

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "A" DELHI**

**BEFORE SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER
&
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER**

I.T.A. No.9400/DEL/2019
Assessment Year 2015-16

Abhirvey Projects Pvt. Ltd., 74, Basement Back Portion, Poorvi Marg, Vasant Vihar, New Delhi.	Vs.	ACIT, Circle-1(2), New Delhi.
TAN/PAN: AALCA9390F		
(Appellant)		(Respondent)

Appellant by:	Shri Mohit Gupta, CA Shri Naveen Kumar, CA		
Respondent by:	Shri Bhagwati Charan, Sr.DR		
Date of hearing:	25	11	2022
Date of pronouncement:	27	12	2022

ORDER

PER PRADIP KUMAR KEDIA, A.M.:

The captioned appeal has been filed by the Assessee against the order of the Commissioner of Income Tax (Appeals)-I, New Delhi ['CIT(A)' in short] dated 26.09.2019 arising from the assessment order dated 18.12.2017 passed by the Assessing Officer (AO) under Section 143(3) of the Income Tax Act, 1961 (the Act) concerning AY 2015-16.

2. The grounds of appeal raised by the assessee read as under:

"1. That the Ld. Assessing Officer as well as the Ld. CIT(Appeal) gravely erred in upholding the addition of Rs.9,72,80,000/- in spite of the fact that the assessee company has undertaken the transaction on the basis of the valuation report of the valuer.

2. That the Ld. Assessing Officer as well as Ld. CIT(Appeal) has failed to appreciate the fact that the valuation report cannot

be disturbed by the Assessing Authority.

3. That the Ld. Assessing Officer as well as Ld. CIT(Appeal) has failed to appreciate that the valuation computed by the Ld. Assessing Authority is wrong against the facts as well as against the law.”

3. As per its grounds of appeal, the assessee has challenged the addition made by the Assessing Officer with reference to the provisions of Section 56(2)(viib) of the Act.

4. Briefly stated, the assessee filed its return of income for Assessment Year 2015-16 in question which was subjected to scrutiny assessment. In the course of the assessment, the Assessing Officer *inter alia* noticed that assessee had issued 24,32,000 equity shares at face value of Rs.10/- per share at a premium of Rs.40 per share. A total amount of Rs.9,72,80,000/- was thus received in the form of share premium. The Assessing Officer alleged that premium received on issue of equity share exceeds its 'Fair Market Value' (FMV) and consequently the excess premium received on issue of equity share is susceptible to tax in view of provisions of Section 56(2)(viib) of the Act as deemed income of the assessee. The Assessing Officer discarded the valuer's report and proceeded to determine value based on actual figures of profits for next two years, i.e., F.Ys. 2015-16 and 2016-17 in substitution of the projected profits before tax adopted in the valuation report. In essence, the Assessing Officer displaced the project figures and substituted actual figures for ensuing years to work out the valuation as per DCF method. In essence, the Assessing Officer alleged that valuation of equity shares has been made on the basis of unverified exorbitant forecast given by the management of the assessee-company which has resulted in inflated value of 'Fair Market Value' at 50.29. The

Assessing Officer reworked the valuations as per DCF methods based on actual figures for next two years available at the time of assessment and concluded that no premium is justified under DCF method. Consequently, the Assessing Officer discarded the alleged excess value received by way of share premium @ Rs.40 per share. As a sequel thereto, an addition of Rs.9,72,80,000/- was made to the total income of the assessee under Section 56(2)(viib) of the Act.

5. Aggrieved, the assessee preferred appeal before the CIT(A). The CIT(A) however did not see any merit in the stance of the assessee on FMV determined by the assessee. The CIT(A) upheld the action of the Assessing Officer while observing the assessee was not entitled to receive share premium having regard to the actual figures of profits arising in the subsequent Financial Years. The operative paragraphs of the order of the CIT(A) is reproduced herein:

“Facts in brief are that the assessee is a company engaged in the business to acquire by original subscription, tender, purchase, exchange or otherwise hold shares, stocks, debentures, debenture stocks, bonds, obligation, securities, and all kind of investment instruments of every description issued or generated by anybody corporate, any Government, RBI, Bank, Sovereign-Ruler Commissioners, public body or any authority, and to act as investor, pawners, bargainers, trustees, advertisers, underwriters, brokers, sub brokers factors, manager, issue house, purchaser, seller, transfer agent, investments, consultants, stocks, shares and securities of all kind of description. During the previous year relevant for the assessment year 2014-15, the assessee had allotted 3,15,000 Equity shares of face value of Rs. 10/- each at a premium of Rs. 40/- per share consisting total amount of Rs. 1,26,00,000/-. The said allotment was done by the assessee company in pursuance to provision of section 56(2)(viib) read with Rule 11UA whose fair market value of the share i.e. Rs. 50/- was done on the basis of Discounted Cash Flow Method which was work out by one of the know Merchant Banker i.e. M/s SPA Capital Advisors Ltd.

