

**IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : "F" NEW DELHI]**

**BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER
AND
SH. YOGESH KUMAR U.S., JUDICIAL MEMBER**

I.T.A. No. 6171/DEL/2019 (A.Y 2015-16)

Punyah Building Materials Pvt. Ltd. 1002, Shiv Colony, Near Talab, Old Faridabad, Faridabad PAN: AAGCP8742B (APPELLANT)	Vs.	ITO Ward-2(1), Faridabad, Haryana (RESPONDENT)
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Appellant by	Shri Rajiv Saxena, Adv, Ms. Sumangla Saxena Adv & Sh. Shyam Sunder, Adv
Respondent by	Shri Sanjay Nargas, Sr. DR

Date of Hearing	01.12.2022
Date of Pronouncement	19.01.2023

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee against the order dated 29/03/2019 passed by the Id. Commissioner of Income Tax (Appeals)- Faridabad [hereinafter referred to CIT (Appeals)] for Assessment Year 2015-16.

2. The assessee has raised the following grounds of appeal:-

“1. The Ld. CIT(A) has erred in law as well as on facts in confirming the assessment framed by Ld. AO u/s 143(3) of the Income Tax Act’ 1961.

2. The Ld. CIT(A) has erred in law as well as on facts in confirming the addition of Rs. 42,50,000/- u/s 68 of the Act on account of alleged unexplained share premium and share capital.

3. The Ld. CIT(A) has erred in law as well as on facts in enhancing the income of appellant assessee by sum of Rs. 75,20,000/- acting ultra vires to statutory limitation of enhancement powers u/s 251 of the Act is ab initio void and fundamentally flawed action.

4. The Ld. CIT(A) has erred in law as well as on facts in enhancing the income of appellant assessee by sum of Rs. 75,20,000/- by invoking section 56(2)(viib) of the Act wherein rejecting the valuation method taken by appellant assessee.

5. The Ld. CIT(A) has erred in law as well as on facts in enhancing the income of appellant assessee by not issuing valid show cause notice as mandated.

6. The Ld. CIT(A) has erred in law as well as on facts in confirming and enhancing the addition without giving cogent reasons and by recording incorrect facts and by disregarding the all the documentary evidences furnished by assessee.

7. That, the appellant craves leave to add, alter, amend or withdraw all or any ground either before or during the hearing of

these grounds.”

It is prayed that it be held that additions/disallowance are not in accordance with law and therefore, the additions/disallowance so made may kindly be deleted and appeal of the appellant may kindly be allowed.”

3. There is a delay of 49 days in filing the present appeal. The assessee has pleaded in the affidavit that, the Chartered Accountant was unwell due to highly diabetic condition and was not able to look after the matter and prepare the appeal on time after receiving the copy of the order from Ld. CIT(A). Therefore, the assessee had engaged the service of another Counsel who has preferred the appeal only on 22/07/2019 which caused delay of 49 days in filing the appeal. Thus pleaded that the delay caused in filing the appeal is unintentional and the same due to bona-fide a mistake, accordingly sought for condoning the delay. For the reasons stated in the application for condonation of delay, the delay of 49 days in filing the appeal is hereby condoned.

4. Brief facts of the assessee case are that, the assessee filed return declared income of RS. 2,74,730/- which has been processed u/s 143(1) of the Income Tax Act, 1961 ('Act' for short). Subsequently, the case was selected for scrutiny and notices were issued. The case was converted into complete scrutiny with the required approval and the assessment proceedings have been initiated against the assessee. The assessment order came to be passed on 30/12/2017 by making an addition of Rs. 94,00,000/- on the ground that the share

premium and share capital received by the assessee company from the investor companies are bogus and treated the same as unexplained credit u/s 68 of the Act. Accordingly, the total income of the assessee has been assessed at Rs. 96,74,730/- as against the returned income of Rs. 2,74,730/-.

5. As against the assessment order, the assessee has preferred an appeal before the CIT(A). the Ld. CIT(A) has partly allowed the appeal vide order dated 29/03/2019 wherein the Ld. CIT(A) deleted the additions made by the A.O. in respect of four Companies i.e. namely M/s. Herculese Builders Coimbatore Pvt. Ltd., M/s. Best Realcon India Pvt. Ltd., M/s. Best Propmart Pvt. Ltd. and M/s. MRS Contractors Pvt. Ltd., further sustained the additions in respect of three Companies namely M/s. Goodluck Industries Ltd., M/s. Pearl Homecon India Pvt. Ltd and M/s. Rishikesh Buildocn Pvt. Ltd.

