

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH 'H', NEW DELHI**

**BEFORE DR. B. R.R. KUMAR, ACCOUNTANT MEMBER  
AND  
SH. SUDHIR KUMAR, JUDICIAL MEMBER**

ITA No.81/Del/2021

Assessment Year: 2016-17

<b>M/s. Punyah Building Materials Pvt. Ltd. House No.1002, Near talab Shiv Colony, Old Faridabad Ballahgarh Haryana 122002 PAN No.AAGCP8742B</b>	<b>Vs</b>	<b>ITO Ward-2 (1) Faridabad Haryana</b>
(APPELLANT)		(RESPONDENT)

ITA No.86/Del/2021

Assessment Year: 2016-17

<b>Sparsh Beauty Care Pvt. Ltd. Plot No.1066, Near Janta Barat Ghar Baba Nagar, Faridabad Haryana 121002 PAN No.AASCS2575D</b>	<b>Vs</b>	<b>ITO Ward-2 (4) Faridabad Haryana</b>
(APPELLANT)		(RESPONDENT)

ITA No.80/Del/2021

Assessment Year: 2016-17

<b>Speedy Courier Services Pvt. Ltd. Plot No.1022, Near Talab Shiv Colony, Faridabad Haryana PAN No.AASCS2579R</b>	<b>Vs</b>	<b>ITO Ward- 2 (4) Faridabad</b>
(APPELLANT)		(RESPONDENT)

Appellants by	<b>Sh.Rajiv Saxena, Advocate</b>
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	<b>Ms. Sumangla Saxena, Advocate</b>
Respondent by	<b>Sh. Amit Katoch Sr DR</b>

Date of hearing:	25/07/2024
Date of Pronouncement:	05/09/2024

### **ORDER**

#### **PER SUDHIR KUMAR, JM:**

These appeals by the assessee are directed against the order of the Commissioner of Income Tax (Appeal), Faridabad [hereinafter referred to as "CIT(A)"], vide order dated 15.03.2020, 19.03.2020 and 19.03.2020 pertaining to A.Y. 2016-17 and arises out of the order passed by the Assessing Officer dated 27.12.2018, 15.12.2018 and 15.12.2018 under Section 143(3) of the Act, 1961 [hereinafter referred as 'the Act'].

#### **CONCISE GROUNDS OF APPEAL**

*1. That the Ld. CIT (A) has erred in law as well as on facts in confirming addition of Rs. 95,00,000/- u/s 68 of the Income Tax Act, 1961 despite furnishing all the documentary evidence for establishing identity, creditworthiness of the investors and the genuineness of the transaction.*

*2. That the Ld. CIT (A) has erred in law as well as on facts in enhancing the income of appellant u/s 251(1) by a sum of Rs. 76,00,000/- under the head income from other sources by applying section 56(2)(viib) of the Act on protective basis and rejecting the valuation of shares as determined as per NAV method provided under Rule 11UA(2)(a) of Income Tax Rules, 1962.*

*3. That the Ld. CIT(A) has erred in law as well as on facts in initiating the penalty proceedings u/s 271(1)(c) of the Act.*

2. The brief facts of the cases are that the returns of income were e-filed by the assessee and the same were processed u/s. 143 (1). The cases were selected for limited scrutiny under CASS to verify “whether the funds received in the form of share premium are from disclosed sources or not. Notice u/s 143(2) of the Act and notice u/s 142(1) with questionnaire were issued to the assessee company. The AO issued the notice u/s 131 of the Act to the assessee for personal deposition of the Directors/Pr officers. The AO made the addition of the entire share premium and share capital to the income of the assessee company treated as unexplained income u/s 68 of the Act.

3. Aggrieved by the assessment orders made by AO against the assessee companies the assessee have preferred appeal before the CIT(A). The Ld CIT(A ) upheld the additions made by AO and enhanced income of the assessee u/s 251(1) read with 56(2)(viib) of the Act. The assesseees have filed the above captioned appeals before us.