3. *For the assessment year 2014-15, the assessee filed Its return of income u/s 139(1) of the Income Tax Act, 1961 (for short referred as the 'Act') on 29-09-2014 declaring a loss of Rs. 53,083/-. Assessment was concluded by order dated 19-12-2016 on a total income at Rs. 1,26,72,917/- and in that process Ld. AO made addition of Rs. 1,27,26,000/- u/s 56(2)(viib) of the Income Tax Act, rejecting the valuation report of the said Merchant Banker i.e. M/s SPA Capital Advisors Ltd. and independently determining the value of Share at Rs. 9.60 and calculating over and*

above the value of share allotted over Rs. 9.60 i.e. Rs. 40.40 i.e., for deriving the aforesaid amount of Rs. 1,27,26,000/- multiply no. of shares i.e. 3,15,000 X Rs. 40.40 (diff. of Rs. 50 and Rs. 9.60). The disallowance u/s 56(2)(viib) of the Income Tax Act of Rs. 1,27,26,000/-.

4. Appeal preferred to the Ld. CIT(A) was dismissed by way of impugned order. Hence, the assessee is before in this appeal stating that the AO is not justified in rejecting the valuation reports submitted before the assessee in support of the issue price of the shares to the Ld. AR and Rule 11UA(2) the Ld. AO is not supposed to ignore the option exercised by the assessee and to impose any other method than that adopted by the assessee. In this case, the assessee adopted the DCF Method and determined the FMV of the shares, as such, if it is not agreeable to the AO on the price determined by the Merchant Banker, Ld. AO could have referred the matter to the Income Tax Department Valuation Officer for a determination of price market value of such capital asset.

5. Per contra, Ld. DR submitted that the orders of the authorities below are based on sound reasoning. He submits that the assessee failed to justify their taking the risk free return at 9.04% within two years of their coming into existence and running into losses from the inception. So also the assessee is not justifying in taking the expected return from market at 15.80 which is quite unrealistic on the face of their performance for the initial two years of their business. He submits that BSE 500 return is not available to the assessee. He further submitted that the assessee is in the financial sector and investing only in its group of companies with a negligible risk, as such, negative beta is applicable to them instead of average beta of one.

6. Further Ld. AO recorded that the cash flow to the firm is the cash left over after taxes and after all reinvestment are met to before interest and principle payments on debt; and the assessee had taken free cash flow to equity value for the year 2013-14 which is in the negative at (0.98) which is similar to the earlier year and the data available over the future years also reflects the negative figures of cash flows. According to the Ld. AO even if we assume for a while that in future the assessee is likely to earn the profits still it will take not less than 3 or 4 years to overturn its fortune to start earning profits. In then circumstances, the figures taken by the assessee on account of risk free return, risk free premium, expected returns from the market, risk free rate and Beta are nowhere nearer to the reality.

7. Basing on the above argument, Ld. DR had taken our attention to the disclaimer clause appended by M/s SPA Capital Advisors Ltd. to their report, and submits that a perusal of the above makes it clear that the valuation of shares is not a realistic one keeping in view the growth and stature of the company and the figures in the valuation report have been cooked up without providing any reliable basis as to how the assumptions took place.

8. Lastly, he submits that in so far as DCF method is concerned it is always possible for the company to decide the proposed value of the shares first and then travelling back to tailor the figures with the reverse engineering process, to suite their convenience.

9. Ld. DR, therefore, submits that unless and until the assessee provides the evidence justifying the facts and figures provided to the merchant banker with their justification it would not be possible for the authorities below either to consider the merits of the DCF method adopted by the assessee or to make suitable adjustments to the same for correct determination of the share price. However, Ld. CIT(A) recorded in his order at page no. 16 thereof that at appellate stage also the assessee was asked to substantiate the basis of projections in cash flow but the Ld. AR relied on the valuers's report and vehemently argued that the valuer report cannot be disturbed by

the AO. By not producing the evidences supporting the figures furnished by the assessee to the valuer for obtaining the report, the assessee did not leave any option to the authorities below to consider the merits of DCF method adopted by the assessee, as such, the authorities are constrained to reject the DCF method which could not be verified in the absence of material. Fie, therefore, submits that in the facts involved in this case there is no other go for the authorities than to adopt the NAV method.