6. Aggrieved by the order of the Ld. CIT(A) dated 29/03/2019, the assessee has preferred the present appeal on the grounds mentioned above.

7. We have heard the parties, perused the material on record and gave our thoughtful consideration.

8. The Ground No. 1 is general in nature which requires no adjudication. Ground No. 2 is regarding the sustaining the addition of Rs. 42,50,000/- made u/s 68 of the Act on account of unexplained share premium and share capital.

9. The Ld. A.O. on the basis of various details filed by the AR found that the assessee had received 75,20,000/- share premium on 1,88,000/- shares at premium of Rs. 40 per share the details of the same are as under:-

<i>Name of Person</i>	<i>No. of shares</i>	<i>Nominal value per share (Rs)</i>	<i>Premium per share (Rs.)</i>	<i>Amount of premium (Rs.)</i>	<i>Total amount paid including premium (Rs.)</i>
<i>Herculese Builders Coimbatore Private Limited</i>	<i>16000</i>	<i>10</i>	<i>40</i>	<i>6,40,000</i>	<i>8,00,000</i>
<i>Best Realcon India Private Limited</i>	<i>20000</i>	<i>10</i>	<i>40</i>	<i>8,00,000</i>	<i>10,00,000</i>
<i>Goodluck Industries Ltd.</i>	<i>55000</i>	<i>10</i>	<i>40</i>	<i>22,00,000</i>	<i>27,50,000</i>
<i>Best Propmart Private Limited</i>	<i>17000</i>	<i>10</i>	<i>40</i>	<i>6,80,000</i>	<i>8,50,000</i>
<i>MRS Contractors Private Limited</i>	<i>50000</i>	<i>10</i>	<i>40</i>	<i>20,00,000</i>	<i>25,00,000</i>
<i>Pearl Homecon India Pvt. Ltd.</i>	<i>10000</i>	<i>10</i>	<i>40</i>	<i>4,00,000</i>	<i>5,00,000</i>
<i>Rishikesh Buildcon Pvt. Ltd.</i>	<i>20000</i>	<i>10</i>	<i>40</i>	<i>8,00,000</i>	<i>10,00,000</i>
<i>Total</i>	<i>1,88,000</i>			<i>75,20,000</i>	<i>94,00,000</i>

10. The Ld. A.O has also issued notice u/s 133(6) of the Act and in response, the investors have submitted various details such as their acknowledgment of e-filing of ITR, ledger copy of the companies account. The Ld. A.O. was of the opinion that the genuineness of the transactions remains highly suspicious and after enquiry, made the addition u/s 68 of the Company holding that the investors companies are bogus and accordingly the share capital of Rs. 94,00,000/- has been treated as bogus transaction as unexplained credit u/s

68 of the Act. In the appeal before the Ld. CIT(A), the addition made by the A.O. in respect of companies namely M/s. Herculese Builders Coimbatore Pvt. Ltd., M/s. Best Realcon India Pvt. Ltd., M/s. Best Propmart Pvt. Ltd. and M/s. MRS Contractors Pvt. Ltd. were deleted on the ground that the amount paid by the shareholders pertains to the earlier years. Further, the Ld. CIT(A) has sustained the addition in respect of the investors companies i.e. M/s Goodluck Industries Ltd., M/s Pearl Homecon India Pvt. Ltd. and M/s Rishikesh Buildcon Pvt. Ltd., which are the subject matter of the present appeal.

11. It is the case of the Ld. AR that the amount has been received by the banking channel for which the parties have confirmed the investment which are kept on record. In respect of all the parties/investors, they are regularly filing the return of income and the copies of the same are also brought on record. The assessee has also furnished the share application form, copy of the investors companies, bank account statement, showing the debit entry, copy of the acknowledgment of the return of income for AY 2015-16 along with the computation of income, copy of the auditor report, balance sheet and trading profit and loss account as on 31/03/2015 and the copy of the shares certificate of investors company issued by the assessee company. The assessee has produced every document to prove the identities of the parties and the creditworthiness of the parties along with genuineness of the transaction as required u/s 68 of the Act. The assessee has filed the following documents

pertaining to those three Companies before the Lower Authorities which are reproduced before us in the paper book which is as under:-

I M/s Good luck Industries(P) Ltd.

