

**IN THE INCOME TAX APPELLATE TRIBUNAL  
DELHI BENCH “G” NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER  
AND  
Dr. B.R.R. KUMAR, ACCOUNTANT MEMBER**

I.T.A. No.1068/DEL/2019  
Assessment Year: 2014-2015

|                                                                                             |     |                                  |
|---------------------------------------------------------------------------------------------|-----|----------------------------------|
| TSI Yatra Pvt. Ltd.,<br>United Cyber Park,<br>1st Floor, Sector-39,<br>Gurgaon,<br>Haryana. | vs. | ACIT,<br>Range-25,<br>New Delhi. |
| TAN/PAN: AABCT7696P                                                                         |     |                                  |
| (Appellant)                                                                                 |     | (Respondent)                     |

|                        |                            |    |      |
|------------------------|----------------------------|----|------|
| Appellant by:          | Shri Tarandeep Singh, Adv. |    |      |
| Respondent by:         | Shri S.S. Rana, Sr.D.R.    |    |      |
| Date of hearing:       | 20                         | 11 | 2020 |
| Date of pronouncement: | 14                         | 12 | 2020 |

**ORDER**

**PER AMIT SHUKLA, JM**

The aforesaid appeal has been filed by the assessee aggrieved against impugned order, dated 21<sup>st</sup> December 2018, passed by Ld. CIT (Appeals)- IX, New Delhi for the quantum of assessment passed u/s. 143(3) for the assessment year 2014-15. The Appellant-Assessee has challenged the impugned order on following grounds:

*“1. On the facts and circumstances of the case and in law, the Commissioner of Income-tax (Appeals)-9, New Delhi [Ld. CIT(A)] has erred in confirming the order of Additional Commissioner of Income-tax Range 25, New Delhi (‘Ld AO’) issued under section 143(3) of the Income-tax Act, 1961 (‘the*

Act”) at income of INR Rs.23,69,90,961/- as against the returned loss of INR 1,05,08,901/-.

2. That the order of Ld. CIT (A) confirming additions of INR 247,499,862 made by Ld. AO to returned income of the Appellant by invoking provisions of Section 56(2)(viib) of the Act on the premise that Appellant has received consideration in excess of fair market value of shares (issued to the extent of INR 247,499,862, is bad in law as it is not a speaking order and is therefore against principles of natural justice.

3. That the Ld. CIT(A) has erred gravely on facts as well as in law in confirming action of the Ld. AO of rejecting valuation reports dated 03.04.2013 and 31.03.2014 determining fair market value of shares of the appellant as per Discounted Cash Flow (‘DCF’) method as prescribed under Rule 11UA(2)(b) of the Income-tax Rules (‘the Rules’) at INR 192 per share and INR 274 per share respectively.

3.1 That the Ld. CIT(A) has gravely erred on facts and in law in confirming the action of Ld. AO of carrying out valuation of shares of the Appellant as per Net Assets Value (‘NAV’) method.

3.2 In doing so, the Ld. CIT(A) as well as Ld. AO have failed to appreciate provisions of Rule 11UA(2)(b) of the Rules which provide for an option to the Appellant to chose a method of his choice for valuation of its shares for the purposes of Section 56(2)(viib) of the Act. The act of rejection of valuation reports and carrying out valuation of shares of Appellant as per NAV method is therefore ultra-vires the Act and the Rules as well as the principle laid down by Hon’ble Supreme Court in the case of *Bharat Hari Singhania & Others vs. Commissioner of Wealth Tax & Others*. (1994) 207 ITR 1 (SC) wherein it was held that it is not an option of an assessing officer to either follow or not to follow the prescribed method of valuation but that he is bound to follow the rules of valuation made under the Act.

4. Without prejudice, that the Ld. CIT(A) erred in confirming the action of Ld. AO of carrying out comparative analysis of projected revenue from operations and actual revenue from

*operations and is against the rule of Hon'ble Delhi Tribunal in case of M/s Stryton Exim India Pvt. Ltd. (ITA No.5982/2018) wherein the Hon'ble Tribunal had held that it was incorrect to assume that the projected cash flows should have equaled the actual cash flows for the purpose of valuation of shares using a DCF method.*

*4.1 Without prejudice, that the Ld. CIT (A) and Ld. AO gravely erred in holding that year-on-year growth rate estimated by Appellant is arbitrary and self-serving without appreciating close proximity between projected cash flows considered as per valuation reports and actual cash flows from operations and the fact that variation between the two cash flows were sometimes as low as 4%-6%.*

*5. The Ld. AO erred on facts and in law in levying the interest under section 234A and 234B of the Act.*

*6. The Ld. AO erred on facts and in law in initiating penalty proceedings under section 271(1)(c) of the act, without appreciating the fact that the appellant has neither concealed particulars of income nor furnished inaccurate particulars.”*

2. Briefly stated the facts of the case are that that appellant is engaged in the business of providing travel related services by way of air ticket booking, hotel booking, etc to travel agents. It primarily caters to B2B segment of Yatra group with its main customers being tour and travel agents. It is a wholly owned subsidiary of M/s Yatra Online Private Limited ('YOPL') which provides similar services to direct customers and end users. M/s YOPL is in turn owned by M/s THCL Travel Holding Cyprus Limited and M/s Asia Consolidated DMC PTE Ltd both being foreign companies. For the year under consideration, appellant filed its return of income declaring loss of (-)Rs. 1,05,08,901/-. However, as against the returned loss, Ld Assessing Officer has passed the assessment vide

order dated 29<sup>th</sup> December 2017, assessing the total income at Rs. 23,69,90,961/-. The assessment has been framed by making a cumulative addition of Rs 24,74,99,862/- after invoking the deeming provisions of section 56(2)(vii)(b).