10. We have gone through the record. As could be seen from the orders of the authorities below the fair market value of the shares was determined by M/s SPA Capital Advisors Ltd. a merchant banker by adopting the DCF method and the approach is as follows:

Year	2013-14	2014-15	2015-16	2016-17	2017-18	Perpetuity
Sources of Funds:						
Pat	-1.95	32.60	34.88	36.98	39.20	
Add: Depreciation	0.00	0.00	0.00	0.00	0.00	-
Change in Net Working capital		0.01	0.01	0.02	0.02	-
Change in Cash Flows	-1.95	32.61	34.89	37.00	39.22	
Less Cash Flow from 01-04-13 - 30-09-13	-0.98					

Free Cash Flow to Equity	-0.98	32.61	34.89	37.00	39.22	212.83
Discounting Factor @20.80%	0.91	0.75	0.62	0.52	0.43	0.43
Discounted Cash Flow	-0.89	24.56	21.75	19.10	16.76	90.95
Sum of Discounted Cash Flows	172.24					
Add: Book Value of Non Current Investments	36.17					
Add: Cash & Bank Balance As on 30-09-13	4.12					
Total Value	212.53					
Number of Shares	4.20					
Value Per Share	50.60					

Calculation of Cost of Equity

Particulars	Values
Risk free return	9.04%
Risk premium	6.75%
Company Specific Risk	5%
Ke	20.80%
Calculation of Risk Premium	

<i>Expected return from market (BSE 500 return since inception)</i>	15.80%
<i>Risk free rate (Zero Coupon Yield as on 30-09-13)</i>	9.04%
<i>Beta (to be on conservative side)</i>	1
<i>Risk Premium</i>	6.75%
<i>Perpetuity Growth rate</i>	2%

11. In so far as the figures relating to cash flow to equity, risk free return, expected return from market and Beta taken by the assessee, the observations of the Ld. Assessing Officer are as follows:

"Cash flow to Equity : The cash flow to the firm is the cash left over after taxes and after all reinvestment needs have been met, but before interest and principle payments on debt. To get to cash flow to the firm, you start with operating earnings, instead of net income, and subtract out taxes paid and reinvestment. The assessee has taken free cash flow to equity value for the year 2013-14 is in negative at 0.98. Same was the case is earlier years. The data available for the future years also reflects negative figures of cash flows. This clearly indicates that the discount rate calculated by the company is nowhere close to the reality.

Risk Free Return: The Risk Free Return (Zero Coupon Yield as on 30-09-13) @ 9.04% taken by a company which has come into existence two years back and since inception is unprofitable is illogical. Even if we took a conservative view the assessee at least would have taken two to three years to overturn its fortune and start earning profit. In view of the above this figure is also not acceptable.

Expected Return from Market: The assessee has taken this figure @ 15.80% which is BSE 500 return since inception. The assessee company was asked to state as why a company newly incorporated and negative earnings since inception has taken BSE 500 figures that too since inception.

Beta: Beta is the measurement of return versus risk. Beta measures the risk of the company relative to the risk of the stock market in general. With greater risk, as measured by a larger variability of returns (Business of operating risk), the company's should have a larger beta. And with greater leverage (higher debt to value ratio) increasing financial risk, the company's stock should also have a larger beta. In the case of the assessee the assessee being in financial sector only invest in its group companies having negligible risk and, therefore, should have taken a negative beta instead of average beta of 1."

12. A notice u/s 142(1) of the Act was issued to the assessee calling for their remarks on these aspects, which reads as follows:

'1. Please refer to your submission dated 07/09/2016 wherein you have submitted certificate of valuation of shares under rule 11UA. On perusal of the valuation report the following facts have been noticed.

(i) In its valuation report M/s SPA Capital Advisors Ltd. has given a disclaimer as under: In preparing the Final Report, SPA has relied upon and assumed,

without independent verification, the truthfulness, accuracy and completeness of the information and the financial data provided by the company, SPA has therefore relied upon all specific information as received and declines any responsibility should the results presented be affected by the lack of completeness or truthfulness of such information.

From perusal of the report it appears that the valuation of shares is not realistic keeping in view the growth and stature of your company. Further, in the valuation report only figures have been put up without giving reasons as to how these assumptions have been made.

(ii) In the DCF method first step is to forecast expected cash flow based on assumptions regarding the company's revenue growth rate, net operating profit margin, income tax rate, fixed investment requirement, and incremental working capital requirement. The revenue growth rate as well as the net profit margin of your Company, since inception, is negative and you have been carrying forward business losses. Even in the subsequent years, for which data is available, you have incurred losses (loss of Rs. 53083/- (AY 2014-15) and Rs. 1,00,384/- (AY 2015-16). However, as per the computation of valuation, the free cash flow to equity figures are -0.98 (2013-14), 32.61 (2014-15), 34.89 (2015-16), 37.00 (2016-17), 39.22 (2017-18) which are unrealistic.