S. No.	Particulars	Page No. of the paper book
1	Copy of Certificate of Incorporation, along with MOA & AOA	Attached with this
2	Copy of confirmation of accounts dated 01.04.2015 from the period of 01.04.2014-31.3.2015 from the assessee company showing the net amount of Rs. . 27,50,000/- received from the investor company by the assessee company.	191
3	Copy of share application form.	192
4	Copy of investor company's bank account statement showing the debit entry of Rs. 15,00,000 on 19.01.2015 and of Rs. 12,50,000/- on 12.02.2015.	193-94
5	Copy of acknowledgement of return of income for AY 2015- 16 along with computation of income tax.	195-96
6	Copy Auditor's report, Balance Sheet and trading and profit & loss account as on 31.3.2015 along with notes to financial statement. -	195-207
7	Copy of Share Certificate of Investor Company issued by the Assessee Company.	208

II. M/s Pearl Homecon India Pvt. Ltd.

S. No.	Particulars	Page no of the paper book
1	Copy of Certificate of Incorporation, along with MOA & AOA	Attached with this synopsis
2	Copy of confirmation of accounts dated 01.04.2015 : period of 01.04.2014-31.3.2015 from the assessee company showing the net amount of Rs. 5,00,000/- received from the investor company by the assessee company.	156
3	Copy of share application form.	157
4	Copy of investor company's bank account statement showing the debit entry of Rs. 5,00,000 on 19.01.2015.	158-159
5	Copy of acknowledgement of return of income for AY 2015- 16 along with computation of income tax.	160-61

6	<i>Auditor's report, Balance Sheet and trading and profit & loss account as on 31.3.2015 along with notes to financial statement.</i>	162-172
7	<i>Copy of Share Certificate of Investor Company issued by the Assessee Company.</i>	173

III M/s Rishi Buildcon

<i>S. No.</i>	<i>Particulars</i>	<i>Page no of the Paper Book</i>
1	<i>Copy of Certificate of Incorporation, along with MOA & AOA</i>	<i>Attached with this synopsis</i>
2	<i>Copy of confirmation of accounts dated 01.04.2015 from the period of 01.04.2014-31.3.2015 from the assessee company showing the net amount of Rs. 10,00,000/- received from the investor company by the assessee company</i>	103
3	<i>Copy of share application form.</i>	104
4	<i>Copy of investor company's bank account statement showing the debit entry of Rs. 10,00,000 on 21.01.2015.</i>	105
5	<i>Copy of acknowledgement of return of income for AY 2015- 16 along with computation of income tax.</i>	106-107
6	<i>Copy Auditor's report, Balance Sheet and trading and profit & loss account as on 31.3.2015 along with notes to financial statement.</i>	108-118
7	<i>Copy of Share Certificate of Investor Company issued by the Assessee Company.</i>	119

12. The above details clearly establishes that the assessee had fulfilled the ingredients of Section 68 of the Act by proving the initial burden cast upon him. Once the assessee proves/fulfils the ingredients of Section 68 of the Act, the burden shifts on the revenue. In the present case, the Lower Authorities have

not brought anything on record to prove otherwise or to disprove the claim of the assessee and in such circumstances, the authorities are precluded from making any other addition on this count in the absence of contrary materials.

13. Further, we placed reliance on the judgment of the Supreme Court in the case of Principal Commissioner of Income Tax Vs. Rohtak Chain Co. (P) Ltd. reported in 59 (SC)/[2019] 110 taxmann.com wherein the Apex Court held that once the genuineness, creditworthiness and identity of investors are established, no addition could be made as cash credit on the ground that the shares are issued at excess price. The relevant portions are as under:-

