

**IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad 'B' Bench, Hyderabad**

**Before Shri Rama Kanta Panda, Accountant Member
AND
Shri Laliet Kumar, Judicial Member**

ITA.No.1790/Hyd/2019		
Assessment Year: 2016-17		
The Deputy Commissioner of Income Tax, Circle 16(1), Hyderabad.	Vs.	M/s. NCL Green Habitats Private Limited, Plot No.1, Bindu Elegance, Ganga Enclave, Petbasheerabad, Quthubdullahpur, Hyderabad. Telangana – 500067. PAN : AACCK2576N.
(Appellant)		(Respondent)
Assessee by:		Sri S. Rama Rao
Revenue by:		Sri M. Naveen Kumar
Date of hearing:		26.04.2023
Date of pronouncement:		15.05.2023

ORDER

Per Shri Laliet Kumar, J.M.

The captioned appeal is filed by the Revenue, feeling aggrieved by the order passed by the Learned Commissioner of Income Tax (Appeals)-4, Hyderabad dated 09.01.2019 for the A.Y. 2019-20 on the following grounds :

“1.The ld.CIT(A) erred in deleting the addition made towards “share premium

2. The ld.CIT(A) erred in deleting the addition made towards ‘share premium’ without considering the factual figures of turnover and profit but relied on valuation report submitted by the assessee.”

2. The brief facts of the case are that assessee is a private limited company engaged in the business of construction / development of commercial complexes. It filed its return of income on 14.10.2016 for A.Y. 2016-17 admitting total income of Rs.44,60,320/- under normal provisions and Book Profit u/s 115JB of the Income Tax Act, 1961. The case was selected for limited scrutiny and the Assessing Officer issued notice u/s 143(2) of the Act dt.14.07.2017. In response to the said notices, assessee company filed the required information / details.

2.1 However, the Assessing Officer did not satisfy with the submissions made by the assessee and the Assessing Officer added back the income to the tune of Rs.3.75 crore in the hands of the assessee. Thereafter, the Assessing Officer had completed the assessment by making certain additions including the addition of Rs.3,75,00,000/- towards share premium. Thereby assessed the total income of the assessee at Rs.5,91,25,461/-. The findings of the Assessing Officer as mentioned in Para 7.2 which is to the following effect :

“7.2 From the above, the following conclusions are drawn for assessing the share premium received by the assessee as income from 'other sources' as per provisions of section 56(2)(vii b)

a) The assessee was having no business for the last several years, and yet it was valued at Rs.400/- per share (Rs. 100/- face value + Rs.300/- premium).

b) Generally shares issued on rights basis to the existing share holders are at a lower price than the prevailing market price. In the instant case there is no market price available, and the shares are issued at premium to the existing value. This has not been substantiated by the assessee through the prescribed method along with supporting documentary evidence, specifically the valuation report.

c) *As mentioned above, the assessee has not furnished any valuation report in support of its claim of having adopted DCF method.*

d) *The company has not substantiated its claim of issue of share at a premium to the satisfaction of the Assessing Officer.*

7.4. *During the year the assessee has issued 1,25,000 shares with face value of Rs.100/- per share and Rs.300/- as share premium per share. In view of the above facts and placing reliance on the aforementioned case law, the share premium amounting to Rs.3,75,00,000/- is added to the income returned as Income from other sources.”*

3. Feeling aggrieved by the order passed by the assessing officer, assessee filed appeal before the Ld. CIT(A), who after seeking remand report from the Assessing Officer had partly allowed the grounds raised by the assessee before him. The findings of the Id.CIT(A) were mentioned in para 4.6 to 4.9 to the following effect:

“4.6 However, AR clarified the method of valuation of shares with details during the appeal proceedings. Assessing Officer has rejected the AR's reasons as under:

The valuation report submitted by the assessee is based on DCF method the projections given the assessee in the Valuation Report and actual figures are as under as per the ROIs filed for the A. Ys. 2016-17, 2017-18 and 2018-19 for the F. Ys.2015-16, 2016-17 and 2017-18 respectively.