You are also requested to submit actual free cash flow (FCF) for the AY 2014-15, 2015-16 & 2016-17 till date)

(iii) Similarly with regard to calculation of Cost of Capital, it is requested to clarify whether weighted average has been taken or otherwise. Further use of BSE 500 return data in your case is uncalled for. All your investments are in the associates company only and you must have the data of their year on year growth rate to calculate the actual return in your case. Also BSE 500 return data since inception is very unusual. Practically for assumption purpose this is a very long period for a company which is incorporated a few years back. Therefore, you are requested to take the realistic figure as deduced from your associate company investments. Further, you are having investments in your associates so the risk factor should be at a very low side. Therefore, you are requested to clarify the basis relying upon the company specific risk has been calculated at 5%. Similarly Beta figure of 1 and Risk premium of 6.75 may also be justified.

(iv) Also you have taken a discounting factor @ 20.80% for a company whose returns are continuously in negative which is an unrealistic approach to calculate the value of shares. In view of the above you are also requested to give details of values which have been taken to arrive at a discounting figure @ 20.8% and also the basis behind such assumption for a company whose return have consistently been negative. Also, whether sector specific study has been carried out to reach the rate of return of growth. If, yes give a copy of the same.

(v) Further, you are requested to submit Financial statement of six months ended on September 30, 2013.

In view of the above, you are requested to submit the details and explanations called for above and to explain as to why the DCF method of valuation employed by you for valuation of shares under Rule 11UA should not be rejected and, therefore, the book value method as per RULE 11UA (2)(a) should not be taken for the purpose of Section 56(2)(viib) of the I.T. Act, 1961.'

13. Having received the above detailed notice, the assessee could not bring anything on record to satisfy the queries of the Ld. AO, necessitating the AO to issue another notice u/s 144/142(1), whereunder the Ld. AO calculated the fair market value by following the NAY, at Rs. 6.0 as against Rs. 50.60 adopted by the assessee. Assessment order further reveals that the assessee did not respond to this notice also, as such, under best judgment method Ld. AO concluded the assessment by making an addition of Rs. 1,27,26,000/- by taking the value of the share at Rs. 9.60, as against 50.60 adopted by the assessee.

14. Even before the Ld.CIT(A) also, as recorded by the Ld. CIT(A) the assessee did not produce any evidence to substantiate the basis of projections in cash flow but relied on the valuer's report vehemently contending that such a report cannot be disturbed by the Ld. AO. At no point of time tried to explain where did the Ld. AO went wrong in his comments on the figures reflected in the above valuation report of the expert.

15. In these circumstances, we are unable to accept the contentions of the assessee that in view of the provisions under section 56(2)(viib) of the Act read with Rule 11UA(2) of the Rules the Ld. AO had no jurisdiction to adopt a different method than the one adopted by the assessee, and if for any reason the AO has any doubt recording such valuation report and does not agree with the same is bound to make a reference to the Income tax Department Valuation Officer to determine the fair market value of such capital asset. This is so because unless and until the assessee produces the evidences to substantiate the basis of projections in cash flow and provides reasonable connectivity between those projections in cash flow with the reality evidences by the material, it is not possible even for the Departmental Valuation Officer to conduct any exercise of verification of the acceptability of the value determine by the merchant banker. This is more particularly in view of the long disclaimer appended by the merchant banker at page no. 16 & 17 of the paper book which clearly establishes that no independent enquiry is caused by merchant banker to verify the truth or otherwise the figures furnished by the assessee at least on test basis. The merchant bankers solely relied upon an assumed without independent verification, the truthfulness accuracy and completeness of the information and the financial data provided by the company. A perusal of this long disclaimer clearly shows that the merchant banker did not do anything reflecting their expertise, except mere applying the formula to the data provided by the assessee. We, therefore, are unable to brush aside the contention of the Revenue that the possibility of tailoring the data by applying the reverse engineering to the pre determined conclusions.

16. For all these reasons, we are of the considered opinion that there has not been any possibility of verifying the correctness or otherwise of the data supplied by the assessee to the merchant banker, in the absence of which the correctness of the result of DCF method cannot be verified. This left no option to the AO but to reject the DCF method and to go by NAV method to determine the FMV of the shares. Without such evidence, it serves no purpose even if the matter is referred to the Department's Valuation Officer. We, therefore, do not find any illegality or irregularity in the approach of conclusions are by the authorities below. While confirming the same, we dismissed the appeal as devoid of merits.

