

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

BEFORE N.K. BILLAIYA, ACCOUNTANT MEMBER

AND

MS. ASTHA CHANDRA, JUDICIAL MEMBER

ITA No. 653/Del/2019

Asstt. Year: 2015-16

M/s. Rugby Regency P. Ltd. 37-Ring Road, Lajpat Nagar-IV, New Delhi – 110 024 PAN AAGCR5908K	Vs.	Addl. CIT, Range-21, New Delhi.
(Appellant)		(Respondent)

Assessee by:	Shri R.S. Singhavi, CA Shri Satyajit Goel, CA
Department by :	Shri P.N. Barnwal, CIT-DR
Date of Hearing	08/11/2023
Date of pronouncement	25/01/2024

ORDER

PER ASTHA CHANDRA, JM

This appeal filed by the assessee is directed against the order dated 27.12.2018 of the Ld. Commissioner of Income Tax (Appeals)-7, New Delhi, ("**CIT(A)**") pertaining to Assessment year ("**A.Y.**") 2015-16.

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

"1(i) *That on facts and circumstances of the case, the Ld. CIT(A) was not justified in upholding disallowance of Rs. 12.96.28,561/- being statutory claim of depreciation on Windmills u/s 32 of the Income Tax Act, 1961 in total disregard to facts and settled legal principles*

- (ii) *That appellant has obtained physical possession and also made almost entire payment and having used the asset, the pre-requisite condition u/s 32 were fully satisfied.*
 - (iii) *That in any case, the beneficial ownership of the appellant is not in dispute and as per the decision of SC in the case of Mysore Minerals Ltd. v. CIT 239 ITR 775, there is no valid basis for disallowance of statutory claim which was in accordance with Income Tax Rules, 1962.*
 - (iv) *That appellant has accounted for the revenue from running of such Windmills and same having been accepted by the assessing officer, the disallowance of claim of depreciation is illogical, irrational and against the well settled principle of beneficial ownership.*
 - (v) *That the procedure followed by the seller so as to suit its convenience cannot be relevant for drawing adverse inference in the case of appellant.*
- 2(i) *That on facts and circumstances of the case, the Ld. CIT(A) has grossly erred in confirming addition to the extent of Rs. 3,24,20,850/-u/s 56(2)(viib) of the Income Tax Act, 1961 in respect of premium even though the valuation of Fair Market Value of equity shares is duly supported from valuation report issued by Chartered Accountant.*
- (ii) *That the valuation of shares is on the basis of Discounted Cash Flow Method as prescribed under Rule 11UA and Financial projections being based on reasonable estimate of future projects, the observations of CIT(A) are irrelevant and misconceived.*
 - (iii) *That Ld. CIT(A) has failed to appreciated the factual matrix and logic of DCF method as prescribed under Rule 11UA, the upholding of addition u/s 56(2)(viib) is on arbitrary and mechanical basis.*
 - (iv) *That Ld. CIT(A) cannot disregard the valuation report of Chartered Accountant and substitute hypothetical value for working out the correctness of the premium in terms of Rule 11UA of the I.T. Rules, 1962.*
3. *That orders passed by lower authorities are not sustainable on facts and are bad in law.”*

3. The assessee company is engaged in the business of generation of power by non-conventional method using wind. For A.Y. 2015-16, the assessee e-filed its return on 29.09.2015 declaring loss of Rs. 21,29,69,144/-. The case was selected for limited scrutiny. Statutory notice(s) along with questionnaire were issued and served upon the assessee. In response, requisite information / details were filed. The Ld. Assessing Officer (“AO”) completed the assessment on total loss of Rs. 5,09,19,730/- including therein disallowance of depreciation of Rs.

12,96,28,561/- on wind mill and addition of Rs. 3,24,20,850/- u/s 56(2)(viib) of the Income Tax Act, 1961 (**the "Act"**) on 23.12.2017 u/s 143(3) of the Act.

4. Aggrieved, the assessee appealed before the Ld. CIT(A) but without any success. This has brought the assessee before the Tribunal and Ground No. 1 and 2 with their sub-grounds relate thereto.

5. Ground no. 1(i) to (v) relate to disallowance of depreciation of Rs. 12,96,28,561/- on wind mill which has been sustained by the Ld. CIT(A) by observing and recording his findings as under:

"3.2. I have carefully considered the assessment order and written submissions filed by the Ld. AR. The AO in the assessment order has disallowed the claim of the appellant with respect to depreciation of Rs. 12,96,28,561/- on Windmill claimed to be purchased in the year under consideration.