Particulars for the year ended 31 st March	2016		2017		2018	
	Projected	Actual	Projected	Actual	Projected	Actual
Sales	714.75	491.28	783.63	1062.15	853.39	514.98
Less : Operating expenses, Administration expenses, Wages and Other expenses	562.56	432.03	644.17	809.58	719.30	421.48
Profit before Interest, Tax, Depreciation (PBITDA)	152.19	59.25	139.46	252.57	134.09	93.50
Depreciation	7.5	0	6.38	0	5.42	0
Profit before Interest, Tax (PBITA)	144.69	59.25	133.08	252.57	128.67	93.50
Interest	95.82	17.89	89.82	137.87	85.02	33.84
Profit before Tax	48.87	41.36	43.26	114.69	43.66	57.18
Tax	15.15	0	13.41	0	1353	0
Profit after Tax	33.72	41.36	29.85	114.69	30.12	57.18

From the above statistics for three F. Ys., it can be observed that projections under DCF method are nowhere matching with the actual statistics. For the purpose of illustration depreciation and interest amounts can be compared they are not at all near to projections, there is huge variation to projections and actual.

Further, in the valuation report, the average share value was arrived by taking the share valued as per DCF method, Book Value Method and Market value of properties, but, in the same valuation report it failed to submit book value method valuation report and how the market value of the properties was valued also not produced. Therefore, the assessee failed to substantiate how valued under DCF method, hence, the valuation adopted under DCF method may be rejected.

4.7 On the other hand, AR in his rejoinder dealt AO's objections as under:

On verification of the certificate issued, the AO observed that the value fixed by the Chartered Accountant is not correct and at para 5, page-2 of the remand report, AO arrived at the profit after tax for the periods 2016, 2017 and 2018. According to the AO, there is a variation between the actual and the projections. The AO also mentioned that the actual are no where matching with the projected figures and that there is a huge variation. Therefore, the AO mentioned that the certificate is not correctly issued.

In this regard, it is submitted that the most important factor in arriving at the value of the share is the profit derived. It can be seen from the statement that there is an increase in the actual net profit compared to the projected one. The following data would indicate that the projected profit after tax is less than the actual profit.

		2016	2017	2018
Profit after tax	Projected	33.72 lakhs	29.95 lakhs	30.12 lakhs
	Actuals	41.36 lakhs	114.69 lakhs	57018 lakhs

The above indicates that there is an increase in the actual profit derived by the appellant for all the years. Even if the profit before interest, tax and depreciation is concerned the profit for 2016 and 2018 are slightly lesser. If the aggregate amount is taken, the total profit for three years projected was 426 as against the actual or 405.32. The difference is only about 5%. This cannot be considered as a huge variation. The appellant, therefore, submits that the submissions made by the AO in the remand report are not justified.

4.8 After having gone through the above, it is clear that the projected profits of the appellant for the assessment years 2016-17, 2017-18 & 2018-19 are less than the actual profits earned by the appellant. Therefore, the method adopted by the AR with regard to the valuation of shares is based on factual matrix and hence the same is acceptable. Further, the appellant has submitted the value under DCF method as prescribed by RBI/ICAI duly suggesting that the rights issue price band could be fixed between Rs.375/- to 415/- per share. As could be seen from the Valuation Summary (page 80 of paper book), the total equity value was determined at Rs.6,63,96,570/- and the value per equity share was arrived at Rs.412/- for a total equity shares of 1,61,050. The appellant has determined Fair Market Value of shares issued at premium on the basis of Discount Cash Flow (DCF) method in accordance with Rule 11UA(1)(c)(b) r.w.s.

56(2)(viib) of the Act and valuation report was prepared as per guidelines given by ICAI.

4.9 *In view of the above, the method adopted by the appellant under Rule 11UA(1)(c)(b) r.w.s. 56(2)(viib) of the Act is held to be correct and hence, the action of the AO in treating the share premium received of Rs.3,75,00,000/- u/s 56(2)(viib) of the Act is not justified and hence directed to be deleted. As a result, the grounds raised in this regard are allowed.”*

4. Feeling aggrieved by the order passed by the Ld. CIT(A), the Revenue is in appeal before us on the grounds mentioned herein above.

5. Before us, ld. DR for the Revenue had submitted that the assessee during the year under consideration had issued the shares at a premium of Rs.300/- to its holding company namely, M/s. NCL Altek and Seccolor Limited. During the assessment year, the Assessing Officer has called upon the assessee to justify the valuation of the shares. The assessee, in response, thereto had filed reply on 17.12.2018 and in that reply, he has categorically mentioned as under :

“Since the company was not actively doing business and allotment was made to holding company on right basis, the company as not considered valuation as contemplated under Rule 11UA(1)(c)(b) and the price of share was arrived based on the discounted cash flow method as determined by the accountant. We request your good office to consider the above facts positively and complete the assessment.”

