IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "B" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI L.P. SAHU, ACCOUNTANT MEMBER

I.T.A. No.8113/DEL/2018
Assessment Year: 2015-16

Cinestaan Entertainment P. Ltd., 203 Siddharth Chambers, Near IIT, Hauz Khas, New Delhi.	v.	ITO, Ward-6(2), New Delhi.
TAN/PAN: AAFCC 4067R		
(Appellant)		(Respondent)

Appellant by:	Shri Pradeep Dinodia, CA & Shri Ravi Kumar, CA		
Respondent by:	Ms. Nidhi Srivastava, CIT-DR		
Date of hearing:	18	03	2019
Date of pronouncement:	27	05	2019

O R D E R

PER AMIT SHUKLA, JM:

The aforesaid appeal has been filed by the assessee against order, dated 24.09.2018, passed by Ld. CIT (Appeals)-2 for the quantum of assessment u/s 143(3) for the assessment year 2015-16. Following grounds have been raised to challenge the impugned order:

1. *That the order dated 24.09.2018 passed by Ld. Commissioner of income-tax Appeals ('CIT (A)') u/s 250 of the Act is bad in law and void ab-initio.*

Addition in respect of share premium received

2. *That Ld. CIT(A) has erred in law and on facts and circumstances of the case in upholding the addition of Rs. 90,95,46,200/- made by the Ld. AO to the assessee's returned income u/s 56(2)(viib) read with rule 11UA(2)(b) in respect of share premium received on issue of equity shares during the year on wholly erroneous, illegal and untenable grounds:*

   a. *That Ld. CIT(A) has erred in law and on facts and circumstances of the case in upholding the aforesaid addition made by Ld. AO by treating the amount of share premium ought to be received by the assessee as NIL without affording any cogent reasons.*

   b. *That Ld. CIT(A) has erred in law and on facts and circumstances of the case in holding that value of entire share premium received of represents the income of the assessee.*

Rejection of valuation report

3. *That Ld. CIT(A) has erred in law and on facts and circumstances of the case by upholding the aforesaid addition made by the Ld. AO by disregarding the valuation report submitted by assessee on completely whimsical and superficial grounds:*

   a. *That Ld. AO and subsequently Ld. CIT(A) have erred in law and on facts and circumstances of the case in taking a hindsight by comparing the projections made at the time of issuance of shares with the subsequent events and actual financial results despite the settled legal proposition that valuation cannot be judged in light of subsequent events or hindsight.*

   b. *That Ld. AO and subsequently Ld. CIT (A) have erred in not appreciating the role and responsibilities of valuer in the right perspective.*

   c. *That Ld. CIT (A) has erred in law and on facts and circumstances of the case in making several factually* *incorrect statements/ baseless assertions without affording any supporting evidence.*

d. That, without prejudice, Ld. AO and consequently Ld. CIT (A) have erred in law and on facts and circumstances of the case in not computing alternate fair market value relying on any of the prescribed methods [under Sec 56(2)(viib) read with Rule 11 UA(2) of Income Tax Rules] which amounts to dereliction of their statutory duty under the Income Tax Act.

Rejection of valuation methodology

4. *That Ld. AO and subsequently Ld. CIT (A) have erred in law and on facts and circumstances of the case in not appreciating the fact that the valuation of the shares of the assessee is based on the prescribed method (DCF Method) under Rule 11UA (2)(b) by a prescribed expert, i.e., Chartered Accountant, and the same can neither be varied nor disregarded by the Ld.AO for determination of fair market value for the purposes of section 56(2)(viib).*

Questioning the commercial wisdom

5. *That Ld. CIT(A) has grossly erred in law and on facts and circumstances of the case by upholding the action of Ld. AO of making the aforesaid addition by challenging the assessee's commercial wisdom and questioning the investment made by the assessee in compulsorily convertible debentures.*

Penalty & Interest

6. *The Ld. AO has grossly erred in initiating penalty proceedings under section 271(1)(c) of the Act mechanically and without recording any satisfaction for its initiation.*

7. *That the Ld. A.O has erred in law in charging interest u/s 234B of the Act on wholly illegal and untenable grounds.*

2. Ground no. 1 being general in nature does not require any specific adjudication. Main issue has been raised vide ground

nos. 2 to 5, pertaining to addition of share premium received by invoking section 56(2)(viib) of the Act.

3. Briefly stated the facts of the case are that The assessee company was incorporated on 19th September 2013 with the objective of carrying on all kinds of business of production and distribution of feature film, television film, video films, magazine tapes and video cassettes and documentary films etc., production and distribution of contents for TV and Internet and other activities thereto. During the year the assessee was in the initial phase of setting-up of the above business, therefore, there was no business of film production. For assessment year 2015-16, the assessee filed return of income on 28.09.2015 declaring NIL income. The case was selected for scrutiny and order of assessment was passed u/s 143(3) of the Income-tax Act, 1961 ('the Act') vide order dated 31.12.2017 determining the income of the assessee at Rs.90,95,46,200/-. The only addition / disallowance made by the assessing officer is the addition of entire share premium amounting to Rs. 90,95,46,201/- received during the year by the assesse u/s 56(2)(viib) of the Act r.w.r. 11UA of the Income-tax Rules, 1962 ('the Rules').

4. The assessee has received share premium of Rs. 90,95,46,201/- from various subscribers/equity partners as stated before the authorities below:-

S. No	Name of equity partner	Date of Issue	No. of Shares	Premium (Rs.) per	Amount of premium (Rs.)

				share	
1.	Shri Anand Mahindra	06.01.2015; 23.02.2015	4,15,385	1949*	80,95,85,365/-
2.	Shri Rakesh Jhunjhunwala	24.03.2015	19,207	2602	4,99,80,793/-
3.	Shri Radhakishan Damani	24.03.2015	19,207	2602	4,99,80,793/-
	Total		**4,53,799**		**90,95,46,200/-**

**The shares issued to Sh. Anand Mahindra at discount of 25% of valuation, in view of he being an Anchor and early strategic investor and he has also provided comfort letter to assessee's banker.*

5. The above funds were required by the assessee for film production and were raised by way of issue of equity shares to aforesaid equity investors. The shares were issued based on the valuation from the prescribed expert i.e. Chartered Accountant using the DCF method which is a prescribed method under section 56(2)(viib) read with Rule 11UA(2)(b). Based on the said valuation report dt.15.12.2014, the assessee issued the shares to aforesaid equity investors at premium as shown in the table above. During the course of assessment, the assessing officer disregarded the valuation report of the assessee. The main reason for disregarding the valuation of equity shares carried out by the assessee is that projections of revenue as considered for the purpose of valuation do not match with the actual revenues of subsequent years. The AO has alleged that no efforts have been made by the assessee to achieve the projections as made out in the valuation report and hence in his view, the share premium

received by the assessee is without any basis and contrary to the provisions of section 56(2)(viib) r.w.s. 2(24)(xvi) of the Act. The AO has further alleged that assessee has also failed to submit any basis of projections. He is also of the view that in order to achieve the said projections, assessee should have invested the share premium amount to earn some income/return, whereas the assessee has made investment in zero percent debentures of its associate company and hence basic substance of receiving high premium is not justified in the view of AO.