3.3. In this regard, the AO in the assessment order has observed that:

a. the appellant has claimed to purchase 12MW Wind mill from M/s Ansal Properties and Infrastructure Limited through slump sale agreement dated 23/03/2015 for a consideration of Rs. 32,94,11,653/- out of which value of land is Rs. 53,40,250/- and balance consideration of Rs. 32,40,71,403/-has been capitalized under the head plant and machinery in the FY. 2014-15 and has claimed depreciation on the same (which is the subject matter of this appeal)

b. As per the terms of agreement dated 23/03/2015, the appellant company has agreed to purchase the wind mill from the transferor for a lump sump of Rs. 32,94,11.653/- and the transfer of said asset will complete on completion date. The completion date has been defined in the Slump sale agreement as the date on which transferor company completes all the activities / obligations prescribed under the slump sale agreement Further, the said date is to be achieved within 180 days from the date of execution of agreement i.e 180 days from 23.03.2015.

c. That the obligations/ activities prescribed under the agreement includes:

- 1. Registration of land lease deed in favor of the appellant company*
- 2. Submission of letter from GEDA to GUVNL directing or transfer of power purchase agreement in favor of the appellant company*
- 3. No dues certificate from lender to the wind mill business.*
- 4. Receipt of all approvals / consents / permissions from Government of Gujarat, Gujarat Electricity Regulatory commissioner, Electricity Distribution Company etc*

5. *Transfer of Power Purchase agreement in the name of appellant company.*
 6. *Signing of O & M contract in the name of appellant company.*
 7. *Transfer of all other ancillary assets/liabilities.*
 8. *Achievement of completion date as per the slump sale agreement*
- d. *That the above obligations/activities have not been achieved / completed before the end of the Financial Year under consideration Le. 31.03.2015.*
- e. *That the assessee has claimed to have accounted for receipts/income from generation of power which has been transfer by M/s Ansal Properties & Infrastructure Limited (seller), however failed to furnish any agreement regarding operation and management of wind mill or energy generation agreement entered into with the seller. The appellant in this regard has simply stated that in pursuance of verbal agreement for operation of wind mill, billing of receipts was made by M/s Ansal and then was passed on to the appellant company.*
- f. *That on enquiry from M/s Ansal Properties & Infrastructure Limited (seller) regarding the slump sale it was found that the said company has not admitted completion of slumps sale of wind mill duong the F. Y. 2014-15. It was also found that WDV of wind mill in the books of seller was Rs 27,914/- only as on 01.04.2014 out of which depreciation of Rs. 22.331/- has been claimed by the seller and closing WDV of Rs. 5,583/- as on 31.03.2015 has been declared in the books of accounts. Accordingly, no sale of wind mill has been recorded by the seller in its books of accounts for the F. Y. 2014-15.*
- g. *That as regards transfer of power purchase agreement / letter of approval from Gujarat Electricity Board, M/s Gujarat Urja Vikas Nigam Limited (GUVNL), refused approval to the appellant company vide its letter dated 10.04, 2015 with the following remarks:*
1. *GUVNL has signed power purchase agreement with M/s Ansal Properties & Infrastructure Limited (seller) and the appellant company is not party to the same. Accordingly, unless M/s Ansal Properties & Infrastructure Limited (seller) initiates the request for signing supplementary power purchase agreement for change in name to M/s Rugby Renergy Pvt. Ltd and assigns all their rights and obligations and assets and liabilities in favor of M/s Rugby Renergy Pvt. Ltd, the request for change in name can not be processed.*
 2. *M/s Ansal Properties & Infrastructure Limited (seller) is required to furnish their Board Resolution for assignment of all their rights, obligations, assets and liabilities in favor of M/s Rugby Renergy Pvt. Ltd.*
- From the above remarks of M/s Gujarat Urja Vikas Nigam Limited (GUVNL) it can be noted that M/s Ansal Properties & Infrastructure Limited (seller) has not assigned their rights, obligations, assets and liabilities in favor of M/s Rugby Renergy Pvt. Ltd.*
- h. *That the operation and management agreement to run the wind mill was executed between the appellant company and M/s Suzion Global services Ltd on*

27/07/2015 with effective date from 01/07/2015 which is also one of the essential conditions for completion of sale as per the slump sale agreement. The effective date and the execution date of this agreement both fall in subsequent year. This also signifies that no sale of wind mill has taken place in the year under consideration.

i. That the enquiry from the assessing officer of M/s Ansal Properties & Infrastructure Limited (seller) also shows that no sale of wind mill has been declared by the seller in its books of account for the F. Y. 2014-15 relevant to AY 2015-16.

j. That the first payment for purchase of wind mill by the appellant has been claimed to be made of 23.04.2014 of Rs. 3 crores, however, the due diligence study report of the wind mill was completed on 28.12.2014. Accordingly, this shows that the prior to the date of agreement there may be only some private arrangement between the parties for exchange of money in form of advance/ loan.