“51. The learned ITAT after due examination of the order of CIT (Appeals) and the documents on record insofar as identity creditworthiness, genuineness of transaction of M/s. Aadhaar ventures (I) Ltd, M/s. Dhanush Technologies Ltd, M/s. Emporis Projects Ltd and M/s. L.N. Industries Ltd (formerly known as L.N. Polyester Ltd) came to the conclusion that the assessee company having receipt share application money through bank channel and furnished complete details of bank statements, copy of accounts and complied with notices issued and the directors of subscriber company also appeared with books of accounts before the appellate authority and confirmed the investment made by them with the assessee company, therefore, the identity and creditworthiness of investor and genuineness of transaction of the share applicant has been proved in the light of the ratio laid down by the M.P. High Court, Delhi High Court and the Hon’ble Supreme Court and were of the opinion that the onus cast upon the assessee as provided under Section 68 of the Act has been duly discharged by the assessee the identity of the share subscriber, creditworthiness and genuineness of the transaction is not to be doubted. The learned ITAT considered the case of the each company in great detail in para 85 to 110 of the

impugned order and recorded its finding. The aforesaid finding of fact recorded by the ITAT are based on the material available on record which is a finding based on appreciation of evidence on record.

52. Issuing the share at a premium was a commercial decision. It is the prerogative of the Board of Directors of a company to decide the premium amount and it is the wisdom of shareholder whether they want to subscribe the shares at such a premium or not. This was a mutual decision between both the companies. In day to day market, unless and until, the rates is fixed by any Govt. Authority or unless there is any restriction on the amount of share premium under any law, the price of the shares is decided on the mutual understanding of the parties concerned.

53. Once the genuineness, creditworthiness and identity are established, the revenue should not justifiably claim to put itself in the armchair of a businessman or in the position of the Board of Directors and assume the role of ascertaining how much is a reasonable premium having regard to the circumstances of the case.”

14. By respectfully following the ratio laid down in the case of PCIT Vs. Rohtak (Supra) and considering the facts and circumstances of the case, we find no merit in the argument of the Ld. DR to hold that the assessee has failed to establish the ingredients of Section 68 of the Act.

15. The Hon'ble Supreme Court in the case of CIT Vs. Lovely Export Pvt. Ltd. reported in 319 ITR 5 (St.) observed that even if the share capital money is received by the assessee from alleged bogus share holders, whose names are given to the A.O. The Department is free to proceed to reopen their individual

assessment in accordance with law. But cannot be regarded as undisclosed income of the assessee Company. In the present case apart from giving the details of the investors, the assessee has substantially provided materials to prove the genuineness of the share holders apart from giving the Pan Card, name and ROC details. Therefore, we delete the addition of Rs. 42,50,000/- made u/s 68 of the Act. Accordingly, the Ground No. 2 of the Assessee is allowed.

16. Ground No.3, 5 & 6 are regarding enhancement of income. The Ld. AR submitted that the Ld.CIT(A) enhanced the income without giving a mandatory notice as required u/s 250(1) of the Income Tax Act. It is the case of the assessee that the income of the assessee was enhanced which has been done in violation of principles of natural justice.

17. In our opinion, when the CIT(A) deems it fit to enhance the assessed income, shall give mandatory notice u/s 250(1) of the Act. In the present case, the Ld. DR has not brought anything on record to prove that the Ld. CIT(A) has issued notice u/s 250(1) of the Act before enhancing the income of the assessee. Therefore, the action of the Ld.CIT(A) in enhancing the income of the assessee is found to be erroneous. Therefore, Ground No. 3, 5 & 6 of the assessee requires to be allowed.

18. Ground No. 4 is regarding enhancing the income of the assessee by sum of Rs. 75,20,000/- by invoking Section 56(2) (viib) of the Act by rejecting valuation method taken by the assessee. According to the Ld. A.O, the value

of the shares issued to the parties are very high in comparison to fair market value of such shares. It is the contention of the Ld. AR that the valuation of the shares have been done as per Discounted Cash Flow Method (DCF Method) which is prescribed under Rule 11UA (2) (b) of Income Tax Rules which has been certified by the Assessee's qualified Chartered Accountant. In our considered opinion, the Valuation Method adopted by the assessee is one of the Methods accepted under law which cannot be disturbed by the Revenue authorities without bringing any contrary materials on record to show that the method adopted by the assessee is incorrect.

19. Further, the Ld. CIT (A) has rejected the valuation report of the assessee, by relying on decision of the Coordinate Bench of this Tribunal in the case of Agro Portfolio Pvt. Ltd. vs. ITO reported in 94 Taxman.com 112 Delhi.