6. Ld. DR further submitted that (1) In appeal before the ld.CIT(A), assessee had filed valuation report and the said valuation report was not placed on record before the Assessing Officer (2) no basis was given by the assessee, before the Assessing Officer for arriving at the valuation of the share to an extent of Rs.412/- per share (3) even on the valuation report furnished before the ld.CIT(A), the Chartered Accountant had

given a qualified remarks vide page 75 and 76 of the paper book, which are to the following effect :

“NCL Green Habitats Private Limited, a company registered under the Companies Act, 2013 vide CIN: U45200TG2001P1C038047 having its Regd. Off at Bindu Elegancy, Plot no. 1, Ganga enclave Petbasheerabad, Quthubdullahpur Hyderabad TG 500067.

The company is a wholly owned subsidiary company to the NCL Ailtek & Seccolor Ltd. Hyderabad.

The Valuation is being carried out for the purpose of determining the fair value at which equity shares can be issued by the Company to the holding company (NCL Ailtek & Seccolor Ltd) on rights basis and as per explanations given to us, the mobilized funds will utilized to restructure its debts.

The valuation of shares is for the purpose of statutory compliance and not for the valuation of business of the Company.

The Valuation report ("Report") has been prepared on the basis of the information provided to us. The report gives an estimated fair market value of the equity shares of NCL Green Habitats Private Limited.

The information contained in this report is selective and is subject to updation, expansions, revisions and amendment. It does not purport to contain all the information recipients may require. No obligation is accepted to provide recipients with access to any additional information or to correct any inaccuracies which might become apparent.

This report is based on data and explanations provided by the management and certain other data pulled out from various Government websites believed to be reliable. I have not independently verified any of the information contained herein. Neither the company nor affiliated bodies corporate, nor the directors, shareholders, managers, employees or agents of any of them, makes any representations or warranty, express or implied as to the accuracy, reasonableness or completeness of the information contained in the report. All such parties and entities expressly disclaim any and all liability for, or based on, or relating to any such information contained in, or errors in or omissions from, this report or based on or relating to the recipients use of this report.”

7. The Id. DR had further submitted that the Id.CIT(A) had not examined the Chartered Accountant, who had given the report on valuation of the shares and further the assessee was not having any business prior to issuance of shares. It was the contention of Id. DR that the issuance of shares at premium rates by the assessee to its holding company is just a camouflage to

bring the undisclosed income of the assessee in the form of share capital. Lastly, it was submitted that the assessee had not paid any taxes in the assessment years 2016-17 to 2018-19.

8. Per contra, ld. AR had vehemently submitted that the order passed by the ld.CIT(A) is in accordance with the law. It was submitted that once the assessee has opted for valuation of shares as per section 56(2)(viib) read with 11UA, then the Assessing Officer has no choice but to adopt the method opted for by the assessee. He has further submitted that in the remand report, the Assessing Officer has not submitted that the valuation report submitted by the assessee was defective on the basis of parameters laid down for the valuation as per DCF. Ld. AR further submitted that even the projected valuation for the assessment years 2016-17 to 2018-19 were less than the actual figures for these assessment years. It was submitted that the Assessing Officer in the remand report has not mentioned any defect in the working of DCF method applied by the assessee. He has drawn our attention to paragraphs 4.1 to 5.1 of the remand report (placed at page 85 of the paper book) which is to the following effect :

“4.1. The contention of the assessee before the CIT(A) is that the Assessing Officer not call for any Certificate from the Chartered Accountant is baseless, because, vide Question No.6 of Annexure to this office notice u/s 142(1) of the I.T.Act, dated 03-11-2018 and also Notice u/s142(1), dated 08-12-2018, the assessee was categorically asked to submit the fair market value of share as per Rule 11 U of the I.T.Rules and the Rule itself specifies , it is to produce valuation report from an Accountant.