3.4 Based on the above observations, the AO in the assessment order has disallowed the claim of depreciation on purchase of windmill

3.5 The appellant during the course of appellate proceedings has submitted written submission alongwith paper book. In the written submission the appellant has emphasized on the fact that 94% of the payment was made to the seller for purchase of wind mill alongwith lease hold rights over the land appurtenant there to till the completion of year under consideration. The appellant has also submitted that lease hold rights over the land were obtained w.e.f. 12.02.2015. The appellant has further submitted that the income to the extent of Rs. 7.58 crores with respect to the sale of power generation from wind mill has already been accounted for in the books of accounts. As regard the objections raised by GUVNL the appellant submitted that those objections were general in nature and are only with reference to substitution of name in power purchase agreement so as to enable the appellant to receive the revenue from sale of power directly. The appellant further submitted that it was because of this reason that M/s Ansal Properties & Infrastructure Limited (seller) had to transfer the revenue from wind mills to the appellant as the name of the appellant could not be substituted till 31.03.2015.

3.6. After going through the observations of the AO in the assessment order and the written submission filed by the appellant, I am of the view that the purchase of wind mill was governed by the slump sale agreement dated 23.03.2015 wherein various terms and conditions were specified which were to be complied with in order to complete the sale / transfer process. The AO in the assessment order has made various observations which depicts that the wind mill has not been transferred to the appellant company in the year under consideration. The observations of the year are duly supported by enquiries conducted by him during the course of assessment proceedings. With respect to the observation of the AO that M/s Ansal Properties & Infrastructure Limited (seller) has claimed depreciation for the whole year with respect to the wind mill in its books of accounts and no sale of wind mill has been declared by it, the appellant has simply stated that the wrong claim of depreciation by one party would not disentitle the other party to make genuine claim in this regard it is relevant to note here that transfer of an asset is a bilateral act. Based on the consent and agreement of both the parties. Accordingly, it is onus of the appellant to prove that how the transfer of asset and put to use of the same has taken place in the year under consideration in light of the fact that the seller party has not recorded any sale transaction in its books of accounts. In this regard it is also relevant to refer

to the comments / objections raised by GUVNL vide its letter dated 10.04.2015 (quoted in the assessment order) that no request for transfer of power purchase agreement has been initiated by M/s Ansal Properties & Infrastructure Limited (seller) and there is no board resolution which could depict that all their rights, obligations, assets and liabilities have been assigned in favor of the appellant company. The said comments/ objections raised by GUVNL also leads to the conclusion that M/s Ansal Properties & Infrastructure Limited (seller) has not transferred the wind mill in the name of the appellant company till the completion of year under consideration. Further, the appellant has also not been able to bring any evidence on record in the form of any confirmation / copy of board resolution of M/s Ansal Properties & Infrastructure Limited (seller) which could substantiate that the wind mill was transferred in its favor and was put to use before the end of year under consideration. In this regard it is also relevant to refer to the observation of the AO in Para 4.6 of the assessment order that the appellant has only submitted no dues and "possession" certificate signed by party M/s Ansal Properties & Infrastructure Limited (seller) however there is no date of certificate and date of possession mentioned on the same and further the columns of signature and particulars of witnesses have been left blank. The said observation of the AO depicts that the date of possession of asset has not been substantiated by the appellant and the so called certificate produced by it has no sanctity because of the defects pointed out by the AO. Also during the course of appellate proceedings the appellant has not brought forward any evidence which could depict the date of possession. The appellant has also not made any counter submission in this regard

3.7. The observation of the AO in Para 4.5 of the assessment order is also relevant to evaluate whether the wind mill was transferred in the name of appellant in the year under consideration or not. The AO has observed that the appellant entered into operation and management agreement to run the wind mill with M/s Suzlon Global services Ltd. on 27.07.2015 with effective date from 01.07.2015. The said observation of the AO clearly leads to the conclusion that operation and management of the wind mill has been taken over by the appellant from the seller in the subsequent year consequent to which it has entered into a fresh agreement for operation and management of the wind mill with M/s Suzlon Global services Ltd. These facts further substantiate the stand of the AO in the assessment order that no transfer of the asset (wind mill) has taken place in the year under consideration. Further, as regard the argument of the appellant that in the year under consideration it has booked revenue from the wind mill, the AO in the assessment order has rightly stated that there was no written agreement between the two parties that wind mill in the year under consideration is to be run by the appellant company and billing of revenue was to be done by M/s Ansal Properties & Infrastructure Limited and then the same is to be passed on to the appellant company. The revenue declared by the appellant can at best be said to be a private arrangement of revenue sharing between the parties to compensate the appellant for interest and other expenses. However, the said arrangement does not change the fact that the transfer of wind mill has not completed in the year under consideration so as to make the appellant eligible for claiming of depreciation of the same as per the provision of section 32 of the act. Further it is noted that the appellant in its written submission has failed to controvert the said observations of the AO in the assessment order and has only argued the matter on the ground that it has paid 94% of the consideration till the completion of this year and has booked revenue from the sale of power. However, it is relevant to point out here that nothing has been brought on record by the appellant which could prove the possession and the use of wind mill by it in the year under

consideration which is the essential factors for claiming of deduction of depreciation Accordingly, the disallowance of depreciation of Rs. 12,96,28,561/- made by the AO is hereby confirmed. Hence, the ground of appeal is ruled against the appellant.”

