee had substantiated the fair market value which was based on Valuation Report dated 27.12.2012, which in turn was largely based on the valuation of share provided by the Valuer of the Mail Today as on 20.7.2012, wherein the valuer has applied DCF method in order to value the share of Mail Today. As per valuation report dated 27.12.2012, the value per share of the assessee company on NAV method was worked out to Rs. 77.06, which was far more than on which assessee had issued shares, i.e., at Rs. 30. Ergo, the underlying asset of the assessee company, i.e., Mail Today was valued as per DCF method and value of shares of Assessee Company was based on NAV method. This substantiation prima facie has not been tinkered with by the AO except for the factors already sated in the foregoing paragraphs. When law envisages that the FMV can be determined in either of the two manners, whichever is higher, so as to demonstrate that the value of shares does not exceeds the FMV, then AO cannot insist upon to follow only one particular method. Here the assessee had substantiated the fair market value which was much higher and the shares have been issued at lower price. It would be incorrect to hold that substantiation made by the assessee has to be

only in accordance with Rule 11U and 11UA. Ld. CIT (A) cannot impose Rule 11U/11UA to hold that assessee's substantiation is incorrect, simply because the value adopted for the shares as per 11UA is less. The report of the Valuer of the assessee company based on NAV method cannot be tested in terms of 11U/11UA on the ground that the Rules do not prescribe valuation as per 'Net Asset Value' method. The substantiation of the fair market value of the assessee has to be first tested on the basis of the valuation done by the assessee and it cannot be tested from the lens of 11UA, which can be applied in case sub-clause (i) has been exercised. When option of sub-clause (i) has not been exercised, then Ld. CIT (A) cannot resort to apply the same and reject the substantiation provided in sub-clause (ii) that it is not in accordance with sub-clause (i).

30. Coming to the observation of the Ld. CIT (A) that, since book value of Mail Today was in loss, therefore, the fair market value of the shares cannot exceed to face value of Rs. 10. From the perusal of the impugned order as well as material placed on record, it is seen that the project report for analysing the net worth of Mail Today prepared by Shri Joy Kumar Jain was for M/s TV Today Network Ltd. He was examined by the AO during the course of assessment proceedings for the assessment year 2014-15. The TV Today Network Ltd. had done the valuation, as they had acquired the shares in Mail Today. Even if one goes by the report of the said Valuer, the value of shares for Mail Today still adopted was at Rs. 44.78 per share. One very important factor relating to the valuation of shares of Mail Today was that, a big Company, M/s. Living Media India Pvt. Ltd. was the investor in Mail Today. Moreover, the valuation of the shares cannot be made simply on the basis of financial statements but has to take into consideration various factors. From the perusal of the statement of Shri Joy Kumar Jain, it is seen that he has also stated that he has not shown

valuation in the case of the assessee and nowhere in his statement has he denied the valuation of Rs. 44.78 per share computed by him only. Another important fact borne out from record is that, the said report of Shri Joy Kumar Jain has been accepted by the AO of M/s. TV India Network Ltd. in the order passed u/s 143(3) at Rs. 44.78. Simply relying upon the project report or statement wherein the said auditor has reported that Mail Today was in losses and book value of the shares is negative and based on such statement to infer the value of the shares shown by the assessee is incorrect, would not be proper, especially, when the same auditor/valuer has valued the shares of Mail today at Rs. 44.78/-. Hence, there could not be question of drawing adverse inference. Even otherwise also, the negative book value of Mail Today reported by in his project report was for altogether different reason, because M/s. TV India Network Ltd. was trying to carry out analysis of the valuation of the equity shares as on 31.3.2013. Nowhere it has been brought on record, whether M/s. TV India Network Ltd. has accepted the project report to be the basis of acquiring the shares or has taken the value at negative, *albeit* in one of the reports, same Valuer has reported that the value of Mail Today has been adopted Rs. 44.78 per share. Thus, the basis of such a reporting or statement of Sri Joy Kumar Jain which has been heavily relied upon the Ld. CIT (A) in A.Y.2013-14 and AO in the A.Y. 2014-15 cannot be matter of adverse inference in the case of the assessee.