4. The Ld. Counsel for the assessees summarizing the issues involved in the above appeals, filed a chart showing common issues involved in the captioned Appeals which reproduced as under :-

S.No.	Particulars	M/s. Speedy Courier Services Pvt. Ltd.	M/s. Punyah Building Pvt. Ltd.	M/s. Sparsh Beauty Care Pvt. Ltd.
1	Addition made by the Ld. AO u/s. 68 of the Act.	Rs.88,00,000/-	Rs.95,00,000/-	Rs.95,00,000/-
2	Addition confirmed sustained by CIT(A) u/s. 68 of the IT Act on account of shares capital invested.	Rs.88,00,000/-	Rs.95,00,000/-	Rs.95,00,000/-
3.	Enhancement of income u/s. 251(1) r.w.s. 56 (2) (viib) – income by CIT(A) on protective basis.	Rs.70,40,000/-	Rs.76,00,000/-	Rs.76,00,000/-
4	Investment made by the investor companies in preceding years	Rs.83,00,000/-	N/A	N/A
5	Details of investors who made investment during the	M/s. Cee Aar Décor (P) Ltd. (Rs.25,00,000/- ) on 27.01.2014	N/A	N/A

	preceding years for which addition is made	<p>M/s. Herculese Builders (P) Ltd. (Rs.25,00,000) on 09.01.2015</p> <p>M/s. Metalcity Constructions Kovai (P) Ltd. (Rs.17,00,000/-) on 03.10.2013</p> <p>M/s. Texcity Constructions (p) Ltd. (Rs.16,00,000/-) on 03.10.2013</p>		
6	Investment made by the investor companies during the year in concern.	Rs.5,00,000/-	Rs.95,00,000/-	Rs.95,00,000/-
7	Details of the investors who made the investment during the year.	M/s. Goodluck Industries (P) Ltd. (Rs.5,00,000/- on 09.09.2015)	M/s. Metalcity Constructions Kovai (P) Ltd. (Rs.45,00,000/- on 26.06.2015)	M/s. Pearl Durobuild (P) Ltd. (Rs.10,00,000/- On 16.07.2015 and Rs.15,00,000 on 31.07.2015)
			M/s. Goodluck Industries (P) Ltd. (Rs.25,00,000/- on 21.10.2015) M/s. Rishi Credit & Industries (P)	M/s. Pearl Multicon Pvt. Ltd. (Rs.20,00,000/- on 22.07.2015) M/s. Goodluck

			Ltd. (Rs.25,00,000/- on 21.10.2015)	Industries (P) Ltd. (Rs.10,00,000/- on 26.10.2015) M/s. Rishi Credit & Industries (P) Ltd. (Rs.40,00,000/- on 26.10.2015)
8.	Evidences furnished in the PB	M/s. Good luck Industries (P) Ltd. (PB Pg131 to 155)	M/s. Metalcity Constructions Kovai (P) O Ltd. (PB 143-165)  M/s. Rishi Credit & Industries (P) Ltd. (PB 166-188)	M/s.Pearl Multicon Pvt. Ltd. (PB 105-130) M/s. Good luck Industries Ltd. (PB 131-154) M/s. Rishi Credit & Industries (P) Ltd. (PB 155-179)

5. The Ld counsel for the assessee has submitted that the CIT(A) has committed error by sustaining the addition made u/s 68 of the Act. The assesseees have given the names, addresses and PAN number of the investors and also entries in ROC Website. The assesseees have proved that identity of investors, creditworthiness of the investors and genuineness of the transaction as required u/s of 68 of the Act by filing the documents. In support their contention they have filed the paper books in the appeals. He has submitted that assesseees have discharged their onus as required u/s 68 of the Act, therefore sought for deletion of the addition. The Ld counsel has also relied on the following decisions;-

- *Order of Tribunal in the matter of Mantram Commodities pvt. Ltd. Vs. ITO in ITA No. 6170/Del/2019 for Assessment Year 2015-16.*

