आयकर अपीलीय अधिकरण, चण्डीगढ़ न्यायपीठ "ए" , चण्डीगढ़
IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH

HEARING THROUGH: HYBRID MODE
श्री आकाश दीप जैन, उपाध्यक्ष एवं श्री विक्रम सिंह यादव, लेखा सदस्य
BEFORE: SHRI. AAKASH DEEP JAIN, VP & SHRI. VIKRAM SINGH YADAV, AM

आयकर अपील सं. / ITA NO.171/Chd/2021
निर्धारण वर्ष / Assessment Year : 2015-16

Authorgen Technologies Pvt. Ltd. C-203, 8th Floor, World Tech Tower Industrial Area, Phase VIII, Mohali 160070, Punjab	बनाम	The Pr. CIT(1) Chandigarh
स्थायी लेखा सं./PAN NO: AADCA0494Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं. / ITA NO.212/Chd/2023
निर्धारण वर्ष / Assessment Year : 2015-16

Authorgen Technologies Pvt. Ltd. C-203, 8th Floor, World Tech Tower Industrial Area, Phase VIII, Mohali 160070, Punjab	बनाम	The ITO Ward 6(1), Chandigarh
स्थायी लेखा सं./PAN NO: AADCA0494Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/Assessee by : Shri K.M. Gupta, Advocate
राजस्व की ओर से/ Revenue by : Shri J.S. Kahlon, CIT, DR &
Smt. Amanpreet Kaur, Sr. DR

सुनवाई की तारीख/Date of Hearing : 05/06/2024
उदघोषणा की तारीख/Date of Pronouncement : 02/09/2024

आदेश/Order

PER VIKRAM SINGH YADAV, A.M. :

These are two appeals filed by the assessee against the order of the Ld. Pr. CIT, Chandigarh -1 dt. 23/03/2021 passed under section 263 of the Income Tax Act, 1961 pertaining to Assessment Year 2015-16 and the order passed by the Ld. CIT(A), NFAC Delhi dismissing the appeal of the assessee in respect of set aside proceedings and the order passed under section 143(3) r.w.s 263 of the

Act dt. 14/02/2023 for Assessment Year 2015-16. Both these appeals were heard together and are being disposed off by this consolidated order.

2. In ITA No. 171/Chd/2021, the assessee has raised the following grounds of appeal:

> *"1. On the facts and under the circumstances of the case and in law, the Commissioner of Income Tax, erred in invoking revisionary powers u/s 263 without appreciating the fact that order passed by AO is neither erroneous nor prejudicial to the revenue, hence revision u/s 263 is bad in law.*
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> *2. On the facts and circumstances of the case and in law, the learned CIT erred in setting aside the order of the AO and directing assessment de-novo, on the grounds that Large share premium received during the year, without appreciating the fact that two out of three investors are foreign investors and such shares are issued above the fair value as required under foreign exchange laws of the country. The Ld. AO has asked at the time of assessment and was explained to him to his satisfaction.*
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> *3. On the facts and circumstances of the case and in law, the learned CIT erred in not appreciating the fact that same class of shares were issued to foreign entities and domestic entity. Section 56(2)(viib) is not applicable to foreign entities and therefore the price paid per share for the same class of shares by foreign entities should be treated as fair market price for share issued to Indian entity. There cannot be different pricing for same class of shares issued to different persons. Hence, the action of CIT of invoking revisionary powers is bad in law."*

3. In ITA No. 212/Chd/2023, the assessee has raised the following grounds of appeal:

> *"1. On the facts and under the circumstances of the case and in law, the learned CIT(A) erred in confirming the action of the AO by treating the share premium as taxable u/s 56(2)(viib) which is bad in law.*
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> *2. On the facts and under the circumstances of the case and in law, the learned AO erred in rejecting the DCF method of valuation adopted by the appellant for valuing the shares and calculating the FMV on the basis of NAV model thereby making an addition of share premium of Rs. 2,59,25,331/- u/s 56(2)(viib) of the Income Tax Act, 1961 even when DCF method was allowable as per Rule 11UA(2)(b) and hence such an action is bad in law.*
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> *3. On the facts and under the circumstances of the case and in law, the learned AO erred in invoking Section 68 of the Income Tax Act, 1961 even though the appellant being resident, has provided complete explanation about the nature and source of sum so credited."*

4. At the outset, it is noted that there is delay in filing the appeal by the Assessee against the order passed by the Ld. Pr. CIT under section 263 dt. 23/03/2021. The appeal has been filed by the assessee on 05/07/2021 after a delay of 44 days as pointed out by the Registry. In this regard, the assessee in its application has submitted that the reasons for not filing the appeal within stipulated time period was due to the second wave of COVID-19 pandemic in the country at the relevant point in time whereby nationwide lockdown was imposed which has resulted in delay in filing the present appeal. Further, reliance was also placed on the decision of Hon'ble Supreme Court wherein the period of limitation has been extended. It was accordingly submitted that the delay in filing the present appeal is beyond the control of the assessee and hence there was a reasonable cause for the delay and the same may be condoned and the appeal be admitted to be heard on merits of the case.

5. The Ld. DR is heard, who has not raised any specific objection.

6. After hearing both the parties and considering the material available on the record, we find that there was a reasonable cause for the delay in filing the present appeal due to COVID-19 pandemic, hence, the delay is hereby condoned and the appeal of the assessee is admitted for adjudication.

7. Briefly the facts of the case are that the assessee filed its return of income on 28/11/2015 declaring a loss of Rs. 29,47,80,832/-. Subsequently, the case of the assessee was selected for complete scrutiny under CASS and one of the reasons for complete scrutiny was to examine matter relating to large share premium amount received by the assessee company during the financial year relevant to impugned assessment year. Subsequently, after issuance of notice and calling for the information and submissions from the assessee, the assessment proceedings were completed and assessed income was determined by the AO at a loss of Rs. 20,99,12,982/- by making an adjustment on account of transfer pricing amounting to Rs. 8,21,51,007/-, addition on account

of ESI/EPF amounting to Rs. 18,81,760/- and disallowance under section 14A amounting to Rs. 8,35,083/-.

7.1 The assessee company thereafter carried the matter in appeal before the Ld. CIT(A) by filing an appeal on 23/01/2019. In the meantime, before the appeal could be taken up for adjudication by the ld CIT(A), the assessee opted for Vivad Se Vishwas (VSV) Scheme 2020 and filed Form No. 1 on 29/01/2021 before the Competent authority. Thereafter after issuance of Form No. 3 dt. 09/02/2021 by the Competent authority, the assessee informed the same to the Ld. CIT(A) and the Ld. CIT(A) granted leave to the assessee to withdraw its appeal against the adjustment and other matters relating to disallowances so made by the AO while passing the assessment order passed under section 143(3) and accordingly, the appeal so filed by the assessee was treated as withdrawn and dismissed by the ld CIT(A) vide order dated 05/03/2021.