4.2. In response to the notices, vide letter dated 12.12.2018, the assessee stated that the company was not actively doing business and allotment was made to holding company on right basis, the company has not considered valuation as contemplated under rule 11UA(1)(c)(b) and the price of share was arrived based on the discounted cash flow (DCF) method as determined by the accountant. Rule 11UA itself mandates submission of share valuation Report from an Accountant. This issue was already discussed in the assessment order. Further, the assessee, during the course of appeal proceedings submitted a Valuation Report dated 14.09.2015, valued by Shri Balanagu V Gupta. When this report was available with the assessee during course of scrutiny proceedings, it should have produced the same before the A.O.,

where it failed to do so, instead, in its submissions it simply stated that the share valuation was done as per DCF method.

5. The valuation report submitted by the assessee is based on DCF method the projections given the assessee in the Valuation Report and actual figures are as under as per the ROIs filed for the A.Ys. 2016-17, 2017-18 and 2018-19 for the F.Ys.2015-16, 2016-17 and 2017-18 respectively.

*** Image left intentionally.

5.1 From the above statistics for the three F.Y-s. it can be observed that projections under DCF method arenowhere matching with the actual statistics. For the purpose of illustration depreciation and interest amounts can be compared they are not at al near to projections, there is huge variation to projections and actual. Further, in the valuati9on report, the average share value was arrived by taking the share valued as per DOE method, Book Value Method and Market value of properties, but, in the same valuation report it failed to submit book value method valuation report 'and how the market value of the properties was valued also not produced. Therefore, the assessee failed to substantiate how the value of share was valued under DCF method, hence, the valuation adopted under DCF method may be rejected.”

9. We have heard the rival submissions and perused the material on record. Section 56(2)(viib) provides as under :

“(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) dividends ;

[(ia) income referred to in sub-clause (viii) of clause (24) of section 2;]

[(ib) income referred to in sub-clause (ix) of clause (24) of section 2;]

[(ic) income referred to in sub-clause (x) of clause (24) of section 2, if such income is not chargeable to income-tax under the head "Profits and gains of business or profession";]

[(id) income by way of interest on securities, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";]

(ii) income from machinery, plant or furniture belonging to the assessee and let on hire, if the income is not chargeable to income-tax under the head "Profits and gains of business or profession";

(iii) where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, and the letting of the buildings is inseparable from the letting of the said machinery, plant or furniture, the income from such letting, if it is not chargeable to income-tax under the head "Profits and gains of business or profession";

[(iv) income referred to in sub-clause (xi) of clause (24) of section 2, if such income is not chargeable to income-tax under the head "Profits and gains of business or profession" or under the head "Salaries";]

33[(v) where any sum of money exceeding twenty-five thousand rupees is received without consideration by an individual or a Hindu undivided family from any person on or after the 1st day of September, 2004 34[but before the 1st day of April, 2006], the whole of such sum :

Provided that this clause shall not apply to any sum of money received—

(a) from any relative; or

(b) on the occasion of the marriage of the individual; or

(c) under a will or by way of inheritance; or

(d) in contemplation of death of the payer; or

35[(e) from any local authority as defined in the Explanation to clause (20) of section 10; or

(f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(g) from any trust or institution registered under [section 12AA or section 12AB].]

38[(vi) where any sum of money, the aggregate value of which exceeds fifty thousand rupees, is received without consideration, by an individual or a Hindu undivided family, in any previous year from any person or persons on or after the 1st day of April, 2006 39[but before the 1st day of October, 2009], the whole of the aggregate value of such sum:

Provided that this clause shall not apply to any sum of money received—

(a) from any relative; or

(b) on the occasion of the marriage of the individual⁴⁰; or

(c) under a will or by way of inheritance; or

(d) in contemplation of death of the payer; or

(e) from any local authority as defined in the Explanation to clause (20) of section 10; or

(f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(g) from any trust or institution registered under ⁴¹[section 12AA or section 12AB].