6. Aggrieved by the above assessment order, the assessee filed an appeal before CIT (A)-2. The CIT (A) vide its order dated 24.09.2018 confirmed the action of AO of making addition of entire share premium received. In addition to confirming the addition in assessment order, the CIT (A) has made certain observations in his order alleging that projections were mere paper plans. He also observed that figures in the valuation report have been cooked up without providing any reliable basis as to how the assumptions took place. Further, he observed that under DCF method, it is always possible for the company to decide the proposed value of the share and then travelling back to tailor the figures with the reverse engineering process, to suit its convenience.

7. Before us, Ld. Counsel for the assessee Shri Pradeep Dinodia after narrating the entire facts and issues involved and giving the various chronology of events as to when the shares were issued,

the number of shares issued and the amount of premium received from each equity partners, submitted that the entire share premium amounting to Rs.90.95 Crores received by the assessee during the year in respect of issue of shares has been treated as income by the AO and CIT(A) u/s 56(2)(viib) of the Acton the reasons which are extraneous, arbitrary and unjustifiable. The Ld. Counsel further contended that it is the prerogative of assessee as to how much capital is to be raised based on its long term and short term funding requirements for the purpose of running its business. The capital has been raised by issuing certain number of shares at certain price, which is again within the domain of assessee to decide. The assessee in captioned case issued shares at premium based on the value arrived at by an independent valuer prescribed under the law (i.e. Chartered Accountant) using the prescribed methodology (DCF Methodology). He further stated that it is a well settled legal position that I.T. authorities cannot dictate the terms as to how a businessman/assessee should have conducted its business. I.T. authorities cannot decide whether assessee should have collected premium on its shares or not. It is completely the businessman's discretion, business requirement and investor's willingness which determines the premium that should be collected on issue of shares. He submitted that the provisions of section 56(2)(viib) aimed to check the menace of unaccounted money and are anti-abuse provisions. These provisions have no applicability to genuine business transactions. The genuineness and creditworthiness of the strategic investors is not even doubted either by AO or by CIT (A). The provisions of section 56(2)(viib) require that in case of closely held company, the shares should be issued at its fair market value to resident investors based on notified valuation formula by a notified expert.

8. It has been submitted that the provisions of section 56(2) and section 68 are in the nature of anti-abuse measures aimed at preventing the malafide transactions intended to avoid tax liability and to tackle the problem of black money and were never intended to be made applicable on genuine, bonafide and purely commercial transactions. To substantiate the same the counsel of the assessee relied on the following board circulars and judicial precedents:

- Para 13.2 and 13.4 of CBDT Circular no. 1/2011 dated 6th April, 2011: stating that the provisions of 56(2)(vii) are anti-abuse provisions which were applicable only if an individual or an HUF is the recipient. These provisions were introduced as a counter evasion mechanism to prevent laundering of unaccounted income. The provisions were intended to extend the tax net to such transactions in kind. The intent is not to tax the transactions entered into in the normal course of business or trade, the profits of which are taxable under specific head of income.
- Paragraph no. 155 of Finance Minister's Budget 2012-13 Speech clarifying scope of provisions of section 56(2)(viib). The finance minister clarified in his speech above provisions were introduced as a series of measures to deter the generation and use of unaccounted money by increasing the

onus of proof on closely held companies for funds received from shareholders as well as taxing share premium in excess of fair market value. Continuing with the above argument the assessee's counsel stated that in order to find out the legislative intent or to ascertain the object or purpose behind the legislation, the speech made by the Minister or the mover of the Bill can be taken into consideration by quoting these judicial precedents: **CIT v. Achaldas 217 ITR 799 (SC); Allied Motors (P.) Ltd. v. CIT [1997] 91 Taxman 205/224 ITR 677 (SC); Kerala SIDC v CIT 259 ITR 51 (SC); Soorjmull Nagarmull v CIT 190 ITR 418 (Cal HC); CIT v Vaidya 224 ITR 186 (SC); Loka Shikshana Trust v CIT 101 ITR 234 (SC).** The counsel further highlighted the subsequent statement of Hon'ble Finance Minister made on 12.02.2019 wherein it was said that "no action of any kind was taken against honest companies that had brought genuine money at premium; we will protect honest people". Thus, emphasizing that said provisions were never meant to be applied on genuine transactions.

- The ld counsel then referred CBDT circular no.10/2018 dated 31.12.2018 and CBDT Circular no.03/2019 dated 21.01.2019 wherein the position of department on interpretation of provisions of section 56(2)(viia) dealing with the transfer of shares was clarified. The CBDT while explaining the legislative intent behind introduction of provisions of section 56(2)(viia), inter-alia, stated that said provisions are anti-abuse provisions to prevent the practices of transferring shares of specified company for no or inadequate consideration. The CBDT while interpreting the aforesaid provision followed the settled law that tax statute should be interpreted strictly. The relevant extract of the latter circular were also reproduced as "*Keeping in view the plain reading as well the legislative intent of the section 56(2)(viia) and similar provisions contained in section 56(2) of the Act, being anti-abuse in nature....".* It was further submitted that although the said circular dated 31.12.2018 was withdrawn due to perhaps certain political reasons yet the board had affirmed its view which always stood since introduction of these provisions.

- The AR further relied on various judicial precedents wherein the assessee highlighted that the bonafide business transactions cannot be taxed under 56(2)(vii) and that the provisions of section 56(2) were to strike at the generation and use of unaccounted money and was never intended the honest and bonafide transactions where consideration for transfer was correctly disclosed by the assessee. Reliance was placed on various case laws some of which are:

i) ITO v.K.P. Varghese (131 ITR 597);

"The object and purpose of sub-section (2), as explicated from the speech of the Finance Minister, was not to strike at honest and bona fide transactions where the consideration for the transfer was correctly disclosed by the assessee but to bring within the net of taxation those transactions where the consideration in respect of the transfer was shown at a

lesser figure than that actually received by the assessee, so that they do not escape the charge of tax on capital gains by understatement of the consideration. This was real object and purpose of the enactment of sub-section (2) and the interpretation of this sub-section must fall in line with the advancement of that object and purpose. We must, therefore, accept as the underlying assumption of sub-section (2) that there is understatement of consideration in respect of the transfer and sub-section (2) applies only where the actual consideration received by the assessee is not disclosed and the consideration declared in respect of the transfer is shown at a lesser figure than that actually received"

ii) Subhodh Menon (ITA 676/Mum/2015); Hon'ble ITAT in this case has observed that a bonafide business transactions cannot be taxed u/s 56(2)(vii), especially when there is no whisper of money laundering by the Ld. AO and the consideration for shares have been received through banking channels.