7.2 The assessment records were, subsequently, called for and examined by the Ld. Pr. CIT and a show cause u/s 263 dt. 10/03/2021 was issued to the assessee company. In the show cause, the Ld. Pr. CIT has stated that basis perusal of the assessment records and in particular, reasons for selection of case for scrutiny, the notice issued by the AO under section 142(1) dt. 14/06/2017 and questionnaire of even date wherein the AO requisitioned the detail of share capital issued during the year and in response to which, the assessee furnished the information, it is noted that the company has received share premium amounting to Rs. 8,99,63,752/- on issuance of 24,28,827/- Compulsorily Convertible Preference Shares (CCPS) at an premium of Rs. 37.04 per share from non-resident companies based out of Netherlands and Mauritius, during the Financial Year 2014-15 relevant to Assessment Year 2015-16. The Ld. Pr. CIT further stated that on examination of records, it is observed that the method adopted to arrive at the face value of more than Rs. 10/- per share or the valuation report to substantiate the Fair Market Value (FMV) adopted by the

company or such other document to confirm the claim were not furnished during the assessment proceedings. Therefore, the identity, genuineness and credit worthiness of the person / companies from whom the assessee received share capital and premium had not been established. It was accordingly held that the order so passed by the AO under section 143(3) r.w.s. 144C(1) is prima facie erroneous and prejudicial to the interest of the Revenue and the assessee was asked to show cause as to why the order may not be revised under the provisions of Section 263 of the Act. In response, there was no reply/ submissions from the assessee company, thereafter, another notice dt. 17/03/2021 was issued to the assessee company and in response, the assessee company submitted that amount towards share capital is received from foreign parties / non residents i.e; companies registered in Netherlands & Mauritius and these transactions are duly governed and monitored by RBI and all necessary FEMA compliances have been done by the assessee company along with compliances made before the Registrar of Companies. It was submitted that identity and creditworthiness of the parties are proved beyond doubt. It was submitted that the money has been received through the authorized banking channels and there is no question of genuineness of the transactions being doubted. It was submitted that money has been credited to the bank account only after KYC compliances are verified by the bankers. It was accordingly submitted that all the compliances as per the regulatory laws was done by the assessee company which duly proved identity, creditworthiness and genuineness beyond doubt. It was further submitted that as far as the provisions of Section 56(2)(viib) are concerned, the same are applicable only when the consideration for issue of shares is received from the resident persons. In the instant case, the assessee company has received the amount for issue of share from foreign companies where are non- resident for tax purposes, hence there is no question of taxability of premium received in terms of provisions of section 56(2)(viib) of the Act.

7.3 The submissions so filed by the assessee were considered but not found acceptable to the Ld. Pr. CIT. As per the Ld. Pr.CIT, on perusal of the assessment records, it is seen that during the year, the assessee has raised share capital though issuance of 24,28,827 CCPS shares and has received share premium of Rs. 8,99,63,752/- over and above the face value of Rs. 10/- per share in the following manner:

Name of Shareholder	No. of Shares	Face Value	Premium	Premium amount	Total amount received	Allotted on
Bertelsmann Netherland B.V. Amsterdansestrewag, 28,1391 Ab code, The Netherland	9,10,810	10.00	37.04	3,37,36,402/-	4,28,44,502/-	9.2.2015
Kaizun Domestic Scheme, IL&Fs, Financial Centre, Plot C-22, G Block Bandra	7,50,806	10.00	37.04	2,78,09,854/-	3,53,17,914/-	9.2.2015
Kaizun Private Equity, C/o Dtos Ltd. 10th Floor, 19, Cybercity Ebone, Mauritius	7,67,211	10.00	37.04	2,84,17,495	3,60,89,605	9.2.2015

7.4 It was stated by the Ld. Pr. CIT that during the course of assessment proceedings, the AO, vide order sheet entry dt. 21/12/2018, asked the assessee to explain as to why the addition be not made by invoking the provisions of Section 56(2)(viib) and thereafter, accepted the plea of the assessee that the shareholders to whom CCPS are issued are venture capital providers and provisions of Section 56(2)(viib) are not applicable where shares are issued at face value or in case, funds are received from Venture Capitalists. It was held by the Ld. Pr. CIT that the AO simply accepted the version of the assessee that the provisions of Section 56(2)(viib) of the Act are not applicable in the case of the

assessee and no further inquiries were made/conducted by him. It was further held by the Ld. Pr. CIT that the assessee company is education service provider and it can be seen from the unambiguous language of Section 56(2)(viib) that the company which receives premium also has to be a Venture Capital Undertaking which the assessee company is not. Hence the AO accepted the plea of the assessee company without examining the facts, provisions of law and the legal aspects. It was further held by the Ld. Pr. CIT that the assessee company neither furnished valuation report to substantiate the FMV adopted by it nor such documents to confirm its claim during the assessment proceedings. Further the AO has not asked the assessee company to establish identity, genuineness and credit worthiness of the persons / companies from it had received share capital and share premium alongwith evidence in support of the calculation/ method adopted to arrive at face value of more than Rs. 10/- per share and to support its claim that the value of shares issued at the FMV which justifies the premium charged. It was held by the Ld. Pr. CIT that the assessee has issued share at a share premium of Rs. 37.04 per share but the AO has not examined the FMV as per the provisions of Section 56(2)(viib) r.w. Rule 11UA of the Income Tax Rules. Regarding plea of the assessee that the provisions of Section 56(2)(viib) are not applicable in case of non residents, the same was not accepted by the ld Pr. CIT for the reason that one of the investor companies, Kaizun Domestic Scheme, was a domestic company and the share premium was charged from the said company. It was further held by the ld Pr.CIT that even in respect of non-resident investors, the assessee has not filed tax residency certificate in case of the non-resident companies, therefore their residency status is not specified. It was accordingly held by the Ld. Pr. CIT that the AO neither called for relevant documents nor examined the documents filed by the assessee nor considering the legal provisions of the Act. The AO did not examine the issue of face value of shares, identity and creditworthiness of the purchasers of shares and legal provisions and accepted the plea of the assessee that the

provisions of Section 56(2)(viib) are not applicable. It was held by the Ld. Pr. CIT that failure to make proper enquiries / verification to arrive at the correct and complete facts and to apply the correct law makes the assessment order erroneous in so far as prejudicial to the interest of the Revenue and he accordingly recorded her satisfaction to the effect that the assessment order so passed by the AO on 27/12/2018 is not only erroneous but also prejudicial to the interest of the Revenue and has been issued without making proper enquiries either from the assessee or from third party to confirm the realities of the additions made in the capital and income shown by the assessee. Therefore the assessment order was set aside to the file of the AO to pass fresh order after making necessary inquiry/ investigations in the light of the discussion made in the impugned order and after giving due opportunity to the assessee.

8. Against the said findings and directions of the Ld. Pr. CIT, the assessee is in appeal before us. Before we advert to the rival contentions raised by both the parties, it would be relevant to refer to the set aside proceedings undertaken by the AO, pursuant to the order passed by the Ld. Pr. CIT under section 263 of the Act, and the findings of the ld CIT(A) who has since dismissed the appeal of the assessee against the said set-aside order so passed by the AO and which is also under challenge before us by the assessee.

9. In the set aside proceedings, notice under section 142(1) dt. 05/01/2022 and another notice dt. 09/03/2022 was issued by the AO calling for the explanation alongwith supporting documentation from the assessee regarding the observations and the directions of the Ld. Pr. CIT. In response, the assessee vide submission dt. 16/03/2022 submitted that it had issued CCPS at a premium during the year and a statement showing the party-wise details of CCPS issued during the year were submitted alongwith copy of the ledger account of share application money. Further, referring to the provisions of Section 56(2)(viib), it was submitted that the said provision are applicable only when the

consideration for issue of shares is received from a resident person. It was submitted that from the details submitted, it can be observed that the assessee company has received the amount for issue of shares from foreign entities i.e; Non-resident companies registered in Netherlands & Mauritius and hence the provisions of Section 56(2)(viib) are not applicable in respect of premium received from those parties. As regards identity and creditworthiness and the genuineness of the transaction, it was submitted that the money has been received through regular banking channel and copy of the bank statement was submitted. It was submitted that since the money has been received in the bank account from outside India, It can be credited only after full KYC compliance and prescribed process has been followed by the bankers. This proves beyond doubt the identity, creditworthiness and genuineness of the transaction. Copy of the ROC forms and RBI documents for Kaizen Private Equity and Bertelsmann Netherland were also submitted and it was stated that all the compliances as per the regulatory laws is duly done by the assessee company. Regarding submission of ITR acknowledgment of last three years of the share holders, it was submitted that these are independent investors and for non residents investors, ITR copy are not required as the provisions are not applicable. As regards resident investor, it was submitted that the particulars of PAN and address of the investor have already been submitted and the Revenue is free to do any direct enquiry or cross verification from them. It was accordingly submitted that there cannot be any addition of share premium under Section 56(2)(viib) to the total income of the assessee as the identity, creditworthiness and genuineness is duly proved.