(a) any sum of money, without consideration, the aggregate value of which exceeds fifty thousand rupees, the whole of the aggregate value of such sum;

44[(b) any immovable property,—

(i) without consideration, the stamp duty value of which exceeds fifty thousand rupees, the stamp duty value of such property;

(ii) for a consideration which is less than the stamp duty value of the property by an amount exceeding fifty thousand rupees, the stamp duty value of such property as exceeds such consideration:

Provided that where the date of the agreement fixing the amount of consideration for the transfer of immovable property and the date of registration are not the same, the stamp duty value on the date of the agreement may be taken for the purposes of this sub-clause:

Provided further that the said proviso shall apply only in a case where the amount of consideration referred to therein, or a part thereof, has been paid by any mode other than cash on or before the date of the agreement for the transfer of such immovable property;]

(c) any property, other than immovable property,—

(i) without consideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a consideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such consideration :

Provided that where the stamp duty value of immovable property as referred to in sub-clause (b) is disputed by the assessee on grounds mentioned in sub-section (2) of section 50C, the Assessing Officer may refer the valuation of such property to a Valuation Officer, and the provisions of section 50C and sub-section (15) of section 155 shall, as far as may be, apply in relation to the stamp duty value of such property for the purpose of sub-clause (b) as they apply for valuation of capital asset under those sections :

Provided further that this clause shall not apply to any sum of money or any property received—

(a) from any relative; or

(b) on the occasion of the marriage of the individual; or

(c) under a will or by way of inheritance;
or

(d) in contemplation of death of the payer or donor, as the case may be; or

(e) from any local authority as defined in the Explanation to clause (20) of section 10; or

(f) from any fund or foundation or university or other educational institution or hospital or other medical institution or any trust or institution referred to in clause (23C) of section 10; or

(g) from any trust or institution registered under 45[section 12AA or section 12AB]; 46[or]

46[(h) by way of transaction not regarded as transfer under clause (vicb) or clause (vid) or clause (vii) of section 47.]

(f) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Central Government or a State Government for the purpose of payment of stamp duty in respect of an immovable property;]

52[(viia) 53where a firm or a company not being a company in which the public are substantially interested, receives, in any previous year, from 53aany person or persons, on or after the 1st day of June, 2010 54[but before the 1st day of April, 2017], any property, being shares of a company not being a company in which the public are substantially interested,—

(i) without 53aconsideration, the aggregate fair market value of which exceeds fifty thousand rupees, the whole of the aggregate fair market value of such property;

(ii) for a 53aconsideration which is less than the aggregate fair market value of the property by an amount exceeding fifty thousand rupees, the aggregate fair market value of such property as exceeds such 53aconsideration :

Provided that this clause shall not apply to any such property received by way of a transaction not regarded as transfer under clause (via) or clause (vic) or clause (vicb) or clause (vid) or clause (vii) of section 47.

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);]

55[(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 56[or a specified fund]; or

(ii) by a company from a class or classes of persons as may be notified⁵⁷ by the Central Government in this behalf:

⁵⁸[Provided further that where the provisions of this clause have not been applied to a company on account of fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the fair market value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place and, it shall also be deemed that the company has under reported the said income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of section 270A for the said previous year.]

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 prescribed⁵⁹; 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;

⁶⁰[(aa) "specified fund" means a fund established or incorporated in India in the form of a trust or a company or a limited liability partnership or a body corporate which has been granted a certificate of registration as a Category I or a Category II Alternative Investment Fund and is regulated under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) ^{60a}or regulated under the International Financial Services Centres Authority Act, 2019 (50 of 2019)];

(ab) "trust" means a trust established under the Indian Trusts Act, 1882 (2 of 1882) or under any other law for the time being in force;]

(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 ⁶¹[Explanation] to clause (23FB) of section 10;]

9.1. The Rule 11UA of I.T. Rules 1962 provides as under :

Determination of fair market value.

^{11UA.30}[(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,—

- (a) *valuation of jewellery,—*
- (i) *the fair market value of jewellery shall be estimated to be the price which such jewellery would fetch if sold in the open market on the valuation date;*
- (ii) *in case the jewellery is received by the way of purchase on the valuation date, from a registered dealer, the invoice value of the jewellery shall be the fair market value;*
- (iii) *in case the jewellery is received by any other mode and the value of the jewellery exceeds rupees fifty thousand, then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date;*
- (b) *valuation of archaeological collections, drawings, paintings, sculptures or any work of art,—*
- (i) *the fair market value of archaeological collections, drawings, paintings, sculptures or any work of art (hereinafter referred as artistic work) shall be estimated to be price which it would fetch if sold in the open market on the valuation date;*
- (ii) *in case the artistic work is received by the way of purchase on the valuation date, from a registered dealer, the invoice value of the artistic work shall be the fair market value;*
- (iii) *in case the artistic work is received by any other mode and the value of the artistic work exceeds rupees fifty thousand, then assessee may obtain the report of registered valuer in respect of the price it would fetch if sold in the open market on the valuation date;*
- (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;*