- *Order of Tribunal in the matter of Mantram Commodities Pvt. Ltd. Vs. ITO in ITA No. 105/Del/2021 for Assessment Year 2016-17.*
- *Order of Tribunal in the matter of Dayalu Iron & Steel Pvt. Ltd. Vs. ITO in ITA No. 6173/Del/2019, Dayalu Fashion Pvt. Ltd. Vs. ITO in IETA o. 6174/Del/2019 and Devesh Cinemas Pvt. Ltd. Vs. ITO in ITA No. 6184/Del/2019 for Assessment Year 2015-16*
- *Order of Tribunal in the matter of Sparsh Beauty Care Pvt. Ltd. Vs. ITO in ITA No. 170 and 246/Del/2022 for Assessment Year 2015-16.*
- *Judgment of Hon'ble High Court of Delhi in the matter of Pr. Commissioner of Income Tax-2 Vs. M/s Cinestan Entertainment Pvt. Ltd. in ITA No. 1007/Del/2019.*
- *Judgment of Hon'ble High Court of Delhi in the matter of Pr. Commissioner of Income Tax-2 Vs. Enrich Agro Food Products Pvt. Ltd. in reported [2023] 148 taxmann.com 26.*
- *Order of Tribunal in the matter of Abhirvey Projects Pvt. Ltd. Vs. ACIT in ITA No. 9400/Del/2019 for Assessment Year 2015-16.*
- *Copy of Judgment of Hon'ble Apex Court in the matter of Pr. Commissioner of Income Tax- Vs. Rohtak Chain Co. Pvt. Ltd. in reported [2019] 110 taxmann.com 59.*
- *Copy of Judgment of Hon'ble Apex Court in the matter of Pr. Commissioner of Income Tax- Vs. BharatSecurities . Pvt. Ltd. in reported [2020] 113 taxmann.com 32.*
- *Copy of Judgment of Hon'ble High Court of Madhya Pradesh in the matter of Pr. Commissioner of Income Tax- Vs.Chain House International Pvt. Ltd. In reported [2018] 98 taxmann.com 47.”*

6. The Ld DR has submitted that assesseees have not produced the requisite original documents to satisfied the ingredients of section 68 of the Act. He has not filed the confirmation of ITR, balance sheet, Bank account etc in some cases. The assesseees have failed to discharge their burden u/s 68 of the Act. Therefore he prayed that the orders of the Ld CIT(A) be upheld.

7. We have heard the both parties and perused the material available on record.

8. In the instant case the assesseees have filed the return of income and the same was processed u/s 143(1) of the act and the cases were selected for limited scrutiny under CASS to verify 'Whether the funds received in the form of share premium are from disclosed sources'. During the proceedings the AO issued statutory notice to the assesseees. In the response to the notice the assesseees have filed certain documents such as certificate of incorporation MOA/AOA, auditor's report along with balance sheet and profit and loss account for the relevant Financial Year 2016-17, ledger account of Axis Bank, bank statement. The assesseees have also furnished the documents with respect to investor companies such as confirmation of accounts, share application, confirmation of accounts share certificate, certification of incorporation along with memorandum and article of association and article of association, and profit and loss account for the relevant F.Y. 2016-17. The particulars of the investment made by the investors as per assesseees as under:-

1- M/s Punyah Building Materials Pvt Ltd. ITA NO 81/Del/2021  
A.Y.2016-17

Sl no	particulars	
1	Details of the investors who made the investment during the year	M/S Metalcity Constructions Kovai (P) Ltd Rs 45,00,000/- on 26-06-2015 M/S Good Luck Industries (P) Ltd Rs 2500000/- on 21-10-2015 M/s Rishi Credit & Industries (P) ltd Rs 2500000/- on 21-10-