6. Before us, the Ld. AR submitted that depreciation is claimed by the transferor of the assets and therefore not allowed in the hands of the assessee in the same year. He reiterated the submissions made before the Ld. CIT(A) which appear at pages 1-6 of the revised Paper Book. The Ld. AR filed a brief summary of sequence of events to show that the assessee is the beneficial owner of the asset and hence depreciation should be allowed. He relied upon the decision of Hon'ble Madras High Court in CIT vs. Smt. Sivakami (2010) 322 ITR 64 (Mad), a copy of which is placed before us.

7. The Ld. CIT-DR supported the order of the Ld. CIT(A) and referred to paras 4.3 and 4.7 of the order of the Ld. AO.

8. We have given a careful thought to the rival submissions and perused the records. The assessee claimed depreciation on wind mill @ 80% on the addition of Rs. 32,40,71,403/- for 180 days at Rs. 12,96,28,561/- which the Ld. AO negated. During assessment proceedings, on query, it was submitted by the assessee that it purchased 12 MW wind mill from M/s Ansal Properties and Infrastructure Ltd. **(APIL)** through slump sale agreement dated 23.03.2015 and copy of the agreement was submitted. The Ld. AO examined the said agreement which was subject to fulfilment of all obligations enumerated therein by the transferor company. The Ld. AO found that as per the stipulation in the agreement the requisite obligation/ activities could not be achieved / completed before the end of the Financial Year i.e. 31.03.2015 relevant to A.Y. 2015-16 under consideration. This was confirmed in enquiry made by the Ld. AO from the seller APIL. The Ld. AO therefore did not accept the explanation of the assessee that it had purchased the wind mill during the Financial Year relevant to A.Y. 2015-16 due to lack of any supporting document and the fact that enquiry by the Ld. AO revealed that no sale of wind mill was recorded in the books of the seller

APIL for Financial Year 2014-15. Admittedly, seller company APIL has claimed depreciation on wind mill during the A.Y. 2015-16. Therefore denial of impugned depreciation in the hands of the assessee is justified. The contention raised during appellate proceedings have been dealt with by the Ld. CIT(A) by recording cogent reasons. The decision of Hon'ble Madras High Court in the case of Smt. Sivakami (supra) will not render assistance to the assessee as in that case the assessee established ownership of buses by documentary evidence whereas in the case at hand purchase of wind mill in the Financial Year 2014-15 could not be proved with documentary evidence. The twin conditions precedent, namely ownership and use of the asset i.e. wind mill, for purposes of assessee's business during the Financial Year 2014-15 relevant to A.Y. 2015-16 are not satisfied in the case of the assessee. We, therefore decline to interfere and decide ground No. 1 and its sub-grounds against the assessee.

9. Ground No. 2(i) to (iv) relate to addition of Rs. 3,24,20,850/- u/s 56(2)(viib) of the Act which has been confirmed by the Ld. CIT(A) by observing and recording his findings as under:

"4.2. I have carefully considered the assessment order and written submissions filed by the Ld AR The AO in the assessment order has added Rs 3,24,20,850/ under section 56(2)(viib) on account of shares being issued at excessive rate. The facts of the case are that the appellant company has issued 12.03,000 shares at the rate of Rs 50 per share. The said value taken by the appellant is based on the valuation report issued by Chartered Accountant wherein valuation of shares has been carried out in accordance with rule 11U/11UA as per discounted cash flow method. In the valuation report the AO noticed that the same was in turn based on the projections and estimates given by the management of the appellant company. Accordingly, the AO during the assessment proceedings required the appellant to justify the values worked out in the report The appellant however simply put its reliance on the valuation report of the Chartered Accountant. The AO in this regard noticed that the valuer in his report has given a disclaimer that financials projections used in the report have been provided to him by the appellant company and accordingly the valuer assume no responsibility for its accuracy and completeness. It is also noticed by the AO that the financial projections made in the report dated 14/11/2014 was based on the proposed business plan to be started in the Jan, 2015 in the valuation report it has been mentioned by the valuer that the appellant is in process of acquisition of operational wind power projects from M/s Ansal Properties & Infrastructure Limited (APIL) of 12 MW situated in Gujarat and KS Oil Limited of 46.4 MW situated at Rajasthan & Madhya Pradesh and process of acquisition will be complete by January 1, 2015. Based in the said assumptions the projections has been made by the appellant company which has been utilized by the valuer for