3. The genesis of the issue of addition Rs 24,74,99,862/ by invoking the provisions of section 56(2)(vii)(b) arises from the fact that during the year under consideration appellant company had issued 1,059,153 equity shares to its holding company, that is, to M/s YOPL. The shares were issued in two lots, details of which have been noted by Ld. AO also in his order which is as under:—

| Date of issue | No. of shares issued | Face value per share (Rs.) | Premium per share (Rs.) | Issue price per share (Rs.) | Total face value (Rs.) | Total premium (Rs.) | Total amount Received (Rs.) |
|---------------|----------------------|----------------------------|-------------------------|-----------------------------|------------------------|---------------------|-----------------------------|
| 04.11.2013    | 5,20,830             | 10                         | 182                     | 192                         | 52,08,300              | 9,47,91,060         | 9,99,99,360                 |
| 31.03.2014    | 5,38,323             | 10                         | 264                     | 274                         | 53,83,230              | 14,21,17,272        | 14,75,00,502                |
| <b>Total</b>  | <b>1,059,153</b>     |                            |                         |                             | <b>1,05,91,530</b>     | <b>3,69,08,332</b>  | <b>24,74,99,862</b>         |

4. In response to the show cause notice by the Ld AO, it was stated by appellant that the Fair Market Value (FMV) of issuance of shares as above was in accordance with provisions of Rule 11UA and that FMV was certified by valuation reports dated 03<sup>rd</sup> April 2013 and 31<sup>st</sup> March 2014 issued by a prescribed expert, i.e. M/s Shiv Shatish & Associates, Chartered Accountants. It was stated that the

valuer has estimated the FMV using the Discounted Cash Flow Method (DCF) which is one of the prescribed method under section 56(2)(viib) read with Rule 11UA(2)(b).

5. Ld. Assessing Officer however, was unimpressed by the valuation technique adopted by the valuer and held that the valuer has prepared the valuation report based on projections provided by the management. To investigate the matter further Ld AO has:

(a) Recorded statement under oath of the Valuer on 17<sup>th</sup> December

2017.

(b) Doubted the basis of projected revenues estimated by the appellant by comparing projected revenue figures (as stated in valuation reports) with the actual revenue recorded in audited books of account and by comparing projected revenue figures of the two valuation reports dated 03<sup>rd</sup> April 2013 and 31<sup>st</sup> March 2014.

(c) Conducted independent search to identify reasonable growth in the industry in which appellant is working. In this regard Ld AO culled out details from ICAO website and concluded that percentage growth in traffic of domestic and international travel between 2006-07 to 2015-16 is at 16.58%. Ld AO also relied upon a report in Sunday Guardian Live by one Shri Anupam Parsseera dated 25<sup>th</sup> September 2016 and concluded that percentage growth in traffic of domestic

travel Financial years 2017, 2018 is expected to be 20%. By relying upon above material, it was concluded by the Ld AO that the appellant has wrongly estimated the percentage growth (in its valuation reports) at the rate of 25%.

6. After investigating the matter as above, Ld. AO has rejected use of DCF Method by concluding as under:

*“4.27 On going through valuation reports and statement given by Mr. Shiv Bansal, Chartered Accountant, and analysis of projected vs. actual figures achieved by the company it is seen that accountant has taken projected revenue, future cash flow and other information as certified by the management. No verification whatsoever of projections and assumptions adopted by management was done by CA, thereby making the report as per the convenience and requirement of the management. The above fact was accepted by Mr. Shiv Bansal Chartered Accountant while recording his statement on 17<sup>th</sup> December, 2017.*

*4.28 The Chartered Accountant considered 25% growth rate in the revenue, he didn't even considered the average growth rate of industry which is approximately 16% available on various sources on internet. Even while issuing the report on 31<sup>st</sup> March, 2014, growth rates of year ending 31<sup>st</sup> March 2013 was not considered.*

4.29 Such exorbitant estimated of sales and free cash flow was used in valuing shares by DCF method. Therefore, it is clear that valuation made on the basis of unverified exorbitant DCF given by management has given inflated value of share Rs.192/- on 31.3.2013 and Rs.274/- on 31.3.2014 respectively. From the statement of Sh. Shiv Bansal it is apparent that he has used the projection figures and also the different discount rates for the purpose of valuation of the share solely on the input of the assessee company who is the beneficiary of the valuation report. He has nowhere applied his mind whether these projections can be correct/reasonable or not. This is more so when there is huge amount of data in respect of every sector is available in public domain.

4.30 The Technical guide on shares valuation' published by the Institute of Chartered Accountants of India (ICAI) wherein three key factors viz., cash flow projections, discount rate and terminal value for computing DCF were discussed, it is observed that none of the above factors as mandated by ICAI has been considered by the said CA issuing valuation report while computing fair value of the unquoted equity shares of the assessee company. As per technical guide on shares valuation issued by ICAI wherein it is stated that the DCF method is as good as input assumptions used for computing Future Cash Flows. It was observed that the CA issuing valuation report dated 04<sup>th</sup> April, 2013 & 31<sup>st</sup> March, 2014 has

*merely adopted the values provided by the management clearly ignoring past performance which is self serving as several factors such as performance, growth prospects, earnings capacity, expansion and average growth rate of industry etc. were not considered by the said CA issuing the said valuation reports.”*

7. Ld. Assessing Officer has thereafter taken recourse of provisions of Rule 11UA and estimated value of shares allotted by the appellant on 04<sup>th</sup> November 2013 in negative by adopting NAV Method as under:

*“For this allotment the balance sheet of year ending 31.03.2013 shall be taken for determination of Fair Market Value of the Unquoted Equity Share of the assessee as per provisions of Rule 11U of the IT Rules.*

|                   |                    |
|-------------------|--------------------|
| A= Total Asset :  | Rs.153,27,31,143/- |
| Less Advance Tax  | Rs. 3,29,26,728/-  |
| Less Deferred Tax | Rs. 21,13,490/-    |

|    |                     |
|----|---------------------|
| A= | Rs.1,49,76,90,925/- |
|----|---------------------|

|                    |                     |
|--------------------|---------------------|
| L= Total Liability | Rs.1,53,27,31,143/- |
|--------------------|---------------------|