31[(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:—*

the fair market value of unquoted equity shares = (A + B + C + D – L) × (PV)/(PE), where,

A = book value of all the assets (other than jewellery, artistic work, shares, securities and immovable property) in the balance sheet as reduced by,—

(i) any amount of income-tax paid, if any, less the amount of income-tax refund claimed, if any; and

(ii) any amount shown as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;

B = the price which the jewellery and artistic work would fetch if sold in the open market on the basis of the valuation report obtained from a registered valuer;

C = fair market value of shares and securities as determined in the manner provided in this rule;

D = the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of the immovable property;

L = book value of liabilities shown in the balance sheet, but not including the following amounts, namely:—

(i) the paid-up capital in respect of equity shares;

(ii) the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;

(iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;

(iv) any amount representing provision for taxation, other than amount of income-tax paid, if any, less the amount of income-tax claimed as refund, if any, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;

(v) any amount representing provisions made for meeting liabilities, other than ascertained liabilities;

(vi) any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;

PV = the paid-up value of such equity shares;

PE = total amount of paid-up equity share capital as shown in the balance sheet;]

(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.]*

32[(2)33 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:—

(a) *the fair market value of unquoted equity shares =*

$$(A-L) \times (PV),$$

(PE)

where,

A = *book value of the assets in the balance sheet as reduced by any amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act and any amount shown in the balance sheet as asset including the unamortised amount of deferred expenditure which does not represent the value of any asset;*

L = *book value of liabilities shown in the balance sheet, but not including the following amounts, namely:—*

(i) *the paid-up capital in respect of equity shares;*

(ii) *the amount set apart for payment of dividends on preference shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company;*

(iii) *reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation;*

(iv) *any amount representing provision for taxation, other than amount of tax paid as deduction or collection at source or as advance tax payment as reduced by the amount of tax claimed as refund under the Income-tax Act, to the extent of the excess over the tax payable with reference to the book profits in accordance with the law applicable thereto;*

(v) *any amount representing provisions made for meeting liabilities, other than ascertained liabilities;*

(vi) *any amount representing contingent liabilities other than arrears of dividends payable in respect of cumulative preference shares;*

PE = *total amount of paid-up equity share capital as shown in the balance sheet;*

PV = the paid-up value of such equity shares; or

*(b) the fair market value of the unquoted equity shares determined by a merchant banker 34[***] as per the Discounted Free Cash Flow method.]*

9.2 From the conjoint reading of section 56(2)(viib) read with Rule 11UA of I.T. Rules, 1962, it is abundantly clear that in case, the assessee opts for determination of the fair market value of the shares and exercise its right by opting for any of the methods prescribed under rules, then such decision of the assessee shall be final. The Assessing Officer / Id.CIT(A) can only scrutinize the valuation report within the conditions or parameters laid down for DCF method only. It is not within the domain of the Assessing Officer to reject the method opted by the assessee and resort to vacate the method as per the Assessing Officer's choice. In the case of Innoviti Payment Solutions Pvt. Ltd. Vs. ITO reported in (2019) 102 taxmann.com 59 (Bangalore Trib), the co-ordinate Bench of the Tribunal in which the J.M. was co-author) one of the party had occasion to examine the above said issue and in the said case, the co-ordinate Bench of the Tribunal had held as under :

" 9. As per Para 2.10 of this report of research committee of (ICAI) as reproduced above, the first and most critical input of DCF model is the Cash Flow Projections. It is also noted in the same Para of this report that the DCF value is as good as the assumptions used in developing the projections. It is also noted that these projections should reflect the best estimates of the management and take into account various macro and micro economic factors affecting the business. In the same Para of this report, some important points to be kept in mind with regard to cash flow projections are also noted. At this point, we feel it proper to take note of two judgments of Hon'ble apex court rendered in the case of Bharat earth Movers vs. CIT, 245 ITR 428 and in the case of Rotork Controls India (P) Ltd. vs. CIT, 314 ITR 62. In the first case, the issue in dispute was regarding estimation of future liability of leave encashment and it was held by Hon'ble apex court in this case that the liability should be capable of being estimated with reasonable certainty though the actual quantification may not be possible. It was held that if this is satisfied than the liability is not a contingent liability.