		2015
2	Evidence furnished in PB	M/S Metalcity Constructions Kovai (P) Ltd (PB-119-142) M/S Good Luck Industries (P) Ltd (PB-143-165) M/s Rishi Credit & Industries (P) ltd (PB_166-188)

2-M/s Speedy Courier services Pvt. Ltd. ITANo 80/Del/2021 A.Y 2016-17

Sl no	particulars	
1	Details of the investors who made the investment during the year	M/s Good Luck Industries (P) Ltd RS 500000/-on 09-09-2015
2	Evidence furnished in PB	M/S Good Luck Industries (P) Ltd (PB-131-155)

3-M/s Sparsh Beauty care Pvt. Ltd. ITANo 86/Del/2021 A.Y 2016-17

Sl no	particulars	
1	Details of the investors who made the investment during the year	M/S Pearl Durobuild (P) Ltd Rs 10,00,000/- on 26-06-2015 and Rs 1500000/-on 31-07-

		2015 M/S Pearl Multicon (P) Ltd Rs 2000000/- on 22-07-2015 M/s Good luck Industries (P) Ltd Rs 1000000/-on 26-10- 2015 M/s Rishi Credit &Industries (P) ltd Rs 4000000/-on 26-10- 2015
2	Evidence furnished in PB	M/S Pearl Multicon (P) Ltd (PB-105-130) M/S Good luck Industries (P) Ltd (PB- 131-154) M/s Rishi Credit &Industries (P) ltd (PB- 155-179)

9. On the perusal of the documents produced by the assessee, it is found that the assessee in order to prove the genuineness of the transaction identity and creditworthiness of the investors produced the copy of the certificate of incorporation along with MAO and AOA ,copy of auditor's report ,balance sheet, trading and profit and loss account along with notes of financial statement, copy of acknowledgement of return of income for A.Y.2016-17 along with computation of income tax, copy of share application form, copy of confirmation of account, copy of bank

account statement and copy of valuation report as per Rule 11U(2) of the Rules. Apart from the same, those companies are active in the MCA web site and credentials could be verified by the Department. It is the case of the assessee that they have filed all documents to prove the genuineness of the transactions so the transactions cannot be doubted.

10. The Ld. DR has stated that the assesseees have not filed the documents in relation to the aforesaid investors. The Ld CIT(A) appreciated the documents, but did not agree with the assesses despite there were nothing brought on record contrary to the documents brought to the record by the assesses.

11. Further, on a reading of section 56(2)(viib) of the Act ,it becomes clear that fair market value of shares as on date of sale has to be determined by applying the methodology provided under rule 11UA of the Rules. As per rule 11UA(2)(b) the fair market value of equity shares has to be decided by applying the methodology as provided under clause (a) or clause (b) at the option of the assessee. In the instant case the assesseees have got fair market value of the shares determined through an accountant and follow the Act.

12. While dealing with an identical issue, the Coordinate Bench in case of M/s. Dayalu Iron & Steel Pvt. Ltd. (supra) has held as under :-

*"12. The Ld. A.O while making an addition u/s 68 of the Act raised question over the ne of the transaction source of funds invested. Further held that, the investor companies do not have produced creditworthiness to fund the assessee company which has been confirmed by the CIT(A) and the CIT(A) has also rejected the valuation report. The assessee in response to notice u/s 142 has produced following documents which have been also in the paper book before us:-*

<i>Particulars</i>	<i>Page no of paper book</i>
<i>Certificate of Incorporation and MOA &amp; AOA</i>	<i>1-34</i>
<i>Independent Auditors Report, Balance Sheet as at 31.03.2015, Profit and Loss Account for the year ended March 31, 2015 along with notes to financial statement for the year ended March 31, 2015</i>	<i>35-47</i>
<i>Copy of acknowledgement of Income Tax Return along with ITR 6 and Computation of Income</i>	<i>48-82</i>
<i>Bank book and Bank statement for the period from 1.4.2014 to 31.3.2015</i>	<i>83-84</i>
<i>Ledger account of the bank book in the books of the appellant company</i>	<i>85</i>
<i>Valuation Reprot under Rule 11UA92)(b) of the Income Tax Rules, 1962 from the Chartered Accountant as per Discounted Cash Flow Method.</i>	<i>86-89</i>

