IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "C", MUMBAI

BEFORE SHRI ANIKESH BANERJEE, JUDICIAL MEMBER AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA 1031/Mum/2024
(Assessment year: 2016-17)

PRL Developers Private Limited, Mumbai City, 8th Floor, Piramal Tower, Peninsula Corporate Park, Ganpatrao Kadam Marg, Lower Parel, Mumbai-400 013 **PAN : AAFCP9978E**	**vs**	**ACIT CIRCLE 8(2)(1), Mumbai** Room No.624, 6th Floor, Aayakar Bhawan, M.K. Road, Churchgate, Mumbai-400 020
APPELLANT		**RESPONDENT**

Assessee by	Shri Ronak Doshi a/w Shri Priyank Gala & Shri Bhavya Jain
Respondent by	Ms. Madhu Malti Ghosh (CIT DR)

Date of hearing : 27/06/2024
Date of pronouncement : 05/ 07/2024

O R D E R

PER ANIKESH BANERJEE, J.M:

Instant appeal of the assessee is preferred against the order of the National Faceless Appeal Centre, Delhi [for brevity, 'Ld.CIT(A)'] passed under section 250 of the Income-tax Act, 1961 (in short, 'the Act'), for Assessment Year 2016-17, date

of order 11.01.2024.The impugned order was emanated from the order of the Ld.Assistant Commissioner of Income-tax, Circle 7(3)(2), Mumbai (in short, 'the A.O.') passed under section 143(3)of the Act date of order25/12/2019.

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

*"**GROUND NO. I: NON-ADMISSION OF ADDITIONAL EVIDENCE:***

1. On the facts and in circumstances of the case in law, the Ld. CIT(A) erred in not admitting the additional evidence filed by the Appellant.

2. The Ld. CIT(A) failed to appreciate that its case falls within the sub-clause (c) and (d) of Rule 46A of the Income Tax Rules, 1962 ("the Rules") to the Act.

GROUND NO. II: VIOLATION OF PRINCIPLES OF NATURAL JUSTICE:

1. On the facts and in circumstances of the case and in law, the Ld. CIT (A) erred in violating the principles of natural justice, inter-alia, on the following grounds:

i. The Ld. CIT(A) erred in passing the impugned order without appreciating and referring to the documents placed on record in the course of Assessment Proceedings and in the course of Appellate Proceedings -

ii. The Ld. CIT(A) failed to provide an opportunity to the Appellant to rebut the contentions of the AO in the remand report.

iii. The Ld. CIT (A) erred in passing the impugned order without providing an opportunity of personal hearing through video conferencing to the Appellant, despite the specific request of the Appellant.

2. The Appellant, therefore, prays that the impugned order passed in gross violation of the principles of natural justice be held as bad in law and the additions/disallowances made be deleted.

***GROUND NO. Ill; DISALLOWANCE OF CLAIM OF DEPRECIATION ON COMPUTER SOFTWARE AMOUNTING TO RS.** 84,40,051/2-*

1. On the facts and in circumstances of the case and in law, the Ld. CIT(A), erred in upholding the AO's action of calculating depreciation on computer software @ 25% instead of @ 60% as claimed by the Appellant.

2. The Appellant prays that it be allowed depreciation (o;60% on computer software instead of depreciation @ 25%.

***3. Without Prejudice** to the above, the Appellant prays that the software purchased be allowed as business expenditure u/s 3 7(1) of the Act.*

GROUND NO. IV: DISALLOWANCE OF SALES PROMOTION EXPENSES AMOUNTING TO RS. 94,98,268/-

1. On the facts and in circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the AO in disallowing the advertisement and business promotion (sales promotion) expenses amounting to Rs. 94,98,2687- and treating the same as work in progress. .

2. The Ld. CIT(A) has erred in observing that the Appellant itself has admitted that these expenses are capitalized under the head "inventory- construction WIP" and still the Appellant is claiming these expenses in P & L account.

3. He further erred in upholding the action of the AO that no expenses can be allowed since income from the project has not been recognized in the year under consideration.

4. The Appellant prays that the aforesaid disallowance of Rs.94,98,2687- be allowed as a deduction as claimed by the Appellant.