20. The Ld. AR has also filed comparative chart giving distinguishing features/facts for non applicability of the ratio laid down in the case of Agro Portfolio Pvt. Ltd. (supra) which is reproduced hereunder:-

Particulars	Agro Portfolio	M/s Punyah Building Materials (P) Ltd.	Remark
Profit after tax (PAT)	Negative AY 14-15: Loss of Rs. 53,083/- (Para 3 & 12(ii) of ITAT order) AY 2015-16: Loss of Rs. 1,00,384/- (Para 12(ii) of ITAT Order)	Profit as P&L Account A.Y 2014 -15: Rs. 1,95,744/- (PB 42) A.Y 2015-16: Rs. 1,89,841/- (PB 42) In ITR, Rs. 2,74,730/- (PB 3).	Assessee has sufficient capital base and earned interest on Rs. 86.01 lacs in AY 2014-15 and on Rs. 97.44 lacs in AY 2015-16 thereon duly declared in ITRs, since inception. (PB 3).
Cash Flow to Equity	Negative (Para 10 & 11 of ITAT Order) showing (-) 0.98.	Highly positive having a capital base in lacs. Cash	PB 41 shows a reserves of about Rs. 79.22 lacs and Capital of Rs. 19.80 lacs,

		flow from equity shown Rs. 19.25 lacs and 20.50 lacs for year ending 31/03/2016 and respectively and even after spending Rs. 4.04 lacs and 4.63 lacs on operating cost, it comes to Rs. 19.25 lacs as on 31.3.2016 and 20.50 lacs as on 31.03.2017. Figures depicted at (PB 49A) in Valuation Report are obtained from Balance Sheet (PB 41) .	invested in short term loans of about Rs. 97.44 lacs, apart from cash of Rs. 2.30 lacs.
Risk Free Returns (RF)	Declared @ 9.04% which was illogical because of unprofitable for the last 2 years.	The 'A' already earning 9-12% interest on capital, has taken a conservative profit at 14-16%.	It is quite normal in the building material business (PB 49-49B) where profit from FY 2014-15 to FY 2016- 17 has been calculated. The assessee has assumed RF only at 6% as per Govt Securities. (PB 49-49B).
Expected return from the Market (RM)	It was taken @ 15.80%.	The 'A' has taken about 14-16% which is below the market rate of return which is 14%, but reduced its capital by 14% to arrive at the Present Value. (PB 49A- & 49B).	Since, the company has no debt, hence Ke i.e Cost of Equity has been taken at 14% as Weighted Average Cost of Capital (WACC). (PB 49A- 49B)
Beta Movement of Share Price as per the Market	Due to higher debt to value ratio, it has a larger Beta.	The 'A' has taken 1 (PB 49-49B)	Since, the assessee has no debt, Beta has been correctly assumed at 1 as there is no risk of debt.
Disclaimer	The valuer clearly states that the valuation of shares is not realistic and figures in the valuation report have been cooked up without providing any reliable basis as to how assumptions took place.	The valuer clearly states that it has used the financial information which is believed to be reliable and conclusions are dependent on such information being reliable and accurate with all material aspects.	The valuer based its report not on assumption or future projections exorbitantly, but the report was given on the financial information and made conservatively by taking the lowest profits as the company is already earning interest @ of 9-12% on its capital and no debts and profit @ 14-16 % is quite reasonable.

21. Apart from the above distinguishing facts of the Agro Portfolio Pvt. Ltd. (supra) to the case of the assessee, the decision made in Agro Portfolio Pvt. Ltd. (supra) has been considered by the Coordinate bench of this Tribunal in the

case of Cinestan Entertainment (P). Ltd. Vs. ITO for AY 2015-16 in ITA No. 8113/Del/2018 vide order dated 27/05/2019, it is held that the Assessing Officer cannot examined or substitute its own value in place of valuation arrived by the assessee either DCF Method or NAV Method, the commercial expediency has to be seen from the point view of businessman. Further held that if law provides the assessee to get the valuation done from a prescribed expert as per the prescribed method, then the same cannot be rejected because neither the Assessing Officer nor the assessee have been recognized as expert under the law. The relevant portion are hereunder:-