valuation of shares However, it is noticed by the AO that the wind power plant 12 M of APIL has not been purchased by the appellant in the year under consideration but in the subsequent year and also the 46.4 MW power project of KS Oil Limited was never acquired by the appellant. Accordingly, the AO was of the view that the projections made by the appellant are highly inflated, hence not reliable. Thereafter, the AO required the appellant to work out the value of shares on the basis of assets and liabilities as provided under Rule 11UA of the IT Rules. The appellant submitted its working before the AD as per which the Book value of the shares was worked out at Rs.39.15. However, the same was rejected by the AO as the working was not as per the methodology given in the rule 11UA. Lastly the AO in the assessment order has computed the fair market value of the shares based on value of assets and liabilities as on last audited balance sheet as prescribed under Rule 11UA and worked out the fair market value of shares at Rs.23.05 per share. Based on the said value of share the AO in the assessment has worked the excessive value recovered by the appellant company at Rs.3,24,20,850/- which has been added in the hands of the appellant under section 56(2)(viib) of the Act.

4.3. The appellant in the written submissions made during the appellate proceedings has tried to justify the financial projections for 20 years used in the valuation report prepared as per discounted cash flow method which has been rejected by the AO in the assessment order. The appellant in this regard has submitted that it has fully acquired the 12MW wind mill project of M/s Ansal Properties & Infrastructure Limited (APIL) also disclosed revenue with respect to the same in the year under consideration. Further as regards the 46.4 MW windmill project of M/s KS Oils Limited, the appellant submitted that as on the valuation dated i.e 14.11 2014 the appellant through its holding company submitted its bid to the State Bank of India and was declared highest bidder on 24.11.2014 and said acquisition was in final stage at that time in support of the contention the appellant has submitted copy of bid documents and communications in the paper book. However, due to some unforeseen circumstances, the acquisition did not go through and the bid was cancelled and the said project could not be acquired by the appellant. However, the appellant kept on its pursuit for the expansion and growth in power sector and subsequently acquired 1.8 MW and 9 MW power projects in District Kutch, Gujarat on 20.04 2017 and 14.06.2017 which has resulted in considerable revenue. In support of its contention the appellant has submitted copy of sale certificate dated 14.06.2017 from J & K bank for purchase of 9 MW power plant and confirmation from GUVNL dated 20.04.2017 with respect to the name change in the power purchase agreement for 1.8 MVV power project, in the paper book.

4.4 The appellant on the basis of said facts submitted that the Discounted Cash Flow Method is based on financial projections which may vary from actual results. The appellant also submitted that the valuation report in its case is realistic and based on documentary evidences and hence the AO was not justified in rejecting the said valuation. The appellant in this regards as has also relied upon judicial pronouncements where it has been held that revenue is not allowed to change the method adopted by the assessee without pointing out any error or fault in the same.

4.5. After going through the observations of the AO in the assessment and submissions of the appellant, I am of the view the valuation of shares relied upon by the appellant is based on discounted cash flow method, however, the question that needs to be addressed here is that whether projections and estimations used therein are reliable or not. In this regard, it is noticed that the appellant has claimed to have

acquired 12 MW windmill power project from M/s Ansal Properties & Infrastructure Limited (APIL), however this issue has already been adjudicated against the appellant in ground no one and it is held that the appellant has not taken the possession of the plant in the year under consideration and hence the transfer of asset cannot be said to be taken place in the year under consideration. Even otherwise if it is assumed that on the date of valuation of shares i.e. on 14.11.2014, it was not possible for the appellant to anticipate correctly that whether the 12MW project will be taken over by it or not, then also the appellant was not justified in taking projections with respect to the said project. In this regard it is noticed that as on the date of valuation of the shares le 14.11.2014 the appellant did not even had the technical due diligence report/study based since the report has been issued by the expert m/s Mitcon Consultancy & Engineering Services Limited, Pune for the first time on 26.12.2014. As on the date of valuation the appellant did not have any document or evidence in its hand which could have enabled it to even work out the correct cost of the project. Accordingly, it is reasonably concluded that the appellant did not have any material/ document/reasonable, basis for calculating or working the projected financial for the next 20 years on the date valuation of shares. Hence, projections of the appellant company with respect to the 12 MW power project convict the said the reliable for the purpose of valuation of shares.