GROUND NO. V: ADDITION OF SHARE PREMIUM UNDER SECTION 56(2)(viib) OF THE ACT:

1. *On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in upholding the action of the AO in making an addition of Rs. 1,85,00,01,0007- u/s. 56(2)(viib) of the Act on the alleged ground that the issue price of shares computed exceeds the fair market value of the shares, disregarding the valuation as per Discounted Cash Flows Method ("DCF Method") adopted by the Appellant and instead applying NAV method.*

2. The Ld. CIT(A) further erred in upholding the action of the AO in considering premium on shares issued to Non-Residents while computing disallowance which is squarely outside the ambit of section 56(2)(viib) of the Act.

3. Therefore, the Appellant prays that the Ld. CIT(A) be directed to delete the addition amounting to Rs.1,85,00,600/- u/s. 56(2)(viib) of the Act.

4. Without prejudice, the Appellant prays that the Ld. CIT(A) be directed to delete the addition pertaining to premium on issue of shares to Non-residents amounting to Rs. 32,500/- u/s. 56(2)(viib)of theAct.

GROUND NO. VI: ERROR IN COMPUTATION OF TOTAL INCOME AND TOTAL TAX LIABILITY:

1. On the facts and circumstances of the case and in law, the Ld. CIT(A) erred in confirming the action of the AO in erroneously computing the total income and the total tax liability for the year under consideration.

2. The Ld. CIT(A) upheld the erroneous action of the AO in calculating the total tax payable by the Appellant taking into consideration the incorrect figure of loss assessed under the head Income from Business or Profession. ,

3. The Appellant prays that the Ld. CIT(A) be directed to compute the correct total income and total tax liability/refund in accordance with the provisions of the Act."

2. The brief facts of the case are that the assessee is a developer and developing the project in Mulund and assessee is as wholly owned subsidiary of 'Piramal Realty Pvt Ltd'(in short, 'PRPL'). The assessee managed a project in Mulund named, 'Revanta'. The assessee is recognizing the revenue in project completion method. During the impugned assessment year, the revenue has added back the excess claim of depreciation, sale promotion expenses amounting to Rs.94,98,268/- and addition of share premium under section 56(2)(viib) of the

Act r.w.s. 11UA of the Rule amounting to Rs.1,85,00,600/-. Aggrieved assessee filed an appeal before the ld. CIT(A) and challenged the additions made by the Ld. AO. But Ld.CIT(A) upheld the assessment order. Being aggrieved, the assessee filed an appeal before us.

3. The Ld.AR in argument, first placed that **grounds 1 & 2** are not pressed. The ground-wise argument is placed before the Bench, which is as follows: -

Ground III: Disallowance of claim of depreciation on computer software

4. The Ld.AR argued and placed the issue that assessee purchased two software and charged depreciation at 60%. Ld.AO has reduced the claim of depreciation from @60% to @25% and claimed that the 60% depreciation will be applicable only in case of computer with software. Separate purchase of the software is an intangible asset and not accepted. The Ld.AR placed that the issue is squarely covered by the order of the co-ordinate bench of ITAT in assessee's own case in **ITA No.1257/Mum/2014**, date of pronouncement **07/05/2019**. The relevant paragraph is reproduced as below: -

> *"15. We find that the issue before us is as to whether an independent purchase of software which admittedly formed part of the profit making apparatus of the assesses business and was capitalized in its 'books of accounts' would be entitled for depreciation @ 60% (as claimed by the assessee) or @25% (as allowed by the AO). Admittedly, the claim of the assessee towards depreciation on computer software @ 60% was allowed by the CIT(A) in its own case for A.Y 2008-09. The revenue had not carried the aforesaid order of the CIT(A) any further in appeal before the Tribunal, which thus had attained finality. Be that as it may, we find that the ITAT, Mumbai in the case of Owens and Corning (India) P. Ltd. Vs. ACIT, Range 7(3)(i), Mumbai (2018) 93 taxamann.com 223 (Mum), had observed that the revenue was in error in*

restricting the assesses claim of depreciation on computer software expenses is allowable @60%. TO 25%. In fact, the Tribunal while concluding as hereinabove, had taken support of the judgment of the Hon'ble HighCourt Bombay in the case of CIT Vs. Saraswat Infotech Ltd. [ITA (L) No. 1243 of 2012; dated 15.01.2013]. Apart there from, we findthat further in the following cases also the coordinate benches of the Tribunal had concluded that depreciation on software expenses is allowable @ 60%:

"(i) Srinivasa Resorts Vs ACIT (41 taxmann.com 350)(Hyd-Trib)
(ii) Ushodaya Enterprises Limited 938 ITRE (T) (Hyd-Trib)
(iii) ACIT Vs. Zydus Infrastructure (P) Ltd (72 taxmann.com 199) (Ahd-Trib)"

16. We are persuaded to subscribe to the view taken by the aforesaidcoordinate benches of the Tribunal and respectfully follow the same. Further, as observed hereinabove, the assesses claim of depreciation on software expense @ 60% which was allowed by the CIT(A) had alsobeen accepted by the revenue and the same had also not been carried any further in appeal before the Tribunal. In terms of our aforesaidobservations, we are of the considered view that the assessee hadrightly claimed depreciation on computer software @, 60%. We thus setaside the order of the CIT(A) in context of the issue underconsideration and vacate the disallowance of Rs. 17,63,425/- made bythe A.O on the said count. The Ground of appeal No. Ill is allowed."

5. The Ld.DR argued vehemently and mentioned that the 60% depreciation is only applicable to computer with software i.e. the software is guiding the computer or is an integral part of the related hardware is treated as a fixed asset and applicable for the depreciation @60%. But the assessee has taken only the application software where the assessee has got the right to use that software. The Ld.DR invited our attention in para 6.7 to 6.11 of the appeal order, which are reproduced as below: -

"6.7 Further the appellant has purchased computer software separately and independently from the computer purchases. The software purchased by the appellant is not system software' but 'application software by which the appellant has got the right to use that software. The appellant has acquired only intangible asset. Hence, the appellant is eligible for depreciation at 25% as per Part B of depreciation schedule as shown in Appendix 1 of the IT. Rules.

6.8 Further it is noted that Note-7 states that computer software means any computer programme recorded on any disk, tape, perforated media or other information storage device. It is merely a definition of computer software and is equally applicable to both types of softwares i.e. system software and application software. However, from mention of this definition in Note 7, it cannot be construed that the intention of the legislature is to include application software.
6.9 As per Accounting Standard 26, where the software is not an integral part of the related hardware, then the computer software is considered as an intangible asset. The relevant para is reproduced as under:

> *"In some cases, an asset may incorporate both intangible and tangible elements that are, in practice, inseparable. In determining whether such an asset should be treated under AS 10, Accounting for Fixed Assets, or as an intangible asset under this Standard, judgement is required to assess as to which element is predominant. For example, computer software for an Intangible Assets computer-controlled machine tool that cannot operate without that specific software is an integral part of the related hardware and it is treated as a fixed asset. The same applies to the operating system of a computer. Where the software is not an integral part of the related hardware, computer software is treated as an intangible asset."*

6.10 In view of above, the contention of the appellant is not found to be acceptable. Therefore, disallowance of depreciation of Rs. 84, 40, 051 /- by the AO is upheld.

6.11 Accordingly, the Ground No. I is dismissed."

6. We heard the rival submission and considered the documents available in the record. The assessee purchased two software –

(i) Office STD 2013SNGLMVL; and

(ii) Prjct 2013 SNGLMVL. In support of the order of co-ordinate bench specifically mentioned that the software is guiding the hardware and also an integral part of the hardware. Considering the order of the co-ordinate bench in assessee's own case (supra), in our considered view, the assessee has rightly claimed deprecation @60% and the addition of Rs.84,40,051/- is deleted.

In the result, **ground No.III** of the assessee is allowed.

Ground IV:DISALLOWANCE OF SALES PROMOTION EXPENSES AMOUNTING TO RS. 94,98,268/-:

7. The Ld.AR argued that assessee is in business of real estate development and has only one construction project at Mulund named 'Revanta'. In impugned assessment year, the assessee had incurred expenses on sale amounting to Rs.94,98,268/- which is debited in the P&L Account in terms of "guidance note on accounting of real estate transaction for revised 2012" (in short, 'GN') issued by the "Institute of Chartered Accountants of India" and accordingly, claimed as revenue expenditure. The Ld.AR placed that the entire amount is related to profit

bearing system and the disallowance made by the ld. AO on the basis of AS-7 is purely related to contractor and not to developer. The Ld.AR respectfully relied on the order of the Co-ordinate bench of ITAT-Mumbai in the case of **ACIT, CC-21, Mumbai vs Layer Exports P. Ltd (2017) 88 taxmann.com 620 (Mumbai Tribunal)**. The relevant part of the order is as follows: -