17. In the result, the appeal of the assessee is dismissed.”

7.2 In the assessment order the AO has noted that during the year under consideration, the appellant company had increased its share capital from Rs. 1,00,000/- to Rs. 2,44,20,000/- through the issuance of Rs. 24,32,000/- shares @ Rs.10/- per equity share at a premium of Rs.40/- per share. A total of Rs. 9,72,80,000/- was received in the form of share premium. The AO had asked the appellant to explain the applicability of section 56(2) of the Act, vide the letter dated which reads as under:

1. "Notwithstanding above; why the share premium charged by you should not be taken as your income as per the provisions of Section 56(2)(viib) of the Income Tax Act Please submit original valuation report by NAV method with detailed calculation in conformity with the provisions of Section HU A in support of your explanation, if any.
2. Please furnish the copies of acknowledged allotment letters issued to the new shareholders alongwith copy of form submitted to ROC in this regard.
3. Copies of all the bank statements with bank-ledger to verify the movement of funds in the course of claimed receipts of share application money/premium. "

The counsel of the assessee attended the proceedings before the AO on and submitted as under:

"..... The share premium is not offered for tax as the same was allotted at fair market value. Also, Section 56(2) lists incomes chargeable to income tax under the head 'Income from Other Sources Finance Act, 2012 inserts clause (viib) with effect from 1-4-2011 (assessment year 2013- 14) to include 'share premium ' received by a company in excess of its fair market value, as its income Chargeable under the head 'Income from other sources. ' Finance Act, 2012 simultaneously amends the definition of income in section 2(24) by inserting clause (xvi) to include the above on side ratio exceeding fair-market value as 'income'. The amendment of the Rules is also to allow DCF valuation for valuing the equity shares.

The company has allotted equity shares at fair market value, therefore, the amount received by the company as share premium is not chargeable for tax under the head of Income from other sources. Copy of duly certified Valuation Certificate as per DCF method is enclosed herewith. "

7.3 In the assessment order the AO has noted that the appellant has issued 24,32,000 equity shares of Rs.10/- each (face value) issued at premium of Rs.40/- per share for which the appellant company was asked to explain the reasonableness of the share premium charged during the year in view of provision of section 56(2)(viib) of the Income Tax Act, 1961. In response to it the appellant has filed a certificate issued by the Chartered Accountant as per provisions of Rule 11UA(2)(b) of the Income Tax Rules wherein valuation of the share of the appellant company has been given at Rs.50.29 per share by following discounted cash flow method. In this regard the AO has referred to 'Technical guide on shares valuation' published by the Institute of Chartered Accountants of India(ICAI) wherein three key factors viz. cash flow projections, discount rate and terminal value for computing DCF are given. The AO has noted that none of these factors as mandated by ICAI has been considered by the CA issuing valuation report while computing fair market value. In this technical guideline on shares valuation issued by ICAI it is clearly stated that the DCF method is as good as input assumptions used for computing Future Cash Flows. The CA issuing valuation report dated 25.03.2015 has merely adopted the values provided by the management clearly ignoring past performance. Such valuation is merely a self serving exercise as several factors such as performance, growth prospects, earnings capacity, expansion etc. were not considered by the said CA issuing the said valuation report dated 25-03-2015. Net asset value (NAV) method reflects historical cost of assets and liabilities of the company on valuation date.

7.4 In the present case, though the appellant has exercised its option for DCF method of valuation as per the provisions of Rule 11UA(2)(b) but the appellant has not been able to demonstrate that the assets have appreciated way above their book value. In the covering letter addressed to the Directors, the Valuer has stated that "this opinion is based on the management projections for next five years, plans in hand and other information made available to us". The Chartered Accountant (Valuer) has stated that the valuation process has been carried out on the basis of the projected data provided to the Valuer. The appellant has not provided any basis/documentary evidences in support of the projected data provided to the Valuer. The AO has concluded that it is crystal clear that the reliability and correctness of the projected data are not based on any material. The appellant does not have any hidden assets in the form of patents, copy rights, intellectual property rights or even such investments etc belonging to the company based on which the appellant would substantially enhances profits. The AO has also noted that the accountant has taken future cash flow as certified by the management. No verification of projections and assumptions adopted by the management was made by the Valuer, thereby making the report as per the requirement of the management. In DCF method future free cash flow is the most relevant variable which can change the value to any extent. The AO further noted that the loans/capital added to the "Profit after Tax" contains a figure of Rs. 5,00,00,000/- for the F.Y. 2013-14, whereas it is Rs. 3,01,00,000/- only as per the comparative figures in the balance sheet submitted by the appellant during the course of assessment proceedings. This amount includes the borrowed funds of Rs. 2.70 Crores and the capital of Rs. 1 Lakh. The AO has observed that wrong figure of Rs. 5 Crores has been put in the

respective column of the DCF calculation chart. The AO has further observed that in the present case, the revenue projections provided by the management were merely self-serving figures which is evident from the final figures available in the return of income for the next two years i.e. for A.Y. 2016-17 and 2017-18.