iii) Vaani Estates (P). Ltd v. ITO 172 ITD 629

"Para 7.2……..In the absence of the provisions of Section 56(2)(viia) & Section 56(2)(viib) of the Act it was possible for any company either closely held or otherwise to introduce unaccounted money as investment in equity share of the company with inflated share premium through a deploy as investor. However in the case of the assessee company, the investors source of investment is genuine and not in dispute. The only other lone shareholder of the assessee company is the daughter of late Mr. B.G. Raghupathy and Mrs. Sasikala Raghupathy who is the new entrant in the business of her parents with no scope of possessing undisclosed cash. From these facts, it is evident that in the case of the assessee company, there is no possibility of generation and use of

unaccounted money resulting from the transaction of infusing cash by Mrs. Sasikala Raghupathy into the assessee company in the form of equity share premium."

- The Ld. Counsel also highlighted that pre-requisite of discharging onus under section 68 on the part of assessee is to establish identity, credit worthiness and genuineness of the transaction. The assessee in the present case has submitted the details such as PAN, address, Board Resolutions, PAS-3 (return of allotment) etc. to discharge the initial onus. The Ld. AO himself went ahead and issued notices u/s 133(6) to confirm the identities, credit worthiness and genuineness of the investment transaction. Further the equity partners of the assessee company who made investment of the said sum with premium are seasoned investors of international repute and their investment wisdom, capacity and prudence cannot be challenged or put to question. It is prominent that investors of assessee who have subscribed the shares of assessee at premium are Sh. Anand Gopal Mahindra, Sh. Radha kishan Damani, Sh, Rakesh Jhunjunwala. The investment prowess of these renowned celebrity investors cannot even be doubted, was submitted by assessee's counsel.

9. The Ld. Counsel further submitted that there is no doubt that share premium receipt is always a capital receipt **(*CIT v Stellar 251 ITR 263 (SC); Lowry v. Consolidated African Selection Trust 8 ITR Suppl 88*).** However, it is only because of

the deeming fiction provided in such sections i.e. section 68 or 56(2)(viib) that in certain circumstances the amount received as capital can be deemed to be income. However, section 68 and 56(2)(viib) being the deeming provisions were created to achieve a particular objective as per the legislature intent of introducing such provisions, which was only to be applied to check and tackle the circulation of unaccounted money. He further referred the provisions of section 56(2)(viib) of I.T. Act and Rule 11UA of I.T. rules and submitted that it is important to refer such provisions in order grasp the real intention of such provisions and scope and power of assessing authorities and drew our attention to the relevant provisions.

10. The ld. Counsel submitted that sub clause (ii) of explanation to section 56(2)(viib) is not applicable to the assessee's case and assessee was not required to satisfy the AO about the valuation done. In accordance with sub clause (i) of explanation, the assessee had an option to carry out a valuation and determine the FMV only on the discounted cash flow method (DCF), which was appropriately followed by the assessee. It was submitted that in any case the assessee has the option to issue shares at a price which is higher of clause (i) or clause (ii) of explanation reproduced above. The AR argued that law leaves no discretion, option or mandate with the AO under explanation (i) to section 56(2)(viib) to interfere or vary the option exercised by the assessee as well as the valuation done by the prescribed expert following the prescribed valuation methodology.

11. He further submitted that cardinal principle of interpretation of fiscal statute is that they should be construed strictly and so long as the provision is free from ambiguity, there should be no need to draw any analogy. In support of his submission he relied upon the judgments in the case of CIT v Kasturi237 ITR 24 (SC); Fed of APCCI v State of AP 247 ITR 36 (SC); CIT v Trivedi 183 ITR 420; Greatway v CIT 199 ITR 391; BM Parmar v CIT 235 ITR 679; Modipon v CIT 247 ITR 40;CWT v TulsiDass 256 ITR 73; Vivek Jain v ACIT 337 ITR 74 ; Rajasthan SEB v DCIT 200 ITR 434).(CIT v Surat Cotton 202 ITR 932; Caltex Oil Refining India Ltd. v CIT 202 ITR 375; CIT v Khimji Menshi 194 ITR 192;CITvsKaimal 123 ITR 755; Malik v CIT 124 ITR 522;).

12. The counsel further to substantiate his submission about the strict interpretation of the statute, strongly relied upon the following judgments and circulars:

i. **Dilip Kumar & Co. &Ors.**(Civil Appeal No. 3327 of 2007). The relevant extract of the judgment is reproduced under:

"12. We may, here itself notice that the distinction in interpreting a taxing provision (charging provision) and in the matter of interpretation of exemption notification is too obvious to require any elaboration. Nonetheless, in a nutshell, we may mention that, as observed in Surendra Cotton Oil Mills Case (supra), in the matter of interpretation of charging section of a taxation statute, strict rule of interpretation is mandatory and if there are two views possible in the matter of interpretation of a charging

section, the one favourable to the assessee need to be applied. There is, however, confusion in the matter of interpretation of exemption notification published under taxation statutes and in this area also, the decisions are galore."

ii. Lakshadweep Development Corporation Ltd [(2019) 411 ITR 213 (Kerela HC)]
iii. M/s Microfirm Capital Pvt. Ltd. v. DCIT (ITA no.513/Kol/2017)
iv. Vaani Estates (P). Ltd v. ITO 172 ITD 629
v. CBDT circular no.10/2018 dated 31.12.2018 and CBDT Circular no.03/2019 dated 21.01.2019

The ld Counsel emphasizing the aforesaid rule of strict interpretation submitted that sub clause (ii) of explanation to section 56(2)(viib) is not applicable and assessee was not required to satisfy the ld. AO about the valuation done. In accordance with sub clause (i) of explanation, the appellant had an option to carry out the valuation and determine the FMV of shares only on the discounted cash flow method, which was appropriately done by the assessee and as such AO had not discretion, option or mandate under explanation (i) to section 56(2)(viib) to interfere or vary the option exercised by the assessee as well as the valuation done by the prescribed expert following the prescribed valuation methodology.