10. The submissions so filed by the assessee were considered but not found acceptable to the AO. As per the AO, from the perusal of the details and documents submitted by the assessee company, it can be seen that the assessee has raised capital from three different shareholders, two of them being Non- Residents and the third one is an Indian Company namely Kaizen Domestic

Scheme-1, located in India and hence, Section 56(2)(viib) is rightly applicable in the instant case. Further, referring to the details submitted by the assessee, the AO stated that the assessee has issued 750,806 shares of Rs. 10/- each at a premium of Rs. 37.04 each as against the value of shares as per the audited balance sheet as on 31/03/2014 as per Rule 11UA which comes to 12.51 per share. Further, regarding genuineness, creditworthiness and identity, the assessee did not submit any documents though the onus lies on the assessee and mere payment by account payee cheque is not sacrosanct nor can it make a non genuine transaction as genuine. Thereafter, invoking provision of Section 56(2)(viib), the difference of Rs. 34.53 [Rs. 47.05 – Rs. 12.51] per share was brought to tax by making an addition of Rs. 2,59,25,331/- to the total income of the assessee wherein the assessed loss earlier determined under section 143(3) was brought down to Rs. 18,39,87,651/- as against initial assessed loss at Rs. 20,99,12,982/-.

11. The assessee again carried the matter in appeal before the Ld. CIT(A) and challenged the action of the AO in making addition of share premium on the ground that the AO has erred in holding that identity, credit worthiness of the investor is not proved and secondly making the addition of share premium under section 56(2)(viib) of the Act. It was submitted that the AO has passed the assessment order, consequent to order u/s 263, by making an addition of share premium of Rs. 2.59 Crores received from one of the investor companies, namely, Kaizen Domestic Scheme-1. In this regard, it was submitted that M/s Kaizen Domestic Scheme-1 is a fully independent investor and registered with SEBI as a Venture Capital Fund (VCF) under the SEBI(VCF) Regulations 1996, and SEBI has granted the registration to the said fund as VCF w.e.f 15/09/2009. It was submitted that all the relevant details about the said fund are available publicly on its website, www.kaizenvest.com and all necessary inquiries can be directly done with the investor as the appellant had provided with the PAN and address of the investor. It was further submitted that the assessee company has received

the money through regular banking channel and copy of the bank statement were also submitted during the course of assessment proceedings and were again submitted during the appellate proceedings. Further, copy of the ITR acknowledgement as well as audited financial statement of the investor company was also submitted during the course of appellate proceedings. It was accordingly submitted that the assessee company has proved all the factors like the identity, creditworthiness and genuineness of the transaction and therefore has duly discharged its onus and therefore the addition made by the AO be deleted. Regarding valuation of the shares, it was further submitted that the assessee company had adopted DCF valuation method for valuing the shares and has submitted the valuation report during the course of assessment. It was submitted that the valuation report has been done as per the provisions of Section 56(2)(viib) r.w. Rule 11UA of the Income Tax Rules wherein the assessee has been given the option to choose the valuation method and accordingly the assessee has chosen the DCF method of valuation of share. Further reliance was placed on the various authorities including decision of the Coordinate Jaipur Benches in case of Ms. Rameshwaram Strong Glass(P) Ltd. Vs. The ITO Ward 2(1) Ajmer (in ITA No. 884/JP/2016 dt. 12/07/2018) wherein it was held that Rule 11UA is a specific provision providing for the valuation of the unquoted equity shares and the matter of valuation has been completely left to the discretion of the assessee and it can either choose NAV method or DCF method of valuation and the AO cannot reject the method so applied by the assessee or compel the assessee to follow some other valuation method. Similarly, reliance was placed on the Coordinate Delhi Benches in case of M/s India Today Online Pvt. Ltd. Vs. The ITO Ward 12(2) *(ITA No. 6453 & 6454/Del/2018 order dt. 15/03/2019)*. It was further stated that the AO has not mentioned any reason for not accepting the DCF valuation and has not rejected the report at all and the choice of method to arrive at the FMV lies with the assessee and

which is not disputed or commented by the AO and therefore the addition so made by the AO be deleted.

12. The submissions so filed by the assessee were considered but not found acceptable to the Ld. CIT(A). The Ld. CIT(A) referred to the provisions of Section 68 as well as Section 56(2)(viib) and stated that the objective of introducing the section was to deter the generation and use of unaccounted money done through subscription of shares of a closely held company, at a value which is higher than the FMV of shares of such company and in the instant case, it cannot be denied that the assessee company has received share premium of Rs. 2.59 crores. It was further stated by the Ld. CIT(A) that any premium received by the company in which public is not substantially interested in excess of face value would be treated as income from other sources and satisfactory explanation under section 68 would not save company from excess share premium taxability under section 56(2)(viib) of the Act, and in support, reliance was placed on Hon'ble Kerala High Court decision in case of Sunrise Academy of Medical Specialties (India)Pvt. Ltd. reported in (2018) 96 taxmann.com 43 (Kerala). Further reliance was placed on the findings of Hon'ble Calcutta High Court in case of Pragati Financial Management (P) Ltd. reported in (2017) 182 taxmann.com 12 and it was held that share premium of Rs. 2.59 crores received by the assessee company is taxable under section 56(2)(viib) of the Act and the appeal of the assessee was dismissed.

13. Against the said findings and the decision of the Ld. CIT(A), the assessee is in appeal before us. However, there is no cross-appeal filed by the Revenue meaning thereby that the Revenue is not aggrieved by the findings of the ld CIT(A).

14. During the course of hearing, both the parties were heard at length in respect of exercise of revisionary powers by the ld Pr. CIT u/s 263 of the Act as

well as on merits of the taxability of premium received from resident investor u/s 56(2)(viib) of the Act.

15. The Ld. AR submitted that the AO vide notice dt. 14/06/2017 and questionnaire of even date requisitioned the details of share capital issued during the year and in response, the assessee furnished the requisite information vide its submission dt. 03/07/2017 wherein the assessee gave complete details of the share issue transaction and explained in details through a writeup on the non applicability of section 56(2)(viib). It was further submitted that the AO vide order sheet entry dt. 21/12/2018 also show caused the assessee as to why the addition be not made by invoking provisions of section 56(2)(viib) to which necessary responses were filed. Further referring to the provisions of section 56(2)(viib), it was submitted that there was no reason for the AO to doubt the explanation of the assessee in respect of the non applicability of the provisions of section 56(2)(viib) of the Act as the said provision could only be invoked in case of a resident which in the present case is Kaizen Domestic Scheme which is a Venture Capital Fund which falls under the exclusion as per the proviso to section 56(2)(viib) of the Act and the said provisions are clearly not applicable as far as the non-resident investors are concerned. It was submitted that all three investors are existing investors of the assessee company which is evident from the balance sheet for the year under consideration. It was further submitted that the said investors had made investment in CCPS earlier as well in January 2013 at the same premium of Rs. 37.04/- per share. It was submitted that the assessment for A.Y. 2013-14 has been completed under section 143(1) and the same has attained finality in absence of any further proceedings been initiated by the Revenue either under section 148 or 263 of the Act. It was accordingly submitted that the AO had made adequate and necessary inquiries to examine the issue of large share premium in accordance with the provisions of section 56(2)(viib) of the Act.