Financial Year	Project profit before tax	Profit before interest, tax & depreciation.
2014-15 (A.Y. 2015-16)	7,00,000	5,08,936
2015-16(A.Y. 2016-17)	25,00,000	(-6,65,450)
2016-17(A.Y.2017-18)	31,25,000	(-49,100)

7.5 After correcting the mistakes as discussed above and replacing the projected figures with the actual figures of "Profit before Tax" as given above for F.Y. 2014-15 to 2016-17, the AO has worked out the Total PV of future cash inflow and share value as under:

Particulars	Audited	Unaudited	Budget based on discounting rate (Provisional)			
	F.Y. 2013-14	F.Y. 2014-15	F.Y. 2015-16	F.Y. 2016-17	F.Y. 2017-18	F.Y. 2018-19
Profit before interest, Tax & Depreciation		7,00,000	25,00,000	31,25,000	39,00,000	48,70,000

Less:			3,00,000	1,20,000	48,000	19,200
Adjustments for abnormal incomes						
Depreciation						
Interest income						
Other income						
Add:						
adjustments for abnormal expenses						
Bad Debts W/Off						
Unsecured Loans						

Profit before interest		7,00,000		30.05.000	38.52.000	48,50,800
Less: Adjustments in Investment in Immovable property for projects			22,00,000	1.20.000	48.000	19,200
Add: Adjustments Interest Depreciation Profit before tax		5,08,936	-6,65,450	-49,100	39,00,000	48,70,000
Less: Corporate tax (30.90%2015-16 & 2016-17, thereafter 25.75%)		1,57,261	-2,05,624	-15,172	10,04,250	12,54,025
Profit after Tax		3,51,675	-4,59,826	-33,928	28,95,750	36,15,975
Add: loans/capital	6.000	13.12.2017	5,00,000			1,30,00,000
Less: Capital Expenditure	4.000	18.00.00				
Cash inflows	19,00,000	3,96,48,325	-9,59,826	-33,928	28,95,750	-93,84,025
Discount rate (10%)	0.10	0.10	0.10	0.10	0.10	0.10
Discount factor PV of Future	1.00	0.91	0.83	0.75	0.68	0.62
cash inflow	-19,00,000	3,60,79,976	-7,96,656	-25,446	19,69,110	-58,18,096

Total PV of	-4,26,51,063				
Future Cash	1,96,73,404				
inflows	-2,29-				
Add: cash &	77,659				
bank Balance	10,000				
31.03.2014	-2,297.77				
Estimated value					
of Business Total					
no. of shares					
Value per share					

Clause (viib) of sub section (2) of section 56 was inserted vide finance act, 2013 w.e.f 01.04.2013 i.e. for A. Y. 2013-14 to provide that where a closely held company issues its shares at a price which is more than its fair market value then the amount received in excess of fair market value of shares would be charged to tax in the hand of the company as income from other sources. According to the provisions of Rule 11UA(2)(b), the appellant exercised the option of valuation of shares by DCF method. However, the actual fair market value of the shares as per DCF Method has been worked out by the AO as above.

7.6 The AO has observed that it is clear that valuation made on the basis of unverified exorbitant forecasts given by management has given inflated value of shares @ Rs. 50.29/- which is not as per recognized DCF method but as per whims & fancy of the management to arrive at higher value to issue shares at huge premium. The AO has observed that the valuation of shares done by CA as per DCF method is found to be erroneous and non-reliable. The AO has rejected the value determined by the appellant and recomputed the values of the shares at negative net-worth as per the re-calculation above. The AO has observed that the following ingredients of Section 56(2)(viib) are satisfied : (i) the appellant company is not a company in which the public are substantially interested, (ii) the appellant company has received, in any previous year, from the person who are resident, (iii) the appellant company has received the consideration for issue of shares, (iv) the consideration so received exceeds the face value which is Rs. 10 for each of its 24,32,000 shares & (v) the aggregate consideration received for such shares is Rs. 12,16,00,000/- and this amount exceeds the fair market value of the shares; which is determined at a negative amount. The AO has held that the aggregate consideration received by the appellant in lieu of shares, exceeds the fair market value. It got clearly established that the appellant company's shares commanded merely its face value as FMV for the purpose of Section 56(2)(viib) and; chargeable on the issue of the shares of the appellant company. Accordingly, the AO has added back the share premium of Rs.9,72,80,000/- charged by the appellant to the income of the appellant company as its "income from other sources" as envisaged in the provisions of Section 56(2)(viib) of the Income Tax Act, 1961. In the present case the valuer has made the valuation of shares based on the projections given by the management. These projections are not realistic and could not be achieved. There is substantial difference between actual figures and projected figures. The

