

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

**BEFORE SHRI A. K. GARODIA, ACCOUNTANT MEMBER AND
SMT. BEENA PILLAI, JUDICIAL MEMBER**

Appeal No. and Assessment year	APPELLANT	RESPONDENT
ITA No. 2541/Bang/2019 2015-16	M/s. VBHC Value Homes Pvt. Ltd., 74-75 Millers Road, Vasanthnagar, Bengaluru – 560 052. PAN : AACCV 7868 G	Income Tax Officer, Ward – 7(1)(3), Bengaluru.
ITA No. 37/Bang/2020 2016-17	-do-	The Assistant Commissioner of Income Tax, Ward – 7(1)(2), Bengaluru.

S.P. No. & Assessment Year	Appellant	Respondent
29/Bang/2020 2015-16 (in ITA No.2541/Bang/2019)	M/s. VBHC Value Homes Pvt. Ltd., PAN : AACCV 7868 G	Income Tax Officer, Ward – 7(1)(3), Bengaluru.
59/Bang/2020 2016-17 (in ITA No. 37/Bang/2020)	-do-	The Assistant Commissioner of Income Tax, Ward – 7(1)(2), Bengaluru.

Assessee/S.P. by : Shri. S. Ramasubramanian, CA
Revenue by : Ms. Neera Malhotra, CIT(DR)(ITAT), Bengaluru

Date of hearing : 10/06/2020
Date of pronouncement : 12/06/2020

ORDER

Per A. K. Garodia, Accountant Member

ITA No. 2541/Bang/2019 and ITA No. 37/Bang/2020

These two appeals are filed by the assessee which are directed against two separate orders of learned CIT(A)-7, Bengaluru, dated 16.10.2019, for Assessment Year 2015-16 and dated 21.11.2019 for Assessment Year 2016-17.

2. **S. P. Nos.29, 59/Bang/2020**

These two S.Ps. are also filed by the assessee for these 2 years. All were heard together and are being disposed of by way of this common order for the sake of convenience.

3. First, we take up the appeal of the assessee for Assessment Year 2015-16 i.e., in ITA No.2541/Bang/2019. The grounds raised by the assessee are as under:

1. *That the order of the learned Commissioner of Income Tax (Appeals) is prejudicial to the interests of the appellant, is bad and erroneous in law and against the facts and circumstances of the case*
2. Grounds regarding Notional lease rent — Rs.2,36,67,539
 - 2.1. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the addition of lease rent of Rs.2,36,67,539/- on a notional basis even though the appellant has not received the above amount.*
 - 2.2. *That the learned Commissioner of Income Tax (Appeals) erred in law and on fact in confirming the addition of notional rent of Rs. 2,36,67,539/- on the plant and machinery leased to sister concerns on the ground that the rent charged by the appellant is not at par with the fair market value even though no material was brought on record to substantiate the FMV arrived by the learned assessing officer.*
 - 2.3. *Without prejudice to the above grounds, the learned Commissioner of Income Tax (Appeals) ought to have held that the disallowance can be made only to the extent of Rs. 1,40,06,539/- which is the difference between actual expenditure incurred and lease rent charged.*
3. Addition u/s. 56(2) (viib) — Rs.14,04,84,895/-
 - 3.1. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the addition of Rs.14,04,84,895/- u/s. 56(2) (viib) of the Act on the ground that the value of the shares issued exceeds the fair market value per share.*

- 3.2. *That the learned Commissioner of Income Tax (Appeals) ought to have held that the assessing officer has no jurisdiction to go beyond the valuation report issued by chartered accountant.*
- 3.3. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in holding that the valuation report cannot be relied upon because the Chartered Accountant did not authenticate the projections.*
- 3.4. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the action of the assessing officer in rejecting the DCF method of valuation adopted in the valuation report and adopting Net Asset Value Method.*
- 3.5. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in holding that the DCF method adopted by the appellant for valuation of shares is irrational and does not have relevance to the factual financial results of the assessee company.*
4. *Disallowance u/s. 14A of the Act — Rs.66,65,268/-*
 - 4.1. *That the Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the disallowance of Rs.66,65,268/- u/s. 14A of the Act even though the appellant has not incurred any expenditure in earning the exempt income.*
 - 4.2. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the application of Rule 8D(2)(iii) straight away without giving a finding that the appellant had incurred expenditure for the purpose of earning the income.*
 - 4.3. *That the learned lower authorities erred in law and on facts in computing the disallowance u/s. 14A r.w.r. 8D(2)(iii) by taking the investments from which exempt income is not earned.*
 - 4.4. *Without prejudice to the above grounds, the learned lower authorities ought to have restricted the disallowance u/s. 14A of the Act to the extent of Rs.25,68,400/- which is actual dividend income claimed as exemption.*

Each of the above grounds is without prejudice to one another and the appellant craves leave of the Hon'ble Income Tax Appellate Tribunal, Bangalore to add, delete, amend or otherwise modify either all or any of the above grounds either before or at the time of hearing of this appeal.

4. In the course of hearing, it was submitted by learned AR of the assessee that ground No.1 is general. Regarding ground No.2, he submitted that the notional addition made by the AO and confirmed by the learned CIT(A) is not justified. He placed reliance on the judgment of Hon'ble Gauhati High Court rendered in the case of Highway Construction Co. Pvt. Ltd., Vs. CIT 199 ITR 702, copy available on pages 57 – 61 of the assessee's Paper Book. As against this, learned DR of the Revenue filed written submissions regarding ground No.2 in Assessment Year 2015-16. It was the submission of learned DR of the Revenue that additional evidence filed by the assessee should not be admitted and in this regard, she placed reliance on three judicial pronouncements which are noted in the written submissions filed by her. It was her alternative contention that this matter may be remanded to AO for a fresh decision.

5. We have considered the rival submissions. We find that this issue was decided by learned CIT(A) as per paras 4.1 and 4.2 of his order and for ready reference, paras 4.1 and 4.2 from the order of CIT(A) are reproduced. These paras are as under:

4.1 The facts involved are that the appellant has leased out plant and machinery, office equipments during the year to its subsidiaries and shown receipt of lease rent of Rs1,11,58,865/-. The amount of lease rent has been determined by the assessee by adding the depreciation charged on assets and the interest payable on bank loan. To verify the FMV, the AO asked for details of WDV of assets leased to sister concerns and depreciation claimed. Thus. the AO found that the actual depreciation claimed by the assessee as per 11 Act on these assets was Rs. 1,82,15,362/- against which the assessee has taken depreciation of Rs 42,08,823/- only for charging lease rent from sister concerns. Thus, the AO held that the difference amount of Rs 1,40,06,539/- is the lease rent short charged from sister concerns. Further. the AO held that the assessee is incurring loss without any plausible reason and lease rent for any other unrelated party would have fetched the assessee minimum 8% of WDV of assets as lease rent over and above the cost of assets. Thus, he calculated the lease rent at Rs.96,61,000/- which is 8% of the WDV of Rs.12,07,62,505/-. By adding the depreciation and the interest expenses to the lease rent as mentioned above, the FMV of lease rent was calculated by the AO at

Rs.3,48,26,404/-. Accordingly, the lease rent short charged from the sister concerns at Rs.2,36,67,539/- was added to the income of the assessee.

4.2 The submission of the appellant has been considered. The appellant argues that income generation (lease rent fixation) is the prerogative of the assessee which is determined in line with market trends and the AO has no authority to re-fix the same holding it as undervalued. However, it is observed that the transaction of leasing the machineries are with the related parties of the appellant. Prima facie, as the AO has pointed out, the depreciation cost and the interest payment on the bank loan for the machineries is more than the lease rent charged by the appellant to its subsidiaries. It is an established and accepted notion that a business enterprise is established for earning some income. It is the hope of earning profits that inspires people to start business. Profit is essential for the survival and growth of every business unit. Therefore, the argument of the appellant that the AO cannot determine the FMV of lease rental is not correct. Further, the appellant has argued that the AO failed to appreciate that the machinery let out is unique to construction activities and are not generally available in the market for leasing except to related parties. Even going by such argument of the appellant its unique and rare machine would normally fetch more lease rental for the appellant. It is observed that the AO has discussed the issue logically and has advanced cogent reasons for determining the FMV for lease rental in the case of the appellant. The computation of lease rental at the rate of 8% of the WDV of the assets held by the AO is also considered reasonable.”

6. From the above paras reproduced from the order of CIT(A), it comes out that the addition was made by the AO on this basis that fair market value (FMV) of lease rental is 8% of WDV plus interest expense and depreciation as per Income Tax Act. In the light of these facts, we are now examining the applicability of the judgment of Hon'ble Gauhati High Court cited by the learned AR of the assessee rendered in the case of Highway Construction Co. Pvt. Ltd., Vs. CIT (supra). In this case, it was noted by the AO that the interest free loan was given by the assessee company to its MD free of interest and the AO came to the conclusion that the assessee had diverted the fund raised by loan to its MD during the year without interest and the AO disallowed the interest payment on the loan borrowed. When the assessee carried the matter before learned CIT(A), in that case it is noted by learned CIT(A) that the

amount of Rs.5 lakhs was advanced by the assessee company to its MD on 05.04.1972 but the borrowings was made during the period between May 1972 and March 1973 and under these facts, learned CIT(A) came to this conclusion that the borrowings had not been utilized in making advance to the MD and therefore, the interest free advances by the assessee company to its MD were out of assessee's own funds. Learned CIT(A) deleted this disallowance against which the Revenue was in appeal before the Tribunal. In Assessment Year 1979-80, the AO made addition of notional interest on interest free advances by the assessee company to its MD. In those years also, the matter was carried by the assessee in appeal before CIT(A) and learned CIT(A) held that the assessee cannot be forced to earn and he deleted the notional interest added by the AO. The Revenue carried the matter in appeal before the Tribunal and the Tribunal reversed the order of CIT(A) and restored that of the AO. Against this Tribunal order, the assessee was in appeal before Hon'ble Gauhati High Court. Hon'ble Gauhati High Court decided the issue in favour of the assessee and the relevant para of this judgment of Hon'ble Gauhati High Court is reproduced here in below from page 61 of the Paper Book. This para reads as under:

"The finding of the Income- tax Officer is that the assessee ought to have collected interest. In other words, the view of the Income-tax Officer, which has been accepted by the Tribunal was that the assessee, as a good business concern, should not have granted interest-free loan, or should have insisted on payment of interest. If the assessee had not bargained for interest, or had not collected interest, we fail to see how the income-tax authorities can fix a notional interest as due, or collected by the assessee. Our attention has not been invited to any provision of the Income-tax Act empowering the income-tax authorities to include in the income interest which was not due or not collected. In this view, we answer question No. (ii) in the negative, that is, in favour of the assessee and against the Revenue."

7. From the above para reproduced from the judgment of Hon'ble Gauhati High Court, it comes out that in a case where the income is not actually received by the assessee and it has not accrued to the assessee, then under no provisions of Income

Tax Act, the income tax authorities are authorized to include such income which was neither due nor collected. In the present case also, this is not the case of the AO that higher amount of lease rental was received by the assessee or it has accrued to the assessee and therefore, in our considered opinion, this judgment of Hon'ble Gauhati High Court is squarely applicable in the present case. No contrary decision of Hon'ble Karnataka High Court or of Hon'ble Apex Court has been cited before us by learned DR of the Revenue and learned DR of the Revenue also could not show that in the facts of the present case, this judgment of Hon'ble Gauhati High Court is not applicable. We respectfully follow this judgment of Hon'ble Gauhati High Court and decide this issue in favour of the assessee. Accordingly, ground No.2 of the assessee's appeal is allowed.

8. Regarding ground No.3, it is was submitted by learned AR of the assessee that in para 6 of his order, learned CIT(A) has noted the facts of the present case regarding this issue of addition of Rs.14,04,84,895/- made by the AO by invoking the provisions of section 56(2)(viib) of Income Tax Act, 1961. He pointed out that the assessee has obtained valuation report of Shri. P. Chandrasekhar, Chartered Accountant, where the value of the shares of the assessee company was recommended at Rs.527/- per share as per DCF method but the AO adopted FMV method and made this addition. In this regard, reliance was placed by him on the Tribunal order rendered in the case of Innoviti Payment Solutions Pvt. Ltd., Vs. ITO as reported in 175 ITD 10 (Bang.). He pointed out that paras 11 to 14 of this Tribunal order available on pages 83-84 of the paper book are relevant as per which the matter was restored back to the file of AO with certain directions. He submitted that in the present case also, the matter may be restored back to the file of AO with similar directions after admitting the additional evidence or the AO ay be directed to consider all evidences which the assessee may produce before him in the set aside proceedings. As against this, learned DR of the Revenue placed reliance on the Tribunal order rendered in the case of TUV Rheinland NIFE Academy Pvt. Ltd., Vs. ITO in ITA No.3160/Bang/2018 dated 27.02.2019.

She filed a copy of this Tribunal order. She also placed reliance on the judgment of Hon'ble Kerala High Court rendered in the case of Sunrise Academy of Medical Specialities (India) (P.) Ltd., Vs. ITO as reported in 409 ITR 109 (Kerala). She also placed reliance on the Tribunal order of Delhi Bench of the Tribunal rendered in the case of Agro Portfolio Pvt. Ltd., Vs. ITO as reported in 171 ITD 74. In the rejoinder, it was submitted by learned AR of the assessee that in the case of Innoviti Payment Solutions Pvt. Ltd. Vs. ITO (supra), the Tribunal has followed the judgment of Hon'ble Bombay High Court rendered in the case of Vodafone M-Pesa Ltd. Vs. Pr. CIT as reported in 256 Taxmann 240 and in this case, the Tribunal duly considered the Tribunal order cited by learned DR of the Revenue having been rendered in the case of Agro Portfolio Pvt. Ltd., Vs. ITO (supra). Regarding the judgment of Hon'ble Kerala High Court, it was submitted that since Hon'ble Bombay High Court judgment is in favour of the assessee at least to the extent of restoring the matter back to the file of AO, the same should be followed in preference to the judgment of Hon'ble Kerala High Court cited by learned DR of the Revenue.

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

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*

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 the 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.

11. Learned DR placed has also placed reliance on the judgment of Hon'ble Apex Court rendered in the case of Pr.CIT Vs. NRA Iron & Steel Pvt. Ltd. as reported in 103 taxmann.com 48 (SC). This judgment is not relevant in the present case because in that case, the addition was made u/s 68 but in the present case, the AO has not invoked section 68 and he has made addition u/s 56(2) (viib) of Income Tax Act, 1961.

12. Regarding ground No.4, it was submitted by learned AR of the assessee that in the present year, there is no exempt income earned by the assessee and in this regard, our attention was drawn to note No.21 attached with the P & L Account which is available on page 21 of the Paper Book and it was pointed out that although in the preceding year, there was dividend income of Rs.25,68,400/- but in the present year, the dividend income is NIL and there is no exempt income earned by the assessee in the present year. He also pointed out that in ground No.4.4, the assessee has stated by mistake that disallowance under section 14A should be restricted to Rs.25,68,400/- which is the actual dividend income claimed as exempt but this is an apparent mistake in the grounds of appeal raised by the assessee because as per the P & L Account, this amount of exempt dividend income was earned by the assessee in the preceding year and not in the present year. At this juncture, the Bench wanted to see the computation of the income filed by the assessee along with return of income because in the present year also, assessee has shown an income of Rs.58,88,121/- as profit on sale of investments (Net). The Bench wanted to see as to whether this income is claimed as exempt or declared as taxable. In reply, it was submitted by learned AR of the assessee that he will file the computation of income after the hearing is over. Learned DR supported the orders of authorities below.

13. We have considered the rival submissions and we find that this is the claim of the learned AR of the assessee that there is no exempt income earned by the assessee in the present year but he has not filed the computation of income to establish that

and we find that the assessee has earned in the present year Rs.58,88,121/- as profit on sale of investments (Net) and in the absence of computation, we do not know whether it is claimed as exempt or is declared as taxable. Moreover, in ground No.4.4, the assessee has stated that disallowance under section 14A should be restricted to Rs.25,68,400/- being exempt income. In course of arguments, it was submitted by the learned AR of the assessee that it is a mistake. But in view of this that the Computation of Income is not filed before us and the assessee has earned in the present year Rs.58,88,121/- as profit on sale of investments (Net) and a part of it might have been claimed by the assessee as exempt income, we feel it proper to restore this matter back to CIT 9A) for a fresh decision after finding out this as to whether the assessee has earned any exempt income in the present year and by restricting the disallowance u/s 14A to the extent of such exempt income earned by the assessee in the present year in line with the judgment of Hon'ble Delhi High Court rendered in the case of Cheminvest Ltd., Vs. CIT as reported in 378 ITR 33 (Del.). Ground No.4 of the assessee's appeal is allowed for statistical purposes.

14. In the result, assessee's appeal stands allowed in terms indicated above.

15. Now, we take up the assessee's appeal for Assessment Year 2016-17 in ITA No.37/Bang/2020. The grounds raised by the assessee as per revised grounds are as under:

1. *That the order of the learned Commissioner of Income Tax (Appeals) is prejudicial to the interests of the appellant, is bad and erroneous in law and against the facts and circumstances of the case*
2. Grounds regarding Notional lease rent — Rs. L43,79,651
 - 2.1. *That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the addition of lease rent of Rs.1,43,79,651/- on a notional basis even though the appellant has not received the above amount.*

2.2. That the learned Commissioner of Income Tax (Appeals) erred in law and on fact in confirming the addition of notional rent of Rs. 1,43,79,651/- on the plant and machinery leased to sister concerns on the ground that the rent charged by the appellant is not at par with the fair market value even though no material was brought on record to substantiate the FMV arrived by the learned assessing officer.

2.3. Without prejudice to the above grounds, the learned Commissioner of Income Tax (Appeals) ought to have held that the disallowance can be made only to the extent of Rs. 61,75,880/- which is the difference between actual expenditure incurred and lease rent charged.

3. Disallowance of share issue expenses of Rs.1,25,09,633/-

3.1. That the learned Commissioner of Income-Tax (Appeals) erred in law and on facts in confirming the disallowance of Rs.1,25,09,633/- being incurred towards issue of shares and qualifies for deduction u/s. 35D of the Act.

3.2. Without prejudice to the above ground, that the learned Commissioner of Income-Tax (Appeals) ought to have allowed the sum of Rs.1,25,09,633/- as deduction u/s. 37(1) of the Act.

Addition u/s. 56(2) (viib) — Rs.23,92,68,988/-

4.1. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in confirming the addition of Rs.23,92,68,988/- u/s. 56(2) (viib) of the Act on the ground that the value of the shares issued exceeds the fair market value per share.

4.2. That the learned Commissioner of Income Tax (Appeals) ought to have held that the assessing officer has no jurisdiction to go beyond the valuation report issued by chartered accountant.

4.3. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in upholding the action of the assessing officer in rejecting the DCF method of valuation adopted in the valuation report and adopting Net Asset Value Method.

4.4. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in holding that the valuation report cannot be relied upon because the Chartered Accountant did not authenticate the projections.

4.5. That the learned Commissioner of Income Tax (Appeals) erred in law and on facts in holding that the DCF method adopted by the appellant for valuation of shares is irrational and does not have relevance to the factual financial results of the assessee company.

16. In the course of hearing, it was submitted by learned AR of the assessee that ground No.1 is general and ground Nos.2 and 4 are similar to ground Nos.2 and 3 raised by the assessee in its appeal for Assessment Year 2015-16 and therefore, these two grounds can be decided in this year also as per the decision of the Tribunal in Assessment Year 2015-16 because the facts and arguments are similar. Regarding, ground No.3 in the present year, it was submitted by him that ground No.3.1 is not pressed and regarding ground No.3.2, it was submitted that this issue was decided by learned CIT(A) as per para 5.2 of his order in which he had decided the issue against the assessee, by following the judgment of Hon'ble Apex Court Brooke rendered in the case of Bond India Limited Vs. CIT as reported in 225 ITR 798 and also judgment of Hon'ble Apex Court rendered in the case of PSIDC Ltd., Vs. CIT as reported in 225 ITR 792 (SC). He drew our attention to page 5 of additional evidence 1 filed before Tribunal and it was pointed out that this is an agreement dated 14.11.2014 between the assessee and M/s. Avendus Capital Pvt. Ltd., and in particular, our attention was drawn to the scope of work for M/s. Avendus Capital Pvt. Ltd., noted in para 4 of this agreement. He placed reliance on the judgment of Hon'ble Bombay High Court rendered in the case of CIT Vs. Glaxo Laboratories (India) Ltd., as reported in 181 ITR 59. In this case, we find that in that case, the facts were that the assessee applied for the Government of India's permission to enter into a fresh technical collaboration so that it could continue to obtain the benefit of research being carried out by the parent company and also day-to-day advice in respect of the manufacture of existing and new products which was available to the assessee as per earlier technical collaboration agreement with its parent company. The government

informed the assessee that it will approve of such an agreement only if the assessee agreed to dilute the shareholding of the parent company in its capital by offering at least 25% thereof to the Indian Public. It is also noted in this case that the Government insisted upon the fulfilment of this precondition. The assessee issued fresh equity capital and for issue of such fresh capital, the assessee incurred an aggregate expenditure of Rs.9,32,946/-. Such expenditure was disallowed by the AO but the same was allowed by Hon'ble Bombay High Court by holding as under:

“It is clear that we must find the aim and objects, from a businessman's point of view, in incurring the said expenditure. It is established, upon the Tribunal's finding, that the assessee had no need for funds. It is established that it had need only of the technical collaboration arrangement to run profitably. What, therefore, motivated the businessman in the assessee was the expediency of ensuring the continuance of the technical collaboration arrangement. The object and purpose of the said expenditure, therefore, seen from the businessman's point of view, must be held to be to obtain the approval of the Government to the continuance of the technical collaboration arrangement. This being the object and purpose, the said expenditure must be held to be revenue expenditure and an allowable deduction. That an advantage of an enduring character, namely, the increase in the share capital resulted cannot, in the circumstances, be held to be decisive.

In the result, we are of the view, upon the peculiar facts of this case, that the Tribunal was right in holding that the said expenditure of Rs. 9,32,946, though incurred in connection with the issue of fresh share capital, was in the nature of revenue expenditure. The question is, accordingly, answered in the affirmative and in favour of the assessee.”

17. From the para reproduced from this judgment of Hon'ble Bombay High Court, it comes out that the primary object and purpose of the said expenditure was not to raise the fresh share capital but to obtain the approval of the Government to the continuance of the technical collaboration arrangements and because of this, it was held to be revenue expenditure by Hon'ble Bombay High Court. In the present case,

the facts are different and therefore this judgment of Hon'ble Bombay High Court does not render any help to the assessee in the present case.

18. As against this, learned DR of the Revenue supported the order of CIT(A) in which he has followed two judgments of Hon'ble Apex Court as noted above.

19. We have considered the rival submissions. We find that as per page 13 of the Assessment Order, out of total disallowance made by the AO of Rs.1,25,09,633/- only an amount of Rs.3,40,760/- and Rs.16,24,118/- are in respect of payment to M/s. Avendus Capital Pvt. Ltd., for which a copy of agreement between the assessee and that company dated 14.11.2014 has been submitted in the additional evidence on pages 3 to 11 of the Paper Book. The remaining expenses are mainly Rs.1,00,49,698/- being share issued security premium as per New Companies Act and stamp duty – ROC. In our considered opinion, whatever be the scope of work of M/s. Avendus Capital Pvt. Ltd., this is not in dispute that the entire expenses are incurred in respect of share issue expenses for a raising fresh share capital. This was also an argument that fresh share capital was required for working capital needs and for this reason also, the expenses for issue of share capital should be allowed as revenue expenditure. But we find no merit in these contentions. Whatever be the scope of work of M/s. Avendus Capital Pvt. Ltd., the nature of expenses remains same. Even if the fresh share capital is to meet working capital needs, then also, the nature of expenses remains same and hence the entire amount of such expenses is to be considered as capital expenditure as has been held by Hon'ble Apex Court in these two judgments having been rendered in the case of Brooke Bond India Limited Vs. CIT (supra) and PSIDC Ltd., (supra). Hence, we decline to interfere in the order of learned CIT(A) on this issue because this issue was decided by him by following these two judgments of Hon'ble Apex Court and we find no infirmity therein. Accordingly, ground No.3 of the assessee's appeal is rejected.

20. In the result, appeal of the assessee for Assessment Year 2016-17 is partly allowed in the terms indicated above.

21. Both the Stay Petitions are dismissed as infructuous because we have decided the appeals itself.

22. In the combined result, assessee's appeal for Assessment Year 2015-16 is allowed in the terms indicated above whereas assessee's appeal for Assessment Year 2016-17 is partly allowed in terms indicated above and both the Stay Petitions filed by the assessee are dismissed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(BEENA PILLAI)
Judicial Member

Sd/-

(A. K. GARODIA)
Accountant Member

Bangalore.
Dated:12.06.2020.
/NS/*

Copy to:

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|---------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.