16. It was submitted that the Ld. Pr. CIT has admitted that the inquiries in respect of the subject matter have been carried out by the AO and therefore it is not a case of no inquiry / lack of inquiry but a case of inadequate inquiry. Thus Explanation 2 to Section 263 of the Act would not be applicable as the same could only be invoked in a case wherein the AO has not made any inquiry or there is a complete lack of inquiry. It was submitted that Explanation 2 is clarificatory in nature and is not in any manner dilute the basis requirement of the provisions of Section 263(1) of the Act. It was accordingly submitted that during the course of assessment, the AO sought the details and explanation on applicability of section 56(2)(viib) of the Act and has also show caused the assessee as to why the addition should not be made under section 56(2)(viib) of the Act which clearly shows that the AO made reasonable inquiry basis which he came to the conclusion that the provision of section 56(2)(viib) of the Act was not applicable on account of specific language of the said provision which excludes non-resident investors as well as Venture Capital Fund.

17. It was further submitted that the assessee has already settled its case under Vivad Se Vishwas Scheme 2020 and withdraw its appeal pending before the Ld. CIT(A) which was duly allowed. It was submitted that once the case is settled under Vivad Se Vishwas Scheme, the same cannot subsequently be disturbed by initiating revision proceedings under section 263 of the Act and in support, reliance was placed on decision of Hon'ble Madras High Court in case of Gopalakrishnan Rajkumar Vs. PCIT [2022] 140 taxmann.com 394 as well as Hon'ble Gujarat High Court in case of PCIT Vs. Mrs. Swatiben Biharilal Parekh [2023] 156 taxmann.com 267.

18. It was accordingly submitted that the assumption of jurisdiction under section 263 by the Ld. Pr. CIT is not in accordance with law and the same is liable to be set aside.

19. On merits of taxability of premium received by the assessee company from Kaizen Domestic Scheme-1 amounting to Rs 2.59 crores u/s 56(2)(viib) of the Act, it was submitted that the provisions to section 56(2)(viib) lays down an exception and in this regard, first proviso provides that where the consideration for issue of shares is received by a venture capital undertaking from a venture capital company or a Venture Capital Fund, the provisions of section 56(2)(viib) shall not apply.

20. In this regard, it was submitted that Kaizen Domestic Co. is a Venture Capital Fund and the same is evident from its financial statement for A.Y. 2015-16 wherein it is stated that Kaizen Trust is a closed ended fund established as an irrevocable and determinate Trust under the Indian Trust Act, 1882 by way of Amended and Restated Indenture of Trust and registered under the Registration Act, 1908 to carry on the activity of a Venture Capital Fund which was subsequently registered with the Securities & Exchange Board of India (Venture Capital Fund) Regulations, 1996 and a certificate of registration has been granted by the Securities & Exchange Board of India to the said Fund which is effective from 15/09/2009. It was submitted that Kaizen's investment objective is to provide investors with superior risk adjusted returns via a portfolio of significant and long-term equity investments in rapidly growing education sector focused companies either domiciled in India (like the appellant in the instant case) and/or which have significant development or marketing opportunities in India.

21. Further, in order to fall under the exclusion clause of section 56(2)(viib), the consideration for issue of shares ought to be received by a venture capital undertaking ('VCU'), it was submitted that "Venture Capital Undertaking" has been defined in the Explanation (c) to Section 10(23FB) of the Act as under:

> *"Explanation — For the purposes of this clause,—*
>
> *" (c) "venture capital undertaking" means—*
>
> *(i) a venture capital undertaking as defined in clause (n) of regulation 2 of the Venture Capital Funds Regulations; or*

(ii) a venture capital undertaking as defined in clause (aa) of sub-regulation (1) of regulation 2 of the Alternative Investment Funds Regulations."

22. It was submitted that regulation 2(n) of SEBI (VCF) Regulations, 1996 defines the term "venture capital undertaking" as under:

"(n) "venture capital undertaking" means a domestic company—

(i) whose shares are not listed on a recognized stock exchange in India;

(ii) which is engaged in the business for providing services, production or manufacture of article or things or does not include such activities or sectors which are specified in the negative list by the Board with the approval of the Central Government by notification in the Official Gazette in this behalf."

23. It was submitted that the assessee qualifies as a venture capital undertaking due to the following reasons:

i) It is a private company incorporated under the provisions of the Companies Act, 1956 and its shares are not listed on any recognized stock exchange in India.

ii) As required by Regulation 2(n) of SEBI (VCF) Regulations, 1996, the appellant is engaged in the service sector *providing IT services viz., providing a platform to its users where students can learn online from real instructors- powered by a SAAS based business model and providing a platform for students to opt for courses uploaded by various authors and tutors for a marketing fee.*

24. It was submitted that the in addition to the above, the assessee has received the consideration for share premium from a Venture Capital Fund i.e., Kaizen Domestic Scheme, which provides investment only in education centric companies thereby causing the assessee to automatically qualify as a Venture Capital Undertaking. It was accordingly submitted that the assessee qualifies as a venture capital undertaking under the SEBI (VCF) Regulations, 1996 since all the conditions therein are fulfilled in order to hold it as a VCU and as such section 56(2)(viib) is not applicable in the present case. It was submitted that the Coordinate bench of this Tribunal in the case of ACIT vs. Drishti Soft Solutions Pvt. Ltd. (ITA No. 8523/Del/2019), under a similar factual matrix, held that where all the parameters of a venture capital undertaking has been established by the

assessee and the investor is venture capital fund and said facts have not been controverted by the Revenue nor the Department has been able to prove otherwise, in such a case, the transaction would fall under the proviso to section 56(2)(viib) of the Act and accordingly deleted the addition made by the ld. AO under section 56(2)(viib). Further, reliance was placed on the decision of the Kolkata Bench of the ITAT in the case of Milk Mantra Dairy (P.) Ltd. v. Deputy Commissioner of Income-tax 2022] 140 taxmann.com 163 (Kolkata - Trib.) wherein it was held that Section 56(2)(viib) would not be applicable with respect to share premium amount received from venture capital undertaking for issuance of equity shares.

25. Regarding decisions of the Hon'ble Kerala High Court in the case of Sunrise Academy of Medical Specialities (India) Pvt. Ltd. (supra) *and* Hon'ble Calcutta High Court in the case of Pragati Financial Management (P) Ltd. (supra) as referred by the ld CIT(A), it was submitted that these cases are factually dissimilar as it is not related to a transaction between a VCF and a VCU which are outside the purview of section 56(2)(viib) of the Act. Even otherwise, the assessee has already placed on record the financial Statements of Kaizen Domestic Scheme, thereby establishing the creditworthiness, identity and genuineness of the impugned transaction between them.

26. It was accordingly submitted that the addition so made by the AO and confirmed by the ld CIT(A) on account of share premium u/s 56(2)(viib) of the Act be deleted.

27. Per contra, the Ld. CIT/DR has relied on the order of the Ld. Pr. CIT and taken us through the findings of the ld Pr.CIT and submitted that the AO has simply accepted the explanation of the assessee regarding non-applicability of provisions of section 56(2)(viib) of the Act and has not really enquired in terms of assessee company qualifying as venture capital undertaking as well as the

investor company qualifying as venture capital fund as these terms have specific connotation and definitions as per Income tax Act and SEBI regulations as so submitted by the ld AR himself during the course of hearing. It was submitted that there was no material before the AO to form the opinion that the assessee qualifies for exception as having satisfied the twin conditions of being venture capital undertaking and the investor company qualifying as venture capital fund. It was submitted that the order so passed by the AO therefore is clearly erroneous in so far as prejudicial to the interest of the Revenue. It was accordingly submitted that the ld Pr.CIT has rightly exercised his powers u/s 263 of the Act and therefore, there is no legal basis to challenge the order so passed by the ld Pr.CIT u/s 263 of the Act and the order so passed be sustained.