> *"46. We have rival contentions and gone through the facts and circumstances of the case. We have gone , through AS-7 issued by the ICAI and find that the same is applicable only to accounting for construction contracts in the financial statements of contractors. The text of AS-7 (Construction Contracts) issued by ICAI was filed before us (Copy enclosed at pages 403-414 of assessee's Paper Book-Ill). Construction Contract has been defined in para 2 of AS-7 as under: —*
>
> *"A construction contract is a contract specifically negotiated for the construction of an asset or a combination of assets that are closely interrelated or interdependent in terms of their design. . -~" technology and function or their ultimate purpose or use."*
>
> *In our view, AS-7 prescribes the method of accounting of construction contracts in the books of the contractors. It presupposes the existence of a 'contract[1] for construction between a contractor and contractee. AS-7 is not applicable to cases where the construction activity is carried out on ownershipbasis and not in pursuance of any contract with a contractee. Thus. AS-7 is not applicable to the case ofthe present assessee which is engaged in development and construction of buildings on ownership basisand sale thereof to customers. The buyers purchase ready flats from the assessee. The agreement is forsale of completed flats as opposed to a contract for construction of flats/ buildings. As such, the entirediscussion of the AO in respect of applicability of AS-7 and percentage*

completion method of accountingin the case of the assessee is without any basis. We also find that the assessee has been consistently following project completion method of accounting since the very inception of its business. The saidmethod of accounting has been consistently accepted as such by the AO in assessments framed u/s 143(3)of the Act over the past years. As such, the same method should have also been accepted for AY 2008-09, there being no change in facts and circumstances vis-a-vis the past years. We are placing reliance on theJudgment of Hon'ble Supreme Court in the case of Radhasoami Satsang v. CIT [1992) 60 Taxman 248/193 1TR 321 (S.C) wherein it is held that in the absence of any material change in facts, a differentview than taken in earlier years could not be taken:

"We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.

On these reasonings, in the absence of any material change justifying the Revenue to take a different view of the matter and, if there was no change, it was in support of the assessee we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of "^ Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

- ***CIT v. Somnath Buildtech (P.) Ltd. [2023] 146 taxmann.com 472 (Del. HC) [Refer PageNo. 197 to 202 of LPB-I****]: The Hon'ble HC held that the expenses incurred by the assessee were in the nature of general administration and selling cost as classified by the GN issued by the ICAI and since the said expenses were incurred for the purposes of business, the same qualified for deduction as revenue expenditure*
- ***DCIT v. Macrotech Developer Ltd. [2022] 192 ITD 438 (Mum. Trib) [Refer Page No. 203to 207 of LPB-I]:*** *The Hon'ble Tribunal has in Para No. 8 of its order, observed as under:*

"5... Admittedly, the assessee had incurred the sales promotion expenses ofRs. 2,02,86,452/-and advertisement expenses ofRs. 6,68,13,114/-for launching of its project and attracting customers. The A. O had treated the aforesaid expenses as apart of the project cost i.e. W.I.P cost, and thus, declined the assessee's claim for deduction of the same as a revenue expenditure. In our considered view, as observed by the Id. CIT(A), and rightly so, the sales promotion expenses, advertisement etc, cannot be capitalized to work-in-progress as per the Accounting Standards prescribed for the real estate sector as well as the accepted accounting policies and judicial pronouncements..."

8. The Ld.DR argued and fully relied on the order of the revenue authorities. The Ld.DR stated that AS-7 is applicable for the assessee and further stated that these expenses are specifically attributable towards Mulund projects and thereafter should be capitalized to project cost and should be carried to work-in-progress. He further argued that no revenue has been recognized in respect of the project. Therefore, as per the matching concept, no deduction can be allowed in respect of sale promotion expenses.

9. We heard the rival submission and considered the documents on the record. The moot point of this issue is whether AS-7 will be applicable in case of assessee or not? As per the documents, we perused that the assessee is purely a civil construction developer and running the project at Mulund. The AS-7 is purely effective for the contractor in construction not for developers. We respectfully followed the judgement of co-ordinate bench of ITAT, Mumbai Bench in the case of **Layer Exports P Ltd** (supra). So the question of capitalizing the project cost of sale promotion is unjustified. We set aside the appeal order on this issue and the addition of Rs.94,98,268/- is deleted.