4.6. Further as regards the 46.4 MW project with respect the claim of the appellant is that as on the date of valuation of shares the bid was already filed and later on it was declared to be highest bidder, I am of the view that the projection of the appellant with respect to this project can also not be relied upon. In this regard, the most important fact which is noticed is that the bids for this 46.4 MW were filed by the M/s Goyal MG Gases Pvt. Ltd which happens to be the holding company of the appellant company. However, the argument of the appellant in this regard is that the said bid was filed on its behalf. The said argument of the appellant appears to be vague and not supported by any documentary evidence, since the bid documents nowhere specifies the name of the appellant company, nor it has been established whether the such type of arrangement was permitted by the auctioneer/bid conductor SBI. Accordingly, it is mere a lame submission of the appellant that it applied for purchase of 46.4MW power project. True fact is that was M/s Goyal MG Gases Pvt. Ltd who applied for the bid which appellant company has tried to portray as if the said bid was filed by it. Since, no bid was filed by the appellant company in its own name, it can be concluded that the appellant was not justified in projecting next 20 years financials with respect to the said project and using the same for valuations of its shares. Even otherwise if it is assumed that the said bid was filed by the appellant then also it was not justified in projecting the financials of the said project and using the same for the purpose of valuation of its shares since there was not reasonable certainty that the said project will be allotted to the appellant company. Simply, filing of bid cannot be considered as an event which could lead to reasonable certainty that the same will result into acquisition of the project. Bid can be filed by any person qualified for the same however the same does not mean that every person filing the bid can assume that his bid is successful and value its shares at higher price using projections. In the present case of the appellant has itself submitted that it was declared the highest bidder on 24 11.2014, however the valuation date is 14,11.2014 in view of these facts, on the date of valuation of shares ie. 14.11.2014, surprisingly there is nothing on record which could be treated as persuading factor which lead the appellant company believe that the power project against which bid has made will be allotted to it only. Moreover, the bid was not even made by but by some other company. These whole set of facts proves that the

appellant had acted highly superficially in making projections with respect to a project with which it had no nexus on the date of valuation of shares and using the said projections for the purpose of valuation of shares in this regard, it is also noticed that the appellant has not even the basis or documents or facts and figures based on which the projections were made and subsequently used by the valuer in valuation report. Hence, projections of the appellant company with respect to the 48 4MW power project cannot be said be reliable for the purpose of valuation of shares.

4.7 Further, the submission of the appellant that in future it has acquired two windmill power projects of 9 MW on 14.06.2017 and 1.8 MW on 20.04.2017 which have generated reasonable revenue and accordingly the same substantiates the projections made by it in the valuation report, is baseless and not tenable. The argument of the appellant in first place cannot be accepted, since, it has not be specified whether the said argument was taken before the AO or not and documentary evidences brought forward in this regard in form of copy of sale certificate dated 14.06.2017 from J&k bank for purchase of 9 MW power plant and confirmation from GUVNL dated 20 04.2017 with respect to the name. change in the power purchase agreement for 1.8 MW power project, in the paper book were submitted before the AO or not. The AO has also not acknowledged any such argument of the appellant in the assessment order. Furthermore, the acquisition of two windmill power projects of 9 MW and 1 BMW are subsequent event cognizance of which cannot be taken for the purpose of valuation of shares of shares on valuation date ie. 14.11.2014. Even if the same is considered the appellant has not specified that to what extent it has contributed to its revenue so as to substantiate the projected revenues. Hence, this argument of the appellant is rejected

4.8. In view of the above, the discounted cash flow method adopted by the appellant for the valuation of shares cannot be relied upon since the same is full of errors and faults as pointed in the above. During the course of assessment proceedings also the appellant failed to submit any document, evidence or information which substantiate the valuation report and projections adopted therein. Hence, the AO was justified in rejecting the said method of valuation of shares adopted by the appellant. Further the judicial pronouncements relied upon by the appellant in its written submission are distinguishable on the facts of the present case, since in the present case the projected data adopted in discounted cash flow method of share valuation adopted by the appellant has no reasonable basis. Further, the method of valuation adopted by the AO has not been controverted by the appellant in its submissions neither any defect in the same has been painted by the appellant. Accordingly, the valuation done by the AO in the assessment order based on assets and liabilities and value of shares at Rs. 23.05 per share worked out from the same is hereby upheld. Hence, the addition made by the AQ of Rs 3,24.20,850/- is hereby confirmed. This ground of appeal is ruled against the appellant.”