28. On merits of the additions so made by the AO in the set-aside proceedings, the ld Sr. DR has relied on the order passed by the AO as well as that of the ld CIT(A). We have already referred to the findings of the AO as well as the ld CIT(A) and the same are thus not repeated for the sake of brevity. It was further submitted by the ld Sr. DR that as per the directions of the Bench, the paper book filed by the assessee before the Tribunal were submitted to the AO seeking his report and a report has since been received from the AO whereby he has requested the Bench to set aside the matter for detailed verification on the new grounds of appeal raised by the assessee for the first time before the Bench. In this regard, our reference was drawn to the report of ITO, Ward 6(1), Mohali dt. 12/04/2024 and the contents thereof read as under:

> *"Sub : Appeal before the Hon'ble FT AT, Chandigarh in the case of M/s Authorgen Technologies Put Ltd, Mohali (AADCA0494Q) in ITA No. 212/Chd/2023 and 171/Chd/2021 for A. Y. 2015-16 - Regarding*
>
> *Kindly refer to your letter in F. No. CIT(DR)-2/ITAT/Chd/2023-24/930 dated 08.02.2024 and F. No. CIT(DR)-2/ITAT/Chd/2023-24/941 dated 12.02.2024 on the subject cited above vide which the Hon'ble ITAT Bench has sought report on the basis of submission made by the assessee before the bench on how the assessee does not fall under the proviso to section 56(2)(viib) of the Income Tax Act, 1961. The relevant portion of the letter is reproduced here under :-*

> *4. In this regard, I am directed to submit that the assessee has claimed before the Hon'ble ITAT Chandigarh that the case falls under the provision of section 56(2)(viib) of the Income Tax Act, 1961, as it is a venture capital undertaking and receiving investment from Kaizen Domestic Scheme 1 (a scheme of Kaizen Trust), which is a venture capital fund, as there are no findings in the consequential order of either AO or CIT(A). The assessee had submitted documents before the Hon'ble ITAT, which were earlier submitted to Ld. CIT(A) but not to the A.O..*

2. In this case, the order u/s 263 of the Income Tax Act, 1961 for making fresh assessment was passed by the Pr. Commissioner of Income Tax-1, Chandigarh on 23.03.2021 on the issue that the Assessing Officer has not asked the assessee company to establish the identity, Genuineness and Credit worthiness of the persons/ companies from whom it had received share capital and premium. During the course of Assessment proceedings it was seen that the assessee has issued 750,806 shares of Rs. 10 each at a premium of Rs, 37.04 each. However, the FMV value of the said company as per the audited balance sheet of as on 31.03.2014, submitted by the assessee during the course of assessment proceedings was 12.51. From the perusal of the said documents, the FMV of the unquoted shares amounts to Rs. 12.51 and the company has issued shares § Rs. 47.04 per share including premium. Thus as per section 56(2)(viib), the different of RS.34.53 was the excess amount and accordingly Rs.2,59,25,331/- was added back to the total income of the assessee. The assessment order u/s 143(3) r.w.s. 263 r.w.s. 144B of the Income tax Act, 1961 was passed by the FAO after making addition of Rs.2,59,25,331/- as the assessee had not submitted any documents regarding genuineness, credit worthiness and identity of the person/companies from whom it had received share capital and premium. During the course of assessment proceedings, the assessee had not raised this issue that his case falls under the first proviso to section 56(2) (viib) of the Income Tax Act 1961 and that the provision of section 56(2) (viib) of the Income Tax Act 1961 are thus not applicable.

3. Thereafter, the assessee had preferred appeal before the Ld. CIT(A). On perusal of the order of Ld. CIT(A) vide appeal No. NFAC/2014-15/10125915 dated 14.02.2023, it is seen that the assessee has raised following Grounds of Appeal :-

"2. GROUNDS OF APPEAL

1. The learned AO erred in addition of share premium of Rs. 2,59,25,331/-on the ground that identity and creditworthiness of the investor in not proved.

2. The learned AO erred in addition of share premium of Rs. 2.59,25,331/-u/s 56(2)(viib) of the Income Tax Act, 1961.

3. The learned AO erred in initiating penalty proceedings u/s 271(l)(c) of the Income Tax Act, 1961.

4. Your appellant craves leave to add, to amend, alter, delete and/or modify the above grounds of appeal on or before the final date of hearing of this appeal petition."

The decision of the Ld. CIT(A) is reproduced as under:-

5. DECISION

5.1I have carefully considered the submissions of the appellant and also it's further submissions made vide representative's letter dated 8-12-2022.

5.2The fact of the matter is that the appellant had received a share premium of Rs 2.59crores. This is subjected to tax in assessment under section 56(2)(viib) of the Act read with sections 68 of the Act.

5.3 The section 68 of the Act, which is reproduced hereunder:-

" Where any sum is found credited in the books of an assessee maintained for any previous year, and the assessee offers no explanation about the nature and source thereof or the explanation offered by him is not, in the opinion of the Assessing Officer, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year. Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee company shall be deemed to be not satisfactory, unless-

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and
(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory".

5.4 Section 56(2)(viib) was inserted via Finance Act, 2012. The objective of introducing the section was to deter the generation and use of unaccounted money done through subscription of shares of a closely held company, at a value which is higher than the Fair Market Value (FMV) of shares of such company. By virtue of section 56(2)(viib) of the Act, it states that, 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 shall be deemed to be the income of the concerned company chargeable to tax under the head Income from other Sources for the relevant financial year.

5.5 Be it what may, it cannot be denied receipt of share premium of Rs 2.59 crores. In case of a company in which public is not substantially interested, any premium received by said Company on sale of shares, in excess of its face value, would be treated as income from other sources, satisfactory explanation under section would not save Company from excess share premium taxability under section 56(2)(viib). The Kerala High Court has considered a similar point in the case of Sunrise Academy of Medical Specialities (India) Pvt Ltd vide it's decision reported in (2018) 96 taxmann.com 43 (Kerala) in WA. NO 1297 OF 2018.WP(C) NO, 3485 OF 2018 DATED JULY 12, 2018 THE ISSUE WAS:

Section 56. read with section 68, of the Income from other sources Chargeable as (Share premium) Whether in case of a company in which public is not substantially interested, any premium received by said company on sale of shares, in excess of its face value, would be treated as income from other sources under section 56(2)(viib)- Held, yes-Whether this is not controlled by section 68 which as substituted with provisos, provides that when resident investor is not able to explain nature and source for credit seen in books of account of Company or explanation offered is not satisfactory then entire credit would be charged to income tax for that previous year-Held, yes Whether however, if an explanation is offered and it is satisfactorily in case of a company in which public are not substantially interested, then charge to tax will only be to that portion exceeding fair market value determined, in which public is not substantially interested, which

any way has to occur under section 56(2)(viib)-Held, yes (Paras 9 and 10] in favour of revenue)".

5.6 Mere fact that the payment was received by cheque or that the applicants were companies, borne on the file of Registrar of Companies were held to be neutral facts and did not prove that the transaction was genuine. The judgement reported in [2017] 182 taxmann.com 12 (Calcutta) by HIGH COURT OF CALCUTTA in the case of Pragati Financial Management (P) Ltd. supports the view that share premium received is taxable under section 56(2)(viib) of the Act.

5.7 In view of the foregoing, the ground No.l and 2 are dismissed.

6. Ground No.3 relates to initiation of penalty proceedings under section 271(l)(c) of the Act. As these are only proceeds initiated by the AO, and the appellant did not submit any evidences, this ground is dismissed.

7. In the result the appeal is dismissed.

On perusal of the above grounds of appeal and the decision of Ld C1T(A) it is evident, that the assessee has not taken the ground of appeal that in view of the first proviso the provision of section 56(2)(viib) of the Income Tax Act, 1961, are not applicable, during the course of appeal proceedings before the Ld. CIT(A). This ground is taken for the first time by the assessee during the course of proceedings before the Hon'ble ITAT.

The issue before the assessing officer and the Ld. CIT(A) was to verify the indentity, genuineness and the credit worthiness or the persons/ companies from whom the assessee had received share capital and premium. The assessee could not establish the identity genuineness and credit worthiness of the persons / companies from whom it had received share capital either before the assessing officer or before the Ld. CIT(A). The issue that the assess is a venture capital undertaking and it had issued shares to the venture capital fund and it falls under the proviso to section 56(2)(viib) had never been raised by the assessee before.

5. Now during the course of proceedings before the Hon'ble ITAT, the assessee has submitted documents and is claiming that the case of the assessee falls under the proviso of section 56(2)(viib) of the Income Tax Act, 1961. In this regard it is submitted that the documents submitted by the assessee needs to be confronted and detail enquiry and investigation is required to verify the claims of the assessee that it falls under the proviso to section 56(2){viib) of the Income Tax Act, 1961 and that detailed verification can be made only during the course of assessment. It is pertinent to mention here that the assessing officer had further observed that the share were allotted to three parties of which two were NRI and that the assessee had failed to establish the identity/ credit worthiness of the parties on which no specific submissions have been made during appellate proceedings and the finding of the AO to this extent have not been challenged by the assessee.

6 In view of above it is the therefore requested that the proceedings in this case may be set aside on the issue of application of section 56(2)(viib) of the Income Tax Act, 1961 so that the detailed verification can be made on the new grounds of appeal raised by the assessee for the first time before the Bench.

29. In his rejoinder, the ld AR has submitted that it is the assessee's claim since the very beginning that it falls under the exception to section 56(2)(viib) and therefore, the AO is wrong in stating that the assessee has taken fresh ground for the first time before the Tribunal. Further, reliance was placed on the written submissions and the contents thereof read as under:

> *"5. It is pertinent to highlight that during the course of the original assessment proceedings, the issue w.r.t taxability of the share premium received by the Appellant u/s 56(2)(viib) of the Act was raised by the Ld. AO during the course of the original assessment proceedings. Your Honors would appreciate that these facts are clearly evident from the following documents:*
>
> • *Acknowledged copy of the submission filed on July 3, 2017 filed before the Ld. AO during the first round of assessment proceedings (refer page 35 to 38 of the Paper Book filed for ITA No. 171/CHANDI/2021) - On perusal of this document, it is clear that details of share premium received by the Appellant from both the resident and nonresident companies were made available to the Ld. AO. Further, the allegation levelled against the Appellant that the benefit of the exclusionary clause was never claimed by the Appellant during the original assessment proceedings, is entirely incorrect and liable to be rejected. It is to be noted that at page 38 of the Paper Book filed for ITA No. 171/CHANDI/2021, the Appellant has categorically submitted that section 56(2)(viib) would not be applicable where funds have been received from Venture Capitalist.*
>
> • *The original assessment order dated December 27, 2018 further notes that one of the reasons for selection of the case of the Appellant for Complete Scrutiny Assessment was "Large share premium received during the year" in respect of which no addition has been subsequently made by the Ld. AO and no adverse finding has been given in this regard (refer page 46 to 82 of the Paper Book filed for ITA No. 171/CHANDI/2021). Further the Office Note forming part of the original assessment order provides a similar noting. The said Office Note further refers to the submission made by the Appellant on the issue of share premium and applicability of section 56(2)(viib) of the Act. The Ld. AO being satisfied with the reasoning provided by the Appellant did not deem it fit to make any addition on this account (refer page 83 to 84 of the Paper Book filed for ITA No. 171/CHANDI/2021).*
>
> *6. Hence, it is a matter of record that the instant issue emanates directly from the original assessment proceedings.*
>
> *7. Subsequent to the original assessment proceedings, proceedings u/s 263 were initiated against the Appellant vide SCN notice dated March 10, 2021. Eventually, a revision order dated March 23, 2021 was passed by the Principal CIT ('POT) wherein it was held as under:*
>
> *"4.2 Out of the above three persons, two are non-residents being companies pertaining to Netherland and Mauritius as per information given by the assessee. One is a domestic company. During the course of assessment proceedings, vide order sheet entry dated 21.12.2018, the assessee was asked to explain as to why*

the addition by invoking the provisions of Section 56(2)(viib) may not be made. However, the AO accepted the plea of the assessee that "shareholders to whom CCPS are issued are venture capital providers. As per the provisions of Section 56(2)(viib), it is not applicable when shares are issued at Face Value or in case funds are received from Venture Capitalists. The AO simply accepted the version of the assessee that provisions of Section 56(2)(viib) are not applicable in the case of assessee and no other enquiries were made."

Similarly, the PCIT has also observed the applicability of section 56(2)(viib) at para 4.5 of the aforesaid revision order.

8. It is a matter of fact that the impugned issue was taken up by the Ld. AO during the course of the original assessment proceedings as evident from para 4.2 of the order u/s 263 of the Act which refers to an order sheet entry dated December 21, 2018 wherein the Appellant was show caused as to why the addition by invoking the provisions of section 56(2)(viib) of the Act may not be made in the year under consideration.

9. It is also pertinent to note that in the present remand report at para 2, it is stated that the revision order u/s 263 was passed by the PCIT for making fresh assessment on the ground that the Ld. AO had failed to inquire the Appellant about the identity, genuineness and credit worthiness of the persons/companies from whom it has received share capital and premium and for the Appellant to establish the same. The same is also evident from para 2 at page 2 of the assessment order u/s 143(3) r.w.s 263 r.w.s 144B dated March 26, 2022, wherein it has been clearly mentioned that the identity, genuineness and credit worthiness of the companies from whom the Appellant had received the share capital and premium had not been established during the course of the original assessment proceedings. However, your honors would appreciate that the Ld. AO in spite of having said that the present revisional proceedings be limited to the identity, genuineness and credit worthiness of the companies from whom the Appellant had received the share capital and premium, proceeded to examine the provisions of section 56(2)(viib) which has no connection with the direction of the Ld. PCIT as admitted by the Ld. AO herein above.

10. Your Honors would also appreciate that the Ld. AO while passing the assessment order pursuant to the 263 order, failed to consider the documents duly placed on record by the Appellant thereby establishing the identity, genuineness and creditworthiness of the parties involved (refer page 39 to 90 of the Paper Book filed for ITA No. 212/CHANDI/2023) and has instead passed the order in an obscure manner by making addition u/s 56(2)(viib) of the Act in respect of share premium received from the domestic entity viz., Kaizen Domestic Scheme, a venture capital fund and also accepted that no addition is warranted in respect of share premium received from non-resident entities viz., Bertelsmann Netherland BV and Kaizen Private Equity, Mauritius. Accordingly, no comment was made on the identity, genuineness and creditworthiness of the investors even though requisite documents were available with the Ld. AO.

11. During the second round of proceedings before the CIT(A), the Appellant has again made elaborate submissions w.r.t identity, genuineness and creditworthiness of the investors as well as on the valuation of shares, in support of

which relevant documents were filed before the CIT(A) (refer page 91 to 127 of the Paper Book filed for ITA No. 212/CHANDI/2023).

12. It is pertinent to further observe that even from para 3.2 at page 2 of the CIT(A) dated February 14, 2023, it is evident the Ld. PCIT had directed the AO to examine the identity, genuineness and creditworthiness of the transaction related to the issue of Cumulative Convertible Preference Shares and that the same issue was before the CIT(A).

13. Accordingly, the lis on section 56(2)(viib) has existed ever since the original assessment and being subsequently included in the second round of assessment too on account of the share premium received from the resident entity that the Ld. AO invoked section 56(2)(viib) of the Act.

14. In view of the above, it is humbly submitted that the ground on first proviso to section 56(2)(viib) being applicable to the case of the Appellant is not a new one. Accordingly, the same may kindly be adjudicated on the material on record."

30. We have heard the rival contentions and purused the material available on record. Regarding the assumption of revisionary jurisdiction by the Ld. Pr. CIT under section 263 of the Act, we are of the considered view that the Ld. Pr. CIT has rightly exercised the jurisdiction under section 263 of the Act and there is no justifiable basis for us to interfere with his order. Our reasoning for arriving at the said conclusion is as follows. Firstly, it is an undisputed fact that the case of the assessee was selected for complete scrutiny and one of the reasons for complete scrutiny was to examine the matter relating to share premium received by the assessee company during the financial year relating to impugned assessment year. It is also a matter of record that the assessee company had infact received share premium amounting to Rs. 8,99,63,752/- during the financial year as part of issuance of 24,28,827 compulsory convertible preference share having face value of Rs. 10/- per share on which premium of Rs. 37.04 per share has been received by the assessee company. During the course of assessment proceedings, it is also a matter of record that the AO vide notice dt. 14/06/2017 asked the assessee to furnish the requisite information regarding the share capital issued during the year under consideration as well as applicability of the provision of section 56(2)(viib) of the Act. It is also a

matter of record that the assessee did respond to the said notice. What is relevant to examine is the nature of information which has been submitted by the assessee during the course of assessment proceedings and whether the same is relevant and sufficient enough for the AO to examine the matter at hand for which the matter was selected for scrutiny keeping into account the relevant provisions of the Act and in absence of relevant and sufficient information being supplied and called for by the AO basis which reasonable opinion can be formed by the AO, whether the assessment order so passed by the AO can be held as erroneous in so far as prejudicial to the interest of the Revenue.

31. In this regard, from the perusal of the assessee's paper book at page 34, it is noted that the assessee has submitted copy of the details of the share capital issued during the financial year relevant to impugned assessment year by way of a ledger account of the share capital and the contents thereof are as under:

Particulars	Nos. of Shares	Capital Amount	Premium Amount	Issued on
Opening Capital Equity	3,262,027	32,620,270	-	
Opening Capital CCPS	4,676,670	46,766,700	397,558,903	
Rajan Anandan	19,550	195,500		17-Jul-14
Radhika Chopra	63,808	638,080	-	17-Jul-14
Kaizen Private Equity, Mauritius	767,211	7,672,110	28,417,495	9-Feb-**15**
Kaizen Domestic scheme **I,** Mauritius	750,806	7,508,060	27,809,854	9-Feb-lS
Bertelsmann Netherland B.V.	910,810	9,108,100	33,736,402	9-Feb-**15**
TOTAL SHARES	**10,450,882**	**104,508,820**	**487,522,655**	

32. Further, the assessee as part of its submission dt 03/07/2017 available at assessee's paperbook page 35-38 submitted a write-up before the AO stating that there is no impact of large share premium received during the year under the provisions of section 56(2)(viib)of the Act and the contents of the write-up read as under:

"Where a company, not being a company in which the public are substantially interested, receives, in any previous year, from any person being a resident, any consideration for issue of shares that exceeds the face value of such shares, the aggregate consideration received for such shares as exceeds the fair market value of the shares:

Provided that this clause shall not apply where the consideration for issue of shares is received— (i) by a venture capital undertaking from a venture capital company or a venture capital fund; or (ii) by a company from a class or classes of persons as may be notified by the Central Government in this behalf.

Explanation. —For the purposes of this clause,—

(a) the fair market value of the shares shall be the value—
(i) as may be determined in accordance with such method as may be prescribed;
or
(ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licenses, franchises or any other business or commercial rights of similar nature,
whichever is higher;

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

Authorgen Technologies Private Limited (referred to as "Company"), during Assessment Year 2015-16 has issued 19,550 Equity Shares to face Value Rs. 10 each at par value i.e. Rs. 10 to Mr. Rajan Anandan& 63,808 Equity Shares to face Value Rs. 10 each at par value i.e. Rs. 10 to Mrs. Radhika Chopra & hence, raised Rs. 8,33,580 at par value.

Also, company has raised funds by issuing Cumulative Convertible Preference Shares (CCPS) to various investors. The details are as follows:

S.No.	Name of Investor	No. of Shares	Face Value	Fair Value	Capital	Premium	Total
1	Bertelsmann Netherland B.V.	910810	10	47.04	9108100	33736402	42844502
2	Kaizen Trust Domestic	750806	10	47.04	7508060	27809854	35317914
3	Kaizen Private Equity	767211	10	47.04	7672110	28417495	36089605
	Total	2428827			24288270	89963752	114252,022

It is evident from above details that company h3s issued Equity Shares at Face Value & shareholders to whom CCPS are issued venture capital providers. As per the text of section as mentioned above, Section 56(2)(viib) is not applicable when shares are issued st Face value or in case funds are received from Venture Capitalists.

Conclusion: Section 56(2)(viib) of Income Tax Act,1951 is not applicable."

33. The said submissions were taken on record by the AO and thereafter by order sheet entry dt. 21/12/2018, the assessee was asked to show cause as to why the addition be not made by invoking provisions of section 56(2)(viib) of the Act. In response to the show cause, we find that there is nothing on record to suggest that any further information/ documentation was furnished by the assessee and thereafter, the assessment order was passed wherein the AO has not recorded any adverse findings as far as the issue of share premium and invocation of provision of section 56(2)(viib)of the Act is concerned.

34. The question that arises for consideration is whether the aforesaid information by way of write-up (and without any supportive documentation) so submitted by the assessee is sufficient enough for the AO for forming of reasonable opinion as to non-applicability of the provisions of section 56(2)(viib) of the Act in the instant case.

35. In this regard, it would be useful to refer to the said provisions which provide that where the company, not being a company in which the public is substantially interested, received in any previous year from any person being a resident, any consideration for issue of shares that exceed the face value of said shares, the aggregate consideration received for such share as exceed the FMV of the share. It further provides that the said clause shall not apply where the consideration for issue of share is received by Venture Capital undertaking from a Venture Capital Company or a Venture Capital Fund. By way of explanation, the FMV has been specifically defined and also the term "Venture Capital Company", and "Venture Capital Undertaking" have been defined to have the

meaning respectively assigned to them under clause (a), (b) and (c) of explanation 2 to Clause (23FB) of Section 10 of the Income Tax Act.

36. What is therefore relevant to examine is that firstly, the consideration for issue of shares has been received from any person being the resident of India. In other words, where the consideration is received from a Non resident person, the provisions of section 56(2)(viib) of the Act are not applicable. As per Ld. Pr. CIT, there are two non-resident investor companies as per information submitted by the assessee and there is nothing on record that the assessee has filed the tax residency certificate in respect of these non-resident investor companies during the course of assessment proceedings, therefore, their residency status is not satisfied. Even before us, nothing has been stated in terms of furnishing the tax residency certificate of these two investor companies before the AO. In absence thereof, we wonder how the AO could have determined their tax residential status going just by the name of the said companies where not even their addresses were stated before the AO or was he required to call for the tax residency certificate issued to such investor companies as so highlighted and rightly so by the ld Pr.CIT and examine the same before deciding non-applicability of provisions of section 56(2)(viib) of the Act.