“28. Now what we are required to examine whether under these facts and circumstances Assessing Officer after invoking the deeming provision of Section 56(2)(vii) could have determined the fair market value of the premium on shares issued at Nil after rejecting the valuation report given by the Chartered Accountant on one of the prescribed methods under the rules adopted by the Valuer. Before us, learned counsel, Mr. Dinodia, first of all had harped upon the spirit and intention of the Legislature in introducing such a deeming provision and submitted that such a provision cannot be invoked on a normal business transaction of issuance of shares unless it has been demonstrated by the Revenue authorities that the entire motive for such issuance of shares on higher premium was for the tax abuse with the objective of tax evasion by laundering its own unaccounted money. His main contention was that, being a deeming fiction, it has to be strictly interpreted and there is no mandate to the Assessing Officer to arbitrarily reject the valuation done by the assessee on his own surmises and whims. We are in tandem with

such a reasoning of the ld. Counsel, because the deeming fiction not only has to be applied strictly but also have to be seen in the context in which such deeming provisions are triggered. It is a trite law well settled by the Constitutional Bench of Supreme Court, in the case of Dilip Kumar & Sons (supra) that in the matter of charging section of a taxing statute, strict rule of interpretation is mandatory, and if there are two views possible in the matter of interpretation, then the construction most beneficial to the assessee should be adopted. Viewed from such principle, here is a case where the shares have been subscribed by unrelated independent parties, who are one of the leading industrialists and businessman of the country, after considering the valuation report and future prospect of the company, have chosen to make investment as an equity partners in a 'start-up company' like assessee, then can it be said that there is any kind of tax abuse tactics or laundering of any unaccounted money. It cannot be the unaccounted or black money of investors as it is their tax paid money invested, duly disclosed and confirmed by them; and nothing has been brought on record that it is unaccounted money of assessee company routed through circuitous channel or any other dubious manner through these accredited investors. If such a strict view is adopted on such investment as have been done by the Assessing Officer and by ld. CIT(A), then no investor in the country will invest in a 'start-up company', because investment can only be lured with the future prospects and projection of these companies.

29. Now, whether under the deeming provision such an investment received by the assessee company be brought to tax. The relevant provision of Section 56 for the sake of ready reference is reproduced hereunder:

"Income from other sources. 56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be

chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E. (2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :— (i)..... (vii) "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: 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;" Further, as per clause (i) of the Explanation as reproduced above, the FMV is to be determined in accordance with such method as may be prescribed. Clause (ii) admittedly is not applicable on the facts of the Assessee's case. The method to determine the FMV is further provided in Rule 11UA(2). The relevant extract of the applicable rules is reproduced below: "11UA. [(1)] 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,— (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:— (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.”

30. Ergo, the assessee has an option to do the valuation and determine the fair market value either on DCF Method or NAV Method. The assessee being a ‘start-up company’ having lot of projects in hand had adopted DCF method to value its shares. Under the DCF Method, the fair market value of the share is required to be determined either by the Merchant Banker or by the Chartered Accountant. The valuation of shares based on DCF is basically to see the future year’s revenue and profits projected and then discount the same to arrive at the present value of the business.....

.....

31.

32. What is seen here is that, both the authorities have questioned the assessee’s commercial wisdom for making the investment of funds raised in 0% compulsorily convertible debentures of group companies. They are trying to suggest that assessee should have made investment in some instrument which could have yielded return/ profit in the revenue projection made at the time of issuance

of shares, without understanding that strategic investments and risks are undertaken for appreciation of capital and larger returns and not simply dividend and interest. Any businessman or entrepreneur, visualise the business based on certain future projection and undertakes all kind of risks. It is the risk factor alone which gives a higher return to a businessman and the income tax department or revenue official cannot guide a businessman in which manner risk has to be undertaken. Such an approach of the revenue has been judicially frowned by the Hon'ble Apex Court on several occasions, for instance in the case of SA Builders, 288 ITR 1 (SC) and CIT vs. Panipat Woollen and General Mills Company Ltd., 103 ITR 66 (SC). The Courts have held that Income Tax Department cannot sit in the armchair of businessman to decide what is profitable and how the business should be carried out. Commercial expediency has to be seen from the point of view of businessman. Here in this case if the investment has made keeping assessee's own business objective of projection of films and media entertainment, then such commercial wisdom cannot be questioned. Even the prescribed Rule 11UA (2) does not give any power to the Assessing Officer to examine or substitute his own value in place of the value determined or requires any satisfaction on the part of the Assessing Officer to tinker with such valuation. Here, in this case, Assessing Officer has not substituted any of his own method or valuation albeit has simply rejected the valuation of the assessee.

