आयकर अपीलीय अधिकरण, मुंबई "सी" खंडपीठ मे

Income-tax Appellate Tribunal -"C"Bench Mumbai

सर्वश्री राजेन्द्र,लेखा सदस्य एवं अमरजीत सिंह, न्यायिक सदस्य

Before S/Sh.Rajendra,Accountant Member and Amarjit Singh,Judicial Member

आयकर अपील सं./I.T.A./4854/Mum/2016,**निर्धारण वर्ष /**Assessment Year: 2013-14

DCIT-1(2)-2 Room No.535, 5th Floor, Aayakar Bhavan M.K. Road, Mumbai-400 020.	Vs.	M/s. Ozoneland Agro Pvt.Ltd. 4, Vaswani Mansions, 120, Dinshaw Vaccha Road Churchgate, Mumbai-400 020. **PAN:AAACO 7454 R**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी **/ Respondent)**

राजस्व की ओर से **/ Revenue by:** Shri T.A. Khan-DR

अपीलार्थी की ओर से **/Assessee by:** Dr. K. Sivaram and Shri Rahul K. Hakani

सुनवाई की तारीख **/ Date of Hearing: 08/02/2018**

घोषणा की तारीख / **Date of Pronouncement: 02/05/2018**

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the order,dated 21/04/2016,of the CIT(A)2,Mumbai the Assessing Officer(AO)has filed the present appeal.Assessee-company,engaged in the business of developing and cultivating land for agricultural purposes,filed its return of income on 18/09/2013,declaring income at Rs. 4.83 crores.The AO completed the assessment u/s.143 (3) of the Act,on 29/01/2016,determining its income at Rs. 9.85crores.

2.First ground of appeal is about deleting the addition made on account of excess share premium of Rs.4.99 crores,u/s. 56 of the Act. During the assessment proceedings, the AO found that the assessee had issued 1941 equity shares to Shapoorji Palonji Ltd.(SPL) at face value of Rs. 10 and premium of Rs.25,749/-,that the assessee had received total share premium of Rs.4,99,99,733/-, that the share premium was charged on the basis of valuation report of a chartered accountant, that the CA had valued the shares by adopting Discounted Cash Flow (DCF) method, that as per the valuation report value of each share was Rs.25,759.78, that the assessee had also carried out project analysis by an Estate Consultant Firm,that the consultant had valued the project at Rs. 1, 47,39.39 millions and the valuation of land was fixed at Rs. 66,000.98 millions,that the valuation was made basis to adopt future cash flow.The AO directed the assessee to file explanation in this regard.Vide its letters dated 23/10/2015 and 19/11/2015,the assessee made submissions about the share premium.After considering the explanation of the assessee,the AO held that there was no business activity carried out during the year,that the premium received by the assessee was disproportionate to the business activities,that the purported nature of business was not undertaken,that the profit

projections even for the first year were astronomical,that the applicability of DCF method was for limited period of only five years,that it had made projection of profits without any calculation or cash flow for 15 years from the date of valuation, that the method adopted by the assessee was deeply flawed,that the valuers had not done any germination of historical financial statement/prospective results to make an unbiased evaluation,that the projections made by the assessee had been incorporated in toto in the valuation report,that the valuer had not applied his mind independently.While completing the assessment, the AO adopted the NAV method and valued one share at Rs.26.4 as against Rs 25,749/-for a township project on 1000 acres.He determined the value of the project at Rs.4.70crores and made an addition of Rs 4.99 crores,under the head excess premium received.

3.Aggrieved by the order of the AO, the assessee preferred an appeal before the First Appellate Authority (FAA) and made elaborate submissions. It also relied upon certain case laws.After considering the available material,he held that the Finance Act,2012 inserted a new clause to section 56 of the Act,that as per the clause income arising out of excess consideration received for issue of shares by a closely held company was to be taxed with effect from AY.2013-14,that the excess consideration was to be determined by comparing consideration with fair market value of shares. He reproduced the fair market valuation of the shares and held that out of the two options prescribed by the Act for calculating FMV, the assessee had chosen one of the option by calculating the FMV of shares in accordance with the method prescribed. He referred to the new amendment to Income Tax Rules, 1962 specially clause 2 to Rule 11 and held that the clause was specifically inserted for valuation of unquoted equity shares for the purpose of section 56(vii),that the assessee had applied by specific clause, that the Rule provided that the assessee had an option to select any one of the methods for valuing the equity shares,that the assessee had opted one of,that the AO would not deviate from the method selected by the assessee and determining FMV of the shares by adopting another method would, that the AO had chosen the Net Value Method (NAV) to determine the value of the shares.He further observed that the AO had not followed the consistency of the earlier assessment orders wherein similar issue had arisen, that the purchaser had paid premium to the assessee keeping in mind the expected future gains,that the premium could not be termed as excessive or unreasonable.