13. On going through the order of A.O and Ld.CIT(A) it is found that the authorities have just brush aside the documents produced by the assessee and without making any enquiry about authenticity of the documents furnished and without bringing any material or making enquiry came to conclusion that the assessee company is not worth enough to fetch the share premium of Rs. 76,00,000/-. The authorities below without verifying the veracity of the documents from the publically available data on the web site of MCA IT Department. Once the assessee provided the names, addresses and Pan, particulars and ROC details of the investors. The Ld. A.O ought to have made further enquiry. Once the assessee furnishes the documents to prove the identity, creditworthiness and genuineness of the transaction. The same cannot be denied in the absence of material contrary brought by the Assessing Officer.

14. The Hon'ble Supreme Court in the case of CIT Vs. Lovely Export Pvt. Ltd. reported in 319 ITR 5 (ST) observed that even if the share capital money is received by the assessee from alleged bogus share holders, whose names are given to the A.O. The Department is free to proceed to reopen their individual

assessment in accordance with law. But cannot regarded undisclosed income of the assessee Company. The present case, the assessee has substantially provided materials to prove the genuineness of the share holders apart from giving the Pan Card, name and ROC details. In our considered opinion, the Ld.CIT(A) has erred in confirming the addition of Rs. 12,00,000/- u/s 68 of the Act on account of unexplained share premium and share capital.

15. Further, the Ld. CIT (A) has rejected the valuation report of the assessee, wherein premium charge of Rs. 40 on each share under Rule 11UA has been found to be without basis and while doing so the CIT(A) has relied on decision of the Coordinate Bench of this Tribunal in the case of Agro Portfolio Pvt. Ltd. vs. ITO 2018, 171/ITD/74 DEL. The decision made in Agro Portfolio Pvt. Ltd. (supra) has been considered by the Coordinate bench of this Tribunal in the case of Cinestan Entertainment (P). Ltd. Vs. ITO for AY 2015-16 dated 27/05/2019, wherein it is held that the Assessing Officer cannot examined or substituted its own value in place of valuation arrived by the assessee either DCF Method or NAV Method, the commercial expediency has to be seen from the point view of businessman. Further held that 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. The relevant portion are hereunder:-

"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 Id. 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 Id. 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: 2018 "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) 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."

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.....

.....

31. ....

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. The attempt on the part of SEBI to challenge the valuation which is but 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- TIOL1358-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 actual 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 actual 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.

16. The Coordinate Bench of the Tribunal while laying down the above ratio has also considered the decision of the Coordinate bench in *Agro Portfolio Pvt. Ltd. Vs. ITO* which has been relied by the CIT(A). Therefore, we are inclined to follow the ratio laid down in the case of *Cinestan Entertainment P. Ltd. Supra* and hold that the Ld. A.O and CIT(A) have committed an error in rejecting the valuation done by the assessee from prescribed expert as per the prescribed method.

17. Further, the Ld.CIT(A) while enhancing the income of the assessee u/s 56 (2)(viib) had observed that, such share premium received by the appellant for Rs. 76,00,000/- during the Financial Year 2014-15 relevant to Assessment Year 2015-16 is considered income of the appellant. The Ld. CIT(A) has not provided mandatory opportunity of hearing to the assessee u/s 251 (1) of the Act which ultimately resulted in enhancement of assessed income. The assessee has produced the valuation report before the CIT (A) but the same has not been considered by the CIT(A). The assessee has prepared valuation of the shares in accordance with Rule 11US of the Act for the purpose of Section 56(2) (viib) of the Act, adopting discounted cash flow method. The Ld. CIT(A) failed to understand the valuation of the shares made as per DCF Method and not considered the valuation provided by the assessee. In our opinion, the CIT(A) has committed an error on this count. Further, similar issue has been considered by the Mumbai Bench in the case of *Vodafone M Star Ltd. Vs. DCIT (2020) 114 Taxman.com 323 (Mumbai Trib.)* wherein it is held as under:-