37. Regarding the resident investor, the issue that arises for consideration is that in order to fall under exception clause, whether the assessee company qualifies as a "Venture Capital undertaking" and the resident investor company from whom the consideration for issue of share has been received qualifies either as a "Venture Capital company" or "Venture Capital fund". Each of these terms have a specific meaning and definition so specified in the Income Tax Act which in turn refers to the SEBI Regulations and therefore, where the assessee claims that the shareholder to whom CCPS are issued are venture capital providers, is that sufficient enough for the assessee to qualify under the exception clause and sufficient enough for the AO to form an opinion and hold

the assessee to fall under the said exception or the AO was required to examine the matter further by calling additional information/documentation and referring to the SEBI Regulations as to how the assessee qualifies as a Venture Capital undertaking and the investor company qualifies either as Venture Capital Company or Venture Capital Fund. We find that there is nothing on record either in terms of any information/documentation being sought by the AO or supplied by the assessee during the course of assessment proceedings. In particular, there is nothing on record that the resident investor has been registered as a venture capital fund with SEBI in terms of certificate of registration or any other related documentation. Further, there is nothing on record that the AO examined the SEBI regulations and in particular, regulation 2(n) of SEBI(VCF) Regulations, 1996 in order to determine the assessee qualifying as a venture capital undertaking. There is thus no information and no discussion as to how the AO has arrived at a finding that the assessee falls under the exception clause. We therefore agree with the contention of the ld CIT/DR that there was no material before the AO to form the opinion that the assessee qualifies for exception as having satisfied the twin conditions of being venture capital undertaking and the investor company qualifying as venture capital fund. Where in absence of such a critical piece of information and examination thereof, the AO has allowed the assessee necessary benefit of the exception to the provisions of section 56(2)(viib), we have no hesitation but to confirm the findings of the Ld. Pr. CIT where he says that the AO has simply accepted the version of the assessee without necessary examination and verification. We find that where the case of the assessee was selected for complete scrutiny and the matter relating to share premium was one of the reasons for selection of the case for complete scrutiny, it was incumbent on the part of the AO to call for the relevant information and documentation from the assessee which unfortunately has not happened in the instant case as we have noted supra. In such circumstances, where the Ld. Pr. CIT has exercised her jurisdiction under

section 263 of the Act and hold the assessment order so passed by the AO as erroneous and prejudicial to the interest of the Revenue, we find that there is no infirmity in the exercise of such jurisdiction by the ld Pr.CIT and the same is hereby sustained.

38. As far as the ld AR's contention that the assessee has settled its case under Vivad Se Vishwas Scheme 2020 and withdrew its appeal which was pending before the Ld. CIT(A), we find that the said settlement was *qua* the declaration filed by the assessee under Section 4 of the Direct Tax Vivad Se Vishwas Act 2020 and which, in turn, is in respect of disputed income and disputed taxes as arising from the assessment order and not in relation to the whole of the assessment proceedings and more specifically, not *qua* the assessment order. This is also apparent from the provisions of Section 5 of the Direct Tax Vivad Se Vishwas Act, 2020 which provide that the designated authority, on receipt of the declaration, shall by an order determined the amount payable by the declarant in accordance with the provisions of this Act and such an order shall be conclusive as to the matter stated therein and no matter covered by the said order shall be reopened in any other proceedings under the Act. Therefore even in terms of provisions of Section 5 of the Vivad Se Vishwas Act, 2020, there is no bar as far as the exercise of the revisionary jurisdiction by the Ld. Pr. CIT as far as the matter which are not covered in terms of the declaration filed by the assessee and the consequent order so passed by the designated authority. Therefore, we do not find any merit in the submissions of the Ld. AR that once the matter is settled under Vivad Se Vishwas, the same cannot be disturbed by initiating revisionary proceedings under section 263 of the Act. We have also gone through the decisions of Hon'ble Madras High Court in case of GopalaKrishnan Rajkumar (supra) and find that in that case, the subject matter of declaration under VSV Scheme and related tax dispute as well as subject matter of subsequent notice u/s 263 was the same and in that background, the Hon'ble Madras High Court has held that once the petitioners

had opted to settle the dispute under the DTVSV Act, the proceedings initiated u/s 263 have to go. The said decision is thus distinguishable as in the instant case, the subject matter of declaration as well as contents of the show-cause are distinct and doesn't support the case of the assessee. Similar is the case before the Hon'ble Gujarat High Court and therefore, the said decisions doesn't support the case of the assessee.

39. In light of the aforesaid discussions and in the entirety of facts and circumstances of the case, we uphold the order so passed by the Ld. Pr. CIT by invoking her jurisdiction under section 263 of the Act as the order so passed by the AO is clearly erroneous in so far as prejudicial to the interest of the Revenue. There is clearly no material on record and thus, non-examination and non-application of mind by the AO as far as the applicability of provisions of section 56(2)(viib) in respect of consideration received for issuance of CCPS share by the assessee company during the financial year relevant to the impugned assessment year is concerned.

40. Now, coming to the set-aside proceedings pursuant to order passed by the ld Pr.CIT u/s 263 wherein an amount of Rs. 2,59,25,331/- was brought to tax by the AO invoking the provisions of section 56(2)(viib) of the Act. The said amount relates to share premium received from one of the investor company namely Kaizen Domestic Scheme -1. In his findings, the Ld. CIT(A) has upheld the addition so made by the AO holding that sufficient explanation under section 68 would not safe the assessee company from excess share premium taxability under section 56(2)(viib) of the Act. Therefore, the limited issue that arise for our consideration is the taxability of premium received by the assessee company from Kaizen Domesti Scheme -1 amounting to Rs. 2.59 Crores under provision of section 56(2)(viib) of the Act.

41. During the course of hearing, the ld AR, referring to the financial statement of M/s Kaizen Domestic Scheme-1, submitted that Kaizen Domestic

Scheme is a venture capital fund established by way of a Trust under the Indian Trust Act and duly registered with SEBI (Venture Capital Fund Regulation 1996) and is therefore a Venture Capital Fund and the investment so made in the assessee company is by such Venture Capital Fund qualifies for exception as so provided in the proviso the section 56(2)(viib). It was further submitted that the assessee company qualifies as a Venture Capital Undertaking in terms of Section 10(23)FB of the Income tax Act r/w Regulation 2(n) of SEBI (Venture Regulation 1996) and reliance was placed on Coordinate Delhi and Kolkata Benches decisions. In her submissions, the ld Sr. DR has submitted that as per the report of the AO, since the assessee has taken fresh ground of appeal before the Tribunal, the matter require verification and therefore, the same be set-aside to the file of the AO. In his rejoinder, the ld AR has submitted that it is the assessee's claim since the very beginning that it falls under the exception to section 56(2)(viib) and therefore, the AO is wrong in stating that the assessee has taken fresh ground for the first time before the Tribunal.

42. In this regard, we do not agree with the submissions of the AO that the assessee has taken any fresh ground of appeal before us for the first time. We find that right from the original assessment proceedings, it is a consistent stand of the assessee that where the amount has been received from the Venture Capitalists, the provisions of section 56(2)(viib) are not applicable. At the same time, what is equally relevant to note that the assessee has to qualify as venture capital undertaking. As to how the assessee qualifies as a Venture Capital Undertaking and the investor company qualifies as a Venture Capital Fund, we find that the relevant information/documentation has been submitted for the first time before the ld CIT(A) (and not before the AO) during the set aside proceedings. However, there has been no finding recorded to this fact by the Ld. CIT(A). We therefore have a situation where there is no findings of either the AO or the ld CIT(A) and given that the AO in his report has sought time to examine the matter and carry out detailed verification of the contention so

raised by the assessee and documentation so submitted in support thereof, we deem it appropriate to set aside the matter for the limited purpose of verification of assessee's claim under the proviso to section 56(2)(viib) of the Act. The AO will examine all the contention so raised before us including the decisions of Coordinate Benches quoted by the Ld. AR at Bar and decide the matter as per law after providing reasonable opportunity to the assessee.

43. In the result, appeal of the assessee in ITA NO.171/Chd/2021 is dismissed and appeal of the Assessee in ITA No. 212/Chd/2023 is allowed for statistical purposes.

Order pronounced in the open Court on 02/09/2024.

Sd/-	**Sd/-**
आकाश दीप जैन	**विक्रम सिंह यादव**
(AAKASH DEEP JAIN)	**(VIKRAM SINGH YADAV)**
उपाध्यक्ष / VICE PRESIDENT	**लेखा सदस्य/ ACCOUNTANT MEMBER**

AG

आदेश की प्रतिलिपि अग्रेषित/ Copy of the order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent
3. आयकर आयुक्त/ CIT
4. आयकर आयुक्त (अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय आधिकरण, चण्डीगढ़/ DR, ITAT, CHANDIGARH
6. गार्ड फाईल/ Guard File

आदेशानुसार/ By order,
सहायक पंजीकार/ Assistant Registrar