3.1. With regard to business activities not being carried out during the year under consideration it was submitted before the FAA that the matter was subjudice due to “forest”

remark at that point of time,that the assessee could not initiate preliminary activities,that the assessee was paying agriculture tax till the year 2016, that most part of the plot of land was under cultivation, that it could not be termed as forest,that the Hon'ble division High Court has decided the issue in favour of the assessee on 18/06/2015,that the AO did not provide sufficient opportunity to the assessee to substantiate its stand about carrying on of business activities.

3.1.1. The FAA,after considering the submissions of the assessee and the assessment order,held that the AO had made the addition on the ground that no business activity was carried out during the year under appeal,that he had held that NAV method was preferable to DCF method. He referred to the provisions of section 56(viib)of the Act and Rule 11UA (2) (b) and held that the assessee had liberty to exercise the option of valuing the shares as per the DCF method, that during the AY. 2012-13,the assessee had issued 17,801 shares at a premium of Rs.25,550/- to SPL,that while completing the assessment u/s.143(3)of the Act,the AO had accepted the valuation,that the shares in that year were valued as per DCF method,that the AO had verified the valuation report. Finally, he held that as per the provisions of Rule 11UA of the Rules the selection of the method for valuation of shares was at the option of the assessee, that the AO had no right to deviate from the method selected by the assessee, that there was no justification for making the addition of Rs. 4.99 crores to the income of the assessee.

4.Before us,the Departmental Representative(DR)contended that that there was no relation between the premium received by the assessee its business activities,that the method adopted by the assessee was highly inflated,that the valuers had not made an unbiased evaluation,that the AO had rightly adopted the NAV method and valued one share at Rs.26.4 as against Rs 25,749/-.The Authorised Representative(AR)supported the order of the FAA and stated that the assessee had adopted one of the methods provided in the section,that AO could not compel it to rely on a particular method,that in the earlier year also shares were issued on premium to the same party,that the AO had accepted the valuation,that the rule of consistency demanded that he should have followed the same method..He relied upon the cases of Bharat Hari Singhania(207 ITR 1),Medplus Health Services P.Ltd.(158 ITD 105).

5.We have heard the rival submissions.We find that the assessee had issued 1941 equity shares to SPL at premium of Rs.25,749/- per share,that face value of the share was Rs.10/-

,that the assessee had received total share premium of Rs.4.99 crores from an unrelated party,that the share premium was charged on the basis of a valuation report wherein the shares were valued as per the DCF method,that in earlier year the AO had accepted the similar valuation,that the assessee had also carried out project analysis by an Estate Consultant Firm,that the AO held that NAV method of valuation was to adopted for valuation of the shares.Thus,the basic issue to be decided is validity of the method to be adopted to value the share price for the year under consideration.As stated earlier,the assessee had adopted DCF method as per the provisions of section 56(viib)r.w.rule 11UA(2)whereas the AO was of the opinion that NAV method was appropriate method,as envisaged by Rule 11 UA(c)(b)of the Rules.

Before proceeding further,we would like to reproduce the provisions of section 56 of the Act and the relevant rule and the same read as under:

Section 56

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

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

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

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

whichever is higher

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

Rule 11UA

For the purposes of section 56 of the Act, the fair market value of a property, other than immovable property, shall be determined in the following manner, namely :-

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(c) valuation of shares and securities,-

(a) the fair market value of quoted shares and securities shall be determined in the following manner, namely :-

(i) if the quoted shares and securities are received by way of transaction carried out through any recognized stock exchange, the fair market value of such shares and securities shall be the transaction value as recorded in such stock exchange ;

(ii) if such quoted shares and securities are received by way of transaction carried out other than through any recognized stock exchange, the fair market value of such shares and securities shall be,-

(a) the lowest price of such shares and securities quoted on any recognized stock exchange on the valuation date, and