10. Before us, the Ld. AR relied upon the written submission made before the Ld. CIT(A) which appears at pages 7 -12 of the revised Paper Book. He emphasised that the assessee issued during the year 12,03,000/- equity shares having face value of Rs. 10/- at Rs. 50/- each and received Rs. 6,01,50,000/-. The valuation is supported by Chartered Accountant's

certificate wherein he determined the fair market value at Rs. 50.50 per share in accordance with the Discounted Cash Flow method as prescribed under Rule 11UA(2)(b) of the Income Tax Rules, 1962. This was not acceptable to the Ld. AO who recomputed the fair market value at Rs. 23.05 per share on the basis of Net Worth of the company amounting to Rs. 2,77,29,150/- and added the difference of Rs. 3,24,20,850/- (Rs. 6,01,50,000 – Rs. 2,77,29,150/-) to the income of the assessee u/s 56(2)(viib) of the Act. The Ld. AR contended that Discounted Cash Flow method is a well recognised method of valuation and if consideration for issue of shares is based on such method, the Ld. AO cannot invoke the provisions of section 56(2)(viib) of the Act. The Ld. AR pointed out that the assessee has issued the shares to its 100% holding company, M/s Goyal MG Gases P. Ltd. and therefore the provision of section 56(2)(viib) are not applicable. He placed reliance on the decisions of Delhi Bench of the Tribunal in M/s KBC India Pvt. Ltd. vs. ITO in ITA No. 9710/Del/2019 dated 02.11.2022 and in DCIT vs. Hometrail Buildtech Pvt. Ltd. in ITA No. 6095/Del/2019 dated 15.09.2023.

11. The Ld. CIT-DR relied on the orders of the Ld. AO/CIT(A).

12. We have carefully considered the submissions of the parties and perused the records. It is not in dispute that the assessee issued 12,03,000/- equity shares to its 100% holding company, M/s Goyal MG Gases Pvt. Ltd. at a premium of Rs. 40/- each. It is also not in dispute that shares have been issued at premium based on fair market value as computed and certified by Chartered Accountant who determined the fair market value in accordance with Discounted Cash Flow method which is a well recognised method of valuation under Rule 11UA of the Income Tax Rules, 1962. In this view of the matter, in our humble opinion, the Ld. AO/CIT(A) are not justified in adopting a different method i.e. Net Asset Value method of valuation resulting in the impugned addition u/s 56(2)(viib) of the Act.

13. In an identical case of KBC India Pvt. Ltd. (supra) equity shares were allotted by the assessee to its holding company at premium and the Tribunal held that in such a scenario no addition can be made u/s 56(2)(viib) of the Act. The observations of the Tribunal contained in paras 9 and 10 of the decision (supra) are extracted below.

“8. I have considered rival submissions in the light of the decisions relied upon and perused the materials on record. On a reading of the assessment order as well as the order of learned first appellate authority, it is very much clear that the genuineness of the transaction relating to sale of shares by the assessee to its holding company has not been doubted.

9. The dispute between the assessee and the Revenue is only with regard to determination of FMV of the shares and the applicability of section 56(2)(viib) of the Act. Undisputedly, the assessee is an wholly owned subsidiary of M/s. Puran Associates Pvt. Ltd. and in the year under consideration, the assessee had allotted 10,000 equity shares to its holding company at a sale price of Rs.1,500/- per shares having face value of Rs.100 per share. In other words, the assessee has charged share premium of Rs.1,400/- over and above the face value of each share. As rightly contended by learned counsel appearing for the assessee, on a careful analysis of the speech of Hon’ble Finance Minister while introducing Finance Bill, 2012, section 56(2)(viib) is an anti-abuse provision introduced to the statute to check and regulate introduction of unaccounted money through share premium.

10. In the facts of the present appeal, the transaction relating to allotment of shares is between a holding company and its wholly owned subsidiary. Therefore, no outsider is benefited through such transaction. When the assessee-company has been promoted by the holding company, infusion of additional fund through share premium can only benefit either the holding company or the subsidiary and no third party is involved. In such a scenario, logically, no addition can be made under section 56(2)(viib) of the Act. For arriving at such conclusion, I draw support from the decisions of the Tribunal in the case of ACIT Vs. Y. Venkannachaudhary (supra) and Vaani Estates Pvt. Ltd. Vs. ITO (supra).

10. Even otherwise also, it requires consideration, whether the FMV of the shares allotted by the assessee can be taken at Rs.1,500/- per share as per the assessee or Rs.1082 per share as determined by the Assessing Officer. Undisputedly, the assessee has got the FMV of the shares valued through a registered valuer. As per the said valuation report, the registered valuer has applied the Net Asset Value method by considering the value of land at Delhi admeasuring 5.35 acres owned by the assessee. Applying the circle rate declared by the State Government, as on 31.03.2016, the registered valuer has determined the FMV of the land at Rs.26.75 crores as against the value of land as per the circle rate of Rs.50.40 crores. However, learned Commissioner (Appeals) has upheld the valuation made by the Assessing Officer primarily on the reasoning that the value of land determined by registered valuer at Rs.26.75 crores is much higher compared to the book value of land shown at Rs.16.88 crores.”