31. One of the cardinal principles of interpretation of fiscal statute is that they should be strictly construed and so long as the provision is free from any ambiguity, there should be no need to draw any analogy. A deeming provision on the other hand is intended to enlarge the meaning of a particular word which includes matters which otherwise may or may not fall within the normal provision, therefore, it should be extended to the consequences and incidents which has been

intended by the Legislature for a definite purpose and should not be extended beyond the mandate of the statute. Thus, deeming provisions require to be construed strictly. Here in this case the assessee has followed one of the options provided under such deeming provision and when such an option has been exercised, then same cannot be discarded to impose other option. The assessee's option has been rejected by the Ld. CIT (A) on the ground it does not stand the test of one of option, which he deems fit. Not only that valuation method adopted by the assessee to value its underlying asset, that is, Mail Today shares has been rejected on the ground that DCF method applied is not correct. DCF method is a recognised method where future projections of various factors by applying hindsight view and it cannot be matched with actual performance, and what Ld. CIT (A) is trying to do is to evaluate from the actual to show that the Company was running into losses, therefore, DCF is not correct. Valuation under DCF is not exact science and can never be done with arithmetic precision, hence the valuation by a Valuer has to be accepted unless, specific discrepancy in the figures and factors taken are found. Then AO or CIT(A) may refer to the a Valuer to examine the same.

32. Lastly, in so far as rejecting of Valuation report by the Ld. CIT (A) on the ground that the Chartered Accountant who has given the Valuation report in the case of the assessee was not a competent person in terms of 11U, we are of the opinion the same would only be relevant, when the Valuer has done the valuation in the manner prescribed in 11U and 11UA, because it is in Rule 11 such a condition has been prescribed. If assessee has not opted for 11U & 11UA, then all those guidelines and formulas given therein would not apply and Ld. CIT(A) cannot thrust upon the assessee the option should be exercised only under 11U and 11UA, which admittedly at the time of issuance of shares such method was not even prescribed in the

statute. Prior to Rule 11UA, Net Asset Value method was accepted method in which no discrepancy has been pointed by the Ld. CIT (A). First of all, the valuation of the shares of Mail Today has been done under DCF method and the valuation of assessee share has been done on NAV method. The reason being, the valuation report for the valuation of the shares by the Mail Today as on 20.7.20012 was shown under DCF method, wherein Rs. 40 per share were determined. Such a valuation of the shares has been accepted by the revenue in the case of Mail Today under scrutiny proceedings, which cannot be discarded. Determination of value of shares on the basis of financial statement of a Company or the book value does not have much relevance under DCF method, because it is based upon, fair expected revenue growth and fair expected cash flow for a period of five years; discount rate and terminal growth rate; and terminal value, etc. are the factors which are taken in the consideration. Therefore, to reject the valuation of the Mail Today mainly on the basis of losses shown in the financial statement would not be correct, until and unless some discrepancy has been out either in the DCF method or in the Valuation Report furnished by an independent Valuer of Mail Today.

33. Accordingly, in view of the reasoning given above, we do not find any justification for reducing the value of shares to Rs. 10 and disallowing premium Rs. 20, as assessee was able to substantiate that the shares issued at Rs. 30 per share was less than the FMV and consequently the enhancement made the Ld. CIT(A) for making the addition of Rs. 48,16,66,660/- u/s 56 (2)(viib) is set aside and the addition by him is deleted.

34. Since we have deleted the addition on merits, therefore, it would be purely academic exercise in deciding the issue of enhancement by the Ld. CIT(A), which has been vehemently argued before the Ld.

Counsel before us. Thus, this issue is treated as academic and is kept open.

34. Now coming to the appeal for the assessment year 2014-15, we find that here in this year, the AO on the basis of Valuation report prepared by M/s. Joy Financial Consulting Pvt. Ltd. of Mail Today has made the addition on the ground that he has reported that there were huge financial losses in Mail Today and accordingly, he has taken the value of shares of Rs. 10. The relevant observation and the finding of the AO reads as under: -

*“5. As may be seen from the above statement, Sh. Joy Kumar Jain has stated in his answer to Question No.3 above that the data relied upon for preparation of project report were supplied by the assessee company. In answer to Question No.8, he has clearly stated that previous project report was not consulted. Further, in answer to Question No.10, Sh. Joy Kumar Jain has stated that the data given were not final and audited. He has also clarified in Question No.11 that he has done the work relating to preparation of project report for the first time. In answer to Question No.14, he has stated that "As mentioned above, we discussed the basis of preparation of the projections with the management and the exemption considered by them while making such projections. Management exemptions are included in appendix -I of our report". He was unable to clarify in answer to Question No.15 that huge difference in projection and actual results. Therefore, it is clear that the basis of preparation of project report is not genuine, hence not reliable.*

*6. The assessee company has submitted the project report of M/s Mail Today News Paper (in which the assessee company has substantial interest). While examining the project report as given*

by the AR of the assessee company during the course of assessment proceeding, it is noticed that year-wise results projected are far from the actual results declared in the final accounts given by the AR during the course of assessment proceedings. For the sake of convenience, the same are reproduced hereunder:

*Summary of NCF for the forecast period (figures in lacs):*

	11-12	12-13	13-14	14-15	15-16	16-17	17-18
EBITDA	-	-	-1154	561	2024	3905	6146
Actual Profit   Loss as reported in	-5279	-2969	-1996	-2459	-601	-	-