In the result, **ground No.IV** of the assessee is allowed.

Ground V: ADDITION OF SHARE PREMIUM UNDER SECTION 56(2)(viib) OF THE ACT:

10. The assessee is engaged in the business of real estate and during the impugned assessment year, the assessee allotted equity shares to following companies at issue price of Rs.75/- per share comprising face value of Rs.10 per share and premium of Rs.65/- per share:

1. Foglight Investment Limited - 1000
2. Board Street Investments (Singapore) Pte Ltd - 450
3. MBD BridgeStreet 2015 Investments (Singapore) Pte Ltd- 50

11. In relation to allotment of share, the Ld.AR submitted that the assessee obtained valuation report from M/s D.B Ketkar & Co which was submitted before the ld. Assessing Officer during the course of assessment proceedings and as well

as before the Ld.CIT(A). Copy of the report is duly enclosed in **APB 55-57**. The Ld.AR further argued that the ld. AO had not accepted the valuation report and assessee is continuing the method of valuation in NAV which was duly calculated by the assessee in NAV and the Ld.AO rejected the method of valuation and calculated in DCF method determining the FMV of equity shares as net asset value method @Rs.4.38 per share and thereby made an addition balance amount of Rs.1,85,00,600/-. The Ld.AR further claimed that the assessee had, for the purpose of compliance with FEMA also obtained valuation report with merchant banker which valued the share @69.41 per share. The grievance of the Ld.AR is that in arbitrary way, the Revenue changed the method of valuation and addition was made without considering the valuation report prepared by the merchant banker considering Rule 11UA of the Income Tax Rule, 1962. The reliance was placed in following orders of the co-ordinate bench of Mumbai and Delhi: -

The Valuation adopted by the Appellant is in accordance with Rule 11UA and done by prescribed expert, cannot be rejected:

In the case of **PNP Maritime Services (P.) Ltd. v. DCIT** [2024] **204 ITD 810(Mum. Trib.)** it was noted that:

> *"There is certainly no immunity from the scrutiny of the valuation report submitted by the assessee and the Assessing Officer is entitled to scrutinise the valuation report and determine a afresh valuation either by himself or by calling for a final determination from an independent valuer, however, the basis has to be the method adopted by the assessee and it is not open to the Assessing Officer to change the method of valuation which has been opted for by assessee under rule 11UA(2). Therefore, the addition made by the Assessing Officer under section*

56(2)(viib) is not in conformity with the provisions of the statute. Further, in the instant case the Assessing Officer did not follow any of the methods prescribed under the relevant Rules for making the impugned addition. "

In the case **of Shanta Blankets (P.) Ltd. v. ITO [2024] 162taxmann.com 97 (Delhi)** it was noted that:

"34. In any case, if law provides the assessee to get the valuation done from a prescribed expert as per the prescribed method, then the same cannot be rejected because neither Assessing Officer nor the assessee have been recognized as expert under the law. 16. The Coordinate Bench of the Tribunal while lying down the above ratio has also considered t) decision of the Coordinate bench in Agro Portfolio Pvt. Ltd. v. ITO which has been relied I the CIT(A)."

The ld. AO cannot take away the option granted by the Statute to the assessee for adopting a method of valuation. The ld. AR relied on the following orders: -

In the case **of Vodafone M-Pesa v. PCIT [2018] 256 taxman 240 (Bom. HC),** it is noted that,

"The Commissioner in the impugned order does not deal with the primary grievance of the assessee. 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. "

In the case **of JCIT v. Om Sons Marketing (P.) Ltd. [2024] 158 taxmann.com 175 (Amr. Trib.),**it is noted that:

"Since the law has prescribed the specific method for valuation i.e DCF so the assessee was free (and rather entitled) to choose this method. The method of valuation could be challenged by the AO only if it was not a recognized method of valuation as per Rule IWA (2) of the Rule. The very purpose of certification of DCF valuation by a merchant banker or chartered accountant is to ensure that the valuation is fair and reasonable. Such valuation is to be done by an expert of the subject only, which an assessing officer is not expected to be. The said rule provides that such valuation shall be the fair market value for the purpose of this section based on DCF Method. The Rule nowhere permits the AO to make any adjustment therein."