19. "Since Ld. CIT(A) has already addressed the issue of method of valuation which has to be adopted therefore we do not intend to go into which method has to be adopted and accordingly, we notice that the department is in appeal against Ld. CIT(A) and in our considered view, Ld. CIT(A)

*has properly rejected the method adopted by the AO and proceeded to accept the DCF method adopted by the assessee. Therefore, we are inclined to dismiss the ground raised by the department.*

*20. Coming to the findings of Ld. CIT(A), we notice that Ld. CIT(A) has accepted the DCF method adopted by the assessee and he analyzed the factual performance of the assessee subsequent to issue of shares. The valuation of shares for that matter any valuation is itself is a projection of future events or activities and no doubt it has to be done with some accuracy, however no person in the world at the time of projecting events or result to project with 100% of accuracy and actual events are highly volatile and highly dependent on so many factors. Assessee has projected based on the fact that software of wallet and association of ICICI bank will increase the market share and accordingly, they have projected the figure; and further the valuer has adopted the projection figures provided by the assessee and it is left to the wisdom of valuer to accept or reject or to carry out independent investigation raised with the valuer as legislature in more than one place depends on the skills of the professionals like merchant banker only value the valuation of shares or other volatile securities. Since, Ld. CIT(A) has compared the factual with projections and assessee has achieved 40% of the actual results is too harsh to the assessee and this valuation is done in order to carry out certain activities by the management. In this case, the valuation was used to issue of rights shares. The AO or Ld. CIT(A) is trying to evaluate the accuracy of the valuation at the time of assessment, this is not proper and also the facts are based on so many factors subsequent to adoption of projection and valuation. Accordingly, we are not in a position to accept the method adopted by Ld. CIT(A). In the similar facts, the Coordinate Bench of ITAT has held as under:*

*"25. We have heard the rival contentions, perused the relevant findings given in the impugned order 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 sections 6 (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 exceeds 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 on business 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 partner; 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:

Sl No.	Name of equity partner	Date of issue	Name of shares	Premium (Rs.) Per share	Amount of premium (Rs.)
1	Sh. Anand Mahindra	06.01.2015 23.02.2015	4,15,385	1949	80,95,85,365
2	Sh. Rakesh Jhunjhunwala		19,027	2602	4,99,80,793
3	Sh. Radhakishan Damani		19,027	2602	90,95,46,200/-
	total		4,53,799		

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 HUA(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 Id. 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 Id. 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 Id. 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.*

*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 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. The attempt on the part of SEBI to challenge the valuation which is but 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 (P.) 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. v. ACIT (ITA 15 l/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 actual 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."*

*Therefore, respectfully following the decision of Coordinate Bench of ITAT, we allow the grounds raised by the assessee;*

*21. In the net result, the appeal filed by the assessee is allowed and appeal filed by the revenue stands dismissed."*

*18. In view of the above judicial pronouncements and for the reasons discussed above we are inclined to delete the addition made u/s 68 of the Act and also set aside the order of the CIT(A) in enhancing the income of the appellant u/s 251(1) of the Act by invoking Section 56(2) (viib) of the Act. Accordingly, we allow the Assessee's Grounds of Appeal No. 2 to 5.*

*19. In the result, I.T.A. No. 6173/DEL/2019 is allowed."*

13. The ratio laid down in the aforesaid decision of the Tribunal squarely applies to the facts of the present captioned appeals.