(b) the lowest price of such shares and securities on any recognized stock exchange on a date immediately preceding the valuation date when such shares and securities were traded on such stock exchange, in cases where on the valuation date there is no trading in such shares and securities on any recognized stock exchange ;
(b) the fair market value of unquoted equity shares shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner, namely :-

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(c) the fair market value of unquoted shares and securities other than equity shares in a company which are not listed in any recognized stock exchange shall be estimated to be price it would fetch if sold in the open market on the valuation date and the assessee may obtain a report from a merchant banker or an accountant in respect of such valuation.'.
(2) Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (1), the fair market value of unquoted equity shares for the purposes of sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be the value, on the valuation date, of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), ***at the option of the assessee****, namely :-*

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(b) the fair market value of the unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method.

5.1. In our opinion,the valuation has been left to the discretion of the assessee.In other words the AO cannot adopt a method of his choice.In the case under consideration the whole controversy has arisen because of the AO has rejected the method adopted by the assessee. We find that in the case of Medplus Health Services P.Ltd.(supra)similar issue was deliberated upon and decided. We are reproducing the relevant portion of the order which reads as under:

"3.During the assessment proceedings u/s 143(3) of the Act, AO observed that the assessee company is a wholesale supplier of goods mainly to its group company M/s. Optival Health Solutions P. Ltd., which in turn is engaged in retail business of pharmaceuticals and general goods and further that both the companies have more than 67% common shareholdings. It was observed that during the F.Y. 2010-11, a major restructuring of the group had taken place wherein almost all the shares of M/s. Optival Health Solutions P. Ltd., were taken-over by the assessee company and the wholesale operations from the assessee were taken-over by M/s. Optival Health Solutions P. Ltd., resulting in the assessee company becoming the holding company of M/s. Optival Health Solutions P. Ltd., and both the wholesale and retail operations coming under the assessee company indirectly. He further observed that majority of the small shareholders of M/s. Medplus Health Care P. Ltd., transferred their shares to Mr. G. Madhukar Reddy, promoter and one of the major shareholders of assessee company and Mr. Madhukar Reddy along with other major shareholders transferred their majority of shareholdings at an attractive price to some local and international institutional investors. Out of these transactions, the A.O. observed that two persons i.e., Mr. C. Srinivasa Raju and Chintalapati Holdings P. Ltd., transferred their shares to the assessee on 04.03.2011 at Rs.75.49 per share whereas, on the same day and also on 08.03.2011 all the other shareholders transferred their shareholdings to the assessee at Re.1 per share. He observed that when the market rate is Rs.75.49 ps, the assessee has purchased the shares at less than the market price i.e., Re.1 per share and therefore, the transactions attract provisions of section 56(2)(viia) of the I.T. Act. Therefore, the A.O. issued a show cause notice dated 27.02.2014 requiring the assessee to explain as to why the difference amount of Rs.74 per share should not be treated as a deemed gift/income and taxed in the hands of the company. The assessee, vide letter dated 07.03.2014, submitted a detailed note as to why the provisions of section 56(2)(viia) are not applicable to the assessee's case. It was submitted that as per Explanation to Section 56(2)(viia) of the Act, the 'fair market value' (FMV in short)

has to be computed in accordance with Rule 11UA of I.T. Rules and that the assessee had computed the fair market value as per the prescribed rule according to which, the fair market value of the share is less than Re. zero and hence, payment of Re.1 per share by the assessee to acquire the shares is more than the fair market value computed under Rule 11UA. Thus, according to him, the provisions of section 56(2)(viia) of the Act do not apply. The A.O. however, was not convinced with the assessee's contentions and held that the 'market value' mentioned in the rule means "price which it would have fetched if sold in the open market."