13. The Learned Counsel further submitted in support of his ground on rejection of valuation report that the main reason for

rejecting the valuation report of the assessee as also observed by AO and subsequently by CIT(A) is that the projections of revenue as per the valuation do not match with the actual revenues of the assessee of subsequent years which is totally unwarranted and beyond the powers provided under statute. The provisions of section 56(2)(viib) read with Rule 11UA(2) nowhere give the right to assessing officer to examine the valuation report submitted by the assessee. The provisions only require the assessee to get the valuation of shares done by an expert (Chartered Accountant) using the prescribed methodology. In the present case, the assessee has obtained a valuation report from a Chartered Accountant which is based on DCF methodology. The very purpose of getting the valuation done by a Chartered Accountant is to ensure that the valuation is fair and reasonable. Such valuation is to be done by an expert of the subject matter only, which an assessing officer is not expected to be. The Rule nowhere permits the AO tinker with the valuation or methodology applied, assumptions used or to make any adjustment whatsoever. It is submitted that FMV determined in such a manner as prescribed by law is binding upon the revenue

14. On a query being put by the bench as to whether AO had done any of his own valuation, the Ld. Counsel clarified that no such attempt has been made and whole of the premium received by the assessee has been treated as taxable income u/s 56(2)(viib) of the I-T Act.

15. He submitted that law provides two valuation methodologies for valuation. The first method is assets based NAV method and other is DCF Method. NAV method is based on actual numbers as per latest audited financials of the assessee. While on the other hand, DCF is not based on actual, but based on estimated future projections. Therefore, the AO/CIT (A) action of comparing the actual with projections is in violation of DCF valuation principles. The AO/CIT(A) have thus, in a way attempted to test the future NAV with DCF, which is not allowable under law. In support of the arguments that revenue authorities cannot disregard or modify the valuation, ld counsel relied upon the following judgements:

i. **Securities & Exchange Board of India &Ors [2015 ABR 291 -(Bombay HC)]**
ii. **Rameshwaram Strong Glass Pvt Ltd v. ITO [2018-TIOL-1358-ITAT-Jaipur]**
iii. **DQ (International) Ltd. vs. ACIT (ITA 151/Hyd/2015)**

Besides it was further contended that neither assessing officer nor assessee are expert in the subject of valuation which is why the law has provided that assessee is required to get the valuation done from an prescribed outside expert (Chartered Accountant or Merchant Banker). Therefore, once the assessee has obtained the valuation in accordance with the prescription of law, it is not open for revenue authorities to comment upon. In the support of his contention the assessee relied on the following judgements:-

i. **Miheer H. Mafatlal v. Mafatlal Industries Ltd (AIR 1997 SC 506)**

"this court sounded a note of caution observing that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy."

ii. **Rameshwaram Strong Glass Pvt Ltd v. ITO [2018-TIOL-1358-ITAT-Jaipur]**

iii. **G.L. Sultania and Anr. Vs. SEBI (AIR 2007 SC 2172)**

"If the valuer adopts the method of valuation prescribed, or in the absence of any prescribed method, adopts any recognized method of valuation, his valuation cannot be assailed unless it is shown that the valuation was made on a fundamentally erroneous basis, or that a patent mistake had been committed, or the valuer adopted a demonstrably wrong approach or a fundamental error going to the root of the matter."

iv. **ITO v. SBS Properties &FinvestPvt. Ltd. (ITA 278 and 2164/Del/2008)**

v. **Dr.RenukaDatla (Mrs.) v. Solvay Pharmaceuticals B.V. and Ors. [2004] 265 ITR 435 (SC)**

"If the valuer applied the standard methods of valuation, considered the matter from all appropriate angles without taking into account any irrelevant material or eschewing from consideration any relevant material, his valuation could not be challenged on the ground of its being vitiated by fundamental error."

vi. Duncans Industries Ltd. v. State of U.P. and Ors. 2000 ECR 19 (SC)

"The question of valuation is basically a question of fact and this court is normally reluctant to interfere with the finding on such a question of fact if it is based on relevant material on record."

16. The Ld. Counsel submitted that CIT(A) has made unwarranted and serious allegations on the assessee without pointing any fundamental fallacy in the projections or methodology used by the assessee. These are mere bald allegations without any evidence. Further, he submitted that all these accusations by CIT(A) indicate that CIT(A)has beenof the view that statute books should not have the DCF as prescribed methodology as this method is always susceptible to reverse engineering process.

17. The counsel further strongly stated without prejudice to the fact that assessing officer cannot examine the valuation carried out in the manner laid down under, in the instant case, the AO/CIT(A) not only rejected the valuation of the assessee on illegal grounds, but also failed to provide any alternate fair value of shares. It is quite surprising that on the one hand the AO rejects the valuation report of the assessee on whimsical grounds and on the other hand failed to provide any alternate fair value of shares. What law requires is the determination of fair market value as per the prescribed methodology. The ld. AO cannot

escape the statutory requirement of determination of FMV by simply rejecting the valuation report. In this case the ld. AO rejected the valuation report wherein DCF method was applied and then determined value of premium at Nil. The ld AO did not even see any need of following any prescribed method. In its support the counsel relied on the following judicial pronouncements: Bharat HariSinghania and Ors v. CWT [1994] 207 ITR 1 (SC);Vodafone M-Pesa Ltd [2018-TIOL-419-HC-Mum-IT]; Ozoneland Agro Pvt. Ltd. [2013-TIOL-117-ITAT-Mum]; Innoviti Payment Solutions Pvt. Ltd. [ITA no.1278/Bang/2018]; Chandra Kishore Jha v. Mahavir Prasad &Ors. (1999) 8 SCC 266 (SC); State of Uttar Pradesh v. Singhara Singh and Ors. [1963 AIR 358 (SC)]; Medplus Health Services P. Ltd. v. The Income Tax Officer [2016 (48) ITR (Trib)396(Hyderabad)]; Social Media India Ltd. v. ACIT 2013 (28) ITR (Trib) 212 (Hyderabad).

18. Mr. Pradeep Dinodia, highlighted that the allegations of AO and CIT(A) wherein they contended that the assessee has failed to submit and substantiate the basis for projections are erroneous. The counsel in response submitted that the said allegation is factually incorrect since the assessee has furnished the detailed basis of projections before ld AO vide its submission dated 22.12.2017 and again before ld CIT (A) vide its submission dated 04.06.2018. The detailed working included the year wise and movie wise projected revenue, operating expenses, balance sheet and profit & loss etc. of future 5 years till 2020 in accordance with the DCF valuation methodology. It was submitted that basis

of projections were very scientific based on the number of movies to be released in upcoming years. Such movies were segregated in Big, Medium, Small and Micro Films, with reasonable number of movies each year viz., 1 Big Film, 2 Medium Film, and 1 or 2 small or micro film a year. Further, the estimates of projected revenue were also very reasonable and conservative keeping in view the engagement of highly successful directors like Rakesh Om Prakash Mehra (ROPM) who has given block bluster films like 'Bhaag Milkha Bhaag' which made a box office collection of INR 164 Crores, 'Rang De Basanti' which made a box office collection of INR 97 Crores etc and also super hit like 'Delhi-6'. The ld counsel took us through the comparative chart of Track records of above movies as also the projections for movies signed with ROPM to demonstrate that projections were quite reasonable and conservative. Engagement of veteran writers and music directors- Like Gulzar and Shankar Ehsaan Loy, interesting start cast, including the launch of -Anil Kapoor's son- Harshvardhan Kapoor and Shabana Azmi's niece SaiyamiKher; along with veteran actors like Om Puri, Art Malik etc. Keeping in view of engagement of renowned star cast and previous success of directors, the assessee has projected only Rs.55 Crores for 1 Big Film in first year. While for other movies, the projections ranged between Rs. 22 lacs to 50 Crores. Further the projected revenues were discounted in later years to account for fluctuations in economic cycles.It was submitted that by no standards such estimates made in arriving at the valuations could be termed as unrealistic.