14. In so far as enhancement made by the Ld. CIT(A) u/s 251(1) r.w.s. 56(2) (viib) of the Act, the Ld. CIT(A) has not accepted the Valuation Report submitted by the Assessee as per Rule 11UA of the Rules. During the assessment proceedings the assessee has submitted the Valuation Report duly signed by the auditor by following NAV/DCF Method as required under Rule 11UA(2) of the Rules. The Valuation Reports are produced before us along with the paper book. Both the lower authorities have failed to follow the Rule 11UA of the Act, as per which the option to choose the valuation of the shares lies with the assessee and the same is binding on the Income Tax Authorities. For the sake of convenience, relevant provisions of Rule 11UA of the Rules are extracted hereunder:

*'(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:-*

*(a) The fair market value of unquoted equity shares (A-L(PV) (PE)*

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

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

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

*(ii) the amount set apart for payment of dividends on preference shares and equity shares and equity shares where such dividends have not been declared before the date of transfer at a general body meeting of the company*  
*(iii) reserves and surplus, by whatever name called, even if the resulting figure is negative, other than those set apart towards depreciation.*

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

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

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

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

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

*(b) the fair market value of the unquoted equity shares determined by a merchant banker or an accountant formatted by the IT (sixth amendment) Rules, 2018 w.e .24.3.2018) as per Discounted Free Cash Flow Method’.*

15. As per the aforesaid Rule, 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 determined under clause (a) or clause (b), at the option of the assessee. The Assessee having the choice to opt for one of the methods enumerated in the above provision and the appellant has chosen to opt for clause (b) in most of the abovementioned cases for valuation of unquoted equity shares and based on the same, the value of the share had been computed. Accordingly, the new shares were issued and allotted to the investors during the captioned assessment year. During the assessment proceedings, computation of Fair Market Value of shares as per Rule 11UA(2) was submitted before the Ld.AO to justify that the shares issued by the appellants were at Fair Market Value (FMV) which was computed in accordance with Rule 11UA(2) of the Income Tax Rules, 1962. But the AO has not given any reasoning for rejecting the valuation of shares nor have they furnished any material to the contrary which justified the rejection of the valuation of shares.

16. When the statute provides for a particular procedure, the authority has to follow the same and cannot be permitted to act in contravention of the same. It has been hitherto an uncontroverted legal position that where a statute requires to do a certain thing in a certain way, the thing must be done in that way only. Other

methods or modes of performance are impliedly and necessarily forbidden. The aforesaid settled legal proposition is based on legal maxim "Expressio unis est exclusio alterius", meaning thereby that if a statute provides for a thing to be done in particular manner, then it has to be done in that manner and in no other and following other course is not permissible. Reliance is placed in the case of IMC Limited and Ors. vs. Union of India and Ors. (10.05.2019 - GUJHC): MANU/GJ/0860/2019.

*19. The Hon'ble Jurisdictional High Court in the case of PCIT Vs Cinestaan Entertainment Pvt Ltd (2021) 433 ITR 82 (Delhi) held that No addition can be made for share issued at Premium based on prescribed methodology in following manners:-*

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

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

17. The assesseees have issued the shares at fair market value computed in accordance of the rules and no err has found in the method applied by the assesseees The Ld CIT(A) has enhanced the value u/s 56(2) of the Act purely on the

conjecture basis. The assesseees have filed the document to prove the identity, creditworthiness and genuineness of the transaction of each shareholder and discharged their burden as requirement u/s 68 of the Act. The addition of income made u/s 68 of the Act as well as the enhancement of income u/s 56(2)(viib) of the Act are liable to be deleted and deleted accordingly.

18. In the result, the appeals of the assesses are allowed.

Order pronounced in the open court on 05.09.2024.

**Sd/-**  
**(DR.B.R.R. KUMAR)**  
**ACCOUNTANT MEMBER**

\*NEHA, Sr. PS\*

Date:- .09.2024

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(Appeals)
- 5.DR: ITAT

**Sd/-**  
**(SUDHIR KUMAR)**  
**JUDICIAL MEMBER**

ASSISTANT REGISTRAR  
ITAT NEW DELHI