He observed that the valuation of any property is based on the fact as to what value the property would fetch if sold in the open market and since in the assessee's own case there are certain transactions to clearly establish market value of the shares sold, resorting to estimation/calculation of market value of the unlisted shares as per the formula under Rule 11UA of I.T. Rules does not arise. He observed that as per the computation of fair market value under Rule 11UA(c)(b) of I.T. Rules, the value of M/s. Optival Health Solutions P. Ltd., was (-) Rs.64.48 ps (i.e., the value of M/s. Optival share is at negative figure) whereas, assessee has paid Re.1 per share and the basis for adopting Re.1 per share by the assessee is not provided. He further observed that one of the shareholders Mr. Kalyana Bhaskara sold his shares in Optival to Mr. Madhukar Reddy at Rs.63.79 ps per share and the basis for adopting this rate is also not known but since it was much more than what is claimed by the assessee at Re.1 per share, he held that it was so shown to defraud the Revenue by transacting at abnormally low price. He therefore, held that the provision of deemed gift under section 56(2)(viia) of the I.T. Act is applicable. Thus, he adopted the price of Rs.75.49 ps paid to unrelated parties to be the market price of the unquoted shares of the company M/s. Optival Health Solutions P. Ltd., and the difference of Rs.74.49 ps per share was treated as "Income from other sources" in the hands of the company. Further, vide its letter dated 19.03.2014, the assessee submitted that as on 3rd March, 2011, the total value of equity shares of M/s. Optival Health Solutions P. Ltd., was Rs.45,44,740, out of which, the shares of Rs.15,90,000 were partly paid i.e., only up to Rs.0.50 ps and that these partly paid up shares were also acquired by the company from the shareholders. It was submitted that in the case of partly paid up shares, an amount of Rs.9.50ps is still to be paid by the purchaser and hence, the value of deemed gift in the case of partly paid shares is to be calculated accordingly. After considering the assessee's contentions, the A.O. computed the value of the deemed gift of partly paid up shares at Rs.10,33,34,100 and of fully paid up shares at Rs.10,89,39,465 and brought it to tax. Aggrieved, assessee preferred an appeal before the Ld. CIT(A) who confirmed the order of the A.O. and against the order of the Ld. CIT(A), the assessee is in second appeal before us.

4. The Ld. Counsel for the assessee, Mr. Kanchan Kaushal, while reiterating the submissions made by the assessee before the authorities below, drew our attention to the provisions of section 56(2)(viia) of the I.T. Act, to demonstrate that the said provisions would apply to the assessee only if the price paid by the assessee was less than the fair market value computed under Rule 11UA of I.T. Rules. He submitted that where the legislature prescribes a particular method to be adopted, then the said method alone should be adopted. He has submitted that in the case of assessee before us, neither the provisions of section 56(2)(viia) nor the Rules prescribe for adoption of the market value of the shares as the fair market value for the purpose of deemed gift under section 56(2)(viia) of the I.T. Act since the provisions relates to anti-abuse provisions. He submitted that where a specific method is prescribed, the A.O. is precluded from adopting any other method. He further drew our attention to the decision of Hon'ble Allahabad High Court in the case of Dr. Shashi Kant Garg v. CIT [2006] 285 ITR 158/ 152 Taxman 308 in support of his contention that a prescribed method has to be strictly followed. He has also placed reliance upon the following other judgments in support of his contention :

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5. The Ld. D.R. on the other hand, supported the orders of the authorities below and submitted that where the market price of the shares at which the assessee has purchased the shares on the very same day is available, the A.O. has rightly adopted the same instead of resorting to the valuation of the fair market value of the shares under Rule 11UA of the I.T. Act.Thus, according to him, the assessment order is to be upheld.

6. Having regard to the rival contentions and the material on record, we find that ground No.1 is general in nature and hence needs no adjudication. With regard to ground No. 2, we find that though the assessee has raised this ground of appeal before the Ld. CIT(A), it was rejected on the ground that the assessee did not press the said ground of appeal. Even before us, the assessee did not advance any arguments on this issue at the time of hearing. In view of the same, ground No. 2 of the assessee is not adjudicated and treated as rejected.

7.As regards grounds No. 3 to 5 are concerned, we find that the undisputed facts are that the assessee has purchased the shares of M/s. Optival Health Solutions P. Ltd., at Re.1 on 4/3/2011 and 8/3/2011 while some of the shareholders have sold the shares of the very same company to the assessee on the very same day at Rs. 75.49 per share. It is also not disputed that the assessee company and M/s. Optival Health Solutions P. Ltd., are related to each other. The only dispute is whether the provisions of section 56(2)(viia) of the I.T. Act are applicable to the facts of the case before us. For the sake of convenience and ready reference, the relevant provisions are reproduced hereunder :
Explanation. For the purposes of this clause, "fair market value" of a property, being shares of a company not being a company in which the public are substantially interested, shall have the meaning assigned to it in the Explanation to clause (vii);]'
7.1 Further, the Explanation to clause (vii) to 56(2) of the Act reads as under :
EXPLANATION:
'(b) "fair market value" of a property other than an immovable property, means the value determined in accordance with the method as may be prescribed.'
7.2 The prescribed method for valuation of the fair market value is under Rules 11U and 11UA(c)(b) of I.T. Rules. Rule 11UA (c)(b) reads as under :
7.3 From the literal reading of the above provision, it is clear that to apply the above provision, the following conditions have to be satisfied:

i. *there is transfer of shares a company not being a company in which the public are substantially interested:*

ii. *the purchaser of the shares is a company not being a company in which the public are substantially interested;*

iii. *the consideration is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees; and*

iv. *the deemed income in the hands of the transferee shall be the aggregate fair market value of such property as exceeds such consideration.*

8. From the facts of the case before us, it is seen that the property i.e., shares which are transferred are the shares of a company in which the public are not substantially interested. Since the transaction of sale and purchase of shares is between related parties and both the companies are companies in which the public are not substantially interested, we are of the opinion that the AO was justified in examining the applicability of the provisions of section 56(2)(viia) of the Act to the transaction of transfer of shares.

9. The next step for application of this provision is to arrive at the fair market value of the shares before comparing it with the consideration at which the shares are purchased by the assessee to examine if it was less than the aggregate fair market value of the property exceeding Rs. 50,000. In the case before us, the AO had adopted the price at which the assessee has purchased the shares from two of the shareholders at a higher price of Rs. 75.49 ps as the fair market value of the share. The question before us is, whether this is valid and as prescribed under the Act? Clause (b) of the explanation to clause (vii) to section 56(2) defines 'fair market value' to be the value as computed under the prescribed rule i.e., rule 11UA. According to the ld counsel for the assessee, where the Act prescribes a rule, it has to be strictly and mandatorily followed and further if the statute has conferred a power to do an act and has laid down the method in which that power is to

be exercised, it necessarily prohibits the doing of the act in any other manner than that has been prescribed.

In support of this contention, the assessee has relied upon various decisions cited supra. Let us now examine the applicability of the said decisions to the facts of the case before us.

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Though the facts and circumstances under which the above rulings have been given are distinguishable,we find that the legal principles laid down in the above judgments are clearly applicable to the facts of the case before us. Therefore the question before us is whether the A.O. can adopt the value at which the assessee acquires the shares of the same company on the same day for a higher consideration as the fair market value of the shares or whether FMV is compulsorily to be valued under Rule 11UA of the Act before applying the provisions of Sec. 56(2)(viia) of the Act.

10. From a plain reading of the provisions which are reproduced above and also the precedents discussed above, it is seen that section 56(2)(viia) requires that before application of the said provision, the A.O. has to necessarily compute the fair market value and only then can compare the same with the consideration paid by the assessee and apply the said provision only if the conditions set therein are satisfied. In the case before us, undisputedly some of the shareholders have sold the shares at a much higher price than that at which the assessee has purchased the balance of the shares from other shareholders i.e., at Re.1. Though the A.O. has not computed the fair market value in accordance with Rule 11UA of the I.T. Rules, he had evidence before him to be satisfied that the market value of the shares was much higher than the value at which the balance of shares were transferred to the assessee. The AO has observed that "mainly the valuation of any property is based on fact as to what value the property would fetch if sold in open market but generally the details as to how much value an unlisted share would fetch will not be available and hence the formula is given to overcome that deficiency". Since the market price of some of the shares at a higher value than Re.1 was available, the AO has adopted the same as the fair market value. This stand of the AO could have been sustainable had the section provided that the FMV of an unquoted share shall be the value computed in accordance with the rule or the actual market value, if any, whichever is higher. But as can be seen from the Act and the rules provided thereunder, no such provision has been made. In fact, under the Wealth Tax Act, Section 7(1) defines the expression "value of an asset" as "the price which in the opinion of the WTO it would fetch if sold in the open market on the valuation date" but in the relevant provisions the definition of fair market value is given in the Act and method has also been prescribed thereunder.