From the above, it can be seen that the company Mail Today News Papers is constantly incurring heavy losses year to year and has no such worth and the value of share has been hypothetically increased to Rs.52.15 per equity share by the assessee company. The value of each equity share of Mail Today News Papers is taken at par though the value of the share is below Rs.10/- by rejecting the assessee's method of valuation of shares. Accordingly, the fair market value of assessee company i.e. M/s India Today Online Pvt. Ltd. is calculated as per the provision of Rule 11 UA of IT. Rules 1962:

*Asset - Liability / Amount of Share*

$$1694995674 - 8235472 / 240933330 = 7.00$$

The net worth of each equity share of M/s India Today Online Pvt. Ltd. comes to Rs.7/-. However, for the sake of natural justice, the value of each share is taken at par and the premium amounting to Rs.101.58 crores received in excess of fair value is

*to be added to the income of the assessee during the year under consideration.*

*In view of the section 56(2)(viib) consideration received in excess of FMV of shares issued by a closely held company to be treated as income of such company, where shares are issued at a premium.*

*(i) Sec. 56(2)(viib) brings to tax the consideration received from a resident person by a company, other than company in which public are substantially interest which is in excess of the FMV of shares.*

*(ii) Such excess is to be treated as the income of a closely held company taxable under sec 56(2)(viib) under the head "income from other sources ". In cases where consideration received for issue of shares exceeds the face value of shares i.e. where shares are issued at a premium.*

*8. The assessee company has issued 5,07,94,056 number of shares at a premium of Rs.20/- to its holding company M/s Living Media Pvt. Ltd. hence, provisions of section 56(2)(viib) are clearly attracted. Thus, the excess value received over and above the fair value of share is taxable as income from other sources as per the provisions of section 56(2)(viib) and aggregate value of such shares comes to Rs.101,58,81,120/-. The same is added back to the income of the assessee. Penalty proceedings u/s 271 (1)(c) are also separately initiated for furnishing inaccurate particulars of its income."*

35. This has been confirmed by the Ld. CIT(A) on the same reasoning as given in assessment year 2013-14 except for in his calculation he

has reduced the addition from 101,58,81,120/- to amount of Rs. 1,00,74,722.

36. Here in this year also the assessee has opted to substantiate the value of the shares in terms of sub-clause (i) of clause (a) of Explanation. Ld. Counsel has stated that in the appeal for the assessment year 2013-14, assessee has substantiated the value on the basis of valuation dated 27.12.2012 and several other precedence. Our findings given in the appeal for the assessment year 2013-14, that the valuation shown by the assessee was duly substantiated not only by the valuation report but catena of other factors will apply here also. As Ld. CIT (A) and AO have once again relied upon project report and statement of Joy Kumar Jain, which we have already discussed above that same cannot be accepted as such, as he in his Valuation report for Valuation has reported value of Mail Today at Rs. 44.78 per share. Further, AO himself is not relying upon the projections under DCF method as stated by the same person and is simply going by the fact that Mail Today was into heavy losses and net worth was negative and hence the face value should be only Rs.10 and premium of Rs.20 is not justified. We have already held that price of Rs. 30 per share is justified. Thus, the same finding will apply *mutatis mutandis* for this year also.

37. Ld. CIT (A) in this year also has held that value of the shares based on NAV method has not been prescribed method under 11UA. As held above, the said rule will apply only if option is exercised in sub-clause (i), but if the assessee has been able to substantiate the fair market value in terms of sub-clause (ii), then valuation done by the assessee cannot be rejected simply on the ground that it does not stand the test of method provided in 11U and 11UA. Here the assessee has been able to show that the aggregate consideration received and

the shares which were issued does not exceed FMV and has demonstrated the value as contemplated in *Explanation (a)* and therefore, the working of the assessee as per *Explanation (a)* sub clause *(ii)* has to be accepted. Section 56(2)(viib) provides for fair market value to be opted whichever is higher either under sub-clause *(i)* or sub-clause *(ii)*. Since the working of FMV so substantiated by assessee company as per sub-clause *(ii)* is higher than value prescribed u/s 11UA, then same should be adopted for the purpose of valuation of the shares of the assessee company. Accordingly, the addition made by the Ld. AO and confirmed by the Ld. CIT (A) is deleted.

38. In the result both the appeals of the assessee are allowed.

**Order pronounced in the open court on 15<sup>th</sup> March, 2019.**

sd/-

**(L.P. SAHU)**  
**ACCOUNTANT MEMBER**

Dated: 15/03/2019

***Veena***

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

sd/-

**(AMIT SHUKLA)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT, New Delhi