*As reduced by*

|                    |                  |
|--------------------|------------------|
| (a) Paidup Capital | Rs.1,83,30,600/- |
|--------------------|------------------|

|             |                   |
|-------------|-------------------|
| (b) Reserve | Rs.-6,28,11,610/- |
|-------------|-------------------|

|    |                    |
|----|--------------------|
| L= | Rs.157,72,12,153/- |
|----|--------------------|

*(a) the fair market value of unquoted equity shares:*

$$= \frac{(A-L) \times (PV)}{PE}$$

|                  |                                         |
|------------------|-----------------------------------------|
| <u>18,33,060</u> | <u>(149,76,90,925 - 157,72,12,153)*</u> |
|------------------|-----------------------------------------|

1833060



$$= \text{Rs.}-7,95,21,228/-$$

*Therefore, the fair market value of each equity share is:*

$$\frac{\text{Rs.}-7,95,21,228/-}{18,33,060/-}$$

$$= \text{Rs.}-43.38/- \text{ per share}$$

*Therefore, the fair market value of the equity share is determined at Rs.-43.38/- per equity share.”*

8. Applying same methodology, Ld. AO also estimated the Value of shares allotted by the appellant on 31<sup>st</sup> March 2014 in negative as under:

*“7. Valuation of 5,38,323 shares allotted on 31.03.2014 @ Rs.274 :*

*7.1 For this allotment the balance sheet of year ending 31.3.2014 as on the valuation date shall be taken for determination of Fair Market value of the Unquoted Equity Share of the assessee as per provisions of Rule 11U of the IT Rules. In this figure the assessee has also included the proceeds of the allotment of shares on 31.03.2014. Therefore, in computation the Paid up Capital and General Reserves and Surplus are modified to the extent of reducing from it the amount of Paid up capital received and Share Premium received.*

|                            |                           |
|----------------------------|---------------------------|
| <i>A= Total Asset :</i>    | <i>Rs.108,84,60,324/-</i> |
| <i>Less Advance Tax :</i>  | <i>Rs. 5,88,91,631/-</i>  |
| <i>Less Deferred Tax :</i> | <i>Rs. 21,13,490/-</i>    |

|           |                           |
|-----------|---------------------------|
| <i>A=</i> | <i>Rs.102,74,55,203/-</i> |
|-----------|---------------------------|

|                            |                           |
|----------------------------|---------------------------|
| <i>L= Total Liability:</i> | <i>Rs.108,84,60,324/-</i> |
|----------------------------|---------------------------|

*As reduced by:*

|                                            |                     |          |
|--------------------------------------------|---------------------|----------|
| <i>(a) Paid up capital: Rs.2,35,38,900</i> | <i>(2,89,22,130</i> | <i>–</i> |
| <i>53,83,230)</i>                          |                     |          |

(b) Reserve: Rs.-79,94,481 (13,41,21,691 –  
14,21,17,272) =  
Rs.107,29,17,005/-

(b) the fair market value of unquoted equity shares  
=  $\frac{(A-L) \times (PV)}{(PE)}$   
 $\frac{(102,74,55,203-108,84,60,324) \times 23,53,890}{23,53,890}$   
= Rs. – 6,10,05,121/-

Therefore, the fair market value of each equity share is:

Rs. –  $\frac{6,10,05,121}{2353890}$   
= **Rs.-25.92/- per share.**

Therefore, the fair market value of 5,38,323 equity share allotted on 31.03.2014 is determined at Rs.-25.92/- per equity share.”

9. Being aggrieved, appellant filed an appeal before the Ld. First Appellate Authority. Ld CIT (A) in his impugned order dated 21<sup>st</sup> December 2018 has upheld the additions made by the Ld. AO and dismissed the appeal summarily after concluding as under:

“4.4 I have gone through the facts of the case, the grounds of appeal, the order of the AO and the submissions of the appellant. The issue in this appeal, is with respect to the valuation of shares and the addition under Sec 56(2)(viib) of the Act.

4.5 The appellant has contended that the AO erred in applying the FMV method and that he also ought to have

*used the DCF method, as the option of using the methods rested with the appellant. It is also contented that the provisions of Sec 56(2)(viib) cannot be applied, since the shares are issued to its 100% shareholder which is its holding company and that it had not used the projection of profit to be 25% each year and had reduced the projections based on the fairly available basis and estimations. The appellant also contended that the projections are not distorted, but spill out a difference of only 4-6%, which the appellant has contended to be a reasonable limit.*

*4.6 On considering the reply of the appellant, I do not find any merit in the contentions so raised. The AO in the assessment order has been right in caring out the unreasonableness in the estimates of the appellant. The appellant has been completely unjustified in adopting a growth rate of 25%, while the AO has been able to duly prove and support the stark contrast in the actual figures vis-à-vis its estimation.*

*4.7 While it is true that not every estimate is required to be correct or that it may be accurate, however, it also remains a crucial aspect that such estimations need to be congruence with the actual figures, i.e., the estimation ought to be as closely accurate as possible. A huge difference arising out on account of some haywire computations is not at all acceptable. Further, an estimation is not something arising out of some*

*calculation in thin air. This calculation needs to be supported and substantiated by some basis or some evidence, which the appellant has outrightly failed to provide.*

*4.8 It is noted that the AO has clearly highlighted the discrepancies in the computation of the appellant and has more than evidently provided evidence as to the difference between the estimation and the actual figures. The appellant has not been able to throw light on the estimation of 25% that has been used by it, visi-a-vis, the actual figures. In fact, the report of the media and other experts, clearly indicate that the estimation used by the appellant is nowhere close to the reality from the very beginning. This in turn means that the appellant has simply overstated its values, with the intent of inflating the share value. However, such inflation has been rightly shown to be unsustainable.*

*4.9 Now, since the AO has rightly highlighted the infirmities in the calculation of the appellant, in as much as in his statement, Sh. Shiva Bansal of m/s Shiv Bansal & Associates has clearly admitted to have failed to carry out any due diligence w.r. to projection for future growth and earnings provided by the appellant the AO is eligible to reject the method of computation, as used by the appellant and hence, apply another method, as has been prescribed by the provisions of Law. Under the*