He further submitted it is not the case that assessee has not made efforts to achieve these projections. The assessee has been resilient and has made its best efforts to achieve the aforesaid projections. The assessee had received hundreds of film scripts out of which it shortlisted its initial set of movies. It may be noted that assessee has hired best directors and star cast, entered into various agreements and incurred costs as estimated. The first big film 'Mirzya' while on the initial stage generated a huge amount of press inprint media, online media, social media and other platforms with over 100 stories.

19. Then the counsel pointed out to the cost projections made in the DCF method and cost actually incurred on production of above movies by highlighting the comparison of cost of movies actually released with their actual cost, submitted that the assessee has incurred costs as projected. However it is impossible to determine the exact cost or revenue of films at the time of signing them. Moreover, on revenue front, in some case (Satellite and digital revenue), the assessee has exceeded the projected estimates. Therefore, he submitted that projections were not mere paperwork as alleged by CIT(A). The assessee has actually made its best efforts and incurred substantial cost to achieve the projected revenue by incurring the costs. He further pointed out the reasons why assessee could not achieve the projected revenues. The reason explained was that first big movie 'Mirzya' flopped on box office and consequently the assessee's relation with renowned director also soured and agreement got

terminated for the other two major movies ‘ Fannney Khan’, ‘Guitar Guru’ which resulted in substantial losses. In addition another movie ‘Kaalakaandi’ got adversely affected due to actor Saif Ali Khan’s earlier back to back flop films ‘Rangoon’ and ‘Chef’.

20. The counsel then summarized his argument related to the above ground by stating that nature of film industry is such that nobody can predict the success or failure of the film and how much business a film would do. Sometimes big fat movies with super star casts flop, while budget movies with no budgets and not so popular casts do wonders. The nature of business of the assessee was stated to be highly risky, full of promises and pitfalls. The nature of the risk of film business is that of either feast or famine. Neither the AO nor CIT(A) were correct in questioning of commercial wisdom/ expediency wherein the assessee’s commercial wisdom of making investment of funds raised in zero percent compulsorily convertible debentures (CCDs) of group companies was questioned by stating that that assessee should have investment in some instruments which would have yield the return/profits/revenue in accordance with the projections made at time of issue of shares. The counsel argued that the AO and consequently CIT (A) failed to appreciate that these are strategic investments which are made to foray in certain business and not to earn the dividend/interest. Further, investments were made in the group entities to advance the assessee’s own business objective of production of films and

media entertainment. The AO/CIT(A) went beyond their jurisdiction by charting out how the assessee should have conducted its business. In support of the above submission the counsel relied upon the judgments of **S.A. Builders (288 ITR 1)(SC)and CIT v. Panipat Woollen & General Mills Co. Ltd (103 ITR 66)(SC). He further cited the Hon'ble Jurisdictional High Court judgement in case of EKL Appliances Ltd. (ITA no.1068 &1070 of 2011)** wherein it was held:

> *"There is no reason why the OECD guidelines should not be taken as a valid input in the present case in judging the action of the TPO. In fact, the CIT (Appeals) has referred to and applied them and his decision has been affirmed by the Tribunal. These guidelines, in a different form, have been recognized in the tax jurisprudence of our country earlier. It has been held by our courts that it is not for the revenue authorities to dictate to the assessee as to how he should conduct his business and it is not for them to tell the assessee as to what expenditure the assessee can incur. We may refer to a few of these authorities to elucidate the point. In* ***Eastern Investment Ltd. v. CIT [1951] 20 ITR 1 (SC)****, it was held by the Supreme Court that "there are usually many ways in which a given thing can be brought about in business circles but it is not for the Court to decide which of them should have been employed when the Court is deciding a question under Section 12(2) of the Income Tax Act". It was further held in this case that "it is not necessary to show that the expenditure was a profitable one or that in fact any profit was earned". In* ***CIT***

v. Walchand& Co. (P.) Ltd. [1967] 65 ITR 381 (SC)*, it was held by the Supreme Court that in applying the test of commercial expediency for determining whether the expenditure was wholly and exclusively laid out for the purpose of business, reasonableness of the expenditure has to be judged from the point of view of the businessman and not of the Revenue."*

21. On the other hand, Ld. DR submitted that the assessee has not provided the basis and parameters of valuation while applying DCF method of valuation and has not produced any evidence to substantiate the basis of projections. In support of her arguments the DR strongly relied upon the judgement of Hon'ble Delhi ITAT in the case of **Agro Portfolio Private Limited [(2018) 94 taxmann.com 112 (Delhi-Trib.)]** wherein it was pointed out that the merchant banker who was appointed by the assessee to carry out the valuation, conducted no independent enquiry to verify the truth or otherwise the figures furnished by the assessee.*"The merchant bankers solely relied upon an assumed without independent verification the truthfulness accuracy and completeness of the information and the financial data provided by the company. A perusal of this long disclaimer clearly shows that the merchant banker did not do anything reflecting their expertise, except mere applying the formula to the data provided by the assessee."*

22. The DR further highlighted the clause of the valuation report which contained a disclosure of limitation by the valuer wherein the valuer has stated that: "*The Valuation report has been prepared on the basis of the Certified Projected Financials and information provided by the management of the company. Although we have reviewed such data for consistency and reasonableness, we have not....*". She submitted that the valuer has not independently applied his mind and accepted the financial projections made by the assessee. She strongly supported the reasons advanced by AO and CIT(A) in their order and submitted that view taken by the authorities below is the correct view and provisions of section 56(2)(viib) are attracted on the facts of this case.