In the second case, the issue in dispute was about provision of warranty expenses to be incurred in future. Para 10 of this judgment is very relevant and therefore, it is reproduced herein below:-

10. What is a provision ? This is the question which needs to be answered. A provision is a liability which can be measured only by using a substantial degree of estimation. A provision is recognized when : (a) an enterprise has a present obligation as a result of a past event; (b) it is probable that an outflow of resources will be required to settle the obligation; and (c) a reliable estimate can be made of the amount of the obligation. If these conditions are not met, no provision can be recognized.

10. From this Para of this judgment, it is seen that it was held that if a reliable estimate cannot be made than the provision cannot be recognized. In the present case in connection with DCF, we have seen that estimate/ projection of future cash flow has to be made and as per Para 2.10 of this report of research committee of (ICAI) as reproduced above, the first and most critical input of DCF model is the Cash Flow Projections. Hence, in our considered opinion, by the same analogy, it has to be seen and ensured that such projection is estimated with reasonable certainty and if it is not established by the assessee that this is a reliable estimate achievable with reasonable certainty, the same cannot be recognized and if the future cash flow cannot be recognized than the DCF method is not workable.

11. As per various tribunal orders cited by the learned AR of the assessee, it was held that as per Rule 11UA (2), the assessee can opt for DCF method and if the assessee has so opted for DCF method, the AO cannot discard the same and adopt other method i.e. NAV method of valuing shares. In the case of M/s. Rameshwaram Strong Glass (P) Ltd. vs. The ITO (Supra), the tribunal has reproduced relevant portion of another tribunal order rendered in the case of ITO vs. M/s Universal Polypack (India) Pvt. Ltd. in ITA No. 609/JP/2017 dated 31.01.2018. In this case, the tribunal held that if the assessee has opted for DCF method, the AO cannot challenge the same but the AO is well within his rights to examine the methodology adopted by the assessee and/or underlying assumptions and if he is not satisfied, he can challenge the same and suggest necessary modifications/ alterations provided the same are based on sound reasoning and rationale basis. In the same tribunal order, a judgment of Hon'ble Bombay High Court is also taken note of having been rendered in the case of Vodafone M-Pesa Ltd. vs. PCIT as reported in 164 DTR 257. The tribunal has reproduced part of Para 9 of this judgment but we reproduce herein below full Para 9 of this judgment.

9. We note that, the Commissioner of Income-Tax in the impugned order dated 23rd February, 2018 does not deal with the primary grievance of the petitioner. This, even after he concedes with the method of valuation namely, NAV Method or the DCF Method to determine the fair market value of shares has to be done/adopted at the Assessee's option. Nevertheless, he does not deal with the change in the method of valuation by the Assessing Officer which has resulted in the demand. There is certainly no immunity from scrutiny of the valuation report submitted by the Assessee. Therefore, the Assessing Officer is undoubtedly entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. However, the basis has to be the DCF Method and it is not open to him to change the method of valuation which has been opted for by the Assessee. If Mr. Mohanty is correct in his submission that a part of demand arising out of the assessment order dated 21st December, 2017 would on adoption of DCF Method will be sustained in part, the same is without working out the figures. This was an exercise which ought to have been done by the Assessing Officer and that has not been done by him. In fact, he has completely disregarded the DCF Method for arriving at the fair market value. Therefore, the demand in the facts need to be stayed."

12. As per above Para of this judgment of Hon'ble Bombay High Court, it was held that the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a final determination from an independent valuer to confront the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. Hence, in our considered opinion, in the present case, when the guidance of Hon'ble Bombay high Court is available, we should follow this judgment of Hon'ble Bombay High Court in preference to various tribunal orders cited by both sides and therefore, we are not required to examine and consider these tribunal orders. Respectfully following this judgment of Hon'ble Bombay High Court, we set aside the order of CIT (A) and restore the matter to AO for a fresh decision in the light of this judgment of Hon'ble Bombay High Court. The AO should scrutinize the valuation report and he should determine a fresh valuation either by himself or by calling a final determination from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. In our considered opinion and as per report of research committee of (ICAI) as reproduced above, most critical input of DCF model is the Cash Flow Projections. Hence, the assessee should be asked to establish that such projections by the assessee based on which, the valuation report is prepared by the Chartered accountant is estimated with reasonable certainty by showing that this is a reliable estimate achievable with reasonable certainty on the basis of facts available on the date of valuation and actual result of future cannot be a basis of saying that the estimates of the management are not reasonable and reliable.

13. Before parting, we want to observe that in the present case, past data are available and hence, the same can be used to make a reliable future estimate but in case of a start up where no past data is available, this view of us that the projection should be on **the basis of reliable future estimate should not be insisted upon because in those cases, the projections may be on the basis of expectations and in such cases, it should be shown that such expectations are reasonable after considering various macro and micro economic factors affecting the business.**

14. In nutshell, our conclusions are as under:-

(1) The AO can scrutinize the valuation report and if the AO is not satisfied with the explanation of the assessee, he has to record the reasons and basis for not accepting the valuation report submitted by the assessee and only thereafter, he can go for own valuation or to obtain the fresh valuation report from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee.

(2) For scrutinizing the valuation report, the facts and data available on the date of valuation only has to be considered and actual result of future cannot be a basis to decide about reliability of the projections.

(3) The primary onus to prove the correctness of the valuation Report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, scientific study and applicable Guidelines regarding DCF Method of Valuation.

15. In the result, the appeal of the assessee is allowed for statistical purposes.”

10. In view of the above, it is abundantly clear that the method adopted by the assessee namely, DCF, is required to be adopted by the Assessing Officer for the purpose of estimating Fair Market Value of the shares allotted by the assessee to its shareholding companies. Having held so, now the question is whether the Assessing Officer has pointed out any defect in the working of the DCF method. In this regard, the Id.CIT(A) has called for remand report from the Assessing Officer and the Assessing Officer, in the said remand report, had not raised any objection about the working of the valuation made by the

assessee by applying DCF method. On the contrary, the Assessing Officer has compared the actual figures with the projected figures on the basis of which the valuation of the shares was made. In our view, as mentioned in the case of Innovative Technologies (supra), the valuation of the shares is required to be considered on the date of issuance / allotment of shares and the data available / factors, which were available on the date of valuation report / allotment of shares could only be considered for the purpose of examining the valuation.

11. In the present case, though the Assessing Officer was given an opportunity in the remand stage to bring on record any defect in working of the DCF method, however, the Assessing Officer has not brought on record any defect in the valuation report. As both the parties have agreed that the issue may be remanded back to the Assessing Officer for verifying the figures considered by valuer, therefore, one more opportunity is given to the Assessing Officer for applying his mind and bring on record any contradiction in the valuation report.

12. This is necessary as neither the assessee nor the Revenue were able to justify how the valuation was arrived by the Chartered Accountant. Hence, we are of the opinion that the matter be remanded back to the file of Assessing Officer with a direction to examine the valuation report and point out any error in the same. If the Assessing Officer is not satisfied with the valuation report of the assessee, then the Assessing Officer is duty bound to give the reasons why the report of the assessee should not be accepted. If the Assessing Officer comes to the conclusion that the valuation report of the assessee on the basis of DCF method cannot be accepted and in that eventuality, the Assessing Officer is duty bound to bring on record the correct valuation report by applying DCF method in accordance with law. In the

light of the above, the Assessing Officer is directed to do the above said exercise after affording the opportunity of hearing to the assessee. The assessee shall be at liberty to file documents, if any, as required for proving its case and the Assessing Officer shall consider the evidences, if any, filed by the assessee. Needless to say the Assessing Officer shall examine those documents / evidence filed by the assessee and also the other documents available on record. Accordingly, the appeal of assessee is allowed for statistical purposes.

13. In the result, the appeal of the Revenue is allowed for statistical purposes.

Order pronounced in the Open Court on 15th May, 2023.

Sd/-

Sd/-

(RAMA KANTA PANDA) ACCOUNTANT MEMBER	(LALIET KUMAR) JUDICIAL MEMBER
---	---

Hyderabad, dated 15th May, 2023.

TYNM /sps

Copy to:

S.No	Addresses
1	M/s. NCL Green Habitats Private Limited, Plot No.1, Bindu Elegance, Ganga Enclave, Petbasheerabad, Quthubullahpur, Hyderabad. Telangana – 500067.
2	The Deputy Commissioner of Income Tax, Circle 16(1), Hyderabad.
3	PCIT – 4, Hyderabad.
4	DR, ITAT Hyderabad Benches
5	Guard File

By Order