The ld. AR placed that no addition can be made u/s 56(2)(viib) of the Act in case of genuine commercial transaction in absence of any element of unaccounted money of the assessee

In the case **of BLP Vayu (Project-1) P. Ltd. V. PCIT [2023] 151 taxmann.com** 47 **(Del. Trib.),**it was noted that,

"The transaction of allotment of shares at a premium in the instant case is between holding company and it is subsidiary company and thus when seen

holistically. there is no benefit derived by the assessee by issue of shares at certain premium notwithstanding that the share premium exceeds a fair market value in a given case. Instinctively, it is a transaction between the self, if so to say. The true purport of Section 56(2)(viib) was analyzed in Ozone case and it was observed that the objective behind the provisions of Section 56(2)(viib) is to prevent unlawful gains by issuing company in the garb of capital receipts. In the instant case, not only that the fair market value is supported by independent valuer report, the allotment has been made to the existing shareholder holding 100% equity and therefore, there is no change in the interest or control ove the money by such issuance of shares. The object of deeming an unjustified premium charged o, issue of share as taxable income under Section 56(2)(viih) is wholly inapplicable for transaction between holding and its subsidiary company where no income can be said to accrue to the u/fimati beneficiary, i.e., holding company. The chargeahility of deemed income arising from transaction. between holding and subsidiary or vice versa militates against the solemn object of Section 56(2) (viib) of the Act."

12. The Hon'ble Bench had during the course of aforesaid hearing, directed the Appellant to furnish the basis and working papers for arriving at a valuation of Rs. 65/- per share, a comparison of projected v/s actual cashflows, and shareholding structure of the Appellant and its subsidiaries in relation to the said ground of appeal. Accordingly, the matter was kept part heard and the was subsequently listed for hearing on June 27. 2024.

13. Now, during the course of hearing on June 27. 2024. the ld. AR at the request of the Hon'ble Bench, submitted the basis of projections

when valuation report was obtained in 2015 & also submitted the comparative analysis of projections v/s actuals figures alongwith reasons for variances therein, during the course of hearing.

14. The ld. AR submitted that variance in projection v/s actual was on account of delay in project due to changes in Development Control & Promotion Regulation 2034 Rules ("DCPR Rules"), delay in receiving various approvals from the regulatory authorities, increase in cost of raw materials such as cement and steel, unexpected increase in approvals and liasoning costs, etc.

15. The ld. AR specifically invited our attention to the decisions of Hon'ble **Delhi High Court** in the case of M/s. **Cinestaan Entertainment Pvt. Ltd. [ITA 1007/2019 & CM APPL. 54134/2019]** and decision of Hon'ble **Mumbai Tribunal** in the case of **Vodafone M-Pesa Ltd. v. DCIT** ITA No.1073/Mum/2019 wherein it respectfully relied on the decision **of Hon'ble Bombay High Court** in the case of **Securities & Exchange Board of India & Ors. [2015 ABR 291].**

16. The ld. AR also submitted that DCF method is recognized method of valuation wherein projection are relied on & under valuation principles, valuation report cannot be rejected merely based on actuals are not comparable to projection figures. For this the ld. ARrespectfully relied on the decision of M/s. **Cinestaan Entertainment Pvt. Ltd** (supra)where the Hon'ble Delhi HC

considered the observation of Hon'ble Delhi Tribunal which include the observation of Hon'ble Bombay HC in the case of **Securities & Exchange Board of India & Ors** (supra)**.** The relevant extract of the observation is reproduced hereunder:

"33. Section 56(2) (viib) is a deeming provision and one cannot expand the meaning of scope of any word while interpreting such deeming provision. If the statute provides that the valuation has to be done as per the prescribed method and if one of the prescribed methods has been adopted by the assesses, then Assessing Officer has to accept the same and in case he is not satisfied, then we do not we find any express provision under the Actor rules, where Assessing Officer can adopt his own valuation in DCF method or get it valued by some different Valuer. There has to be some enabling provision under the Rule or the Act where Assessing Officer has been given the power to tinker with the valuation report obtained by an independent valuer as per the qualification given in the Rule 11U.Here, in this case, Assessing Officer has tinkered with DCF methodology and rejected bycomparing the projections with actual figures. The Rules provide for two valuation methodologies, one is assets based NAV method which is based on actual numbers as perlatest auditedfinancials of the assessee company. Whereas in a DCF method, the value is based on estimated future projection. The Rules provide for two valuation methodologies, one is assets based NAV method which is based on actual numbers as per latest audited financials of the assessee company. Whereas in the DCF method, the value is based on estimated future projection. These projections are based on various factors and projections made by the management and the Valuer, like growth of the company, economic/market conditions, business conditions, expected demand and supply, cost of capital and host of other factors. These factors are considered based on some reasonable approach and they cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and