14. Similarly, in the case of Hometrail Buildtech Pvt. Ltd. (supra), the ITAT held thus:

“11. We have given thoughtful consideration to the orders of the authorities below. There is no dispute that the valuation of the assessee is supported by valuation report from a technical expert who has adopted DCF method, which is one of the recognized methods u/r 11UA of the Rules. Therefore, the Assessing Officer erred in rejecting the method.

12. On a perusal of the relevant sections read with the Rules, we are of the view that the action of the Assessing Officer in substituting the method of valuation is beyond jurisdiction. We are of the view that DCF Method is based on projections which are based on factors like growth of the company, economic/market conditions, business conditions, expected demand and supply, cost of capital and host of other factors.

13. 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 a certain period of time.

14. Moreover, valuation of an unquoted equity share, in terms of Rule 11UA of the Rules can, at the option of the assessee, be determined as per either NAV Method or as per DCF Method, which means that the option is given to the assessee and once the assessee has exercised an option, the Assessing Officer is bound to follow the same unless by bringing cogent material on record, the Assessing Officer establishes perversity in the method adopted by the assessee.

15. The Hon'ble High Court of Delhi in the case of PCIT Vs. Cinestaan Entertainment 433 ITR 82 has held a under:

“13. From the aforesaid extract of the impugned order, it becomes clear that the learned ITAT has followed the dicta of the Hon'ble Supreme Court in matters relating to the commercial prudence of an assessee relating to valuation of an asset. The law requires determination of fair market values as per prescribed methodology. The Appellant-Revenue had the option to conduct its own valuation and determine FMV on the basis of either the DCF or NAV Method. The Respondent-Assessee being a start-up company adopted DCF method to value its shares. This was carried out on the basis of information and material available on the date of valuation and projection of future revenue. There is no dispute that methodology adopted by the Respondent-Assessee has been done applying a recognized and accepted method. Since the performance did not match the projections, Revenue sought to challenge the valuation, on that footing. This approach lacks material foundation and is irrational since the valuation is intrinsically based on projections which can be affected by various factors. We cannot lose sight of the fact that the valuer makes forecast or approximation, based on potential value of business. However, the underline facts and assumptions can undergo change over a period of time. The Courts have repeatedly held that valuation is not an exact

science, and therefore cannot be done with arithmetic precision. It is a technical and complex problem which can be appropriately left to the consideration and wisdom of experts in the field of accountancy, having regard to the imponderables which enter the process of valuation of shares. The Appellant-Revenue is unable to demonstrate that the methodology adopted by the Respondent-Assessee is not correct. The AO has simply rejected the valuation of the Respondent-Assessee and failed to provide any alternate fair value of shares. Furthermore, as noted in the impugned order and as also pointed out by Mr. Vohra, the shares in the present scenario have not been subscribed to by any sister concern or closely related person, but by outside investors. Indeed, if they have seen certain potential and accepted this valuation, then Appellant-Revenue cannot question their wisdom. The valuation is a question of fact which would depend upon appreciation of material or evidence. The methodology adopted by the Respondent-Assessee, accepted by the learned ITAT, is a conclusion of fact drawn on the basis of material and facts available. The test laid down by the Courts for interfering with the findings of a valuer is not satisfied in the present case, as the Respondent-Assessee adopted a recognized method of valuation and Appellant-Revenue is unable to show that the assessee adopted a demonstrably wrong approach, or that the method of valuation was made on a wholly erroneous basis, or that it committed a mistake which goes to the root of the valuation process.

14. In view of the foregoing, we find that the question of law urged by the Appellant-Revenue is purely based on facts and does not call for our consideration as a question of law.”

The ITAT relied upon the decision of the Hon'ble Delhi High Court in PCIT vs. Cinestaan Entertainment 433 ITR 82 (Del).

15. Following the decisions (supra), we hold that the objective behind the provisions of section 56(2)(viib) of the Act is to prevent unlawful gain by issuing company in the garb of capital receipts. However, in the transaction between holding and its subsidiary company no income can be said to accrue to the ultimate beneficiary i.e. holding company. The chargeability of deemed income arising from transactions between holding and subsidiary or vice-versa militates against the solemn object of section 56(2)(viib) of the Act. Accordingly, ground No. 2 and its sub-grounds are decided in favour of the assessee.

16. Ground No. 3 is general in nature.

17. In the result, appeal of the assessee is partly allowed.

Order pronounced in the open court on 25th January, 2024.

sd/-
(N.K. BILLAIYA)
ACCOUNTANT MEMBER

sd/-
(ASTHA CHANDRA)
JUDICIAL MEMEBR

Dated: 25/01/2024

Copy forwarded to-

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

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	