11. On a careful reading of the judgments discussed above, it is seen that the Courts have held that where a method has been prescribed by the legislature, that method alone shall be followed for computation of the fair market value. The A.O. and the Ld. CIT(A) have not followed the relevant provisions for adopting or computing the fair market value of the shares, but have adopted the market value at which some of the shares have been purchased by the assessee as FMV. This, in our opinion, is not correct. As held by the Courts in the above judgments, the A.O. has to compute the fair market value in accordance with the prescribed method but cannot adopt the market value as fair market value under section 56(2)(viia) of the Act. The legislature in its wisdom has also given a formulae for computation of the fair market value which cannot be ignored by the authorities below.

12. We find that at para 4.12 of the assessment order, the AO has recorded that the assessee has furnished the valuation of the shares based on the working given under rule 11UA(c)(b) of the IT Rules, according to which, the fair market value of the shares is Rs. 64.48/- (i.e., the value of Optival share is at a negative figure) whereas the assessee has paid at Re.1 per share. He has also observed that no basis is given by the assessee for adopting the rate of Rs.63.79 per share for purchase of shares by Sri Madhukar Reddy. He observed that there is no basis for transacting in the shares at different rates and that this arrangement has been done to defraud the revenue of its

taxes by transacting at abnormally low prices. Having regard to the above observations of the AO, we are of the opinion that if the AO was not satisfied with the working given by the assessee, he ought to have computed the FMV himself in the method prescribed under the rules but ought not to have adopted higher of the prices paid by the assessee for purchase of some of the shares of M/s Optival as even when the transactions are between the related parties, the provisions of section 56(2)(viia) can be applied only in accordance with the prescribed method and the difference between the price at which the assessee has purchased the shares and aggregate of the fair market value of the shares as computed can be brought to tax as deemed income in the hands of the assessee....."

5.2.Here,we would like to refer to the case of Taparia Tools Ltd.(372 ITR 605)of the Hon'ble Apex Court.In that matter the assessee was following the mercantile system of accounting. It floated an issue of non-convertible debentures under the terms and conditions of which subscribers were given two options as regards the payment of interest thereupon : they could either receive interest half yearly at 18 per cent. per annum over a period of five years or opt for a one-time payment of Rs. 55 per debenture to be immediately paid. At the end of the five-year period, the debentures were to be redeemed at the face value of Rs. 100. Two subscribers gave their letter of acceptance opting for payment of interest upfront and were accordingly paid interest in sums of Rs. 2,72, 25,000/and Rs. 55 lakhs,respectively, in the accounting years 1995-96 and 1996-97,respectively. It showed the upfront payment of interest on debentures as deferred revenue expenditure in the accounts to be written off over a period of five years. However, in its returns for the AY.s 1996-97 and 1997-98, it claimed the entire upfront interest payment as fully deductible expenditure. The AO denied the assessee's claim and instead, spread the deduction over a period of five years thereby giving deduction only to the extent of one-fifth in each of the respective assessment years.The FAA,Tribunal and the High Court maintained the method of deduction adopted by the AO.Allowing the appeal,the Hon'ble Supreme Court held as under:

"..... the disallowance of the deduction on the ground that the debentures were issued for a period of five years was clearly not tenable. Two methods of payment of interest were stipulated in the debenture issued. ***By allowing only one-fifth of the upfront payment actually incurred, though the entire amount of interest was actually incurred in the very first year, the Assessing Officer, in fact, treated both methods of payment at par, which was clearly unsustainable. By doing so, the Assessing Officer, in fact, tampered with the terms of issue, which was beyond his domain*** (emphasis added).*On exercise by the subscriber of the option for upfront payment of interest in the very first year, the assessee paid that amount in terms of the debenture issue and by doing so it was simply discharging the interest liability in that year thereby saving the recurring liability to interest for the remaining life of the debentures because for the remaining period the assessee was not required to pay interest on the borrowed amount. By discharging the liability to interest in the first year of the issue itself, the assessee had benefited by making payment of a lesser amount of interest in comparison with the interest which was payable under the first mode over a period of five years.*

.....the moment the second option was exercised by the debenture holder to receive the payment upfront, the liability of the assessee to make the payment in that very year, on exercise of this

option, had arisen and this liability was to pay Rs. 55 per debenture. Not only had the liability arisen in the assessment year in question, it was even quantified and discharged as well in that very accounting year.

…..the assessee did not seek to spread this expenditure over a period of five years as in its return, it had claimed the entire interest paid upfront as deductible expenditure in the same year. When this course of action was permissible in law to the assessee as it was in consonance with the provisions of the Act which permit the assessee to claim the expenditure in the year in which it was incurred, the fact that a different treatment was given in the books of account could not be a factor which would bar the assessee from claiming the entire expenditure as a deduction. Once a return in that manner was filed, the Assessing Officer was bound to carry out the assessment applying the provisions of the Act and not to go beyond the return. There is no estopple against the statute and the Act enables and entitles the assessee to claim the entire expenditure in the manner it is claimed."

Considering the ratio of Taparia Tools(supra),we hold that the AO had 'tampered' with the provisions of the Act.

Section 56 allows the assessees to adopt one of the methods of their choice. But,the AO held that the assessee should have adopted only one method for determining the value of the shares.In our opinion,it was beyond the jurisdiction of the AO to insist upon a particular system, especially the Act allows to choose one of the two methods.Until and unless the legislature amends the provision of the Act and prescribes only one method for valuation of the shares,the assessees are free to adopt any one of the methods.Therefore,in our opinion the order of the FAA does not suffer from any factual or legal infirmity.

5.3. We also find that in the earlier assessment year,the AO had,while completing scrutiny assessment, accepted the valuation of same shares at Rs.25,500/-.But,during the year under appeal why did he not follow the earlier year's order is not known.As per the basic principles of taxation,the AO.s are not governed by the principles of res judicata and every assessment is a fresh assessment.But,it is also equally accepted that the AO.s should not deviate from the earlier years' decisions without assigning any concrete and justifiable reasons.Tax determination cannot be left to whims and fancies of a person.It is a serious task and has to be accomplished in a disciplined manner.If an assessee has been allowed a certain concession in earlier year/(s),with-out giving any plausible reason it cannot be withdrawn in subsequent years. As early as year 1952,in the case of Tejmal Bhojraj(22 ITR 208) the Hon'ble Nagpur High Court has reiterated the principles of non applicability of res- judicata and consistency in income tax proceedings as under:

The principle of estopple by record or res judicata, applicable to decisions of civil Courts, has no application to income-tax proceedings so as to prevent a decision in a prior year from being reopened in the assessment proceedings in a subsequent year because of the nature of enquiry and because the Income-tax Officer is not a Court. A previous finding or decision of such an authority may be reopened and departed from in subsequent years in the following

circumstances, namely: (a) the previous decision is not arrived at after due enquiry; (b) the previous decision is arbitrary; or (c) if fresh facts come to light which on investigation would entitle the officer to come to a conclusion different from the one previously reached. In the absence of fresh circumstances, the Income-tax Officer cannot arbitrarily depart from the finding reached after due enquiry by his predecessor in office simply on the ground that the succeeding officer does not agree with the preceding officer's findings.

In this regard in the case of Godrej & Boyce Manufacturing Co.Ltd.(394 ITR 449),the Hon'ble Apex Court has held as under:

"While it is true that the principle of res judicata would not apply to assessment proceedings under the Act, there is need for consistency and certainty and existence of strong and compelling reasons for a departure from a settled position has to be spelt out.

In International Tractors Ltd.(397ITR 696),the Honble Delhi High Court has held that deductions allowed in the earlier assessment years should not be withdrawn unless the circumstances have changed.

The Hon'ble Allahabad High Court,in the case of Zazsons export Ltd. (397 ITR 400), has held as under:

"In order to maintain consistency, a view, which had been accepted in an earlier order ought not to be disturbed unless there was any material to justify the Department to take a different view of the matter. In respect of the earlier assessment year, 2005-06, the Department had accepted the decision of the Appellate Tribunal that the trade amount due to the trade creditors in the books of account of the assessee could not be added to the income of the assessee. There was nothing on record to show that any appeal had been filed by the Department against that order, which had become conclusive.

In the case of Galileo Nederland BV,(367ITR319),the Hon'ble Delhi High Court has held as under:

Decision on an issue or question taken in earlier years though not binding should be followed and not ignored unless there are good and sufficient reasons to take a different view. Said principle is based upon rules of certainty and that a decision taken after due application of mind should be followed consistently as this lead to certainty, unless there are valid and good reasons for deviating and not accepting earlier decision."