valuer has made the valuation of shares without any application of mind. Considering the facts of the case, I am of the view that the AO has rightly rejected the valuation of shares under DCF method. In the case of Agro Portfolio (P.) Ltd [2018] 94taxmann.com 112 (Delhi - Trib.) Hon'ble ITAT Delhi has held that "For all these reasons, we are of the considered opinion that there has not been any possibility of verifying the correctness or otherwise of the data supplied by the assessee to the merchant banker, in the absence of which the correctness of the result of DCF method cannot be verified. This left no option to the AO but to reject the DCF method and to go by NA V method to determine the FMV of the shares. Without such evidence, it serves no purpose even if the matter is referred to the Department's Valuation Officer. We, therefore, do not find any illegality or irregularity in the approach of conclusions are by the authorities below. While confirming the same, we dismissed the appeal as devoid of merits." The decision of Hon'ble ITAT, Delhi in the case of Agro Portfolio (P.) Ltd (supra) is squarely applicable to the facts of the case. In view of the above, it is held that the AO has correctly made the addition of Rs.9,72,80,000/- u/s 56(2)(viib) in the present case. Accordingly, the addition of Rs.9,72,80,000/- u/s 56(2)(viib) is upheld in the instant case. Ground No. 1 is decided against the appellant.

7.7 Ground No. 2: *In this ground of appeal the appellant has objected to initiation of penalty u/s 271(1)(c). This ground of appeal is premature and not adjudicated.*

7.8 Ground No. 3, 4 & 5: *In this ground of appeal the appellant has objected to charging interest u/s 234A, 234B & 234C. Charging of interest u/s 234A, 234B & 234C is mandatory and the AO is directed to charge proper interest u/s 234A, 234B & 234C as per the provision of the Act.*

7. In the result, appeal of appellant bearing Appeal no.309/17-18 is partly allowed."

6. Further aggrieved by the denial of relief, the assessee preferred appeal before the Tribunal. The ld. counsel for the assessee argued in length to defend the correctness of premium charged.

7. The ld. Sr.DR, on the other hand, placed reliance on the order of the lower authorities and submitted that in the light of the facts noted by the Assessing Officer no interference with the order of the Revenue Authorities are called for. It was pointed out on behalf of the Revenue that while adopting the DCF method, the

projected figures on profits in the subsequent years do not match with the actual figures available for next two Assessment Years 2016-17 and 2017-18. It was thus submitted that valuation was carried out on unrealistic data which has been rightly disregarded by the Assessing Officer.

8. We have heard the parties in length and perused the assessment order as well as the first appellate order. The documents referred and relied upon has been taken cognizance in terms of Rule 18(6) of the Income Tax (Appellate Tribunal) Rules, 1963.

8.1 In the case in hand, the solitary question presented for determination is whether the consideration received by the assessee towards premium on issue of equity share represents the fair market value or exceeds the fair market value, and whether deeming provisions of Section 56(2)(viib) of the Act are attracted in the facts of the case.

8.2 The legal fiction inserted by Section 56(2)(viib) seeks to deem premium received from subscribers being Indian entities in excess of Fair Market Value as the chargeable income in the hands closely held company issuing such share at premium in excess of its Fair Market Value.

8.3 To set the context, the assessee company in the instant case, received consideration of Rs.10 towards face value of each equity share and Rs.40 as premium thereon towards issue of 24,32,000 shares. In the process of issue of equity shares, a total of Rs.9,72,80,000/- was received in the form of share premium. The assessee adopted DCF method for determination of Fair Market Value as per valuation report dated 25.03.2015, of the independent

valuer filed to support and vindicate the share premium on issue of equity share. The Assessing Officer however found fallacy in the quantification of FMV so determined by DCF method and observed that the FMV determined as per DCF method is without any sound factual basis and the projected figures of the ensuing years do not correspondingly match with the actual figures reported and presently available at the time of assessment.

8.4 The Assessing Officer essentially alleged that the valuation derived by the valuer is unconnected to the ground realities and cannot be relied upon. The Assessing Officer thus embarked to adjust the projected figures of the subsequent years, i.e., F.Ys. 2015-16 and 2016-17 in sync with actual figures reported and available at the time of assessment. The Assessing Officer thus re-determined the value as per DCF method to be Rs.10 per share. The difference computed between the adjusted DCF value determined by the Assessing Officer and the amount received by the assessee in the form of premium was thus considered as chargeable income of the assessee under Section 56(2)(viib) of the Act. The excess consideration received by way of premium was thus determined at Rs.9,72,80,000/- arising on issue of equity share on the touchstone of Section 56(viib) of the Act.

8.5 To contradict the action of the Assessing Officer, the assessee broadly submits that;

(i) the provisions of Section 56(2)(viib) introduced by Finance Act, 2012 are anti-abuse provisions with a sacrosanct object to curb the practice of introducing unaccounted money by issuing shares at a price which is higher than its FMV. Thus, provisions of Section 56(2)(viib)

cannot be applied mechanically to a genuine transaction which also has the backing of the report of independent valuer in accordance with Rules 11U and 11UA of the Income Tax Rules.

(ii) the Assessing Officer has not disputed the application of DCF method in the instant case but however has unauthorizedly altered the projected figures used for the purposes of determination of Fair Market Value (FMV) at the time of issuance of shares. The Assessing Officer committed gross error in taking a hindsight by comparing the projections made at the time of issuance of shares with the subsequent events and actual financial results despite the legal proposition that valuation cannot be judged in the light of the subsequent events or hindsight. A reference was made to the decision of Hon'ble Delhi High Court in the case of *Pr.CIT vs. Cinestaan Entertainment Pvt. Ltd. (ITA No.1007/2019) & CM Application No.54134/2019 judgment dated 01.03.2021.*

(iii) the assessee further contends that the DCF method adopted by independent valuer seeks to value the equity shares of a company by discounting its free cash flows for explicit forecast period and the perpetuating value thereafter. The free cash flow represents the cash available for distribution to the owner of the business. Such free cash flows are discounted by appropriate cost of capital. The present value of the free cash flows during the discrete period and the perpetuity value indicate the fair value of the business. The DCF method thus attempts to estimate the FMV future cash flows based on projection of how much

money that the proposed investment is likely to generate in future. The assessee thus contends that FMV as per DCF method is determined on the basis of projected figures of cash flow in the future years which is bound to be at variance with the actual revenue and cash flow of the subsequent years as the projected figures cannot be gauged with any arithmetical precision. The valuation of the cash flow in future years cannot be visualized at the time of projections having regard to the many imponderables which may enter with the passage of time. The valuation determined under DCF is only an estimate of potential of establishment and any comparison of such projections with actual figures at a later stage to reject the valuation would totally frustrate the intended outcome from DCF method of valuation recognized by the statute.

9. On conspectus of the plea raised on behalf of the assessee, we find plausibility therein. The assessee in the instant case has proceeded to issue equity share at a premium on the basis of independent valuer report wherein DCF method was adopted for the purposes of determination of fair market value. The Assessing Officer has not disputed the DCF method adopted for valuation *per se*. The Assessing Officer however, has compared the projected figures used by the valuer with the actual figures available at the time of assessment. The AO displaced the FMV determined as per DCF method based on projected figures by replacing the same by actual figures to discard the justification of share premium. We find that such action of the Assessing Officer substitute the figures estimated at the time of valuation towards ensuing years by actual figures made available to Assessing

Officer at the later point of time is squarely in contrast to the judgment of the Hon'ble Delhi High Court in *Cinestaan Entertainment (supra)* and decision of Co-ordinate Bench in *Intelligrape Software Pvt. Ltd. vs. ITO, ITA No.3925/Del/2018 Assessment Year 2014-15 order dated 30.09.2020*.

10. In *Cinestaan (supra)*, the Hon'ble Delhi High Court took cognizance of the identical situation, i.e., the Assessing Officer had disregarded the valuation report of the assessee primarily on the ground that the projections of revenue considered for the purpose of valuation do not match with the actual revenue arose in the subsequent years. The Hon'ble Delhi High Court in the fact situation observed that the assessee company has adopted a recognized method of valuation and the revenue could not show that assessee has adopted demonstrably wrong approach. It was observed that valuation is not an exact science and therefore cannot be done with arithmetic precision. It is a technical and complex issue which should best be appropriately left to the consideration and wisdom of experts in the field, having regard to the imponderables which enter the process of valuation of shares. The Hon'ble High Court thus upheld the action of the ITAT and consequently the additions made under the deeming provisions of Section 56(2)(viib) made by the Assessing Officer were reversed.

11. Similar view has been taken by the Hon'ble Co-ordinate Bench in *Intelligrape Pvt. Ltd. (supra)* wherein it was observed that the valuation based on future projections at the time of issue of shares cannot be inferred as the actual figures may vary depending on the market conditions and host of other factors.

12. In consonance with the view taken by the Hon'ble Delhi

High Court as well as the Co-ordinate Bench, in similar fact situation, we find substantial merit in the plea of the assessee. The order of the CIT(A) is thus set aside and the additions made by the Assessing Officer are reversed.

13. In the result, the appeal of the assessee is allowed.

Order pronounced in the open Court on 27/12/2022.

Sd/-

**[CHALLA NAGENDRA PRASAD]
JUDICIAL MEMBER**

DATED: /12/2022

Prabhat

Sd/-

**[PRADIP KUMAR KEDIA]
ACCOUNTANT MEMBER**