23. Mr. Pradeep Dinodia, the ld. Counsel of the assessee in rejoinder took us through the valuation report wherein he invited our attention to one of the clause of the valuation Report where the purpose of valuation was clearly stated to be the fulfilment of requirement of section 56 of the Income Tax Act, 1961 for the purpose of issuance of Equity Shares of assessee i.e. Cinestaan Entertainment Private Limited. He further distinguished the ruling of Agro Portfolio Private Limited from the present case of the assessee under various headings as presented in the table below:

S.No.	**AGRO PORTFOLIO PVT. LTD. (Sector – Financial Services)**	**ASSESSEE (CINESTAAN ENTERTAINMENT PVT. LTD). (Sector – Media/ Film)**

S.No.	AGRO PORTFOLIO PVT. LTD. (Sector – Financial Services)	ASSESSEE (CINESTAAN ENTERTAINMENT PVT. LTD). (Sector – Media/ Film)
1.	**AO has questioned Financial Parameters of Valuation Report** From the ITAT Order, it appears that the **assessee (Agro Portfolio) failed to justify any of the financial parameters questioned by the AO in relation to the valuation report (para 5)**; whichinclude: **(1) Beta** **(2) Market Rate of return** **(3) Risk free rate of return** ITAT has observed that despite AO's questioning the above, no responses at all came from assessee. The AO therefore proceeded on best judgment assessment to determine FMV relying on NAV Method.	In case of assessee (FY 2014-15), **neither the Assessing Officer nor CIT (Appeal) has questioned any of the technical / financial parameters** for valuation report (such as beta, risk free rate of return etc.). AO/ CIT (A) hasdisregardedthe valuation report solely on account of comparison of future actual performance with projections [Note: hindsight is not a criteria to reject valuation as held by numerous Court Rulings].Moreso, when reasons for deviation of actual performance from projected revenues have been submitted in detail before both AO and CIT (A) none of them have controverted or even discussed the same in their orders.
2.	**Procedural non-compliance and best judgement order.** ITAT order (para 13) notes that **assessee (Agro Portfolio) did not respond to multiple notices issued** by the Assessing Officer and **therefore AO proceeded to apply NAV method under best judgement assessment.** ITAT order notes (Para 14) that no evidence to justify projections was produced even before the CIT(A). Assessee only argued that a valuation report could not be disturbed by AO.	**Assessee has complied with each and every notice of the AO providing detailed explanation on each aspect.** Detailed submission was filed with AO explaining the basis of projections with reference to track record of the crew, caste etc. Even reasons for deviation from actual projections were explained. All backups for projections were placed on record (both before AO and CIT(A)) While there has been no non-compliance by Assessee, it is

S.No.	AGRO PORTFOLIO PVT. LTD. (Sector – Financial Services)	ASSESSEE (CINESTAAN ENTERTAINMENT PVT. LTD). (Sector – Media/ Film)
		the AO/ CIT(A) who have cursorily brushed aside the voluminous defence put forward by assessee.
3.	**Past Performance of Assessee** From the limited description of the facts in ITAT Order it appears that the assessee **already had history of poor performance or track record as AO has noted that it was carrying forward losses (para 5 of the ITAT Order)**. Therefore, on the facts of the case, this raises a question mark that how positive cash flow projections could have been taken.	For assessee, valuation report is dated (December, 2014) to a time when **all film production operations were yet to commence.** There was no adverse history or performance or track record (post production) available for assessee as that would caste a doubt on projections.
4.	**NAV applied by AO as alternative method** AO has applied Alternative Method (NAV Applied) and determined the value of share at 9.46.	In assessee's case, no alternative method has been applied by AO/ CIT (A) for computation of FMV. AO/ CIT(A) have arbitrarily assumed the premium to be NIL.
5.	**Case of Best Judgement Assessment** This was a case under best judgement assessment as assessee failed to cooperate/ respond to any notices issued by AO.	AO has not resorted to best judgment assessment as all notices issued were duly complied with.
6.	**Reliance on Valuer's Disclaimer** ITAT noted that while valuer has given a disclaimer (*"that valuer did not verify the truth of the projections"*), the assessee (Agro Portfolio) has also completely failed to justify the	For assessee (FY 2014-15), the valuer has stated that the **projections were examined for reasonableness and consistency**. **That apart, assessee has also explained the basis for projections in**

S.No.	AGRO PORTFOLIO PVT. LTD. (Sector – Financial Services)	ASSESSEE (CINESTAAN ENTERTAINMENT PVT. LTD). (Sector – Media/ Film)
	projections.There was no response whatsoever by assessee to justify the projections or respond to queries of AO on financial parameters.	**detail in its submissions before AO/ CIT** (A) which have not been controverted by the tax authorities.

DECISION

25. We have heard the rival contentions, perused the relevant findings given in the impugned orders as well as material referred to before us at the time of hearing. In various grounds of appeal, the sole issue raised by the appellant assessee relates to the addition of Rs.90,95,46,200/- made by the AO, by invoking the deeming provisions of Section 56(2)(viib) by adopting fair market value of the share premium received by the Assessee Company from the investors at Nil. What has been sought to be taxed is mainly the share premium issued on equity shares which according to the AO far exceeded the FMV of the shares. Though facts have been discussed in detail in the foregoing paragraphs, however in the succinct manner, the relevant facts and background are reiterated in order to appreciate the controversy and the issue for adjudication. The assessee company was incorporated on 19th September, 2013, i.e., in the Assessment Year 2014-15, with the objective of carrying of business of production and distribution of feature film, tele films, video films, documentary films etc. During the year under consideration assessee company was in the initial phase of the setting up of the

business, therefore, there was no business of film production as such. The assessee company to start its venture of its film production approached accredited ace investors of India to join in as equity partners, namely, Shri Rakesh Jhunjhunwala, Shri Anand Gopal Mahindra & Shri Radhakishan Damani. The funds were raised by way of issue of equity shares to the aforesaid equity partners and by raising premium on such shares over and above the face value of Rs.10/- per share. The details and quantum of premium received from each of the equity partners are as under:

S.No.	Name of equity partner	Date of Issue	No. Of shares	Premium (Rs.) per share	Amount of premium (Rs.)
1.	Shri Anand Mahindra	06.01.2015; 2302.2015	4,15,385	1949	80,95,85,365/-
2.	Shri Rakesh Jhunjhunwala	24.03.2015	19,207	2602	4,99,80,793/-
3.	Shri Radhakishan Damani	24.03.2015	19,207	2602	4,99,80,793/-
	Total		**4,53,799**		**90,95,46,200/-**

26. The assessee before issuing the shares had got the share valued by Chartered Accountant, i.e., 'Accountant' as provided under Rule 11UA(2) by using the 'DCF Method' which is one of the prescribed method in Rule 11UA(2)(b) r.w.s. 56(2)(viib). Based on the said valuation report dated 15.12.2014, the assessee company had issued the shares to the aforesaid equity partners on premium. The ld. Assessing Officer has discarded the

valuation report of the CA mainly on the ground that valuation of the equity shares carried out by the assessee was based on projection of revenue which did not match with the actual revenues of the subsequent years. He further held that no efforts have been made by the assessee to substantiate the figures of projected revenue in the valuation report and has also failed to submit any basis for projection. Instead, AO held that assessee should have invested the share premium amount to earn some income, whereas assessee has made investment in debentures of its associate company and hence the basic substance of receiving the high premium was not justified. After invoking the provision of Section 56(2)(viib), AO took fair market value of premium at Nil and face value of Rs. 10/- per share.