The Hon'ble Bombay High Court in the matter of Aroni Commercials Ltd.(362 ITR 403) has dealt the issue of consistency as follow:

Though the principle of res judicata is not applicable to tax matters as each year is separate and distinct,nevertheless where facts are identical from year to year,there has to be uniformity and in treatment.

5.4. Similarly,in the case of Gopal Purohit(336ITR287),the jurisdictional High Court has held that there should be uniformity in treatment and when facts and circumstances for different years were identical particularly in the case of the same assessee.

Considering the above,we hold that the AO should have given some reasons for not accepting the valuation for the year under consideration whereas for the earlier year he had accepted the valuation.It is a clear violation of principle of consistency.

As the issue stands covered by the order of the Tribunal in the case of Medplus Health Services P.Ltd.(supra) and the AO has violated the rule of consistency for the year under appeal without any reason,so,we confirm the order of the FAA and decide GOA 1 against the AO.

7.Second ground of appeal is about deleting the disallowance of business expenses of Rs. 2.44 lakhs.During the assessment proceedings, the AO found that the assessee had claimed an expenditure of Rs. 2,43,303/-.After gathering information in that regard, he held that assessee had not carried out any business during the year under consideration. Therefore, he disallowed the said amount and added back to the income of the assessee.

7.1. During the appellate proceedings,the FAA held that the AO was not justified in disallowing the normal business expenses required for the purpose of carrying out day-to-day business activities, that for aligning business expenditure earning profit was not a pre-requisites. He referred to the case of Espeejay Builders P.Ltd (ITA/8055/Mum/2011) and reversed the order of the AO.

7.2. Before us,the DR stated that assessee had not carried out any business activity during the year under consideration, that AO had rightly disallowed the disputed amount.The AR contended that the expenses were incurred to maintain the corporate entity as a going concern, that the assessee had set up its business and had purchased plots of land, that it had applied for permissions, that the assessee had paid professional tax and ROC filing fees, that audit fees and bank charges were paid for carrying out the routine business activities, that the assessee had paid legal and professional fee for the purpose of obtaining valuation report of shares, that all the expenses were required to carry out the business for the year under consideration,that the FAA had rightly deleted the addition made by the AO.He referred to the cases of Multi-Act Reality Private Ltd. (ITA/7274/Mum/2011,dated 28/08/2015), Premiums Investment And Finance Ltd. (ITA/4879/ Mum/2012,dated 13/05/2015) Rampur Timber and Turnery Co.Ltd. (129 ITR 58).

7.3. We find that the AO had made the disallowance on the ground that assessee had not carried out any business activity for the year under appeal. While making the disallowance he forgot the basic fact that assessee is a corporate entity. For maintaining the corporate status assessee has two incur certain expenditure and same could not be disallowed in absence of earning profit in a particular year. If we analyse the expenses incurred by the assessee,as

mentioned by the AR, we find that the expenditure incurred by the assessee was of a routine nature and was essential to run the business for the year under consideration. In the case of Preimus Investment And Finance Ltd., the tribunal has dealt with the issue of expenditure incurred for maintaining corporate entity as under:

> *"In the case of Rampur Timber & Turnery Co. Ltd.(supra),the Hon'ble Allahabad High Court has held that expenditure incurred for retaining the status of the company, namely miscellaneous expenses, salary, legal expenses, travel expenses, expenses would be expenditure wholly and exclusively for the purpose of making and earning income.There is no doubt that the assessee is a corporate entity. Even if it is not carrying on any business activity it has to incur some expenditure to keep up its corporate entity.Therefore expenditure incurred by it has to be allowed."*

Considering the above facts, we are of the opinion that order of the FAA does not suffer from any legal or factual infirmity.So,confirming the same,we decide second ground of appeal against the AO.

As a result, appeal filed by the AO stands dismissed.
फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपील नामंजूर की जाती है.

Order pronounced in the open court on 2nd May, 2018.
आदेश की घोषणा खुले न्यायालय में दिनांक 2 मई, 2018 को की गई।

Sd/-	**Sd/-**
(अमरजीत सिंह **/ Amarjit Singh**)	(राजेन्द्र **/ Rajendra**)
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांक/Dated : 02.05.2018.
Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी
3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त
5.DR " C " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अ.न्याया.मुंबई
6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**
उप/सहायक पंजीकार **Dy./Asst. Registrar**
आयकर अपीलीय अधिकरण, मुंबई **/ITAT, Mumbai.**