33. Section 56(2) (viib) is a deeming provision and one cannot expand the meaning of scope of any word while interpreting such deeming provision. If the statute provides that the valuation has to be done as per the prescribed method and if one of the prescribed methods has been adopted by the assessee, then Assessing Officer

has to accept the same and in case he is not satisfied, then we do not we find any express provision under the Act or rules, where Assessing Officer can adopt his own valuation in DCF method or get it valued by some different Valuer. There has to be some enabling provision under the Rule or the Act where Assessing Officer has been given a power to tinker with the valuation report obtained by an independent valuer as per the qualification given in the Rule 11U. Here, in this case, Assessing Officer has tinkered with DCF methodology and rejected by comparing the projections with actual figures. The Rules provide for two valuation methodologies, one is assets based NAV method which is based on actual numbers as per latest audited financials of the assessee company. Whereas in a DCF method, the value is based on estimated future projection. These projections are based on various factors and projections made by the management and the Valuer, like growth of the company, economic/market conditions, business conditions, expected demand and supply, cost of capital and host of other factors. These factors are considered based on some reasonable approach and they cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and catena of underline facts and assumptions. Nevertheless, at the time when valuation is made, it is based on reflections of the potential value of business at that particular time and also keeping in mind underline factors that may change over the period of time and thus, the value which is relevant today may not be relevant after certain period of time. Precisely, these factors have been judicially appreciated in various judgments some of which have been relied upon by the Id. Counsel, for instance: - i) Securities & Exchange Board of India &Ors [2015 ABR 291 - (Bombay HC)] “48.6 Thirdly, it is a well settled position of law with regard to the valuation. that valuation is not an

exact science and can never be done with arithmetic precision. The attempt on the part of SEBI to challenge the valuation which is but its very nature based on projections by applying what is essentially a hindsight view that the performance did not match the projection is unknown to the law on valuations. Valuation being an exercise required to be conducted at a particular point of time has of necessity to be carried out on the basis of whatever information is available on the date of the valuation and a projection of future revenue that valuer may fairly make on the basis of such information.” ii) Rameshwaram Strong Glass Pvt. Ltd. v. ITO [2018-TIOL1358-ITAT- Jaipur] "4.5.2. Before examining the fairness or reasonableness of valuation report submitted by the assessee we have to bear in mind the DCF Method and is essentially based on the projections (estimates) only and hence these projections cannot be compared with the actual to expect the same figures as were projected. The valuer has to make forecast on the basis of some material but to estimate the exact figure is beyond its control. At the time of making a valuation for the purpose of determination of the fair market value, the past history may or may not be available in a given case and therefore, the other relevant factors may be considered. The projections are affected by various factors hence in the case of company where there is no commencement of production or of the business, does not mean that its share cannot command any premium. For such cases, the concept of start-up is a good example and as submitted the income-tax Act also recognized and encouraging the start-ups.” iii) DQ (International) Ltd. vs. ACIT (ITA 151/Hyd/2015) “10..... In our considered view, for valuation of an intangible asset, only the future projections along can be adopted and such valuation www.taxguru.in I.T.A. No.8113/DEL/2018 42 cannot be reviewed with actual after 3 or 4 years down the line.

Accordingly, the grounds raised by the assessee are allowed". The aforesaid ratios clearly endorsed our view as above.

34. In any case, if law provides the assessee to get the valuation done from a prescribed expert as per the prescribed method, then the same cannot be rejected because neither the Assessing Officer nor the assessee have been recognized as expert under the law.

22. The Coordinate Bench of the Tribunal while deciding the appeal, laid down the above ratio and also considered the decision of the Coordinate Bench in Agro Portfolio Pvt. Ltd. Vs. ITO (supra) which has been relied by the CIT(A). Therefore, we are inclined to follow the ratio laid down in the case of Cinestan Entertainment P. Ltd. (Supra) and hold that the Ld. A.O and CIT(A) has committed an error in rejected the valuation done by the assessee from prescribed expert as per the prescribed method.

23. In view of the above discussion, we inclined to allow the Ground No. 4 of the assessee by deleting the addition made by the Lower Authorities.

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

Order pronounced in the Open Court on : 19.01.2023.

Sd/-
(B. R. R. KUMAR)
ACCOUNTANT MEMBER
Dated : 19/01/2023

Sd/-
(YOGESH KUMAR U.S.)
JUDICIAL MEMBER

R. N, Sr. PS

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT NEW DELHI