27. From the perusal of the records and the impugned orders, it transpires that Assessing Officer had also issued notices u/s.133(6) to all the 3 investors to seek confirmation, information and documents pertaining to transaction of issuance of shares. In response to the said notices, Assessing Officer has received all the details and replies directly from these investors confirming the transaction. The venture agreement between the assessee and the investors were also filed before the Assessing Officer and in this regard, our attention was also drawn by the ld. counsel that the investment was to be made by these investors in various phases and transactions and it was only after they have gone by the projection and satisfied with the potentials and credentials of future growth, they were willing to make such huge investment in the '***start-up company***' like assessee. Thus, neither the identity

nor the creditworthiness of the investors nor the genuineness of the transaction can be doubted and in fact the same stands fully established to which Assessing Officer has also not raised any doubt or disputed this fact. Thus, under the deeming provisions of section 68, the test of proving the nature and source of the credit received stood accepted.

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

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

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

"Income from other sources.

56. (1) Income of every kind which is not to be excluded from the total income under this Act shall be chargeable to income-tax under the head "Income from other sources", if it is not chargeable to income-tax under any of the heads specified in section 14, items A to E.

(2) In particular, and without prejudice to the generality of the provisions of sub-section (1), the following incomes, shall be chargeable to income-tax under the head "Income from other sources", namely :—

(i).......

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

Provided that this clause shall not apply where the consideration for issue of shares is received—

(i) by a venture capital undertaking from a venture capital company or a venture capital fund; or

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

***Explanation**—For the purposes of this clause, —*

(a) the fair market value of the shares shall be the value -

*(i) **as may be determined in accordance with such method as may be prescribed**: or*

ii) as may be substantiated by the company to the satisfaction of the Assessing Officer, based on the value, on the date of issue of shares, of its assets, including intangible assets being goodwill, know-how, patents, copyrights, trademarks, licences, franchises or any other business or commercial rights of similar nature,

whichever is higher;"

Further, as per *clause (i)* of the *Explanation* as reproduced above, the FMV is to be determined in accordance with such method as may be prescribed. Clause *(ii)* admittedly is not applicable on the facts of the assessee's case.

The method to determine the FMV is further provided in Rule 11UA(2). The relevant extract of the applicable rules is reproduced below:

> *"11UA. [(1)] For the purposes of section 56 of the Act, the fair market value of a property, other than immovable property, shall be determined in the following manner, namely,—*
>
> *(2) Notwithstanding anything contained in sub-clause (b) of clause (c) of sub-rule (1), the fair market value of unquoted equity shares for the purposes of sub-clause (i) of clause (a) of Explanation to clause (viib) of sub-section (2) of section 56 shall be the value, on the valuation date. of such unquoted equity shares as determined in the following manner under clause (a) or clause (b), at the option of the assessee, namely:—*
>
> *(b) <u>the fair market value of the unquoted equity shares determined by a merchant banker or an accountant as per the Discounted Free Cash Flow method.</u>"*

30. Ergo, the assessee has an option to do the valuation and determine the fair market value either on DCF Method or NAV Method. The assessee being a 'start-up company' having lot of projects in hand had adopted DCF method to value its shares. Under the DCF Method, the fair market value of the share is required to be determined either by the Merchant Banker or by the Chartered Accountant. The valuation of shares based on DCF is basically to see the future year's revenue and profits projected and then discount the same to arrive at the present value of the business. Before us, the ld. counsel from the facts and material placed on record had pointed out that the basis of projection adopted by the valuer was based on very scientific analysis and method, like number of movies to be released in the upcoming

years and such movies were further segregated into big, medium, small and micro films with reasonable number of movies in hand, like one big film, two medium films and one or two small or micro film a year. Further, the estimate of projected revenue was also kept on a conservative side keeping in mind of the following: -

- Engagement of successful directors like Rakesh Om Prakash Mehra who has given block buster films like Bhaag Milkha Bhaag which made a box office collection of INR 164 Crores, and Rang De Basanti which made a box office collection of INR 97 Crores etc. In support Ld. Counsel had referred to Annexure-III, giving details of Track records v. Projections for movies signed with Rakesh Mehra.
- Engagement of veteran writers and music directors-Like Gulzar and Shankar Ehsaan Roy.
- Interesting start cast, including the launch of Anil Kapoor's son- Harshvardhan Kapoor and Shabana Azmi's niece Saiyami Kher; along with veteran actors like Om Puri, Anu Malik etc.
- Keeping in view of engagement of renowned star cast and previous success of directors, the appellant has projected revenue for only Rs. 55 Crores for 1 Big Film in first year which went till Rs. 93.10 Crores in 5th Year. While for other movies, the projections ranged between 22 lacs to 50 Crores. Further the projected revenues were discounted in later years to account for fluctuations in economic cycles.
- The number of movies and total revenue and average revenue for such movies are as projected under:

Particulars	Year 1 (2016	Year 2 (2017)	Year 3 (2018)	Year 4 (2019)	Year 5 (2020)
Number of movies	1 Big, 2 Medium, 1 small, 1 Micro	1 Big, 2 Medium, 1 small, 1 Micro	1 big, 2 Medium, 2 small, 1 Micro	1 Big, 2 Medium, 3 small, 1 Micro	1 Big, 2 Medium, 3 small, 2 Micro
Total revenue projected (Rs. Crores)	121.62	142.50	197.68	238.16	274.76
Average revenue per movie (Rs. crores)	24.32	28.5	32.95	34.02	34.35

31. It has been submitted that the assessee had made all the efforts to achieve these projects and in fact had received 100 films scripts out of which it had short listed its initial stage of movies. The ld. counsel has also drawn our attention on various agreements for production of these films. He also pointed out that the assessee was projected to make five movies which it had actually commenced and released and has also pointed out that assessee has worked upon with 25 movies inception. Not only that, assessee had also taken into account the cost incurred in production of various movies and also the comparison of projected revenue and cost of three movies which were actually released by the assessee with actual revenue and cost, for which separate annexure were filed before us. Nowhere the Assessing Officer and ld. CIT (A) has either disputed the details of projects, revenues, cost incurred and the manner in which it was substantiated by the actual revenue. In fact, the projected revenue really commensurate with the actual state of affairs based on subsequent year financials. It has been pointed out that

assessee had incurred huge cost which were precisely as per the estimates as projected. However, the revenue could not be generated as much expected, because the film did not do well in the box office. Ld. Counsel has also highlighted various reasons as to why assessee could not achieve the projected revenue from various documentary evidences. None of these averments and the and the manner in which the valuation of the shares has been adopted in the valuation report has been disputed by the Assessing Officer or by the ld. CIT(A) or any material facts have been brought on record to show that either the methodology or the contents of the report are not correct.