catena of underline facts and assumptions. Nevertheless, at the time when valuation is made, it is based on reflections of the potential value of business at that particular time and also keeping in mind underline factors that may change over the period of time and thus, the value which is relevant today may not be relevant after certain period of lime. Precisely, these factors have been judicially appreciated in various judgements some of which have been relied upon by the Id. Counsel, for instance:

i) Securities &Exchange Board of India & Ors [2015 ABR 291 (Bombay HC)]

"48.6 Thirdly, it is a well settled position of law with regard to valuation that valuation is not and exact science and can ever be done with arithmetic precision. The attempt on the part of SEBI to challenge the valuation which is by its very nature based on projections by applying what is essentially a hindsight view that the performance did not match the projection is unknown to the law on valuations. Valuation being an exercise required to be conducted at a particular point of time has of necessity to be carried out on the basis of whatever information is available on the date of the valuation and a projection of future revenue that valuer may fairly make on the basis of such information. "

17. The Ld.DR argued and placed that the assessee at a higher rate allotted the share. The Ld.Assessing Officer determined the share at Rs.4.38 per share whereas the valuer made the valuation made at Rs.69.41 per share. The Ld.DR further claimed that the valuation report was not furnished to the Ld.Assessing Officer during the course of assessment proceedings and also contended that the valuation report has no independence as it was issued by the statutory auditor of the assessee.

18. We heard the rival submissions and considered the documents available in the record. The assessee completed the valuation during the transfer of shares from intercompany adjustment. Rule 11UA was duly followed and assessee completed the valuation in NAV with a rate of 69.41 per share. On the other hand, the revenue had calculated without rejecting the valuation report of the merchant banker duly placed by the assessee at the time of assessment proceedings. The issue was duly resolved by the Ld.AR by inviting our attention in **APB pages 154 to 171** where the proof is attached that the assessee placed the valuation report before the Ld. AO. The change of method of valuation cannot be done by Ld.AO. We fully relied on the order of **PNP Maritime Services (P.) Ltd** (supra) &**Shanta Blankets (P.) Ltd** (supra). The Ld.AR relied on the decision in the case of **BLP Vayu (Project-1) P. Ltd** (supra). From talking tour from this order, no addition can be made under section 56(2)(viib) of the Act in case of genuine commercial transaction in absence of any amount of unaccounted money of the assessee relied on **Cinestaan Entertainment Pvt. Ltd** (supra). Both the revenue authorities have not rejected the valuation report duly prepared under rule 11UA of the Rule. In our considered view, the addition made by the Ld.Assessing Officer amount to Rs.1,85,00,600/- is hereby deleted.

In the result, **ground V** of the assessee is allowed.

Ground VI:

19. Ground 6 is with respect to erroneous action of the Ld.AO calculating the total tax payable by the assessee taking into consideration of loss assessed under

the head 'PGBP'. In this respect, we direct the Ld.AO to recompute the computation and give the effect accordingly.

20. **Ground VII** is consequential in nature.

21.In the result, the appeal of the assessee bearing **ITA No.1031/Mum/2024** is allowed.

Order pronounced in the open court on 05th day of July, 2024.

Sd/- sd/-

(GAGAN GOYAL) (ANIKESH BANERJEE)
ACCOUNTANT MEMBER JUDICIAL MEMBER
Mumbai,दिनांक/Dated: 05/07/2024
Pavanan

Copy of the Order forwarded to:

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकरआयुक्त CIT
4. विभागीयप्रतिनिधि, आय.अपी.अधि., मुबंई/DR, ITAT, Mumbai
5. गार्डफाइल/Guard file.

BY ORDER,

//True Copy//

(Asstt. Registrar), **ITAT, Mumbai**