*circumstances, I do not find any infirmity in the application of FMV method by the AO.*

*Extending above deliberation, the AO has rightly used and calculated the FMV and hence, I do not find any miscalculation therein. Therefore, in result of the above, the addition is sustained and the ground of appeal is dismissed.*

*4.10 In view of my detailed discussion, I am inclined to uphold the impugned addition made by the AO in the assessment order. Appellant fails in these grounds of appeal. As far as alternative plea of the appellant that no disallowance of face value amounting to Rs.10591530/- is concerned, it is noted that the provision of S. 56(2)(viib) clearly stipulates that consideration received over and above, the FMV is deemed to be income as there is no exception for face value is mentioned therein. In the case of appellant FMV being computed by the AO to be in negative at Rs.(-) 43.38/- share on 04.11.2013 and Rs.- 25.52/ shares, computation and addition of total consideration including alleged face value is found to be justified. Hence, alternative plea is dismissed.”*

10. Before us Ld. Counsel for the appellant, challenging the additions made it was submitted that the authorities below have not properly considered the facts of the case and have also incorrectly applied the relevant legal provisions. At the outset it was submitted that the authorities below have

erroneously invoked the provisions of section 56(2)(viib) to the facts of the present case. In this regard it was submitted that the legislative intent behind insertion of provisions of section 56(2)(viib) and alike provisions was to tackle the menace of Black Money. It was submitted that the action of lower authorities in interpreting the provisions of this section by applying rule of literal interpretation is against the purpose of introduction of this section. It was submitted that the provisions of section 56(2)(viib) be interpreted applying of purposive construction. In support Ld. AR cited several judicial precedents. It was also submitted by Ld. AR that this objection was specifically raised before Ld. CIT (A) in ground no 4. Ld CIT (A) though records submission of appellant on this issue (briefly at internal page 11), however, thereafter he has failed to record any conclusions.

11. Ld. AR also challenged the impugned additions made on merits. In this regard Ld. AR narrated the facts of the case sequentially and submitted that both the authorities have not properly appreciated the same. Written synopsis has also been filed where in it has been submitted as under:

“ii) Submissions on merits of the case

*It is submitted that in the assessment order passed by the AO he has relied on several erroneous, extraneous and irrelevant facts in rejecting cash flow projections of the Appellant in the two valuation reports, details of which have been specified below:*

(a) At page 3, para 4.12 AO has erred in comparing the two valuation reports inter se. The first valuation report dated 03<sup>rd</sup> April 2013 was prepared at the very beginning of the relevant Financial Year as such even the financial data for the year under consideration i.e. 2014 was adopted on an estimate basis (refer page 39-40 of the PB). The second valuation report is dated 31<sup>st</sup> March 2014 which has been prepared on the last day of relevant financial year but before finalization of annual accounts. Actual revenue figures were by and large known by then and therefore the second valuation report adopted nearly actual revenue figures for the year under consideration i.e. 2014 (refer pages 43-44 of PB). The AO therefore has erred in not considering the second valuation report which provided a more accurate result of the share valuation.

(b) The basic thrust of AO's case is that he has ventured to compare projected revenue figures with actual revenue figures. In this regard at page 2-3, para 4.8 AO has alleged that if revenues as per Provisional Balance Sheets are compared actual audited revenues for year ending 31<sup>st</sup> March 2013 and 31<sup>st</sup> March 2014 then there is a difference of 7.3% and 13.8% respectively. In this regard it is submitted that entire approach to compare projected revenue with actual revenue is not in accordance with law {Reference: Rameshwaran Strong Glass Pvt Ltd reported in 172 ITD 571(Jai) copy enclosed at pages 13 to 33 of Case law PB-II relevant at pages 30-31, para 4.5.2 and 4.5.3}

Without prejudice, it is submitted that the AO has erroneously concluded that Appellant's revenue projections are without any

rationale and scientific basis.In this regard, the assessee would like to submit below comparison of actual revenues vis-à-vis revenue projections as per the second valuation report:

| Particulars                                       | FY 2013-14   | FY 2014-15   | FY 2015-16    | FY 2016-17    | FY 2017-18    |
|---------------------------------------------------|--------------|--------------|---------------|---------------|---------------|
| Revenues as per Audited financial statements      | 775,214,407  | 870,364,711  | 1,041,082,532 | 1,249,146,922 | 1,381,615,024 |
| Paper Book page reference                         | Page 52      | Page 80      | Page 80       | Page 107      | Page 133      |
| Revenues as per valuation report dated 31.03.2014 | 810,500,000  | 927,300,000  | 1,105,300,000 | 1,314,200,000 | 1,642,700,000 |
| % age variation compared to actual revenues       | <b>4.35%</b> | <b>6.14%</b> | <b>5.81%</b>  | <b>4.95%</b>  | <b>15.89%</b> |

It is amply clear from the aforesaid table that the projected revenues of the Appellant closely approximate to the actual revenues with variance of just 4-6% (except for FY 2017-18 which was primarily on account of an extraordinary macro-industry factor i.e. - the announcement of merger of two biggest competitors of the Appellant namely Make My Trip and Goibibo, essentially creating the largest on-line travel portal in India with a comprehensive set of deep discounted travel offerings). Hence, growth projection



*percentage adopted by the Appellant cannot be said to be arbitrary and self-serving in nature by any stretch of imagination.*

*(c) The Ld. AO erroneously alleged that growth projection in revenue from operation taken at 25% is arbitrary and self-serving – It is submitted that that Ld. AO has totally erred in alleging that Appellant has assumed growth projections in revenues at 25%. The Appellant is engaged in the business of travel and hotel reservations and earns revenues in the form of commission on these reservations. The Appellant had considered a growth rate of 25% in Total Transaction Value ('TTV') of reservations to be handled by it and not on revenues. The corresponding growth on revenues as per the first and second valuation reports was in the range of 16-25% and 14-25% respectively. The aforesaid growth projection in TTV was based on, amongst several other factors, a travel report issued in the year 2012 (copy at pages 236 to 257 of PB) by a travel industry research authority, according to which year-on-year growth for online air segment was 23%-38% in the year 2009-2013. Similarly, the year-on-year growth for online hotel segment in the same period was 14%-37%. The overall online market grew year-on-year at 22-35%. Accordingly, it is evident that the Appellant had rational basis in the form of past trends to project its growth projections.*

*Without prejudice, to the above, it is submitted that during assessment the AO himself conducted an independent search and in the order of assessment he has taken into consideration a report of the Sunday Guardian Live by Sh Anubhav Parseera dated 25.09.2016. Even as per AO's search the estimated average growth rate of industry for the year under consideration was approximately 16% (refer para 4.28 on Page 8 of final assessment order). As the AO himself has considered that the industry growth to be approximately 16%, it is submitted that the DCF method at the growth rate of 25% in TTV could not have been further questioned by the AO, especially given the fact that growth rate of 16% is for the whole industry where Appellant is the second largest player. At the most, the AO could refer the valuation to an expert or to Valuation Officer as the AO is himself not an expert.*

*(d)Applying net asset method, the AO has computed a negative share price. After having accepted industrial growth rate of 16%, valuing shares at a negative price itself shows absurdity valuation method adopted by AO.*

*(e)It is humbly submitted that **order passed by Ld. AO is without jurisdiction** and is liable to be quashed as the AO does not have the power to reject Applicant's chosen method in view of language employed in section 56(2)(viib) and Rule 11UA. Law provides an option to the assessee and once that option is exercised then the AO cannot change the method. At the most, the AO could refer the*

*matter to a valuation an expert or to Valuation Officer.*

*References:*

- *Hon'ble Bombay High Court in the case of Vodafone M-pesa ltd v. Principal Commissioner of Income Tax (2018) 92 taxmann.com 73 copy enclosed at pages 67 to 71 of case law PB-II relevant at page 70, para 9.*
- *Rameshwaran Strong Glass Pvt Ltd reported in 172 ITD 571(Jai) copy enclosed at pages 13 to 33 of Case law PB-II relevant at page 29*
- *Ozoneland Agro Pvt Limited ITA No. 4854/Mum/2016 order dated 02<sup>nd</sup> May 2018 copy enclosed at pages 34 to 46 of Case Law PB-II relevant at page 432<sup>nd</sup> para top.*
- *Innoviti Payment Solutions (P) Limited reported in (2019) 102 taxmann.com 59(Bang) copy enclosed at pages 47 to 66 of Case Law PB-II, relevant at page 65-66, paras 11 to 14*

*As submitted above, the financial data provided by management to the Valuer was accurate and the AO has erroneously doubted the same. Specific reference in this regard is invited to following observations of Hon'ble Jaipur ITAT in case of Rameshwaran Strong Glass (supra) as under:*

*“ .....Further, though the AO can scrutinize the valuation report only if some arithmetical mistakes are found, he may make necessary adjustments. But if he finds the working of the C.A. or the assumptions made as erroneous or contradictory, he may suggest the necessary*

*modification and alterations therein provided the same are based on sound reasoning and rational basis and for this purpose the AO may call for independent expert valuer's report or may also invite comment on the report furnished by the assessee's valuer as the AO is not an expert. It is not open for the AO to challenge or change the method of valuation, once opted by the assessee and to modify the figures as per his own whims and fancies. In any case, the revenue could not ask to prepare the valuation report based on actuals which is not contemplated in Rule 11UA (2)(b)."*

*(f) Appellant had dully narrated the above submissions in detail before CIT(A) refer pages 27 to 37 of CIT(A) order wherein submissions made by appellant have been reproduced. It was specifically pleaded by appellant before CIT(A) as to why that business carried on by appellant is very lucrative (refer page 16 of CIT(A) order). It is submitted that there is no consideration by CIT(A) to the above legal and factual submissions.*

*(g) Moreover, it is submitted that provisions of section 56(2)(viib) of the Act apply only in cases where money have been invested by a resident. It may be noted that in the instant case, even though shares were issued by the Appellant to Yatra Online Private Limited ('Yatra Online'), an Indian resident, purchase of shares were funded by Yatra Online through inflow of funds in it by way of Foreign Direct Investment ('FDI'). Yatra Online received a*

*sum of Rs 82.34 crores by way of share allotment to Yatra Online Cyprus Limited, a company registered outside India, on July 12, 2012, allotting 329,385 shares at value of Rs 2,500 (including share premium of Rs 2,490). Copies of Annual Accounts of M/s Yatra Online Limited for year ended 31<sup>st</sup> March 2014 were filed during course of hearing on 26<sup>th</sup> August 2019. Genuineness of Share Capital received by M/s Yatra Online Limited has been accepted by tax department and there is also no dispute on Share Premium of Rs 2,490/- accepted by M/s Yatra Online Limited. The aforesaid money received by the Yatra Online was then invested in Appellant in November 2013 and March 2014 respectively. Accordingly, in the instant case, as share allotment money has been infused in the Appellant by a company registered outside India and source of funds invested is effectively FDI, provisions of section 56(2)(viib) should not be attracted.”*

12. On the other hand, Ld. CIT (DR) vehemently challenged the submissions made by appellant. It was submitted by the Ld CIT(DR) that both the lower authorities have for just reasons made / upheld the additions. Ld CIT (DR) also opposed the arguments advanced by the Ld AR objecting to application of provisions of section 56(2)(viib) to the facts of the case. It was submitted by him that the Ld AO was justified in rejecting DCF method followed by the assessee in view of following facts:

(i) (para 4.5) both valuation reports are based on projection provided by the management

(ii) As per law, valuation reports are required to be based on Consolidated Financial Statements. The valuer could not have taken provisional figures. The assessee issued first lot of shares on 04.11.2013, when financial statement of the year ending was crystalized and audited but assessee still chose to use valuation certificate dated 03.04.2013 'that was based on provisional financial statements.

(iii) In statement on oath of Shri Shiv Bansal recorded u/s 131 on 17.12.2017, he was asked to furnish supporting evidences on the basis of which valuation reports were prepared. He submitted projection given by assessee and provisional financial statements on 31.03.2013 and 31.03.2014. A huge difference was found in the figures shown in provisional financial statements and actual financial statements (para 4.8 & 4.9)

(iv) Vide order sheet entry dated 21.11.2017, assessee was asked to provide basis of projections for valuation of FMV of shares. However, assessee did not state anything regarding basis or documents on the basis of which projections were made.

(v) From perusal of two valuation reports, it is seen that there is huge variation in figures of projected revenue taken for different financial years. (para 4.12)

(vi) Assessee has taken projection summarily a growth percentage at 25% year on year which is very high. Vide letter dated 27.12.2017 some data was submitted but it showed growth rate of only 9.70% against projected 25%

(vii) The fact that valuation of shares as per Rule 11UA comes to a negative figure itself indicates that valuation as per Discounted cash flow method was defective

(viii) Vide letter dated 27.12.2017 some data was submitted but it showed growth rate of only 9.70% against projected 25%

(ix) During the year, assessee has declared loss of Rs. 1,05,08,901 in its return of income. A loss making company could not possibly have such high valuation.

(x) As per valuation report dated 03.04.2013, FMV was computed at Rs. 192 per share. As per valuation report dated 31.03.2014, FMV was computed at Rs. 274 per share. It is difficult to believe that the valuation increased by so much when there was no substantial change in performance of the company. It is surprising that shares were issued @Rs. 192 on 04.11.2013 and @Rs. 274 on 31.03.2014. No possible explanation has been furnished for increase in share price by Rs. 82 within a short span of 4 months.

(xi) As per Rule 11UA, onus has been cast upon merchant banker to compute FMV as per DCF method. This onus has not truly been discharge by the merchant



banker in present case since instead of making independent and comparable inquiries, he has simply relied upon figures furnished by management of the assessee company. He has not been able to substantiate reason for taking growth rate of 25%

(xii) Detailed analysis has been provided by AO in para 4.18 to 4.21. In para 4.24, AO has analysed how there is no correlation between projections and actual figures of the assessee.

13. In support Ld CIT (DR) also relied upon following judicial pronouncements:

- Agro Portfolio (P) Ltd reported in 171 ITD 74(Del)
- Sunrise Academy of Medical Specialties reported in 257 Taxman 373(Ker)
- Sunrise Academy of Medical Specialties reported in (2018) 94 taxmann.com 181(Ker)
- Madhurima International Private Limited, ITA 421/Mum/2017 order dated 28<sup>th</sup> April 2017.

14. We have heard both the parties, gone through the orders and have also considered facts of the case and the material referred to before us. Sole issue in dispute relates to the addition of Rs. 24,74,99,862/- made by the Assessing Officer by invoking the deeming provisions of Section 56(2)(viib) of the Act. Relevant facts qua the issue have already been culled out above. For ease of reference, provisions of Section 56 are 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 :—*

*(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 9[or a specified fund];  
or*

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

*[Provided further that where the provisions of this clause have not been applied to a company on account of*

*fulfilment of conditions specified in the notification issued under clause (ii) of the first proviso and such company fails to comply with any of those conditions, then, any consideration received for issue of share that exceeds the fair market value of such share shall be deemed to be the income of that company chargeable to income-tax for the previous year in which such failure has taken place and, it shall also be deemed that the company has under reported the said income in consequence of the misreporting referred to in sub-section (8) and sub-section (9) of section 270A for the said previous year.]*

*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”.*

15. As per clause (i) of the *Explanation (a)*, the FMV of shares issued is to be determined in accordance with such method as may be prescribed. Method to determine this 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:—*

*(a) ..... (net asset method), or*

*(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."*

16. One of the arguments of the Id. counsel before us while challenging the addition was that the authorities below have wrongly invoked the provision of Section 56(2)(vii)(b). It has been stated that the legislative intent behind the insertion of such provision was to tackle a menace of the black money and literal interpretation should not be applied and one has to see the purpose of introduction of this section that is, purposive construction should be given while interpreting the

said section. It was submitted that the aforesaid deeming provision was brought in the statute as an anti-abuse provision where a company receives any consideration for issue of shares that exceeds the face value of shares, then excess value is deemed to be income of that company.

17. From a plain reading of the Section, it is seen that the language of the statute is absolutely clear and there is no ambiguity in such provision. No exception has been carved out that it shall not be applicable on certain kind of transaction looking to the hardships or there was no intention of any evasion of taxes in such kind of transfers or receiving of shares. It is trite and well settled law that the construction of the statute must be taken from the bare words of the Act. One should not look what could have been the intention of the legislature behind the legislating section and if a legislature did intend in this way, then it has to be expressed clearly in the language of the Section. The Courts cannot invent something which is not there in the statute nor should try to gauge the intention of the Legislature. It is only where the language of the statute in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, then a construction may be given which modifies the meaning of the words and even the structure of the sentence. In such circumstances, the Courts while interpreting the provision probable can go what was the

purpose of bringing that legislation. Otherwise a literal construction has to be given and the deeming provision has to be given strict interpretation, especially where words of the statute are clear and unambiguous then recourse cannot be taken to principles of purposive interpretation, even if the literal interpretation results in hardship and inconvenience to the tax payer. The purposive construction can only be resorted to when there is ambiguity or the contradiction in two provisions for the same statute. Here, no such ambiguity or contradiction is there nor has been pointed out before us. A Court of law has nothing to do with reasonable or unreasonableness of a provision of a statute except as it may hold in interpreting what the legislature has clearly stated. If the language of the statute envisages only one meaning then it must be construed to mean and intended what it has been clearly expressed. Accordingly, the contention raised by the ld. counsel is rejected.

18. Coming to the method of valuation, from the plain reading of Rule 11UA it is clear that it provides an option to the assessee to estimate the FMV by applying either 'Net Assets Value' (NAV) Method or 'Discounted Cash Flow' (DCF) Method. In the present case appellant exercising this option has chosen DCF method. Under DCF the valuation of shares is basically estimated taking into consideration the future anticipated revenues and profits. These projections are then discounted to arrive at the present value of the business. 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 AO has to confine to the choice made by the assessee. The Method once adopted thus cannot be changed. In case, the AO is not satisfied with any of the parameters adopted in estimating the value, then subject to material being available on record, the Ld. AO 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. In our considered opinion in absence of there being some enabling provision allowing AO to change the method of valuation the choice of method adopted by the assessee cannot be disturbed. Precisely, these factors have been judicially appreciated in various judgments some of which are as under: -

***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 by its very nature based on projections by applying what is essentially a hindsight view that the performance did not match the projection is unknown to the law on valuations. Valuation being an exercise required to be conducted at a particular point of time has of necessity to be carried out on the*

*basis of whatever information is available on the date of the valuation and a projection of future revenue that valuer may fairly make on the basis of such information.”*

**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.

19. We further find further from the decision of Coordinate Bench decision of Tribunal as relied upon by the Ld. counsel in case of VBHC Value Homes Pvt. Limited in ITA No. 2541 & 37/Bang/2019, wherein vide order dated 12<sup>th</sup> June 2020 it was held as under:

*“9. We have considered the rival submissions. First of all, we reproduce paras 11 to 14 from the Tribunal order cited by learned AR of the assessee having been rendered in the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO (supra). These paras are as follows:*

*"11. As per various tribunal orders cited by the learned AR of the assessee, it was held that as per Rule 11UA (2), the assessee can opt for DCF method and if the assessee has so opted for DCF method, the AO cannot discard the same and adopt other method i.e. NAV method of valuing shares. In the case of M/s. Rameshwaram Strong Glass (P) Ltd. vs. The ITO (Supra), the tribunal has reproduced relevant portion of another tribunal order rendered in the case of ITO vs. M/s Universal Polypack (India) Pvt. Ltd. in ITA No. 609/JP/2017 dated 31.01.2018. In this case, the*

*tribunal held that if the assessee has opted for DCF method, the AO cannot challenge the same but the AO is well within his rights to examine the methodology adopted by the assessee and/or underlying assumptions and if he is not satisfied, he can challenge the same and suggest necessary modifications/alterations provided ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 the same are based on sound reasoning and rationale basis. In the same tribunal order, a judgment of Hon'ble Bombay High Court is also taken note of having been rendered in the case of Vodafone M-Pesa Ltd. vs. PCIT as reported in 164 DTR 257. The tribunal has reproduced part of Para 9 of this judgment but we reproduce herein below full Para 9 of this judgment.*

*"9. We note that, the Commissioner of Income-Tax in the impugned order dated 23rd February, 2018 does not deal with the primary grievance of the petitioner. This, even after he concedes with the method of valuation namely, NAV Method or the DCF Method to determine the fair market value of shares has to be done/adopted at the Assessee's option. Nevertheless, he does not deal with the change in the method of valuation by the Assessing Officer which has resulted in the demand. There is certainly no immunity from scrutiny of the valuation report submitted by the*

*Assessee. Therefore, the Assessing Officer is undoubtedly entitled to scrutinise the valuation report and determine a fresh valuation either by himself or by calling for a final determination from an independent valuer to confront the petitioner. However, the basis has to be the DCF Method and it is not open to him to change the method of valuation which has been opted for by the Assessee. If Mr. Mohanty is correct in his submission that a part of demand arising out of the assessment order dated 21st December, 2017 would on adoption of DCF Method will be sustained in part, the same is without working out the figures. This was an exercise which ought to have been done by the Assessing Officer and that has not been done by him. In fact, he has completely disregarded the DCF Method for arriving at the fair market value. Therefore, the demand in the facts need to be stayed."*

*12. As per above Para of this judgment of Hon'ble Bombay High Court, it was held that the AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a final determination from an independent valuer to confront the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. Hence, in our considered opinion, in the present case, when the guidance of*

*Hon'ble Bombay high Court is available, we should follow this judgment of Hon'ble Bombay High Court in preference to various tribunal orders cited by both sides and therefore, we are not required to examine and consider these tribunal orders. Respectfully following this judgment of Hon'ble Bombay High Court, we set aside the order of CIT (A) and restore the matter to AO for a fresh decision in the light of this judgment of Hon'ble Bombay High Court. The AO should scrutinize the valuation report and he should determine a fresh valuation either by himself or by calling a final determination from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot ITA No. 2541/Bang/2019 ITA No. 37/Bang/2020 S. P. Nos. 29 and 59/Bang/2020 change the method of valuation which has been opted by the assessee. In our considered opinion and as per report of research committee of (ICAI) as reproduced above, most critical input of DCF model is the Cash Flow Projections. Hence, the assessee should be asked to establish that such projections by the assessee based on which, the valuation report is prepared by the Chartered accountant is estimated with reasonable certainty by showing that this is a reliable estimate achievable with reasonable certainty on the basis of facts available on the date of valuation and actual result of*

*future cannot be a basis of saying that the estimates of the management are not reasonable and reliable.*

*13. Before parting, we want to observe that in the present case, past data are available and hence, the same can be used to make a reliable future estimate but in case of a start up where no past data is available, this view of us that the projection should be on the basis of reliable future estimate should not be insisted upon because in those cases, the projections may be on the basis of expectations and in such cases, it should be shown that such expectations are reasonable after considering various macro and micro economic factors affecting the business.*

*14. In nutshell, our conclusions are as under:-*

*(1) The AO can scrutinize the valuation report and if the AO is not satisfied with the explanation of the assessee, he has to record the reasons and basis for not accepting the valuation report submitted by the assessee and only thereafter, he can go for own valuation or to obtain the fresh valuation report from an independent valuer and confront the same to the assessee. But the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee.*

*(2) For scrutinizing the valuation report, the facts and data available on the date of valuation only has to be*

*considered and actual result of future cannot be a basis to decide about reliability of the projections.*

*(3) The primary onus to prove the correctness of the valuation Report is on the assessee as he has special knowledge and he is privy to the facts of the company and only he has opted for this method. Hence, he has to satisfy about the correctness of the projections, Discounting factor and Terminal value etc. with the help of Empirical data or industry norm if any and/or Scientific Data, Scientific Method, scientific study and applicable Guidelines regarding DCF Method of Valuation."*

*10. From the paras reproduced above, it is seen that in this case, the Tribunal has followed the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra). The Tribunal has noted that as per the judgment of Hon'ble Bombay High Court, it was held that AO can scrutinize the valuation report and he can determine a fresh valuation either by himself or by calling a determination from an independent valuer to confront the assessee but the basis has to be DCF method and he cannot change the method of valuation which has been opted by the assessee. The Tribunal has followed the judgment of Hon'ble Bombay High Court and disregarded various other Tribunal orders against the assessee which were available at that point of time. In the present case also, we prefer to follow the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr.*

*CIT (supra) in preference to the judgment of the Hon'ble Kerala High Court cited by DR of the Revenue rendered in the case of Sunrise Academy of Medical Specialities (India) (P.) Ltd. Vs. ITO (supra) because this is settled position of law by now that if two views are possible then the view favourable to the assessee should be adopted and with regard to various Tribunal orders cited by learned DR of the Revenue which are against the assessee we hold that because we are following a judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd., Vs. Pr. CIT (supra), these tribunal orders are not relevant. In the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO (supra), this judgment of Hon'ble Bombay High Court was followed and the matter was restored back to the file of AO for a fresh decision with a direction that AO should follow DCF method only and he cannot change the method opted by the assessee as has been held by the Hon'ble Bombay High Court. The relevant paras of this Tribunal order are already reproduced above which contain the directions given by the Tribunal to the AO in that case. In the present case also, we decide this issue on similar line and restore the matter back to the file of AO for a fresh decision with similar directions. Accordingly, ground No.3 of the assessee's appeal is allowed for statistical purposes."*

20. Respectfully following the above coordinate Bench decision we are of the opinion that the action of Ld. AO in rejecting use of DCF method is not proper.



21. We also find considerable merit in the argument advanced by Ld. AR that the under DCF, the information to be considered should be as on date of valuation. In the instant case, Ld. AO has erred in comparing estimated projections with the actual audited revenues. This issue has also been considered by Tribunal in case of Innoviti Payment Solutions (*supra*) and VBHC Value Homes (*supra*).

22. We further find merit in submissions of the Ld AR that the lower authorities have not properly adjudicated upon the contentions raised by the appellant. Before Ld CIT (A) appellant narrated the reasons for variation in estimated projections in valuations reports dated 03<sup>rd</sup> April 2013 and 31<sup>st</sup> March 2014. It was also submitted by the appellant that estimated projections as per valuation report dated 31<sup>st</sup> March 2014 are with a range of 4% to 6% of the actual audited revenues and therefore there is no material variance. Appellant further elaborated that it had considered a growth rate of 25% in Total Transaction Value ("TTV") of reservations to be handled by it and not on revenues and that corresponding growth on revenues as per the first and second valuation reports was in the range of 16-25% and 14-25% respectively which is reasonable even as per the independent search conducted by the Ld AO himself, wherein after taken into consideration a report of the Sunday Guardian Live by Sh Anubhav Parseera dated 25.09.2016, Ld AO's has estimated average growth rate of industry for the year under consideration at approximately 16%. Above crucial issues



highlighted before us were specifically placed before the Ld. CIT(A) {refer pages 7 to 17 of impugned order}, however, there is no objective consideration of these issues by him. Ld CIT(A) has in a laconic manner upheld the addition made without considering the above factual issues. These are crucial factual issues which have to be considered by the authorities below and in absence of a definite finding being expressed in this regard it is difficult for us to render a definite final conclusion.

23. Under these facts and circumstances of the case, we do not approve the approach and the findings of either Ld AO or Ld CIT(A). The decisions relied upon by Ld CIT(DR) are also not relevant. In case of Agro Portfolio (*supra*) it was a case of ex-parte assessment. AO directed the appellant to furnish material in support of its valuation applying DCF. In reply there was no compliance by the assessee and therefore left with no other alternative AO completed assessment u/s 144 applying NAV method. However, in the present case, as noted by us above, the appellant has not only participated during assessment but also categorically highlighted the errors in factual findings of the Ld AO. Decision of Mumbai ITAT in case of Madhurima International Private Limited (*supra*) is again not relevant. In this case issue was concerning proceedings u/s 263. ITAT upheld the case of revenue in invoking jurisdiction u/s 263 as there was lack of enquiry during course of original assessment. The decision of Hon'ble Kerala High Court in case of Sunrise Academy of Medical Specialties (*supra*) is again distinguishable. In this case the

assessee filed a writ before Hon'ble High Court challenging jurisdiction of AO. Decision of Hon'ble Kerala High Court has also been considered in case of VBHC Value (supra).

24. We accordingly reiterate the conclusions recorded by Division Benches in para 14 of M/s. Innoviti Payment Solutions (supra) which have also been followed in case of M/s VBHC Value (supra) and set aside the matter back to the records of Ld AO for a de novo examination of DCF Valuation adopted by the appellant as per law. The Ld. AO is directed to re-examine the matter afresh considering our findings above and after giving due and effective opportunity of hearing to the assessee to substantiate the case.

25 In the result, the appeal of the assessee is partly allowed for statistical purposes.

**Order pronounced in the open Court on 14<sup>th</sup> December, 2020**

Sd/-

**[B.R.R. KUMAR]**

**[ACCOUNTANT MEMBER]**

DATED: 14/12/2020

*Prabhat*

Sd/-

**[AMIT SHUKLA]**

**JUDICIAL MEMBER**