32. What is seen here is that, both the authorities have questioned the assessee's commercial wisdom for making the investment of funds raised in 0% compulsorily convertible debentures of group companies. They are trying to suggest that assessee should have made investment in some instrument which could have yielded return/ profit in the revenue projection made at the time of issuance of shares, without understanding that strategic investments and risks are undertaken for appreciation of capital and larger returns and not simply dividend and interest. Any businessman or entrepreneur, visualise the business based on certain future projection and undertakes all kind of risks. It is the risk factor alone which gives a higher return to a businessman and the income tax department or revenue official cannot guide a businessman in which manner risk has to be undertaken. Such an approach of the revenue has been judicially frowned by the Hon'ble Apex Court on several

occasions, for instance in the case of SA Builders, 288 ITR 1 (SC) and CIT vs. Panipat Woollen and General Mills Company Ltd., 103 ITR 66 (SC). The Courts have held that Income Tax Department cannot sit in the armchair of businessman to decide what is profitable and how the business should be carried out. Commercial expediency has to be seen from the point of view of businessman. Here in this case if the investment has made keeping assessee's own business objective of projection of films and media entertainment, then such commercial wisdom cannot be questioned. Even the prescribed Rule 11UA (2) does not give any power to the Assessing Officer to examine or substitute his own value in place of the value determined or requires any satisfaction on the part of the Assessing Officer to tinker with such valuation. Here, in this case, Assessing Officer has not substituted any of his own method or valuation albeit has simply rejected the valuation of the assessee.

33. Section 56(2) (viib) is a deeming provision and one cannot expand the meaning of scope of any word while interpreting such deeming provision. If the statute provides that the valuation has to be done as per the prescribed method and if one of the prescribed methods has been adopted by the assessee, then Assessing Officer has to accept the same and in case he is not satisfied, then we do not we find any express provision under the Act or rules, where Assessing Officer can adopt his own valuation in DCF method or get it valued by some different Valuer. There has to be some enabling provision under the Rule or the Act where Assessing Officer has been given a power to tinker with the

valuation report obtained by an independent valuer as per the qualification given in the Rule 11U. Here, in this case, Assessing Officer has tinkered with DCF methodology and rejected by comparing the projections with actual figures. The Rules provide for two valuation methodologies, one is assets based NAV method which is based on actual numbers as per latest audited financials of the assessee company. Whereas in a DCF method, the value is based on estimated future projection. These projections are based on various factors and projections made by the management and the Valuer, like growth of the company, economic/market conditions, business conditions, expected demand and supply, cost of capital and host of other factors. These factors are considered based on some reasonable approach and they cannot be evaluated purely based on arithmetical precision as value is always worked out based on approximation and catena of underline facts and assumptions. Nevertheless, at the time when valuation is made, it is based on reflections of the potential value of business at that particular time and also keeping in mind underline factors that may change over the period of time and thus, the value which is relevant today may not be relevant after certain period of time. Precisely, these factors have been judicially appreciated in various judgments some of which have been relied upon by the ld. Counsel, for instance: -

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

"48.6 Thirdly, it is a well settled position of law with regard to the valuation. that valuation is not an exact science and can never be done with arithmetic precision. <u>The attempt on the part of SEBI to</u>

challenge the valuation which is bu its very nature based on projections by applying what is essentially a hindsight view that the performance did not match the projection is unknown to the law on valuations. Valuation being an exercise required to be conducted at a particular point of time has of necessity to be carried out on the basis of whatever information is available on the date of the valuation and a projection of future revenue that valuer may fairly make on the basis of such information."

ii) Rameshwaram Strong Glass Pvt. Ltd. v. ITO [2018-TIOL-1358-ITAT- Jaipur]

"4.5.2. Before examining the fairness or reasonableness of valuation report submitted by the assessee we have to bear in mind the DCF Method and is essentially based on the projections (estimates) only and hence these projections cannot be compared with the actuals to expect the same figures as were projected. The valuer has to make forecast on the basis of some material but to estimate the exact figure is beyond its control. At the time of making a valuation for the purpose of determination of the fair market value, the past history may or may not be available in a given case and therefore, the other relevant factors may be considered. The projections are affected by various factors hence in the case of company where there is no commencement of production or of the business, does not mean that its share cannot command any premium. For such cases, the concept of start-up is a good example and as submitted the income-tax Act also recognized and encouraging the start-ups."

iii) DQ (International) Ltd. vs. ACIT (ITA 151/Hyd/2015)

"10...... In our considered view, for valuation of an intangible asset, only the future projections along can be adopted and such valuation

cannot be reviewed with actuals after 3 or 4 years down the line. Accordingly, the grounds raised by the assessee are allowed".

The aforesaid ratios clearly endorsed our view as above.

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

35. There is another very important angle to view such cases, is that, here the shares have not been subscribed by any sister concern or closely related person, but by an outside investors like, Anand Mahindra, Rakesh Jhunjhunwala, and Radhakishan Damania, who are one of the top investors and businessman of the country and if they have seen certain potential and accepted this valuation, then how AO or Ld. CIT(A) can question their wisdom. It is only when they have seen future potentials that they have invested around Rs.91 crore in the current year and also huge sums in the subsequent years as informed by the ld. counsel. The investors like these persons will not make any investment merely to give dole or carry out any charity to a start-up company, albeit their decision is guided by business and commercial prudence to evaluate a start-up company like assessee, what they can achieve in future. It has been informed that these investors are now the major shareholder of the assessee company and they cannot become such a huge equity stock holder if they do not foresee any future in the assessee company. In a way Revenue is trying to question even the

commercial prudence of such big investors like. According to the Assessing Officer either these investors should not have made investments because the fair market value of the share is Nil or assessee should have further invested in securities earning interest or dividend. Thus, under these facts and circumstances of the case, we do not approve the approach and the finding of the ld. Assessing Officer or ld. CIT(A) so to take the fair market value of the share at 'Nil' under the provision of Section 56(2)(viib) and thereby making the addition of Rs.90.95 crores. The other points and various other arguments raised by the ld. counsel which kept open as same has been rendered purely academic in view of finding given above.

36. Other grounds are either consequential or have become academic, hence same are treated as infructuous. In the result appeal of the appellant assessee is allowed.

Order pronounced in the open Court on 27th May, 2019.

Sd/-	Sd/-
[L.P. SAHU]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 27th May, 2019

PKK: